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ARREST OF ASSOCIATED SHIPS FROM A COMMON LAW PERSPECTIVE

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ABSTRACT

The 1952 and 1999 Arrest Conventions provide for the arrest ships owned by the person who would be liable for the claim in personam. The widespread use of one-ship companies effectively circumvented these provisions. It allowed shipowners to limit or avoid their liability by distributing their fleet between one-ship companies. The only country that introduced separate associated ship provisions was South Africa. Other countries do not follow this example and generally deal with one-ship companies through beneficial ownership and piercing the corporate veil.

This paper examines the law and practice of arresting associated ships in South Africa, the US, the UK, Singapore, and Australia. Particular focus is paid to the impropriety criterion, which is part of piercing the corporate veil but is irrelevant to the South African approach. It is concluded that the primary function of impropriety is preventing overreaching, the subversion of the idea of separate legal personality of a shipowning company. It highlights that the courts are generally reluctant to pierce the corporate veil. The problem of overreaching in South Africa is demonstrated by ships owned by State-owned enterprises. The reasonable shipowner and objective approaches are proposed as a middle solution to the problem. Finally, the paper considers how associated ships relate to other institutions of admiralty and how their amendment may affect the possible benefits of permitting the arrest of associated ships.

Keywords: Arrest of ships, one-ship companies, piercing the corporate veil, sister ships, surrogate ships, associated ships, beneficial ownership, state-owned enterprises, state immunity.

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1 Introduction

The arrest of ships[1] has two main functions: to provide security for a claim and to determine the jurisdiction of the court at the place of arrest.[2] These functions are reflected in the International Convention Relating to the Arrest of Sea-going Ships, Brussels, 1952 (the '1952 Arrest Convention'), and the International Convention on the Arrest of Ships, Geneva, 1999 ('the 1999 Arrest Convention'), both of which are in force.[3]

The Arrest Conventions provide that it is possible to arrest a ship that was not involved in the maritime incident but is wholly owned when an action is brought by a person that would be liable in a maritime claim in personam (a so-called 'sister ship').[4] The widespread use of one-ship companies actively circumvents these provisions.[5] If the shipowner only has one ship, there are no sister ships to arrest. If it is also impossible to arrest the ship involved in the incident because the ship has been sold and the claim is not secured by a maritime lien, the claimant cannot obtain security. It is doubtful it will be able to enforce its claim.[6] One-ship companies help shipowners avoid liability.

To ensure that creditors' rights are protected, it may be sensible to allow the arrest of ships not owned by the person liable but have another connection or nexus with the ship concerned, such as common control or common beneficial ownership. In other words, it might be reasonable to allocate the debts caused by a one-ship company to the person who controls the operation of this company. The UK delegates at the Diplomatic Conference proposed

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1 Generally, see Francesco Berlingieri, *Berlingieri on Arrest of Ships: A Commentary on the 1952 & 1999 Arrest Convention* vols 1, 2 (6th edn, Informa Law from Routledge 2017); Paul Myburgh (ed), *The Arrest Conventions: International Enforcement of Maritime Claims* (Hart 2019); Andrew Tettenborn and Francis Rose, *Admiralty Claims* (Sweet & Maxwell 2020); Nigel Meeson and John Kimbell, *Admiralty Jurisdiction and Practice* (5th edn, Informa Law from Routledge 2018); Malcolm Wallis, *The Associated Ship and South African Admiralty Jurisdiction* (Siber Ink 2010); John Hare, *Shipping Law & Admiralty Jurisdiction in South Africa* (2nd edn, Juta 1999); Gys Hofmeyr, *Admiralty Jurisdiction: Law and Practice* (2nd edn, Juta 2012); Thomas Schoenbaum, *Admiralty and Maritime Law* vol 2 (6th edn, Thomson Reuters 2018).

2 *The Atlantic Star* [1974] AC 436 (HL), 454; *Stolt Kestrel BV v Sener Petrol Denizcilik Ticaret AS (The Stolt Kestrel and the Niyazi S)* [2015] EWCA Civ 1035, [2016] 1 Lloyd's Rep 125, [12]; *Natwest Markets PLC (Formerly known as The Royal Bank of Scotland PLC) v Stallion Eight Shipping Co SA (The Alkyon)* [2018] EWHC 2033 (Admlty), [2018] 2 Lloyd's Rep 601, [14].

3 See <https://treaties.un.org/> for the latest signatories.

4 'Surrogate ships' in Australia, s 19 of Admiralty Act No 34, 1988 (Cth).

5 Malcolm Wallis, 'Recovery of Maritime Debts and the Role of Associated Ship' (2012) 28 Banking & Finance LR 103, 110.

6 *Berlingieri on Arrest of Ships* vol 2 (n 1) [8.73].

introducing such provisions into the 1999 Arrest Convention.[7] However, the proposal was not supported beyond stipulating that such provisions may be enacted nationally.[8] One of the possible problematic issues behind this institution is what is referred to as 'overreaching'. The relevant provisions overreach when they may be used against their original purpose, which is to deal with one-ship companies. This was likely why the CMI delegates rejected the UK proposal to introduce the arrest of associated ships.[9]

The explanation behind the rejection of overreaching was that 'the notion of control, on which the UK proposal is based, is unclear and its application would give an unacceptable discretion to the courts'.[10] The courts acquire discretion to arrest the associated ships even in those cases the legislator did not have in mind. In other words, the provisions are so widely formulated that the courts obtain full control over their application and interpretation, even though this would contradict the original intentions of the legislator. Therefore, the functions of creating law are transferred from the legislature to the judiciary. Concerning the arrest of ships not owned by the person liable, overreaching exists if these provisions are used not against one-ship companies but against all kinds of companies, subverting the idea of separate legal personality. South Africa is the only country where the arrest of ships not owned by the person liable is expressly permitted.[11]

Thus, one of the essential tasks concerning the development of the relevant provisions, if they are desirable from the point of view of public policy, is to formulate them in a balanced way, considering possible unjust situations for maritime claimants and shipowners.

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7 *The Travaux Préparatoires of the International Convention on Arrest of Ships 1999* in Berlingieri, ibid, 274 et seq. See also at [8.70].

8 Art 3.3; Berlingieri, ibid, [8.71].

9 Berlingieri, ibid, [8.70]–[8.74]. The same arguments arose during the discussion of introducing the relevant provisions into Australian law: see Australian Law Reform Commission, *Civil Admiralty Jurisdiction* (Report No 33, 14 December 1986) [138]–[141].

10 Berlingieri, ibid, [8.71].

11 The reason behind the introduction of provisions on the arrest of associated ships – to deal with the widespread use of one-ship companies – was discussed in the South African Law Commission, *Report on the Review of the Law of Admiralty* (Project 32, 15 September 1982) [7.3]; Douglas Shaw, *Admiralty Jurisdiction and Practice in South Africa* (Juta 1987) 36.

2 Terminology

2.1. Arrest

The 1952 Arrest Convention defines arrest as 'the detention of a ship by judicial process to secure a maritime claim, but does not include the seizure of a ship in execution or satisfaction of a judgment'.[12] Accordingly, arrest under the Convention covers not only the arrest in rem but also the pre-judgment measures of constraint in personam, resulting in the ship's detention. At the same time, statutory enactments, including those in Singapore[13] and the UK,[14] do not follow this definition. The term 'arrest of ships' in these statutes is restricted to arrest in rem.[15]

This paper follows the definition of the arrest in the 1952 Arrest Convention. Therefore, 'arrest' covers arrest in rem, attachment in personam, and, to a limited extent, a Mareva injunction.

2.2. Associated ships

There is no accepted term describing the ship arrested other than the ship in relation to which the maritime claim arose and not owned by the person who would be liable for the claim in personam. The 1999 Arrest Convention uses the phrase 'a ship not owned by the person liable'.[16] However, this phrase is inaccurate since, as discussed below, the arrest of ships in some jurisdictions, such as the UK, Singapore and Australia, is based on the concept of beneficial ownership, whereby an arrested ship may be considered 'beneficially' owned by a person liable. Another issue arises when the ship is sold after a claim arises but is arrested

[12] Art 1.2.

[13] High Court (Admiralty Jurisdiction) Act of 1961, 2020 rev edn.

[14] Senior Courts Act 1981, c 54.

[15] On the difference of understanding of the arrest, for instance, in the UK, see *The Rena K* [1979] QB 377, 407, discussed below at 15. For discussion, see David Jackson, *Enforcement of Maritime Claims* (4th edn, LLP 2005) 393; 436; 439.

[16] Art 3.3. The 1952 Arrest Convention states nothing regarding the possibility of the arrest of ships not owned by the person liable. In Arts 3.1 and 3.2, it is only stipulated that ships in the same ownership may be arrested.

because a maritime lien secures the claim.[17] In such circumstances, the ship is also not 'owned by the person liable'.

Section 3(7)(a)(b) of the South African Admiralty Jurisdiction Regulation Act 105 of 1983, as amended ('the AJRA 1983'), refers to 'associated ships', which covers both sister ships and 'ships not owned by the person liable'. The terms 'true associated ship provisions'[18] and 'ships associated through common control'[19] define and differentiate the arrest of a 'ship not owned by the person liable'. Even though more precise than the wording of the 1999 Arrest Convention, they are unique to South Africa and barely applicable to others.

Berlingieri uses the term 'associated ship'[20] to distinguish such ships from sister ships. Although this designation is not entirely accurate from the perspective of South African law, it is straightforward. In this paper, the phrase 'associated ship' refers to a targeted ship other than a guilty ship whose registered owner is not the person who would be liable in personam. The ships owned by the relevant person at material times are 'sister' or 'surrogate' ships.

The arrest of an associated ship may be considered veil piercing in cases where the guilty ship is owned by a subsidiary and the targeted ship is owned directly by its parent. Reverse (or outsider reverse) veil piercing is where a guilty ship is owned directly by a parent company, and the targeted ship is owned by its subsidiary.[21] Considering the widespread practice of one-ship companies, there is usually a combination of both direct and reverse veil-piercing. Both ships concerned and targeted are owned by subsidiaries and arrested as controlled by their common parent. The issue becomes more complex because of beneficial ownership and trusts, but this understanding is generally appropriate for most cases.

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[17] Maritime lien claims fall outside the scope of this paper. For detailed coverage, see Rhidian Thomas, *Maritime Liens* (Stevens & Sons 1980); Tettenborn (n 1) [4-037] et seq.

[18] Wallis (n 1) 4, n 20.

[19] Graham Bradfield, 'Arrest of Associated Ships' in Myburgh (n 1) 35; 42.

[20] *Berlingieri on Arrest of Ships* vol 1 (n 1) ch 13.

[21] David Cabrelli, 'The Case Against 'Outsider Reverse' Veil Piercing' (2010) 10 J of Corp Law Studies 343, 359.

3 Arrest of associated ships in South Africa

As noted, in South Africa, the AJRA 1983 expressly introduced the power to arrest associated ships. These provisions are unique[22] among admiralty statutes worldwide and have not been replicated.[23] The starting point is s 3(7)(a), which provides that the ship may be arrested as associated if it is owned, when the action is commenced, by the company which was owned or controlled by the person who owned the ship concerned or controlled the company owning the ship concerned when the maritime claim arose. The ship concerned is 'the ship in respect of which the maritime claim arose'.[24] The ship targeted is the ship to be arrested in place of the ship concerned. The main issue is that the vessel may be arrested as associated with the ship concerned if it is 'controlled by a person' who owned the ship concerned 'or controlled the company which owned the ship concerned, when the maritime claim arose'.[25] The vessel may also be attached in personam,[26] but there is no requirement for the existence of other jurisdictional links to attach the vessel in South Africa.[27] The same applies to a security arrest.[28]

There are two primary characteristics of the South African approach. First, two ships are recognised as commonly owned if 'the majority in number of, or of voting rights in respect of, or the greater part, in value, of, the shares in the ships are owned by the same persons'.[29] In the 1952 Arrest Convention, this arises when the same person owns all the shares.[30] Second, as highlighted above, the South African Act allows the arrest of ships associated by common control.[31] The purpose of these provisions is 'to make the loss fall where it belongs by reason of ownership, and in the case of a company, ownership or control of the shares'.[32]

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22 South Africa is the only country which has expressly introduced such provisions. The situation did not change markedly after 1983: see Bradfield (n 19) 37.

23 For discussion, see Hilton Staniland, '*Ex Africa semper aliquid novi*: Associated Ship Arrest in South Africa' [1995] LMCLQ 561; Graham Bradfield, 'Guilt by Association in South African Admiralty Law' [2005] LMCLQ 234; Hare (n 1) [§2.2-6]; Hofmeyr (n 1) 133 et seq; Bradfield (n 19); Shaw (n 11) 35 et seq.

24 AJRA 1983, s 3(6).

25 Ibid, s 3(7)(a)(iii).

26 Ibid, s 4(4)(d). See also Hare (n 1) [§2-2.3] et seq; Hofmeyr (n 1) 199; Shaw (n 11) 25.

27 Ibid, s 4(4)(c); Hofmeyr, ibid, 121.

28 Ibid, s 5(3); Hofmeyr, ibid, 173 et seq.

29 Ibid, s 3(7)(b)(i).

30 Art 3.2.

31 AJRA 1983, s 3(7)(a)(ii),(iii).

32 *Owners of the MV Silver Star v Hilane Ltd (The Silver Star)* [2014] ZASCA 194, 2015 (2) SA 331 (SCA), [40] (Wallis JA), quoting directly from *Euromarine International of Mauren v The Ship Berg (The Berg)* [1986] ZASCA 4, 1986 (2) SA 700 (A), 712A.

One of the first cases where the relevant provisions were applied was *The Berg*.[33] In this case, it was established that the claim against an associated ship is brought instead of the ship concerned, and that means that the liability is allocated to the shipowner of the ship targeted and not the ship concerned, even though the shipowner of the ship targeted is not liable in personam for the claim and there is no maritime lien against the ship targeted. In other words, the associated ship provisions provide an alternative procedure for enforcing a maritime claim and an alternative defendant, the latter being an alternative substantive right against a person not liable in personam for the claim.[34] It is also worth mentioning that under the priority rules stipulated in s 11(11) of the AJRA 1983, the claims against an associated ship have a lower priority than claims against the ship concerned or a sister ship.[35] That means that the associated ship provisions do not violate the rights of maritime lienees or claimants who have direct claims against the ship's registered owner.

