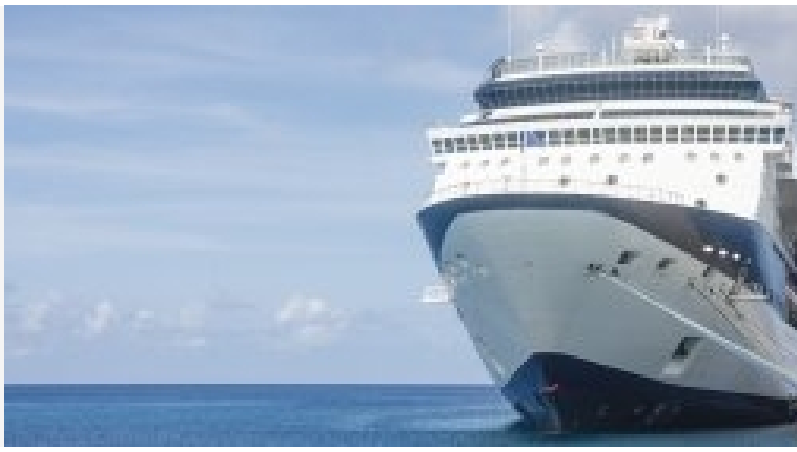
KNOW YOUR DEBTOR: SHIP ARRESTS FOR CLAIMS AGAINST BAREBOAT CHARTERERS

12 MARCH 2021 • ARTICLE



In a recent decision[1] by Admiralty Registrar Davison[2], in a case in which WFW acted for the successful shipowner, the Admiralty Court has helpfully confirmed that claims against bareboat (demise) charterers can only be enforced against the ship in respect of which the claim arose if the charter remains in place when proceedings are commenced. Such claims cannot, therefore, be brought against the sale proceeds of a ship that has been judicially sold. Once the charter comes to an end or is terminated and the ship is redelivered to the owner (or, in the case of a court sale, is delivered to the successful bidder), claims for which the bareboat charterer (i.e. rather than the owner) is liable *in personam* may no longer be enforced *in rem* against the owner's ship (or, in the case of a court sale, the sale proceeds paid into court).

"Maritime trade creditors who often supply goods and services on credit terms to bareboat charter operators only retain a right of ship arrest whilst the relevant bareboat charter remains in place."

This means that maritime trade creditors such as bunker suppliers, port (or travel) agents, ship victuallers and repairers and the like who often supply goods and services on credit terms to bareboat charter operators, especially in the cruise sector, only retain a right of ship arrest whilst the relevant bareboat charter remains in place. This makes eminent good sense and protects ship owners who have terminated bareboat charters (typically following one or more hire payment defaults) from having their ships kept exposed to arrest for unpaid trade debts of a former bareboat charterer.

The facts

The claim in question arose from the well-publicised difficulties currently affecting the cruise sector as it battles the economic effects of the COVID-19 pandemic. In March 2020, at the start of the pandemic, the operators[3] (both of whom were affiliates of Cruise & Maritime Voyages ("CMV")) of two cruise ships (*Columbus* and *Vasco da Gama*) placed them into lay up in the Thames estuary. In July 2020, CMV filed for UK administration. A number of trade creditors notified claims against the ships to the ships' owners, Carnival Plc. In August 2020, Carnival appointed V Ships as caretaker managers, and commenced *in rem* proceedings against the ships in a claim for possession and unpaid hire. On 2 September 2020, at the hearing of an application for the ships to be sold *pendente lite*, the court was informed that Carnival did not intend to terminate the charters until the ships were sold. As the court observed, that gave the operators' creditors "*ample further time*" to bring claims *in rem*.

The ships were duly advertised for sale and, in early October, were sold by court auction. Immediately before the auction closed, Carnival terminated the charters by written notice to their operators. A few days later, the ships were delivered to their buyers and the proceeds of sale paid into court.

In the meantime, a number of CMV's creditors had protected their claims by issuing claim forms *in rem*. However, a travel agent, Aspida Travel, did not commence proceedings until November 2020, several weeks after the court sales had completed. The question therefore arose whether Aspida's claim could validly be enforced *in rem* against the sales proceeds.

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The law and the judgment

Where the party who is liable to a claim *in personam* is a bareboat charterer, that party must still be the bareboat charterer "*when the action is brought*"[4] in order for the ship in connection with which the claim arises to be liable *in rem*. For this purpose, an action is brought when the court issues the claim form *in rem*. This is how English law gives effect to Article 3(4) of the 1952 Arrest Convention[5], to which the UK is a party. Clearly, when Aspida issued its claim form *in rem*, the ships had been long sold and were no longer under charter.

Aspida nevertheless relied on an earlier authority, *The Sanko Mineral*[6] to argue that its claim *in rem* could be brought against the proceeds sale paid into court, notwithstanding that the party liable *in personam* (i.e. the operating affiliates of CMV) had ceased to be the bareboat charterers upon completion of the court sales. However, *The Sanko Mineral* concerned a claim *in personam* against a ship owner rather than a bareboat charterer. The court in that case considered the apparent conflict between s.21(4) Senior Courts Act 1981 (that provides that the person liable *in personam* must be the owner of the ship when the claim is brought, which will no longer be the case following a court sale) and the long line of authorities[7] to the effect that a court sale transfers claims *in rem* to the proceeds of sale in court. The court resolved this apparent contradiction by holding that a claim *in rem* could be brought against the proceeds of sale just as well as against the ship, but only if "*the person liable in personam is the owner of the proceeds of sale*".