Another issue the courts faced when dealing with the relevant provisions was the term 'control' in s 3(7)(a)(ii),(iii) and 3(7)(b)(ii) of the AJRA 1983.[36] The Act does not define control, save for elaborating that control may be 'direct' or 'indirect'.[37] However, these words are also not defined, so it is a matter of statutory interpretation to determine what 'control' is,[38] and this is derived from case law.[39]

One of the earliest cases to determine the meaning of control was *The Nefeli*.[40] In this case, it was held that two ships being part of a single commercial fleet was not enough to establish common control between them.[41] Control meant determining the company's fate and not its

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[33] *The Berg*, ibid. See also Hilton Staniland, 'Arrest of Associated Ship Not Retrospective in Operation' [1986] LMCLQ 279.

[34] *The Berg*, Ibid, 712D.

[35] Hofmeyr (n 1) 293 et seq.

[36] Control is the most important concept in South African law on the arrest of associated ships. The existence of control is the only thing besides the ordinary requirement, such as the existence of a maritime claim, needed to arrest an associated ship, see Bradfield (n 19) 43.

[37] AJRA 1983, s 3(7)(b)(ii).

[38] Wallis (n 1) 186.

[39] Ibid, 192-193.

[40] *EE Sharp and Sons Ltd v MV Nefeli (The Nefeli)* 1984 (3) SA 325.

[41] Ibid, 327A.

day-to-day management.[42] 'Control', therefore, represents powers which ordinarily belong to shareholders.[43]

The leading case on the meaning of 'control' is *The Heavy Metal*.[44] This concerned an application to arrest the *Heavy Metal* (the ship targeted), which was associated with the *Sea Sonnet* (the ship concerned). The maritime claim arose from a ship sale agreement for the *Sea Sonnet*.[45] These two vessels were allegedly commonly controlled.[46] The companies owning the ship targeted and the ship concerned were at the relevant times owned by a sole shareholder, Mr Lemonaris, a Cypriot advocate and allegedly the nominee for the actual beneficiaries.[47] The ship targeted was arrested.[48] The shipowners of the ship targeted applied to set the arrest aside. The application was dismissed, and the shipowner appealed to the Supreme Court of Appeal from the Cape High Court.[49] The majority judgment, delivered by Smalberger JA, dismissed the appeal. Marais JA gave alternative reasoning but also found that the appeal should be dismissed, while Farlam JA gave a dissenting judgment.

None of the judges disputed that the power to control the company meant the power to decide on the company's fate, namely, the most critical matters.[50] The difference between the majority and minority judgments lay in the court's understanding of 'direct and indirect'. According to the majority, Mr Lemonaris, as a sole shareholder, could exercise power to control the companies directly or *de jure*, while the actual beneficiaries could control the companies indirectly or *de facto*. The direct control exercised by Mr Lemonaris as a nominee shareholder was sufficient to establish the association between the two ships.[51]

The dissenting view expressed by Farlam JA was that there was only one power to control, which may be exercised directly by the actual shareholders or indirectly by the beneficiaries. However, in either case, it must be real.[52] In this regard, the power belonging to the nominee

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42 Ibid, 327B.
43 Ibid, 326I; 327A. For a critique of the interpretation of 'control' in *The Nefeli*, see Shaw (n 11) 39.
44 *Belfry Marine Ltd v Palm Base Maritime Sdn Bhd (The Heavy Metal)* [1999] ZASCA 44, 1999 (3) SA 1083 (SCA).
45 Ibid, [3]; [4] (Farlam JA). See AJRA 1983, s 1(1)(c).
46 Ibid, [7] (Farlam JA).
47 Ibid, [59] (Farlam JA).
48 Ibid, [1]; [2] (Farlam JA).
49 1998 (4) SA 479 (C) (Thring J).
50 *The Heavy Metal* (n 44) [8] (Smalberger JA).
51 Ibid, [8] (Smalberger JA).
52 Ibid, [57] (Farlam JA).

shareholder would not be the power to control the company since it could not decide on the company's fate by its own will but acted according to the beneficiaries' orders. In this situation, only the beneficiaries exercised the real power to control. Marais JA had the same view on the issue,[53] but with the difference that Farlam JA decided that the association between the two ships was not established, while Marais JA concluded that the applicants proved the association on the balance of probabilities.[54]

The majority judgment in *The Heavy Metal* is binding on all lower courts. The main conclusion is that South African law stipulates two types of power to control a company: direct control, exercised by the company's shareholders, and indirect control, exercised by persons other than shareholders, such as beneficiaries.[55] These two powers may co-exist. One of them is sufficient to establish common control.

Control of the company is understood objectively as having the right to direct the company's fate.[56] In turn, piercing the corporate veil under the company law provisions is based on the control of the particular operation of the company, which exists in relation to the particular situation concerned.[57] Therefore, to find the association between the two ships, it does not matter if a controlling party actually exercised control; it is enough that they could exercise it.[58] The court does not assess the company's actual use or how and by whom it was managed.[59] In this case, subjective impropriety regarding the use of a shipowning company is also out of the question.[60]

In summary, to arrest an associated ship in South Africa, it is only necessary to prove common control between the ship concerned and the ship targeted. However, this should not create

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53 Ibid, [4] (Marais JA).
54 Ibid, [21] (Marais JA).
55 Ibid, [8] (Smalberger JA)
56 Ibid, [65] (Farlam JA).
57 This is the result of the impropriety criterion, which may exist only subjectively: see *The Aventicum* [1978] 1 Lloyd's Rep 184, 187; Michael Blackman et al, *Commentary on the Companies Act* vol 1 (6th edn, Juta 2009) 4-143; 4-144.
58 This follows from the wording 'power to control'; see *The Heavy Metal* (n 44) [8] (Smalberger JA).
59 *DHN Food Distributors Ltd v Tower Hamlets London Borough Council* [1976] 1 WLR 852 (CA), 859F-H; 867C-E. Lord Denning MR and Shaw LJ paid much attention to the fact that the companies in the DHN group were managed by the same director. This fact would be irrelevant for the arrest of the associated ship in South Africa save for possible persuasive effect.
60 Wallis (n 1) 72-73.

the impression that this task is easy. The proof of control is on a balance of probabilities,[61] a very high bar, considering that speed matters in vessel arrest.[62] Also, one-ship companies are usually created in jurisdictions where corporate structures are not public. Even without considering time restrictions, obtaining the necessary evidence may be difficult.[63]

4 Arrest and attachment of associated ships in the US

The Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions of Federal Rules of Civil Procedure regulate the arrest and attachment of ships in the US.[64] The action in rem in the US is based on a strict personification theory.[65] According to this concept, which is now unique to US law,[66] the guilty ship is considered the proper defendant for an action in rem; the ship is personified and acquires the characteristics of a person. Moreover, almost all maritime claims in the US give rise to maritime liens.[67] In this situation, it is not possible to arrest a sister ship, not to mention associated ships. However, in almost all cases, a 'guilty' ship is available for arrest, even if it was sold to another person.[68]

In this regard, the question is whether claimants in the US need to arrest an associated ship. The guilty ship would be almost always available except in the extraordinary case where it had sunk or had moved out of American waters and did not return. The situations where the value of the ship is not enough to satisfy the claims are also rare, especially considering the availability of limitation of liability. However, when the guilty ship is unavailable for arrest, the

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61 *The Heavy Metal* (n 44) [15] (Marais JA).

62 Hare (n 1) 91.

63 Bradfield (n 19) 48–50.

64 Rules of Civil Procedure for the United States District Courts, as amended to 1 December 2023.

65 Martin Davies, 'In Defence of Unpopular Virtues: Personification and Ratification' (2000) 75 Tulane LR 337, 345-346.

66 English courts abandoned the personification concept in favour of the procedural theory of action in rem, ibid, 342; *The Dictator* [1892] P 304. Before *The Dictator*, the English courts applied the personification understanding basis for which was *Harmer v Bell (The Bold Buccleugh)* [1851] 7 Moo PC 267, 284; Tettenborn (n 1) [4-001]–[4-004]. For an overview in the United States, see Grant Gilmore and Charles Black, *The Law of Admiralty* (2nd edn, Foundation Press 1975) [§9-3]; Frank Wiswall, *The Development of Admiralty Jurisdiction and Practice since 1800* (Cambridge UP 1970) 158 et seq.

67 Schoenbaum (n 1) 596-597. The American broader understanding of maritime liens would unlikely be accepted in other countries. On the effect of the foreign maritime liens in the different common law jurisdictions, see *Reiter Petroleum Inc v The Ship 'Sam Hawk' (The Sam Hawk)* [2016] FCAFC 26, [2016] 2 Lloyd's Rep 639; *Bankers Trust International Ltd v Todd Shipyards Corp (The Halcyon Isle)* [1980] AC 221 (PC), *Transol Bunker BV v MV Andrico Unity (The Andrico Unity)* [1989] ZASCA 30, 1989 (4) SA 325.

68 Schoenbaum, ibid, 597.

concept of associated ships becomes relevant. The mere fact that this remedy is available for the claimants and applies is another argument in favour of its usefulness.

Attaching a ship other than the guilty ship under Rule B (attachment in personam) is possible. Attachment in personam is based on the shipowner's personal liability and is available only if the shipowner cannot be found within the relevant court's district. Attachment in personam may be used to found jurisdiction of the court and provide security for the claim against the shipowner and not the ship itself. Therefore, all the property of the liable person, particularly any sister ships, may be attached. In most cases where arrest in rem is available to the claimant, attachment in personam would, in principle, be available.

In most cases, associated ships may be attached by applying the 'alter ego' rule.[69] If a ship is not 'owned' by the registered owner, the real shipowner may be found behind this corporate structure, and the ship may be attached as theirs.[70] In this regard, the ship's registered owner would be considered an alter ego of the actual owner or a 'closely related company'.[71] In general, to attach an associated ship, an applicant should prove that there is a prima facie admiralty claim and a prima facie alter ego claim.[72] While the standard for piercing the corporate veil is high, the essence of attaching an associated ship under Rule B was confirmed by Agee CJ in *Flame SA v Freight Bult Pte Ltd* as being to 'achieve an equitable result'[73] by 'focus[ing] on reality and not form, on how the corporation operated and the individual defendant's relationship to that operation'.[74]

To apply the 'alter ego' rule, there should be such unity of interest and ownership that treating the relevant companies independently would result in inequity.[75] The US jurisprudence

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[69] *Blue Whale Corp v Grand China Shipping Dev Co* 722 F 3d 488, 491-492 (2d Cir 2013); *Vitol SA v Primerose Shipping Co Ltd* 708 F 3d 527, 543 (4th Cir 2013).

[70] Schoenbaum (n 1) 593.

[71] Ibid.

[72] *Blue Whale Corp* (n 69) [4].

[73] Quoting directly from earlier authority: *Brunswick Corp v Waxman* 599 F 2d 34, 36 (2nd Cir 1979); *Williamson v Recovery LLP* 542 F 3d 43, 53 (2nd Cir 2008); *Vitol* (n 69) 544.

[74] *Flame SA v Freight Bult Pte Ltd* 807 F 3d 572, 587 (4th Cir 2015), quoting his earlier judgment in *Vitol*, ibid, 540.

[75] *Flame*, Ibid, 588; *Riddle v Leuschner* 335 P 2d 107, 110-111 (Cal 1959), quoting their earlier judgment in *Automotriz Del Golfo De California v Resnick* 306 P 2d 1, 3 (Cal 1957); Christian Witting, *Liability of Corporate Groups and Networks* (Cambridge UP 2018) 340.

indicates factors that should be considered by the court when applying the 'alter ego' rule. These factors differ among circuits[76] but generally may include the following:

> …(1) disregard of corporate formalities; (2) inadequate capitalisation; (3) intermingling of funds; (4) overlap in ownership, officers, directors, and personnel; (5) common office space, address and telephone numbers of corporate entities; (6) the degree of discretion shown by the allegedly dominated corporation; (7) whether the dealings between the entities are at arms length; (8) whether the corporations are treated as independent profit centers; (9) payment or guarantee of the corporation's debts by the dominating entity, and (10) intermingling of property between the entities…[77]

The criteria are flexible because piercing the corporate veil is a discretionary measure. Therefore, the court will evaluate the evidence provided and decide whether the requirements to pierce the corporate veil are met, notwithstanding the alter ego criteria.[78] Another consequence of this discretion is that it may be insufficient to meet the 'alter ego' criteria. Impropriety or inequity should be found.[79] Therefore, the attachment of a ship under Rule B is based on company law principles, including the requirement of instrumentality and impropriety of a separate legal personality.[80]

One-ship companies are not always established for illegitimate purposes, and the mere fact that one-ship companies are registered in convenient jurisdictions does not, of itself, justify corporate veil piercing. Therefore, attaching an associated ship becomes impossible without finding additional impropriety in the shipowner's actions.[81] This is a high bar, which is challenging to meet. Accordingly, the attachment of associated ships due to piercing the corporate veil allows shipowners to avoid liability by distributing their assets in most cases.[82]

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76 Martin Davies, 'The Future of Ship Arrest' in Myburgh (n 1) 313.

77 *Freeman v Complex Computing Co Inc* 119 F 3d 1044, 1053 (2nd Cir 1997). In other circuits, other factors are mentioned, but these are essentially similar: see *Ost-West-Handel Bruno Bischoff GmbH v Project Asia Line Inc* 160 F3d 170, 174 (4th Cir 1999), *Oxford Capital Corporation v USA* 211 F3d 280, 284 n 2 (5th Cir 2000).

78 *Dry Handy Investments v Corvina Shipping Co* 988 F Supp 2d 579, 583 (ED Va 2013).

79 *Belvedere Condo Owners v RE Roark* 617 NE 2d 1075, 1086 (Ohio 1993).

80 Davies (n 76) 314.

81 *Vitol SA* (n 69) 547-548.

82 *Berlingieri on Arrest of Ships* vol 2 (n 1) [8.73].

5 Arrest of associated ships in the UK

Under English law, obtaining pre-judgment security by attachment in personam is impossible, as is the case in the US and South Africa.[83] The only way to deal with the debtor's assets at a pre-judgment stage besides an arrest in rem is to apply for an interim injunction, such as a Mareva[84] (or freezing) injunction.

A freezing injunction is an exception to the principle that until the judgment is rendered, a claimant should bear the risk that it may be unenforceable.[85] It is generally not aimed at providing pre-judgment security for the defendant but at stopping the claimant from 'dissipating their assets' if there is such a risk.[86] From this perspective, a freezing injunction does not have the same purpose as an arrest in rem but has a similar effect in stopping a defendant from disposing of their assets.

In order to succeed in an application for a freezing injunction, there must be the risk that the targeted asset may be dissipated or removed,[87] and the defendant must have substantial assets wherever they are suited.[88] The applicant must prove that it has a good arguable case on the merits.[89] In this connection, a freezing injunction is discretionary since the court should establish that substantive grounds for its imposition are met.[90] Meanwhile, arrest in rem is a right of the claimant.[91] Despite the stricter bar, a freezing injunction is relevant in admiralty proceedings since it is obtainable when arrest in rem is unavailable.

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83 Meeson (n 1) [1.57]. On attachment in the US, see William Tetley, 'Arrest, Attachment, and Related Maritime Law Procedures' (1999) 73 *Tulane LR* 1895, 1934–1936. In South African law, a claimant may either arrest the vessel in rem or apply for its attachment in personam. These procedures have the same purpose and overlap in many cases; see Hofmeyr (n 1) 188. On overlapping, see Hare (n 1) [§2-2.3].

84 So named after *Mareva Compania Naviera SA v International Bulkcarriers SA* [1980] 1 All ER 213, [1975] 2 Lloyd's Rep 509 (CA), 510-511 (following on from *Nippon Yusen Kaisha v Karageorgis* [1975] 1 WLR 1093; [1975] 3 All ER 282; [1975] 2 Lloyd's Rep 137 (CA)).

85 Adrian Zuckerman, *Zuckerman on Civil Procedure: Principles of Practice* (4th edn, Sweet & Maxwell 2021) [10.240].

86 *Fourie v Le Roux* [2007] UKHL 1, [2007] 1 WLR 320, [2].

87 Tettenborn (n 1) [5-034]; *Congentra AG v Sixteen Thirteen Marine SA (The Nicholas M)* [2008] EWHC 1615 (Comm); [2008] 2 Lloyd's Rep 602, [49].

88 Zuckerman (n 85) [10.257]; *Babanaft International Co SA v Bassatne* [1990] Ch 13 (CA), 28.

89 This standard is high, but it is not necessary that the chances for success are greater than 50 per cent: see Tettenborn (n 1) [5-037], *Ninemia Maritime Corp v Trave Schiffahrts GmbH & Co KG (The Niedersachsen*) [1983] 1 WLR 1412 (CA), 1422.

90 *Civil Admiralty Jurisdiction* (n 9) [245].

91 *The Varna* [1993] 2 Lloyd's Rep 253 (CA), 257.

In *The Rena K*, Brandon J stated that the vessel arrested in rem should be released if the claimant decided to pursue their claim in the arbitration and not in the court where the arrest in rem was granted.[92] It was held that the claimant could proceed with an alternative freezing injunction.[93] Brandon J concluded that releasing the vessel from arrest does not mean that the vessel cannot be detained under a freezing injunction.[94]

A freezing injunction is a measure aimed at a person, not a thing.[95] Thus, the debtor has a worldwide obligation not to dispose of its assets. In relation to vessels, this actually results in the same position: the vessel is prohibited from leaving the port where it is moored.[96] Furthermore, a freezing injunction does not fulfil the jurisdictional function of arrest in rem. Thus, a freezing injunction is the closest to an arrest in rem in terms of the consequences for a shipowner because the ship (and other property) is detained.[97] However, these measures are 'clearly distinguished'[98] and are not interchangeable. The present part deals only with the arrest in rem.

Section 21(4) of the Senior Courts Act 1981 stipulates that for a ship to be arrested, the claim must, 'when the cause of action arose',[99] be 'in connection with the ship'[100] and be owned or chartered, controlled or possessed by the person who would be liable on the claim in action in personam ('the relevant person').[101] The ship to be arrested must be the ship involved in the incident (the guilty ship) or any other ship ('that ship') that is beneficially owned 'as respects all the shares in it' or chartered by demise by the relevant person.[102] The issue of associated ships relates only to the second part of this provision, the connection between the

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92 This judgment was handed down before the enactment of the Senior Courts Act 1981, when English law did not permit the arrest of a vessel to obtain security for arbitration proceedings: see *The Maritime Trader* [1981] 2 Lloyd's Rep 153, 156.

93 *The Rena K* (n 15) 396-397.

94 Ibid, 403.

95 Meeson (n 1) [1.57].

96 Tettenborn (n 1) [5-033].

97 *The Alkyon* (n 2) [44] (Teare J). This position was also discussed and confirmed in the judgment of the Court of Appeal, *Natwest Markets plc (formerly known as The Royal Bank of Scotland plc) v Stallion Eight Shipping Co SA (The Alkyon)* [2018] EWCA Civ 2760, [2019] QB 969, [82].

98 Ibid, [5-036].

99 s 21(4)(b).

100 s 21(4)(a).

101 s 21(4)(b).

102 s 21(4)(i).

ship to be arrested and the relevant person.[103] Therefore, discussing the link between the guilty ship and the relevant person is unnecessary.[104]

In order to determine whose ships may be arrested under s 21(4), it is essential to understand what the phrase 'beneficial owner' means and in which case the beneficial ownership may belong to the person who is not the legal or registered owner[105] of the vessel.

In *I Congreso del Partido*, Goff J found that

> … the words 'beneficially owned as respects all the shares therein' refer only to cases of equitable ownership, whether or not accompanied by legal ownership, and are not wide enough to include cases of possession and control without ownership, however full and complete such possession and control may be.[106]

This statement was made to justify that the phrase 'beneficial ownership' does not cover a demise charter.

According to *The Permina 3001*, a person is a beneficial owner of the property if they have a right to 'sell, dispose of or alienate the ship'.[107] In *The Aventicum,* Slynn J concluded that the reference to beneficial ownership gives a right to look behind the registered ownership of the vessel when there are suggestions of trust or nominee holding.[108] In *The Evpo Agnic*, it was confirmed that one company, which is a beneficial owner of another, is not necessarily a beneficial owner of its assets.[109]

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[103] For the understanding of ownership in s 21(4)(b) of the Senior Courts Act 1981, see *The Evpo Agnic* [1988] 1 WLR 1090 (CA), 1096. In this case, Lord Donaldson of Lymington MR held that 'the owner' meant the registered owner of a guilty ship. It is important to note that this understanding of the phrase is relevant only for s 21(4)(b); in s 21(4)(iii), the phrase 'beneficial owner' is used.

[104] This issue is discussed in Tom Ashley, 'The Meaning of 'Control' for the Purpose of the Statutory Action in rem' [2014] LMCLQ 350.

[105] *The Evpo Agnic* (n 103) 1096.

[106] *I Congreso del Partido* [1978] QB 500, 538; James Allsop, 'Beneficial Ownership of Vessels – Navigating the Maze: Litigation Aspects' (MLAANZ 2000) 8.

[107] *The Permina 3001* [1977] SGCA 5, [1979] 1 Lloyd's Rep 327, [9] (Sing CA).

[108] *The Aventicum* (n 57) 187. At the time, the Administration of Justice Act 1956 was in force, but this Act already used the term 'beneficial ownership' and stipulated the possibility of arresting the vessel in the same beneficial ownership as the guilty ship.

[109] *The Evpo Agnic* (n 103) 1096. See also Meeson (n 1) [3.53].

In this case, to establish beneficial ownership of one company over the assets of another, the corporate veil needs to be pierced, [110] and to do that, it is necessary to prove that the grounds for such piercing are met.[111] If so, then the phrase 'beneficially owned' does not give much in the sense of dealing with one-ship companies and essentially applies only to trusts[112] and, in some cases, to nominee holdings.[113] In most cases in shipping, searching for a beneficial owner involves piercing the corporate veil because of the widespread use of one-ship companies.[114]

One of the cases where the applicant managed to arrest the ship not legally owned by the person liable was *The Saudi Prince.*[115] The arrest of the vessel was granted because Sheen J was 'not satisfied that SSST did in fact purchase *Saudi Prince* from SEL on May 30, 1979, or at all.'[116] The judge concluded that the purchase of the vessel was a sham and beneficial ownership was not transferred. As a result, the corporate veil of the legal shipowner was 'lifted',[117] and the true beneficial owner of the *Saudi Prince* was identified. The same approach to the fictitious transfer of a vessel as a ground to arrest the ship occurred in *The Tjaskemolen*,[118] where Clarke J stated that 'where an alleged transfer of a vessel is in the relevant sense a sham or façade, the court will hold that the original owners retain the beneficial ownership in the vessel'.[119] At the same time, it is essential to note that these cases, even though they include the concept of beneficial ownership, do not relate to the arrest of an associated ship but of a ship transferred from the relevant person to another entity fraudulently. In these situations, therefore, the corporate veil was not pierced. However, the seller retained the beneficial ownership of the vessel due to the impropriety of the

[110] *The Maritime Trader* (n 92) 157. Sheen J states directly that the concept of beneficial or equitable ownership cannot be used to one-ship companies without piercing the corporate veil.
[111] Ibid.
[112] Another issue that may arise is whether the concept of trust is applicable in jurisdictions where the concepts of trust and beneficial ownership do not exist. The answer is generally positive if relations regarding the vessel meet the criteria of beneficial ownership under English law: see, eg, *Crescent Gas Corp v National Iranian Oil Co* [2024] EWHC 835 (Comm), [160]-[161].
[113] The same conclusion is reached in Tettenborn (n 1) [4-092].
[114] See the description of the state of affairs in the UK in *Berlingieri on Arrest of Ships* vol 2 (n 1) [9.41]–[9.51].
[115] [1982] 2 Lloyd's Rep 255.
[116] Ibid, 258.
[117] Ibid, 260.
[118] [1997] 2 Lloyd's Rep 465.
[119] Ibid, 469. The same approach to recognition of the transfer of ownership as a sham may be found in *Glastnos Shipping Ltd v Panasian Shipping Corp & Withers (a firm) (The Glastnos)* [1991] 1 Lloyd's Rep 482, 487.

transaction, even though in *The Saudi Prince*, the phrase 'lifting the corporate veil' is used.[120] In these cases, the ships were sold after the claims arose but before the claim forms (writs) were issued.[121] One-ship companies usually own ships before claims arise.[122]

It may be possible to arrest the vessel belonging to one-ship companies by piercing the corporate veil. This is so when a separate legal personality is used as a 'device or façade to conceal the true facts',[123] or where it is necessary to 'reveal the truth'.[124] One of the attempts to do so occurred in *The Maritime Trader*. The *Maritime Trader* was owned by MTS, a wholly subsidiary of MTO, which was the relevant person. Sheen J declined the argument of the arresting party that the *Maritime Trader* is beneficially owned by MTO:

> From that starting point there is no way in which it can be said that Maritime Trader was 'beneficially owned as respects all the shares therein' by MTO, unless the corporate veil can be lifted. I would not hesitate to lift that veil if the evidence suggested that it obscured from view a mask of fraud rather than the true face of the corporation.[125]

Sheen J refused to lift the corporate veil because he found that the ownership of MTS of the *Maritime Trader* was 'no device or sham designed to defraud the plaintiffs'.[126] One factor taken into account was that MTS, a one-ship company, had owned the vessel and acted accordingly for over four years.[127]

Thus, three main situations where a ship not owned by the relevant person may be arrested in the United Kingdom and related jurisdictions[128] can be distinguished.[129] The first is where a company incorporated is a 'sham'.[130] The second is where a vessel transfer or another related

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[120] *The Saudi Prince* (n 115) 260.
[121] Meeson (n 1) [3.59].
[122] *The Evpo Agnic* (n 103) 1096.
[123] *Antonio Gramsci Shipping Corp v Stepanovs* [2011] EWHC 333 (Comm), [2011] 1 Lloyd's Rep 647, 651.
[124] *The Maritime Trader* (n 92) 157.
[125] Ibid.
[126] Ibid.
[127] Ibid.
[128] Singapore and Australia are discussed below: see 22 et seq and 26 et seq, respectively.
[129] Allsop (n 106) 14-15. This conclusion is based on Australian and New Zealand authorities, but the general approach of Australian law is similar to English law.
[130] *Antonio Gramsci Shipping Corp* (n 123).

transaction is a 'sham'.[131] The third is where a separate legal personality is used improperly to avoid liability.[132] The second situation does not relate to associated ship arrest but concerns the arrest of a guilty or sister ship transferred to another entity fraudulently.