The problem here for Aspida was that the CMV affiliated operators, unlike the shipowner in *The Sanko Mineral*, had no interest in the ships' sales proceeds. Indeed, the operators' bareboat charters had been terminated before the court sales of the ships had been completed. Even had this not been so, those charters would otherwise have been terminated by operation of law upon the ships' delivery pursuant to court bills of sale that provided for the transfer of title "*free of all liens encumbrances and debts whatsoever*"[8], leaving the CMV's affiliated operators with no interest in the sales proceeds.

Aspida also sought to challenge the validity of Carnival's charter termination notices. The bareboat charters entitled Carnival to terminate for non-payment of hire on 30 days' notice. Carnival's October 2020 notices had been issued without notice. But those notices relied on both Carnival's express termination right in the charters and on Carnival's right to terminate at common law for repudiatory breach. The court had no hesitation in finding that the operators were clearly in repudiatory breach of charter at common law, fully entitling Carnival to bring the charters to an end with immediate effect.

Aspida then questioned whether Carnival had effectively terminated the charters, since termination requires an owner to retake possession. Again, the Registrar had no hesitation in finding that Carnival had retaken possession in August, when it appointed V Ships to manage the ships.

Finally, Aspida sought to raise an estoppel in reliance on the statement made at the sale application hearing that the owners did not intend to terminate the charters until the ships were sold. The court had no hesitation in rejecting this argument and finding that no "*open-ended assurance*" had been given and that "*Carnival held off from terminating the charters for 5 weeks, which was ample further time for claimants to bring claims*"[9].

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Lessons learned

Under the 1952 Arrest Convention[10], a 'maritime claimant' (which includes bunker suppliers, repair yards, port agents and suppliers of spares, amongst others) may arrest a ship for the debts of a bareboat charterer for so long as the bareboat charter remains in place. The position is the same in South Africa, which is commonly thought of as being at the most liberal end of arrest jurisdictions, but whose law, in this respect, follows the 1952 Convention. By contrast, the USA treats claims for supplies of 'necessaries' as maritime liens that 'follow the ship', i.e. which survive a change in ownership or operation.

A shipowner cannot necessarily avoid the risk of arrest simply by terminating a bareboat charter that is in default. Until the lessor actually recovers possession of the ship, it is likely that the lessee's creditors can continue to arrest her. In the Singaporean case of *The Chem Orchid*[11], it was held that a bareboat charterer remained the person liable *in personam* in the period following contractual termination of the bareboat charter until later physical redelivery of the ship to the owner, during which period (described by the judge as 'limbo') the charterer retained full *de facto* possession and control of the ship. The Singapore judge doubted the correctness of an earlier Australian court decision[12] that the requirement of physical redelivery to terminate a bareboat charter could be contracted out of, for example under clause 29 of Barecon 2001, which provides that the charterer holds the ship as gratuitous bailee between termination and redelivery.

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The bottom line here is that an owner who bareboat charters out a ship assumes the risk that its bareboat charterer could, in a worst case scenario, trade the ship on credit in the months preceding redelivery, possibly even diverting cruise or sub-charter earnings to its own benefit, before inviting those creditors to arrest the ship before such redelivery takes place on completion of her final charter voyage. This may leave the owner with little practical choice but to pay off or to bond such claims (despite not being liable for them *in personam*), before pursuing the former bareboat charterer for breach of its non-lien undertakings (such as those in Clause 16 of Barecon 2001). That right would be of little or no value as against an insolvent charterer. Nor would it be attractive where such claims were known or feared to exceed the value of the ship. In such an event, an owner could decide either to abandon the ship to its bareboat charterer or, as Carnival did here, to arrest her to recover possession before applying for her judicial sale. The lesson for creditors of bareboat charterers is that the ship to whom they supply goods or services can only provide any kind of security for their claims for so long as the charter remains in place. Even then, the value of that security will depend on the level and priority ranking of competing claims. Ultimately, ship arrest may give maritime trade creditors who extend credit to bareboat charterers some leverage to get paid but they would be unwise to regard themselves as secured creditors.

[1] *Taxidiotiki-Touristiki-Nautiliaki Limited (trading as Aspida Travel) v The Owners and/or demise charterers of the Vessels "Columbus" and "Vasco da Gama* [2021] EWHC 310 (Admlty).
[2] Who succeeded Jervis Kay QC with effect from 25 February 2020.
[3] Lyric Cruise Limited and Mythic Cruise Limited.
[4] s. 21(4) Senior Courts Act 1981.
[5] The International Convention for the Unification of Certain Rules Relating to the Arrest of Seagoing Ships.
[6] *The Sanko Mineral* [2014] EWHC 3927 (Admlty), a case in which this firm acted for the mortgagee.
[7] *The Optima* (1905) 10 Asp. MLC 147 at p. 149; *The Acrux* [1962] 1 LR 405 at p. 409, *The Queen of the South* [1968] P. 449 at pp. 461–462 and *The Union Gold* [2014] 1 Lloyd's Rep. 53 at para. 2.
[8] These words appear in bills of sale issued by the Admiralty Marshal to record the legal effect of a court sale.
[9] Para 7.
[10] The position in this respect is the same under the 1999 Arrest Convention.
[11] [2015] 2 Lloyd's Rep. 666.
[12] *The Hako Fortress* [2013] FCAFC 21.

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