Therefore, it is generally possible to arrest an associated ship belonging to a one-ship company only by piercing the corporate veil. However, the English law approach is even narrower than the US because of the general reluctance by the English courts to pierce the corporate veil,[133] following *Salomon v Salomon & Co Ltd*.[134] In *Antonio Gramsci Shipping Co v Stepanovs,*[135] Burton J stated that

> many if not all of them [the cases concerning piercing the corporate veil so as to render those who control the company liable] put before me: nine in which the veil has been pierced and 10 in which the adoption of such course has been considered but in the event rejected.[136]

The situation today is slightly different from the time of the famous *Salomon* case.[137] At the same time, there still should be some extraordinary circumstances to pierce the corporate veil, which may be difficult to find at the arresting stage. This approach faces the same problems as the US one, considering that the scope of application of the relevant mechanism in the UK is narrower.[138] One-ship companies are often created for legitimate commercial reasons, and the transfer of ownership to these companies is usually not considered a sham but a real commercial transaction.[139]

In *Prest*, Lord Neuberger PSC held that piercing the corporate veil is possible if the corporate structure is used to avoid liability. This measure may be exercised only as a last resort.[140]

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131 Above at 17.
132 *The Maritime Trader* (n 92) 157.
133 Ibid.
134 [1897] AC 22 (HL), 42-43.
135 [2011] EWHC 333 (Comm), [2011] 1 Lloyd's Rep 647.
136 Ibid, 651. Arrest is relatively uncommon in the UK today: see *The Alkyon* (n 2) [15] (Teare J).
137 *Prest v Petrodel Resourses Ltd* [2013] UKSC 34, [2013] 2 AC 415, [68] (Lord Neuberger PSC).
138 Davies (n 76) 313. This restrictive approach to piercing the corporate veil may be found in *VTB Capital Plc v Nutritek International Corp* [2013] UKSC 5, [2013] 2 AC 337, [132], where the veil was not pierced to find the controlling person of the party to the contract because it would be the 'extension' of a traditional view on veil piercing.
139 Ibid, 312.
140 *Prest* (n 137) [62] (Neuberger PSC).

Sumption JSC departs from the old 'fraud' or 'sham' approach and introduces the principles of concealment and evasion.[141] Only in the latter case is the corporate veil pierced; in the former, the court looks behind the veil to establish certain facts, ie, lift the corporate veil. In the shipping context, the concealment principle is similar to Slynn J's position expressed in *The Aventicum,* where it was said that 'the court in all cases can and in some cases should look behind the registered owner to determine the true beneficial ownership'.[142] It is not piercing the corporate veil but establishing the facts that demonstrate the beneficial ownership.

With respect, *Prest* does not seem to bring something new to the existing position. This search for beneficial ownership is not helpful without direct and reverse veil piercing and treating the group's assets accordingly.[143] The court would most likely need to address the issue of piercing the corporate veil to find the controller company liable for its subsidiary's debts. Therefore, the bar does not seem to have been relaxed.

In *Hurstwood Properties (A) Ltd v Rossendale Borough Council*,[144] Lord Briggs and Lord Leggatt concluded that there is only little room for the evasion principle,[145] and it may only be applicable in the cases of reverse veil piercing.[146] As noted, the arrest of associated ships often consists of both direct and reverse veil piercing since allegedly associated ships, in most cases, would be owned by separate one-ship companies.[147] In this regard, it is unclear to what extent the evasion and concealment approach is applicable to the arrest of ships. Regarding the ambiguity of this distinction, Lady Hale stated in *Prest*:

> I am not sure whether it is possible to classify all of the cases in which the courts have been or should be prepared to disregard the separate legal personality of a company neatly into cases of either concealment or evasion. They may simply be examples of the principle that the individuals who operate limited companies should not be

[141] Ibid [28] (Sumption JSC).
[142] *The Aventicum* (n 57) 187.
[143] Davies (n 76) 316, takes a slightly different view on the consequences of *Prest* for ship arrest, stating that the corporate veil may be 'lifted' to find 'beneficial ownership' of the vessel belonging to a one-ship company. The standard required for 'lifting' the corporate veil is lower than that required to pierce it.
[144] *Hurstwood Properties (A) Ltd v Rossendale Borough Council* [2021] UKSC 16, [2022] AC 690.
[145] Ibid, [73].
[146] Ibid, [72].
[147] Discussed above at 6.

> allowed to take unconscionable advantage of the people with whom they do business.[148]

One should not overestimate the relevance of *Prest* for ship arrest. First, there are no reported cases where the beneficial ownership of the ship was found concerning the concealment principle described in *Prest*.[149] Second, it is unclear whether *Prest* changed the approach to separate legal personality or clarified and made the existing rules more straightforward.[150] Also, it seems that Sumption JSC did not alter the general subjective approach, using the word 'deliberately' in the following passage:

> there is a limited principle of English law which applies when a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control.[151]

Therefore, it would be difficult to say that *Prest* relaxed the bar for piercing the corporate veil.[152] It is also impossible to conclude that it has become easier to arrest an associated ship.

6 Arrest of associated ships in Singapore

In Singapore, like the UK, obtaining pre-judgment security or attachment of assets with proceedings in personam is generally impossible.[153] The only way to detain the defendant's property besides arrest in rem is a Mareva injunction,[154] now known in Singapore as 'injunctions prohibiting the disposal of assets'. While based on the same principles as a freezing injunction in English procedural law,[155] it is not an attachment of the defendant's

[148] *Prest* (n 137) [92] (Lady Hale). See also Brenda Hannigan, 'Wedded to "Salomon": Evasion, Concealment and Confusion on Piercing the Veil of the One-man Company' (2013) 50 Irish Jurist 11, 30–32.

[149] Davies (n 76) does not provide any examples of such arrests.

[150] The same issue was raised by Davies, ibid, 317. Clarifying *Prest* is also emphasised in Tan Cheng Han, Wang Jiangyu and Christian Hofmann, 'Piercing the Corporate Veil: Historical, Theoretical and Comparative Perspectives' (2019) 16 Berkeley Business LJ 140, 153; 158; Hannigan (n 148) 39; Stefan Lo, 'Nature of Corporate Veil-piercing and Revitalization of the Evasion Principle' (2023) 139 LQR 436, 456.

[151] *Prest* (n 137) [35] (Lord Sumption JSC).

[152] The same conclusion is reached in Paul Davies, Sarah Worthington and Christopher Hare, *Principles of Modern Company Law* (11th edn, Thomson Reuters 2021) [7-021].

[153] Toh Kian Sing SC, *Admiralty Law and Practice* (3rd edn, LexisNexis 2017) 28.

[154] Ibid.

[155] Cavinder Bull, *Singapore Civil Procedure 2024* vol I (Sweet & Maxwell 2023) [13/1/53]; [13/1/54].

assets but a measure against the defendant in personam.[156] Thus, as is also the case under English law, a Mareva injunction is not a means to obtain security for the claim in rem but a measure to stop a claimant from dissipating their assets.[157]

The arrest of sister ships ('any other ship') in Singapore is enacted in s 4(4) of the High Court (Admiralty Jurisdiction) Act 1961, with amendments in 2004 and 2019.[158] The ship may be arrested as beneficially owned by the person liable for the claim in personam (relevant person).[159] This provision does not differ from the English statute,[160] save for its numbering. As Singapore has the same legal provisions regarding beneficial ownership, it is reasonable to assume that 'beneficial ownership' may be helpful only when dealing with trusts and not one-ship companies. In order to determine this, it is necessary to look at some cases where beneficial ownership regarding the ship to be arrested is defined. The issue of associated ship arrest relates to 'step 5' in *The Bunga Melati 5* analysis.[161]

In *The Min Rui*,[162] the defendant entered into a sell-purchase agreement for the *Min Rui* before the vessel was arrested as a sister ship under s 4(4). However, the bill of sale was issued, and the vessel was delivered to the buyer after the arrest.[163] Belinda Ang J confirmed that the beneficial ownership of the vessel was transferred on the date when the vessel was delivered to the buyer.[164] Interpreting the meaning of beneficial ownership, Belinda Ang J referred to *The Permina 3001*,[165] where it was held that beneficial ownership entailed the right to 'sell, dispose or alienate' the ship.[166] On this interpretation, beneficial ownership 'embraces the

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156 *Tribune Investment Trust Inc v Dalzavod Joint Stock Co* [1997] SGHC 313, [1997] 3 SLR(R) 813, [14].

157 Bull (n 155) [13/1/57].

158 s 4(4)(d); Toh (n 153) 110-111. Cf also *Admiralty Jurisdiction of the High Court: Arrest of Ships on Demise Charter to Secure the Obligations of the Demise Charterer* LRRD No 1/2003 (AGC 2003) <https://www.agc.gov.sg/resources/publications> accessed on 8 July 2024.

159 Toh, ibid, 141.

160 Senior Courts Act 1981, s 21(4).

161 See *The Bunga Melati 5* [2012] SGCA 46, [2012] 4 SLR 546, [112]: 'prove on the balance of probabilities, that the relevant person was, at the time when the action was brought: (i) the beneficial owner of the offending ship as respects all the shares in it or the charterer of that ship under a demise charter; or (ii) the beneficial owner of the sister ship as respects all the shares in it ('step 5')' (VK Rajah JA).

162 [2016] SGHC 183, [2017] Lloyd's Rep Plus 37.

163 Ibid, [13]–[17].

164 Ibid, [76].

165 Above, n 107. See also *The Andres Bonifacio* [1993] SGCA 70, [1993] 3 SLR(R) 71, [16]; *The Temasek Eagle* [1999] SGHC 157, [1999] 2 SLR(R) 647, [12].

166 *The Permina 3001* (n 107) [9].

concept of equitable title and allows for the institution of the trust'.[167] As per this interpretation, beneficial ownership does not deal with the problem of one-ship companies but only with a specific common law concept of trust.

The meaning of beneficial ownership regarding the guilty ship was considered in *The Opal 3*.[168] The *Opal 3* was allegedly transferred to Emerald, the relevant person, under the Memorandum of Agreement with Leninets, which was still registered as the owner in the Russian state registry when the action was brought.[169] Leninets intervened to set the arrest of the *Opal 3* aside. Referring to the English authorities, Selvam J held that the legal owner of the ship, in most cases, would be the registered owner. However, the legal owner may or may not be the ship's beneficial owner, and the register was not conclusive proof of beneficial ownership.[170] In finding the beneficial ownership, Selvam J emphasised four kinds of principles that may be applicable – equity and trust,[171] piercing the corporate veil,[172] transfer of title to goods, and estoppel – [173] and found that both legal and beneficial ownership had been transferred from Leninets to Emerald. Therefore, the *Opal 3* could have been arrested.

One unique point discussed in *The Opal 3* is the estoppel principle based on which beneficial ownership can be found.[174] Unfortunately, Selvam JC did not refer to any authorities. In this context, this principle means that the person who acts as the owner cannot just withdraw from this status as it has stopped benefiting.[175] This approach may assist the creditor wishing to arrest an associated ship in certain circumstances. However, it may be only very specific

[167] Ibid, [53].

[168] *The Opal 3 ex Kuchino* [1992] SGHC 156, [1992] 2 SLR(R) 231. This approach differs from the UK, where the nexus between the guilty ship and the relevant person is 'legal ownership', which means 'registered owner' as opposed to the beneficial owner: see *The Evpo Agnic* (n 103) 1096. The authority overcoming *The Evpo Agnic* in Singapore expressly is a later case, *The Ohm Mariana* [1993] 2 SLR(R) 113, [29].

[169] *The Opal 3*, ibid, [6].

[170] Ibid, [10]; [11].

[171] Citing *Smith's Dock Co v St Merriel (The St Merriel)* [1963] P 247; *I Congreso del Partido* (n 106); *The Permina 3001* (n 107).

[172] Citing *The Aventicum* (n 57); *The Maritime Trader* (n 92); *The Saudi Prince* (n 115); *The 'Loon Chong' Owners v Eng Hong Trading Co Sdn Bhd (The Loon Chong)* [1982] 1 MLJ 212; *The Asean Promoter* [1981] SGHC 24, [1981-1982] SLR(R) 289, [10].

[173] *The Opal 3* (n 168) [11].

[174] Ibid.

[175] *Tinkler v Revenue and Customs Commissioners* [2019] EWCA Civ 1392, [2019] 4 WLR 138, [53]; [54].

cases in parties' dealings.[176] In any event, it is not clear how the estoppel principle may assist in dealing with one-ship companies, which usually act as shipowners themselves.

The Ivanovo[177] is another case where beneficial ownership was found in the hands of a person who was not the ship's registered owner. The vessel's arrest was set aside since the beneficial owner of the ship was not its registered owner, Azov Shipping, but the Ukrainian government.[178] This conclusion was based on the fact that Azov Shipping could not dispose of the vessel without the State's approval.[179] This state of affairs, where the company has full rights of possession and use of the property, but its ultimate owner remains the State, is a feature of post-soviet law.[180] This specific relationship, where the possessor of the ship does not own it and ownership remains in the hands of the State, was qualified as beneficial ownership of the State.

In similar circumstances, in *The Makassar Caraka Jaya Niaga III-39*,[181] Tan Lee Meng J did not find that Indonesia was the vessel's beneficial owner. The vessel's registered owner was PTDL, the 'relevant person' for the purposes of s 4(4). PTDL submitted that the beneficial owner of the vessel was Indonesia, and PTDL was a State-appointed operator since the governmental funds were used to purchase the vessel.[182] First, Tan Lee Meng J stated that the issue of beneficial ownership should be decided under Singapore law.[183] At the same time, the court considered 'relevant aspects of the relevant foreign law for a better picture of how ships may be owned or transferred'.[184] Upon analysis of Indonesian law, the judge did not support the allegation that Indonesia was the beneficial owner of the vessel.[185] The relations between

[176] The issue of estoppel was addressed in *The Ivanovo* [2000] SGHC 22, [2000] 1 SLR(R) 263, [41]; [42].
[177] Ibid.
[178] Ibid, [45].
[179] Ibid, [23].
[180] In Russia, this kind of company is regulated by Art 113 of the Civil Code of Russia, which states that these enterprises 'do not have the ownership rights to the property transferred to them'. This feature of post-soviet countries' law resulted in many cases worldwide, including New Zealand, Singapore and the UK: see, eg, *The Nazym Khikmet* [1996] 2 Lloyd's Rep 362 (CA), *Sovrybflot v The Efim Gorbenko* [1996] 2 NZLR 727; *The Kapitan Temkin* [1998] SGHC 427, [1998] 2 SLR(R) 537; *Centro Latino Americano de Commercio Exterior SA v Owners of the Kommunar (The Kommunar) (No 2)* [1997] 1 Lloyd's Rep 8; *The Guiseppe di Vittorio* [1998] 1 Lloyd's Rep 136 (CA).
[181] *The Makassar Caraka Jaya Niaga III-39* [2010] SGHC 306, [2011] 1 SLR 982.
[182] Ibid, [3]; [19].
[183] Ibid, [9].
[184] Ibid.
[185] Ibid, [28].

PTDL and Indonesia were in the nature of a loan, and under these arrangements, Indonesia did not retain beneficial ownership as understood in Singapore law.[186]

The Skaw Prince is one of the cases in which the applicant attempted to arrest a ship owned by a one-ship company.[187] The *Skaw Prince* was arrested in Singapore as a sister ship to the *Skaw Princess*. The registered owner of the *Skaw Princess* was a Liberian company, Corsair, and the registered owner of the *Skaw Prince* was another Liberian company, Filey. Both these companies were 100 per cent owned by Pontina A/S, a Norwegian company, which was 100 per cent owned by Skaw Shipping A/B, a Swedish company. The applicants alleged that Skaw Shipping was in possession or control of the *Skaw Princess* when the claim arose and the beneficial owner of the *Skaw Prince* when the action was brought.[188] Amarjeet Singh JC found that Corsair and Filey as one-ship companies were entirely legitimate, and there was no evidence of grounds for piercing the corporate veil.[189] In light of this, '[t]he law is plain. A parent company or a shareholder has no property in the assets of its subsidiary or the company itself.'[190] Therefore, the *Skaw Prince* and the *Skaw Princess* were not sister ships for the purposes of s 4(4).[191]

Generally, in the case of one-ship companies, the beneficial ownership of the parent company may be found only by piercing the corporate veil. At the same time, the subjective criterion of impropriety must be met.[192] As confirmed in *The Skaw Prince*,[193] one-ship companies are legitimate business structures, and their use is insufficient to justify veil piercing. This approach does not differ much from the UK approach and is unsurprising since the Singapore courts often rely upon English authorities and apply the same statute textually.

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[186] Ibid, [26]; [27].
[187] *The Skaw Prince* [1994] SGHC 18, [1994] 3 SLR(R) 146.
[188] Ibid, [9].
[189] Ibid, [27].
[190] Ibid.
[191] Cf also *The Andres Bonifacio* (n 165) [41]; [49].
[192] *Sri Jaya (Sendirian) Bhd v RHB Bank Bhd* [2000] SGHC 206, [2000] 3 SLR(R) 365, [63]; Hans Tijo, Pearlie Koh, Lee Pey Woan, *Corporate Law* (2nd edn, Academy Publishing 2024) [06.081]. On the similarity of approaches in England and Singapore, see Tan (n 150) 158 et seq.
[193] *The Skaw Prince* (n 187) [19].

7 Arrest of associated ships in Australia

Australian law provides the possibility of freezing the assets under a *Mareva* order.[194] A *Mareva* order in Australia prevents the person from dissipating the assets. It may be granted relating to the foreign assets, even if they are located outside the relevant court district.[195] Australian law generally reflects the same approach as English law.[196]

The Australian Admiralty Act 1988 differs from the English statute. While Australia did not sign the Arrest Conventions of 1952 or 1999, it enacted provisions for arrest in rem of the ship other than the guilty ship, so-called 'surrogate' ships. Section 19(b) of the Admiralty Act provides that the relevant person, firstly, should be the owner or charterer of, or in possession or control of, a guilty ship (the first-mentioned ship).[197] Secondly, they should be 'the owner' of the second-mentioned ship to arrest it as a 'surrogate' to the first-mentioned ship. A 'relevant person' is a core concept in Australian admiralty law[198] and is defined in s 3 of the Admiralty Act as a person 'who would be liable on the claim in a proceeding commenced as an action in personam'.[199]

The issue of the arrest of associated ships in Australia is based on interpreting the phrase 'the owner' in s 19(b) of the Admiralty Act.[200] This issue was thoroughly investigated in *The Cape Moreton*.[201] It was again confirmed that the English approach applies, and 'the owner' under s 19(b) of the Admiralty Act is a 'beneficial owner' rather than a 'registered owner'.[202]

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[194] Damien Cremean, *Admiralty Jurisdiction Law and Practice: Australia, New Zealand, Singapore, Hong Kong and Malaysia* (5th edn, Federation Press 2020) 330. On why 'Mareva orders' is preferable to a 'Mareva injunction' see Bernard Cairns, *Australian Civil Procedure* (12th edn, Thomson Reuters 2020) 670.

[195] *National Australia Bank Ltd v Dessau* [1988] VR 521, 527-528.

[196] Cremean (n 194) 330. For comprehensive comparison of a Mareva order and arrest in rem, see *Civil Admiralty Jurisdiction* (n 9) [245].

[197] On the reasoning for the relevant provision, see *Civil Admiralty Jurisdiction* (n 9) [118].

[198] Sarah Derrington and Michael White (eds), *Australian Maritime Law* (4th edn, Federation Press 2020) 117.

[199] This term is used in the Senior Courts Act 1981 (UK), s 21(4)(b), in the same sense.

[200] *Tisand (Pty) Ltd v Owners of the MV Cape Moreton (ex Freya) (The Cape Moreton)* [2005] FCAFC 68, (2005) 143 FCR 43, [92]. The interpretation in *The Cape Moreton* applies not only to s 19(b) but also to s 17, 18 and 19(a).

[201] Ibid, [131]–[141].

[202] Ibid, [131]. The same approach may be found in the minority judgment in *Kent v SS 'Maria Luisa' (No 2) (The Maria Luisa)* [2003] FCAFC 93, 130 FCR 12, [17], [19] (Moore J). Both these cases follow the interpretation of the wording 'the owner' expressed in *Malaysia Shipyard and Engineering Sdn Bhd v 'Iron Shortland' (The Iron Shortland)* [1995] FCA 1565, (1995) 59 FCR 535, which is discussed below. Another point is that the wording of the Admiralty Act 1988 aims to 'strike a balance' between the approach in the UK and the Arrest

Therefore, to arrest a ship as a surrogate, it is necessary to establish who is a beneficial owner relating to all shares in that ship and whether they are a relevant person.[203]

Searching for a beneficial owner who is not the vessel's registered owner may not always relate to piercing the corporate veil.[204] A beneficial owner may be a legal owner simultaneously, but this is not always the case.[205] As stated in *The Gem of Safaga*, a legal owner, in turn, is not always a registered owner since the Australian system is one of 'registration of title' and not 'title by registration'.[206] This approach contradicts the English view expressed in *The Evpo Agnic*.[207] However, it remains unclear when legal ownership may differ from registered ownership.

An issue of beneficial ownership was considered in *The Iron Shortland*.[208] It was separately emphasised that this case did not relate to piercing the corporate veil, and this issue did not arise.[209]

The *Iron Shortland* (the second-mentioned ship) was arrested as a surrogate ship to the *Newcastle Pride* (the first-mentioned ship). Malaysia Shipyard applied to arrest the second-mentioned ship due to the failure to pay for the repairs and equipment of the first-mentioned ship.[210] The first mentioned ship had been arrested in Singapore.[211]

The registered owner of the first mentioned ship was Newcastle Pride Co, the wholly subsidiary of Capeco Maritime. The ownership of Capeco Maritime over the first-mentioned ship was found since Capeco Maritime was mentioned as 'owner of the vessel' and the registered owner of the first-mentioned ship was named 'disponent owner' in management

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Convention 1952: *Owners of 'Shin Kobe Maru' v Empire Shipping Co Inc (The Shin Kobe Maru)* [1994] HCA 54, (1994) 181 CLR 404, [18].

[203] *The Ship 'Gem of Safaga' v Euroceanica (UK) Ltd (The Gem of Safaga)* [2010] FCAFC 14, 182 FCR 27, [10]. In this case, the arrest was set aside because one of the ten shares in the ship was not owned by the relevant person.

[204] Ibid, [8].

[205] *The Maria Luisa (No 2)* (n 202) [7] (Moore J). In this aspect, Moore J's minority judgment does not contradict the majority judgment by Tamberlin and Hely JJ.

[206] *The Gem of Safaga* (n 203) [18]. However, in *The Iron Shortland* (n 202) [33], the term 'registered owner' is used to differentiate it from the beneficial owner.

[207] *The Evpo Agnic* (n 103) 1096.

[208] *The Iron Shortland* (n 202) [33].

[209] Ibid, [35].

[210] Ibid, [4]; [7].

[211] Ibid, [4].

and repair contracts, insurance certificate, and correspondence between managers and Capeco Maritime.[212] The managers in relations with third parties acted on behalf of the owners, who were indicated as Capeco Maritime.[213] At the same time, beneficial ownership of Capeco Maritime over the second-mentioned ship was not established since evidence similar to one concerning the *Newcastle Pride* was not provided.[214]

The beneficial ownership of Capeco Maritime over the first mentioned ship was not essential. It was necessary to establish that Capeco Maritime was the relevant person and controlled this ship. Both of these issues were successfully proved.[215] It did not matter if Capeco Maritime was the true owner of the *Newcastle Pride*. However, Sheppard J expressly stated that Capeco Maritime was a beneficial or true owner of the first mentioned ship.[216]

The Iron Shortland does not establish the criteria that should be met to conclude that a person is a beneficial owner of the vessel. In rendering the judgment, Sheppard J does not explain or define 'beneficial ownership'. References to beneficial ownership are usually accompanied by the wording 'or true ownership' in the judgment.[217]

As already noted, beneficial ownership is a term of the law of equity that refers to 'equitable property'.[218] Equitable property is a type of interest in the property not against the whole world but against a particular person.[219] This kind of interest arises when the beneficiary does not have legal ownership over the property but specific rights against the trustee, and the trustee has the corresponding obligations.[220] This constitutes the internal part of an equitable interest.[221] The external part is negative and means restricting third parties from interfering

[212] Ibid, [64].
[213] Ibid.
[214] Ibid, [70].
[215] Ibid, [64]. Even reaching the conclusion that Capeco Maritime is the owner of the *Newcastle Pride*, Sheppard J added that the evidence 'at least establishes that Capeco Maritime was in possession or control of the *Newcastle Pride*'.
[216] Ibid. See a brief description of the conclusions reached in this case in James Crawford, 'The Australian Admiralty Act: Project and Practice' [1997] LMCLQ 519, 533.
[217] Ibid, [59]; [63]; [64]; [69]; [70]. One possible question is whether *Newcastle Pride's* beneficial ownership could be an example of the application of estoppel mentioned in *The Opal 3* (n 168) [11], discussed above at 24. In any event, estoppel is not mentioned in *The Iron Shortland*.
[218] Above, n 106.
[219] *Snell's Equity* (34th edn, Thomson Reuters 2020) [2-003].
[220] Ibid. See also *Target Holdings Ltd v Redferns* [1996] AC 421, 434.
[221] *Snell's Equity*, ibid.

with the property in the trust, which is wider than just interference in relations between beneficiary and trustee.[222] The third party's obligation, therefore, is to restore the assets to the duly appointed trustee and not violate the beneficiary's interest.[223]

Sheppard J in *The Iron Shortland* does not define beneficial ownership as part of the law of equity but as an actual position where the rights, usually belonging to the shipowner, are exercised by a person other than the registered owner.[224]

Another situation where beneficial ownership may theoretically be found separately from legal ownership is nominee shareholding since nominee shareholders do not acquire actual rights to dispose of, sell, or alienate the company's assets.[225] Nominees control the company's shares and not the company's property. If the nominees' control is disregarded, the true owner of the shares in the company is the beneficiary. However, it does not result in disregarding the company's separate legal personality per se. Suppose the nominees' control is ignored, and control by the beneficiary of the company is found in place of this nominee. This kind of control would be the same as direct control of this company. Due to separate legal personality, the company's assets cannot be treated as the shareholders' assets. As control of a company by the direct beneficiaries is essentially control of its shares, not the company's property, the company's property cannot be treated as belonging to them.

Three understandings of beneficial ownership appear to have some support in case law. First, equitable interests in the property in trust;[226] second, rights to control the nominee shareholders; third, the actual position where ownership rights are exercised by a person who

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[222] Ibid, [2-004].

[223] Ibid.

[224] Sheppard J refers to *Civil Admiralty Jurisdiction* (n 9), where it is stated that trusts are rare in shipping, but the English courts declined to interpret the relevant wording as allowing for piercing or lifting the corporate veil: *The Iron Shortland* (n 202) [17]. The same view on the Sheppard J position is reflected in *The Maria Luisa (No 2)* (n 202) [18] (Moore J). Interestingly, a very similar understanding of 'shipowner' may be found in the Nordic expression 'reder' as a person who exercises the most functions of the shipowner: Thor Falkanger, Hans Jacob Bull and Lasse Brautaset, *Scandinavian Maritime Law: The Norwegian Perspective* (4th edn, Universitetsforlaget 2017) 146 et seq.

[225] The basis for this view on beneficial ownership is *The Permina 3001* (n 107) [9]. The Australian Law Commission expressly relies upon this case when discussing the meaning of beneficial ownership: *Civil Admiralty Jurisdiction* (n 9) [130], n 104.

[226] On the position of the former owner when a ship is transferred to trust for security, see *Korea Shipping Corp v Lord Energy SA (The Dangjin)* [2018] FCAFC 201, (2018) 267 FCR 660 (Allsop CJ). Another case where the vessel may be found in the resulting trust is the one where one party provides the purchase money: *The Gem of Safaga* (n 203) [17], referring to *The Ventura* [1908] P 218.

is not a legal owner.[227] The first of these is the usual understanding of beneficial ownership. The second situation is irrelevant since if the nominees hold shares in the company for their beneficiaries, beneficial ownership may be found only concerning these shares and not the company's property. If the nominees hold the property, this constitutes an implied trust and is covered by the first situation. The third understanding is the one in *The Iron Shortland*.

One-ship companies are generally subsidiaries of other companies.[228] So, the 'trust understanding' of beneficial ownership does not apply to them, and the 'nominee shareholding'[229], as stated, cannot apply per se. Even though *The Iron Shortland* provides some assistance in dealing with one-ship companies, using the understanding of beneficial ownership as true ownership, this judgment has not been followed. In *The Gem of Safaga,*[230] the court emphasised with reference to *The Sea Success 1* that 'the distinction between a parent and a subsidiary company is fundamental'.[231] The fact that the parent company owns 100 per cent of shares in the subsidiary company does not mean that the subsidiary's assets belong to the parent.[232] If a ship belongs to a one-ship company, which is, in turn, a subsidiary of the other company owning another one-ship company, the ships belonging to these one-ship companies cannot be arrested as surrogate ships without piercing the corporate veil. It appears, therefore, that trust is the only instance where the concept of beneficial ownership may be directly used for ship arrest.[233] However, as also noted by Brandon J, 'trusts of ships … are … rare'.[234]

The Australian statute, as so in the UK, does not provide for the special court's power to arrest an associated ship by reference to beneficial ownership. Concerning one-ship companies, the corporate veil has to be pierced. This choice appears intentional. The Admiralty Act was

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[227] The minority judgment in *The Maria Luisa (No 2)* (n 202) [11] (Moore J) refers to the second and third understandings.

[228] Meeson (n 1) [3.52].

[229] See *The Maria Luisa (No 2)* (n 202) [55] (Tamberlin and Hely JJ).

[230] *The Gem of Safaga* (n 203) [6]. The same approach may be found in the majority judgment in *The Maria Luisa (No 2)*, ibid, [47] (Tamberlin and Hely JJ).

[231] *The Gem of Safaga*, ibid, [99].

[232] *MV 'Sea Success I' v Liverpool and London Steamship Protection and Indemnity Association (The Sea Success 1)* [2002] AIR Bombay, [54].

[233] The same approach to the term 'beneficial' may be found in the English cases, *I Congreso del Partido* (n 106) 561 and *The Tjaskemolen* (n 118) 471, and in the Australian case *The Maria Luisa (No 2)* (n 202) [55].

[234] *Medway Drydock & Engineering Co Ltd v MV Andrea Ursula (The Andrea Ursula)* [1973] QB 265, 269.

adopted after the South African Admiralty Jurisdiction Regulation Act.[235] The discussion of the South African approach was reflected in the Australian Law Reform Commission Report, published in 1986.[236] There, it was said that 'the right to proceed in rem with respect to owners' and demise charterers' liabilities, combined with the existing law of maritime liens, covered most situations' and it was undesirable to make 'special provision with respect to the corporate veil in legislation dealing with admiralty jurisdiction'.[237] It was left to the company and insolvency law to resolve the issues of the group's indebtedness.[238]

There are no clear rules for disregarding the corporate veil in Australia,[239] as is the case also in the UK.[240] Generally, veil piercing is a fact-specific remedy.[241] In *Dennis Willcox Pty Ltd v Federal Commissioner of Taxation*,[242] Jenkinson J stated that

> [T]he separate legal personality of a company is to be disregarded only if the court can see that there is in fact or in law a partnership between companies in a group, or that there is a mere sham or facade in which that company is playing a role, or that the creation or use of the company was designed to enable a legal or fiduciary obligation to be evaded or a fraud to be perpetrated.[243]

Australian law, therefore, aligns with the approach in many common law jurisdictions that separate legal personality may be considered transparent only in particular circumstances where some impropriety, dishonesty or fraud is found.[244] Therefore, the same problems arising from arresting associated ships based on piercing the corporate veil in other common law countries are also relevant in Australia.

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[235] On the uniqueness of the AJRA 1983 provisions, see above at 7.
[236] *Civil Admiralty Jurisdiction* (n 9) [139].
[237] Ibid, [140]; [141].
[238] Ibid, [141].
[239] *Ford, Austin & Ramsay's Principles of Corporations Law* (LexisNexis 2024) [4.250].
[240] Discussed above at 19 et seq.
[241] This position in common law countries remains unchanged since *Salomon v Solomon & Co* (n 134); see *Ford, Austin & Ramsay's Principles of Corporations Law* (n 239) [4.250.9]; Anil Hargovan, Michael Adams, Catherine Brown, *Australian Corporate Law* (8th edn, LexisNexis 2023) [5.12]. Some specific cases where the corporate veil was pierced are listed in Hargovan, ibid, [5.14].
[242] [1988] FCA 123, (1988) 79 ALR 267.
[243] Ibid, [11].
[244] *Salomon v Salomon & Co* (n 134) 42-43; *Ford, Austin & Ramsay's Principles of Corporations Law* (n 239) [4.250.12].

8 The relevance of impropriety

As noted, the main criterion for piercing the corporate veil is impropriety on the part of the shipowner. It is accepted that one-ship companies are not always created fraudulently or improperly but for legitimate commercial purposes. It is said that It was not the desire to avoid liability that gave rise to the use of flags of convenience throughout the world but rather political and economic reasons such as lower operational costs for American ships or lower taxes for Greek shipowners.[245] However, it is now more common to use one-ship companies as a mask to limit or avoid liability, although it is not always, or at least not only, the reason behind it.[246]

The main issue is that one-ship companies, even if created and used for a legitimate purpose, result in a situation where the property of an actual owner is hidden behind this corporate structure. The outcome would be the same if such a company were created and used for illegitimate purposes. Thus, it is evident that shipowners effectively use these companies to avoid liability, but their creditors can do nothing about it except in extraordinary cases.[247]

At the same time, requiring impropriety for the arrest of an associated ship obscures the underlying problem. Moreover, supposing fraud or other improper conduct is required, it becomes crucial to establish that the separate legal personality of the shipowner deceived the person seeking the arrest.[248] If this is not the case, the ship targeted cannot be arrested. Vessels belonging to separate legal entities are also not at risk of being arrested unless these entities are used to defraud their creditors.

The South African approach, in turn, excludes the necessity of proving impropriety from the arrest of associated ships. Wallis even states that because of the absence of the impropriety criterion, the arrest of ships associated by common control in South Africa is not based on

[245] Boleslaw Bozcek, *Flags of Convenience. An International Legal Study* (Harvard UP 1962) 30; 36.
[246] Davies (n 76) 310–312; Hilton Staniland, 'The implementation of the Admiralty Jurisdiction Regulation Act in South Africa' [1985] LMCLQ 462, 468.
[247] Toh describes the judgment in *Asteroid Maritime Co Ltd v The Owners of the Ship or Vessel 'Saudi Al-Jubail' (The Saudi Al-Jubail)* [1987] SGHC 71, where the corporate veil was successfully pierced, as a 'rare instance': Toh (n 153) 139, even though in the judgment the wording 'lifting the corporate veil' is not used.
[248] *The Maritime Trader* (n 92) 157.

piercing the corporate veil.[249] This reasoning also indirectly follows from *The Berg*, which says that it is not the person liable who bears the consequences of liability for the claim when an associated ship is arrested, but the owner of the arrested ship. However, this person is not liable in personam.[250] So, it is not the assets of one company that are treated as belonging to another company, but a new substantive right, allowing the arresting party to bring an action against the person not liable in personam due to some link or nexus. However, it seems to be a more widespread position that these provisions are a special kind of 'statutory' veil piercing.[251] It is submitted that this is not practically essential to determine the nature of these provisions. Moreover, the control criterion is closer to company law than admiralty or maritime law.

The South African approach may also result in injustice. The relevant provisions' overreaching becomes possible because they are not formulated as special rules for dealing with one-ship companies, even though the idea behind them is precisely that.[252] They may be used to pierce the corporate veil of any shipowner even though it is not a one-ship company.[253]

Discussing the justifiability of the diversification of assets between separate companies within the group, Wallis agrees that using separate companies for 'asset partitioning'[254] is proper.[255] However, asset partitioning in shipping is taken 'to an extreme' and is unjustifiable when shipowners diversify their assets into one-ship companies, violating creditors' rights.[256] After that, he concludes that 'the true associated ship jurisdiction represents a legitimate legislative response to a perceived exorbitant and opportunistic use of the benefits of the corporate form'.[257] These arguments and considerations concerning one-ship companies can be

[249] Wallis (n 1) 72-73
[250] *The Berg* (n 32) 712D.
[251] *The Heavy Metal* (n 44) [22] (Farlam JA); Bradfield (n 19) 50-51.
[252] *Report on the Review of the Law of Admiralty* (n 11) [7.3].
[253] Bradfield (n 19) 52.
[254] Henry Hansmann, Reinier Kraakman, 'Organizational law as asset partitioning' (2000) 44 European Economic R 807, 811. The alternative term 'entity shielding' may be used: see John Armour, Henry Hansmann, Reinier Kraakman, Mariana Pargendler, 'What is Corporate Law?' in Reinier Kraakman et al, *The Anatomy of Corporate Law: A Comparative and Functional Approach* (2nd edn, OUP 2009) 6, n 13. On the understanding of asset partitioning, see Armour, ibid, 9.
[255] Wallis (n 1) 78-79.
[256] Ibid, 79.
[257] Ibid, 89.

supported. However, the problem is that the provisions of the AJRA 1983 are not restricted to one-ship companies but disregard separate legal personality in general.

There is a twofold problem. Arrest or attachment of associated ships by piercing the corporate veil is not an effective way to deal with one-ship companies owing to the necessity to prove that such a company is a sham and is being used to conceal facts or evade liability, which is not always the case. On the other hand, the South African approach, which is based on the concept of arresting a ship associated by common control without proving impropriety, may result in overreaching of the relevant provisions. Therefore, the paramount relevance of the impropriety criterion is the exclusion of overreaching factors from the arrest of associated ships, but doing so allows shipowners to avoid liability by using the mechanism of one-ship companies.

As highlighted, the problem of overreaching may exist only in situations where a ship may be arrested as associated without proving improper conduct on the part of the shipowner. Nowadays, this problem is relevant only in South Africa. However, if there is a desire to introduce the possibility of arresting associated ships in other countries, the problem of overreaching should be discussed and solved beforehand.

9 Ships owned by foreign State-owned enterprises

One of the clearest examples of the overreaching problem concerns the arrest of ships belonging to State-owned enterprises. Suppose ships may be arrested as associated through common State control. In that case, all ships belonging to State-owned enterprises might be arrested for the debts of one ship belonging to another State-owned enterprise. Potentially, a huge commercial fleet might be at risk of being arrested. This risk is relevant not only for the State-related shipowners themselves but also for their counterparties.

There are two main reasons why State-owned enterprises are created.[258] The first is economics, which is concerned with market imperfections and curing the unfair situations

[258] Andrew Karolyi, Rose Liao, 'State Capitalism's Global Reach: Evidence from Foreign Acquisitions by State-owned Companies' (2017) 42 J of Corp Finance 367, 368.

that arise from them.[259] The fact that a State-owned enterprise was created for economic reasons does not predetermine the goals of its activity.[260] They may differ.[261] It is one of the grounds that differentiates State-owned from private enterprises. For private enterprises, the goal-determining process is more straightforward. Their activity is aimed at exceeding the gain.[262] State-owned companies, in turn, may act based on other reasons depending on the particular demands made by controlling parties, in most cases, the State.[263]

The second reason for creating State-owned enterprises is political. The existence of State-owned enterprises may be explained by the ideological and political strategy of a particular State.[264] In most cases, communist or socialist ideology is predominant in such countries, but this is not invariably the case.[265] The whole economy, or at least its main part, is often owned directly or controlled through State intermediaries.

In both cases, all the State-owned enterprises and, in some situations, their subsidiaries may be considered associated with each other as the State controls them. However, in reality, the situation may be more complex.[266]

The development of the governance of State-owned enterprises resulted in a position where different specialised bodies, entities, or agencies controlled them.[267] In other words, the State does not control these enterprises as other spheres of public policy but creates 'buffers' to ensure their effectiveness in the market economy.[268] These buffers become the actual controllers of companies even though such control is exercised on behalf of the State.[269]

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[259] Alvaro Cuervo-Cazurra, et al, 'Governments as Owners: State Multinational Companies' (2014) 45 J of Int'l Business Studies 919, 921.

[260] Brian Levy, 'A Theory of Public Enterprise Behavior' (1987) 8 J of Economic Behavior and Organization 75, 77.

[261] Ibid, 85.

[262] Ibid, 76.

[263] Cotton Lindsay, 'A Theory of Government Enterprise' (1976) 84 J of Political Economy 1061, 1069.

[264] Cuervo-Cazurra (n 259) 921-922.

[265] For example, the Russian economy is capitalist and based on free market principles; however, the number of state-owned companies there is much higher in comparison to the ordinary capitalist state, see Alexander Abramov, Alexander Radygin, Maria Chernova 'State-owned enterprises in the Russian market: Ownership structure and their role in the economy' (2017) 3(1) Russian J of Economics 8, 10. The same is applicable to other post-soviet and post-communist states. Regarding these states, political reasons transformed into historical ones.

[266] Ian Thynne, 'Ownership as an Instrument of Policy and Understanding in the Public Sphere: Trends and Research Agenda' (2011) 32 Policy Studies 183, 185.

[267] Ibid, 192.

[268] Ibid, 188.

[269] Ibid, 185.

Therefore, when different buffers control two companies, their activity and management are separated, and these companies do not actually relate to each other.

As we have seen, the primary purpose of the arrest of associated ships is to allocate the debt to the person who ought to be the debtor. In the commercial sphere, such a person would be the common controller of two companies; one of those is a formal debtor. For the State, it is hardly possible to say that all the State-owned companies may be regarded as controlled by the same entity. It may be problematic to justify the possibility of arresting all the ships ultimately controlled by the State from the economic point of view.

9.1 Association between ships owned by State-owned enterprises in South Africa

In *The Baconao*, a vessel owned by Transportes Del Mar SA, a company ultimately controlled by the Cuban government, was arrested as associated with the *Jade Bay*, a vessel chartered by Mambisa, a State-owned enterprise and allegedly a 'chartering arm' of the Cuban government.[270] The association was established since the Cuban government controlled both Transporter Del Mar SA and Mambisa.

In *The Le Cong*, judgment was given in favour of the shipowner. The arrest was set aside since the association between the *Gaz Progress*, the ship concerned chartered by the Shantou Sez, an enterprise allegedly controlled and financed by the Shantou Municipal City Government, and the *Le Cong*, the vessel owned by Guangzhou Ocean Shipping Co, an enterprise controlled and funded by the central government of China, was not proved.[271] The applicant failed to prove on the balance of probabilities that the People's Republic of China controls both vessels. In giving the judgment, Scott JA emphasised that the Chinese legal, political, and social system differed drastically from the South African one, as did 'political philosophy and culture'.[272]

The most recent case involving the arrest of an associated ship allegedly controlled by a State-owned enterprise is *The Shandong Hai Chang*.[273] This was an application by DHL Project &

[270] *Transportes del Mar SA v Jade Bay Shipping Co Ltd (The Baconao)* [1996] SCOSA C42(D). In his judgment (at C55B), Pistorius AJ refers to *I Congreso del Partido* (n 106), where the structure of Mambisa and relations between Mambisa and the Cuban government were investigated, but he concluded that the law of Cuba could change between judgment in *I Congreso del Partido* and the proceedings in *The Baconao*.

[271] *International Marine Transport SA v MV Le Cong (The Le Cong)* [2005] ZASCA 106, [17].

[272] Ibid, [13].

[273] *DHL Project and Chartering Ltd v MV Shandong Hai Chang (The Shandong Hai Chang)* [2022] ZAKZDHC 24.

Chartering Ltd to arrest the vessel *Shandong Hai Chang* (the ship targeted), which belonged to Tonkolili, as associated with the *Zhong Teng* (the ship concerned), owned by Shandong Haiyang. DHL sought the arrest to enforce an arbitration award given by a Hong Kong arbitral tribunal in its favour against Shandong Haiyang. To succeed, DHL should have proved that the same entity controlled both the shipowner of the ship targeted and the ship concerned, allegedly Shandong Provincial State-Owned Asset Supervision and Administration (SASAC), an 'agency or arm of the government of the Peoples' Republic of China'.[274] It was not contended that SASAC controlled the Shandong Haiyang.[275] However, it was argued that SASAC did not control Tonkolili.

Pillay J stated with reference to *The Silver Star* that the purpose of the provisions on the arrest of associated ships was to allocate the debts where they belonged[276] and to enable creditors to enforce their claims 'against all vessels in the fleet, irrespective of where … debts are incurred, if the vessel calls at a South African port'.[277] Another important point made by Pillay J was that the law applicable to the notion of control is the law of exercising such control. Usually, it is the law of the place of company registration. In the present case, it was the law of China.[278] Pillay J had to establish the content of Chinese law to find an association.

All the shares in Tonkolili were owned by Steel Group Co Ltd (SIS). SASAC was the controlling shareholder of SIS. Despite that, the owners of the ship targeted argued that SASAC did not actually have the power to control Tonkolili. It was contended that 'SASAC could not intervene into the market decision-making of subsidiaries under SIS'.[279] The reason was that the reform took place in China. Under this reform, SASAC had the power to delegate its rights as a capital contributor to SIS in relation to its subsidiaries, including Tonkolili, while remaining the shareholder in SIS.[280] In other words, there was a break in the chain of control. While SASAC controlled SIS, it could not commercially control its subsidiaries due to express legal

[274] Ibid, [5]-[6].
[275] Ibid, [43].
[276] Above, n 32; *The Shandong Hai Chang*, ibid, [1].
[277] *The Shandong Hai Chang*, ibid, [4]. It is important to read this part cautiously. In *The Nefeli* (n 40) 327B, it was established that the status of ships as part of one fleet is irrelevant to the arrest of an associated ship. In practice, these provisions may and often do apply to arrest the vessels that form one fleet, but this fact is not of any legal relevance other than having the persuasive effect of proving the common control.
[278] *The Shandong Hai Chang*, ibid, [4].
[279] Ibid, [28].
[280] Ibid, [56].

provisions.[281] Pillay J several times emphasised that these conclusions were counter-intuitive to 'Western law'.[282] However, the judge stated that deciding any other way would be 'disrespectful and misanthropic of the reform that the Peoples' Republic of China is constitutionally committed to undergo'.[283]

Another interesting point made by the expert for the ship targeted, which Pillay J did not thoroughly comment on, was '[if the ships are found associated], all companies in China would be deemed to be associated because they are all subject to government power of regulation'.[284] It may be assumed that Pillay J indirectly supported the position that this would be unsatisfactory:

> With the opening of the economy to the Western world, for as long as the State controlled the destiny of all its enterprises, the Peoples' Republic of China would be rich pickings for claims of association. The reform would bring the State ownership of enterprises by the Peoples' Republic of China in line with Western market economies, whilst maintaining a socialist agenda.

It may appear that the judgment in *The Shandong Hai Chang* demonstrates that the problem of overreaching regarding State-owned companies is avoided. Nevertheless, control is usually established with reference to the law of the place of the company incorporation. *The Shandong Hai Chang* is a factually unique case decided on the basis of Chinese law where, allegedly, SASAC's control of SIS's subsidiaries was excluded expressly. The main argument related to the reform that took place in China. Would the actual position of a buffer change if this reform had not been carried out? The relevant judgment does not give a general answer to this question. One should not attribute universal significance to this decision, especially considering that it is not a judgment of the Supreme Court of Appeal.

In neither of the cases discussed did the issue of State immunity arise. This is a result of the express exclusion of foreign State immunity with regard to the commercial activities of foreign

[281] Ibid, [51]; [60]; [63].
[282] Ibid, [33]; [36]; [62].
[283] Ibid, [64].
[284] Ibid, [36].

States.[285] These considerations apply not only to admiralty but also to attachment within general civil proceedings.[286] However, such restrictive application of immunity is not universal.

9.2 Foreign State immunity in the United States of America

US federal law, the Foreign States Immunity Act 1976 (the FSIA), stipulates that foreign States, in general, should not be immune from the US courts' jurisdiction concerning their commercial activities if these activities are connected with the US.[287] At the same time, the FSIA expressly excludes the property of the foreign States from the applicability of measures of constraint such as Rule B attachment in personam and Rule C arrest in rem.[288] There are exclusions from this general rule, but these only apply at the execution stage.[289]

This immunity applies to State-owned enterprises as long as they may be considered an 'instrumentality' of the State.[290] The FSIA stipulates that the State should own the majority of shares in such a company.[291] The Supreme Court of the US clarified this criterion in a narrow sense and stated that the shares in the entity should be owned by the State directly.[292] Also, the court emphasised that the doctrine of piercing the corporate veil cannot apply to find immunity under the FSIA.[293] In this regard, the Supreme Court of the US interpreted the FSIA as applicable only to the States and the companies directly owned by the States. In other cases, the immunity does not apply, and therefore, the property of those subsidiaries not directly owned by the State may be arrested in rem under Rule C or attached in personam under Rule B.

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[285] Foreign State Immunity Act, No 87 of 1981 (SA), s 4(1)(a).

[286] *The Shipping Corp of India Ltd v Evdomon Corp* 1994 (1) SA 550 (A), 565H.

[287] 28 USC 1, s 1605(a). On 'direct effect' in the US, see *Republic of Argentina and Banco Central De La Republica Argentina v Weltover Inc* 112 S Ct 2160, 2168 (1992).

[288] Ibid, s 1609. The reasoning is discussed in *Jet Line Services Inc v M/V Marsa El Hariga* 462 F Supp 1165, 1171; 1173-1174 (1978).

[289] Ibid, s 1610. See Schoenbaum (n 1) 569.

[290] Ibid, s 1603(b).

[291] Daniel Loud, 'Emitting Injustice? Foreign State-Owned Enterprises That Cause Transboundary Pollution and the Foreign Sovereign Immunities Act of 1976' (2020) 59 Columbia J of Transnational Law 169, 183.

[292] *Dole Food Co v Patrickson* 123 S Ct 1655, 1661 (2003).

[293] Ibid. One should take into account the dissenting position stated by Breyer J, according to which it is important not to look at a formal criterion of ownership but at substantive relations between the companies or within the group. An issue of formation of the group is a 'matter purely of form, not of substance': see ibid, 1666.

The question is whether it is possible to attach the vessel under Rule B based on the indirect ownership or control of the vessel targeted and the vessel guilty by the State when dealing with two subsidiaries not subject to immunity under the FSIA. Even though the company may not be subject to the FSIA, the State is subject to it. If the State's assets are treated as those from which it is possible to satisfy the claim, even though they are considered State-owned due to reverse veil piercing, they must be subject to immunity under the FSIA.[294] Therefore, if the corporate veil piercing reaches the company's assets to which the FSIA applies, ie, 'instrumentality', which is majority-owned by the foreign State, their attachment should be impossible.[295] However, this situation is unlikely to happen. Corporate veil piercing, based on impropriety, may apply to State-owned enterprises only in some extraordinary cases where subsidiaries are misused. In this situation, it is difficult to imagine that the fraudulent business structures, as understood by the US courts, would be utilised by the State or enterprises directly owned by the State. So, the attachment of associated ships will hardly reach the level of State-owned enterprises with direct State shareholding.

Such a level of immunity granted by the US law is not unique. The restrictions on the pre-judgment measures of constraint over the State's property, even if used for commercial purposes, are reflected in the United Nations Convention on Jurisdictional Immunities of States and their Property 2004, New York (the Convention on Jurisdictional Immunities).[296] However, in the UK,[297] Singapore,[298] and Australia,[299] ships involved in commercial activities are excluded from immunity.[300] South African law, likewise, excludes the immunity of foreign

[294] Mark Widemaier, 'Piercing the (Sovereign) Veil: The Role of Limited Liability in State-Owned Enterprises' (2021) 46(3) Brigham Young University LR 795, 829; 834; 835.

[295] Ibid, 832.

[296] Art 18. The Convention did not enter into force.

[297] State Immunity Act 1978 (UK), s 3, 10, and 13. State-owned companies or 'separate entities' do not enjoy immunity if the State in the same case would not enjoy it: s 14(2). See Hazel Fox, *The Law of State Immunity* (2nd edn, OUP 2008) 298; Meeson (n 1) [3.64]. On the nature of the exclusion from the immunity when enterprises are involved in commercial activities (restrictive state immunity) see *UK P&I Club NV v Bolivariana de Venezuela (The RCGS Resolute)* [2022] EWHC 1655 (Comm), [2022] 2 Lloyd's Rep 520, [79] et seq; *UK P&I Club NV v Bolivariana de Venezuela (The RCGS Resolute)* [2023] EWCA Civ 1497, [2024] 1 Lloyd's Rep 417, [44]; [48]; [50]; [56]; *Argentum Exploration Ltd v Republic of South Africa* [2024] UKSC 16, [2024] 2 WLR 1259, [24] et seq; [77]. Cases involving the issue of State ownership over a ship to be arrested are *The Nazym Khikmet* (n 180) and *The Guiseppe di Vittorio* (n 180). State immunity was also discussed in *I Congreso del Partido* (n 106).

[298] State Immunity Act 1979, s 5; s 15.

[299] Foreign States Immunity Act 1985 (Cth), s 11; s 32.

[300] Roger O'Keefe, Christian Tams (eds), *The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary* (OUP 2013) 301.

States and their property when engaged in commercial activities.[301] By comparison with these jurisdictions, the immunity level in the US regarding ships belonging to State-owned enterprises engaged in commercial transactions is rather unusual.[302]

9.3 Justification for the immunity

The question is whether such immunity may assist in avoiding unfair situations regarding the arrest of associated ships directly or indirectly belonging to the State. On the one hand, it is possible to say that the high bar for corporate veil-piercing in the US excludes the possibility of overreaching, so there is no need to apply immunity. On the other hand, the immunity issue is common to all countries. For this reason, we should determine whether the immunity would be helpful regarding the arrest or attachment of associated ships if the bar is relaxed.

Foreign State property is automatically protected from execution since, in most cases, it is located in the relevant States, and courts in those States may be reluctant to recognise and enforce a foreign court judgment or arbitration award. The FSIA provides exclusions for the measures of constraint to the foreign State's property located in the US at the post-judgment stage, but these exclusions do not apply to the pre-judgment measures, such as attachment in personam or arrest in rem.[303]

Brown and O'Keefe, with regard to the Convention on Jurisdictional Immunities, noted that the difference between approaches to pre-judgment and post-judgment measures is not based on the principles of immunity but rather on the idea that the use of the state's property should not be restricted before the judgment on the merits.[304] However, most state-owned enterprises will not be considered the 'State'; therefore, the problem discussed may only arise in rare cases.[305]

States or State-owned companies also use one-ship companies. If it were impossible to impose pre-judgment measures against vessels, finding the property to satisfy a claim within the jurisdiction may be impossible. In other words, all the same problems regarding private

[301] Foreign State Immunity Act 87 of 1981, s 4(1)(a).
[302] Fox (n 297) 616.
[303] *Jet Line Services Inc* (n 288) 1173.
[304] O'Keefe (n 300) 289; 292
[305] Ibid, 291 et seq.

one-ship companies would be relevant to State-owned ones.[306] That is why it may be essential to arrest or attach ships belonging to State-owned enterprises at the stage before the proceedings on the merits.

Arrest does not entail the detention of a vessel throughout the entire proceedings. The vessel may, and often is, released upon providing alternative security such as a letter of undertaking (LOU),[307] bail or other forms of security, such as a bank guarantee. If the vessel is owned by a State that is interested in its continued exploitation, it may provide such security. This should be relatively simple, as States are, in most cases, considered reliable debtors.[308] Therefore, if the purpose of enacting the immunity from pre-judgment arrest or attachment is to ensure that the State may continue to use its property, this purpose is not met by this restriction since there is a mechanism allowing the continuing use of this property even after its detention.

Another possible reason for prohibiting the pre-judgment measures of constraint is to restrict the possibility of finding the court's jurisdiction only by attachment of the foreign State's property.[309] However, this does not seem relevant to the US since s 1605(b) of the FSIA allows the enforcement of claims based on maritime liens but only in personam against the relevant State without any additional jurisdictional links.[310] As already noted, for the US courts to have jurisdiction over disputes involving foreign States or State-owned enterprises, they should be engaged in commercial activities connected with the US.[311] However, if adequate notice is given, this restriction does not cover the enforcement of maritime liens against ships belonging to foreign States.[312]

An additional argument favouring immunity is that pre-judgment measures of constraint against States are unnecessary since States usually have enough property to satisfy maritime creditors' claims. However, this argument does not apply to maritime arrest or attachment since these measures are not dependent on necessity and are non- or limitedly discretionary.

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[306] On the problem and its importance, see *Berlingieri on Arrest of Ships* vol 2 (n 1) [9.68].
[307] Paul Myburgh, 'P&I Club Letters of Undertaking and Admiralty Arrests' (2018) 24(3) JIML 201, 203; 208.
[308] It is unlikely that the state will face the same problems as private companies struggling to find alternative security to release the ship arrested; for instance, see *The Alkyon* (n 2) (Teare J).
[309] Fox (n 297) 617.
[310] Schoenbaum (n 1) 562-563; *Jet Line Services Inc* (n 288) 1174.
[311] Schoenbaum, ibid, 560.
[312] See FSIA, s 1605(b); *Castillo v Shipping Corp of India* 606 F Supp 497, 503 (1985).

The concept of maritime arrest should be amended to make it possible to rely upon this reasoning.

In this regard, it seems that the immunity from pre-judgment measures is not justified, at least concerning ships. One of the arguments favouring this may be that not many countries have enacted the same level of immunity.[313]

State immunity is another way to avoid overreaching the associated ship arrest provisions concerning State-owned enterprises. However, this approach seems too radical since it prohibits the imposition of any measures of constraint upon States' or State-owned enterprises' property at the pre-judgment stage. In some cases, pre-judgment measures may violate the defendant's rights and concern the State's sovereignty. However, complete prohibition seems unnecessary and far-reaching.

Another reason why State immunity may not be a beneficial solution is that it deals only with the particular issue of State-owned companies and is not concerned with other unjust situations that may arise. This legislative approach to deciding all the problematic instances that may occur case by case cannot assist in dealing with the general problem in question. First, finding all possible issues is difficult until they arise in practice. Second, while the law will regulate the existing mechanisms, new forms of ownership and control will occur, and they will not be reflected in the existing provisions. Thus, determining a general solution to the problem under study may be more reasonable.

10 General solutions: objective and reasonable shipowner approaches

The arrest of associated ships based only on common control between two ship-owning companies may result in overreaching since applying the relevant provisions is not restricted to one-ship companies. These provisions may circumscribe the idea of a separate legal personality within the arrest proceedings and are only expressly enacted in South Africa. As we have seen, in other common law countries, it is necessary to pierce the corporate veil to arrest an associated ship.

[313] Above at 41.

As explored earlier, piercing the corporate veil requires proof of impropriety. Most common law jurisdictions accept that creating one-ship companies is generally legitimate. As Sheen J stated in *The Maritime Trader*, there is nothing wrong with using one-ship companies to avoid liability.[314] Therefore, the mere fact that a one-ship company was created is not enough to justify the arrest; it must be proved that it was used to defraud the creditors. This is a very high bar, especially for the arrest stage, and encourages shipowners to use one-ship companies to avoid liability.

If avoiding liability is not the direct result of creating the relevant business structure, for instance, if its existence may be fully justified by the concept of 'asset partitioning', the arrest of associated ships is not justified. For instance, if a multinational enterprise creates separate legal entities in the countries where it conducts business, it may hardly be concluded that avoiding liability was the clear and direct purpose of this conduct. Moreover, creditors, in some cases, may even benefit from this kind of asset distribution. The same applies to situations where the property is distributed between several companies, but these companies still have a reasonable amount of property to satisfy maritime creditors' claims. At the same time, if an enterprise diversifies its assets so much that it becomes apparent that it may violate its creditors' interests, then such diversification is not justified. This conduct should not be encouraged, and the ships owned by such companies, even though not used fraudulently, should be considered associated.

A middle solution may be the 'objective' approach. When common control between two ships is established, the most problematic point which bars the claimant from arresting the ship is proving that the person deliberately took actions to evade liability and defraud creditors. Under the objective approach, it would be possible to arrest an associated ship if a creditor is actually deprived of its rights by the existence of a particular shipowning company, even though they failed to prove that the shipowner deliberately took actions to defraud them. This is narrower than the associated ship provisions in South Africa, where only the common control of two vessels must be proved, but wider than the veil-piercing approach since it excludes impropriety or other subjective elements in the shipowner's conduct.

[314] *The Maritime Trader* (n 92) 157.

Another way to formulate these provisions in a balanced way may be reasonableness. Under this approach, the ship may be arrested as associated only in those cases where a reasonable shipowner would know that the relevant business structure may violate creditors' rights. If a separate legal personality is used to avoid liability and the shipowner knows or is deemed to know and accept it, an associated ship should be arrested. The result should be the same irrespective of whether the companies were used fraudulently and whether the creditors were deprived of their rights. This criterion is not subjective, meaning proving that a particular company or person controlling the company knew their conduct was improper is unnecessary. However, it must be clear to the average reasonable shipowner that violation of creditors' rights would directly result from these actions.

11 Discretionary arrest and liability for wrongful arrest

One of the features of the arrest of ships in the UK is that arrest is available as a matter of right.[315] The applicant does not have to disclose all the material facts at the arresting stage.[316] If the bar for the arrest is so low, this remedy should be restricted so as not to allow its abusive use. In this sense, allowing the arrest of associated ships without having to prove fraud may seem a far-reaching measure. It appears that enacting the relevant provisions might already be justifiable if there is a disclosure requirement, as in South Africa[317] and Singapore.[318]

When the arrest of ships is discretionary, the court decides whether or not an arrest is necessary to secure the claim. In the case of the State, it does not seem that security measures are often needed because the State ordinarily can pay its commercial debts. If the court decides that it is not so, and it would be difficult to enforce the judgment if the arrest is not granted, then it is unclear why there should be any exclusions for the arrest of State-owned

[315] Rhidian Thomas, 'Ship Arrest – Issues of Availability, Fairness and Proportionality' in Myburgh (n 1) 25.
[316] *The Varna* (n 91) 255.
[317] *Galsworthy Ltd v Pretty Scene Shipping SA (The Pretty Scene)* [2021] ZASCA 38, 2021 (5) SA 134 (SCA), [19]. If the facts shown before the registrar are potentially controversial, especially regarding the maritime nature of the claim and alleged association, the issue may be referred to the judge.
[318] *The Rainbow Spring* [2002] SGHC 255, [2003] 3 SLR(R) 362, [37]; *The AA V* [1999] SGHC 274, [1999] 3 SLR(R) 664, [47]; *The Vasiliy Golovnin* [2008] SGCA 39, [2008] 4 SLR(R) 994, [84] et seq.

companies' property. Therefore, the shipowners' rights are generally protected.[319] The same applies to other companies, not only State-owned enterprises.

Another mechanism of control over the arrest is liability for wrongful arrest. Even if the arrest was unjustified in the first place, the arresting party would compensate the damages caused by this arrest. This is the idea behind liability for wrongful arrest.[320] As South Africa is the only country where the provisions on the arrest of associated ships are enacted, it would be sensible to consider the understanding of wrongful arrest there.

Liability for wrongful arrest is formulated in s 5(4) of the AJRA 1983 as a liability for loss and damages caused by 'proceedings brought without reasonable and probable cause'.[321] This means that when applying for arrest, the arresting party must have had an honest belief that it is entitled to arrest the vessel (subjective element), and this belief must have been 'reasonable' (objective element).[322] A lack of both subjective and objective elements constitutes wrongful arrest.

One of the leading cases is *The Cape Athos*.[323] In this case, the agreement between the parties contained a clause prohibiting the arrest of ships belonging to either.[324] Nevertheless, the applicant arrested the vessel to obtain security for arbitration proceedings. The arrest was based on legal advice to the effect that the arrest was possible.[325] The court held that a reasonable person would not rely on this consultation and could not believe that the arrest was possible despite the parties' agreement.[326] The court stipulated that the issue '[w]hether in a given case a reasonable person would have accepted that the legal advice and would have acted on it remains a question of fact'.[327] The shipowner should have proved this

[319] There are other reasons to amend the English approach to the ship arrest. The amendments to the wrongful arrest concept have been under discussion at least since 2014, see Giorgio Berlingieri, 'Liability for the Wrongful Arrest of Ships: Where We Stand' (2020) 174 Comparative Maritime Law 107, 115 et seq; *The Alkyon* (n 97) (CA), [95]. For general discussion, see Thomas (n 315) 25 et seq.

[320] *The Evangelismos* (1858) 12 Moo PC 352, 360; Meeson (n 1) [4.35]; Cremean (n 194) 328; *Northern Endeavour Shipping Pte Ltd v Owners of NYK Isabel (The NYK Isabel)* [2016] ZASCA 89; 2017 (1) SA 25 (SCA), [45].

[321] Hofmeyr (n 1) 242.

[322] Ibid.

[323] *Cape Athos Shipping Ltd v Blue Emerald Shipping Ltd (The Cape Athos)* 2000 (2) SA 327 (D).

[324] Ibid, 334D.

[325] Ibid, 340A-F.

[326] Ibid, 342E.

[327] Ibid, 336F.

unreasonableness to set the arrest aside and obtain compensation for damage caused by the wrongful arrest. They successfully did so.

The threshold for wrongful arrest in South Africa and Australia[328] is lower than in the UK or Singapore, where the 'malice' threshold applies.[329] If it is easier to find an arresting party liable for wrongful arrest, then there is less probability that the arrest of an associated ship would significantly violate the shipowner's rights.

The arrest of associated ships does not exist in a vacuum because it relates to other aspects of admiralty law and procedure. If it is proposed to amend other principles, introducing the provisions on the arrest of associated ships may have some benefit.

12 Conclusion

South Africa is the only jurisdiction which has expressly enacted associated ship arrest provisions. Sections 3(6) and 3(7) of the AJRA 1983 stipulate that a ship may be arrested due to the same person's common direct or indirect control. There is no statutory definition of 'control', but case law has held that this entails the power to decide on the company's fate or destiny, ie, to make the most important decisions. This power ordinarily belongs to the company's shareholders (direct control) but may also be exercised by third parties through their nominees (indirect control).

In the US, the arrest of associated ships is possible only by attachment in personam under Rule B. This is because arrest in rem is based on the personification theory, and almost all maritime claims are secured by maritime liens. Attachment in personam of associated ships is based on piercing the corporate veil, in most cases, by applying the 'alter ego' rule. The US courts generally pierce the corporate veil more willingly compared with the courts in the UK

[328] Section 34(1) of the *Admiralty Act 1988* (Cth). This provision is analysed in Cremean (n 194) 328 et seq. Cremean indicates that only Australia and South Africa have provisions, lowering the relevant threshold. See also *Delaware North Marine Experience Pty Ltd v The Ship 'Eye-Spy' (The Eye-Spy)* [2017] FCA 708, [239]–[299].

[329] *Centro Latino Americano de Commercio Exterior SA v Owners of the Ship Kommunar (The Kommunar) (No 3)* [1997] 1 Lloyd's Rep 22, 33; *The Alkyon* (n 97) (CA), [83]; *The Kiku Pacific* [1999] SGCA 96, [1999] 2 SLR(R) 91, [30]; *The Vasiliy Golovnin* (n 318) [137]; *The Xin Chang Shu* [2015] SGHC 308, [2016] 1 SLR 1096, [1]; [2]; [25]; [42].

and many other common law jurisdictions. However, there is still a very high bar due to the necessity of proving impropriety on the part of the shipowners.

In the UK (and Singapore), the courts may look behind the registered ownership to establish beneficial ownership of the ship, but there is no extraordinary power to pierce the corporate veil. Due to the concept of separate legal personality, beneficial ownership of the vessels belonging to one-ship companies controlled by the same person may be found only by piercing the corporate veil. Piercing the corporate veil is possible only in extraordinary cases where separate legal personality is used improperly to evade liability. It is a very high bar. Therefore, arresting an associated ship in the UK is extremely difficult. This situation encourages shipowners to use one-ship companies to avoid liability.

In Australia, the arrest of the associated ship ('surrogate ship') is also based on the interpretation of 'beneficial ownership'. Although the UK and Australian systems differ in minor aspects, the arrest of associated ships in Australia is based on principles similar to those in the UK. Therefore, this kind of remedy is usually unavailable for maritime claimants.

The general approach of common law countries is that ships belonging to one-ship companies might be arrested when the requirements for piercing the corporate veil are met. This is a very high bar, mainly because of the subjective criterion of impropriety. This impropriety requirement is excluded in South Africa. Still, the problem with this approach is that these provisions may overreach and confound their initial purpose, which is to deal with one-ship companies. One example of overreaching is the arrest of ships belonging to State-owned companies based on the common control of the State.

Ships of State-owned enterprises are only an example of the possible overreaching of the relevant provisions. The solution to the problem should be general and not deal with particular instances. Finding all possible examples and drafting the relevant provisions dealing with all of them case-by-case would be impossible.

In the US, for instance, State-owned ships are generally immune from pre-judgment measures of constraint. The enactment of this kind of protection of State-owned property is unique. It

seems this approach may have far-reaching consequences. However, other common law countries do not provide this degree of immunity.

In this paper, two possible general solutions are proposed. The first is piercing the corporate veil based on an objective approach. It means that it is insufficient to prove the common control between the companies; it will also be necessary to show that the existence of the particular corporate structure violated the creditor's rights even though it is not proved that it has been used to defraud the particular arresting creditor. The second is the reasonable shipowner approach, where proving that the reasonable shipowner would understand that the relevant corporate structure may violate the creditors' rights is necessary. If proven, this structure may be disregarded.

In the end, the arrest of associated ships is not an institution that exists in a vacuum; rather, it relates to other aspects of admiralty law. Apart from discretionary arrest and liability for wrongful arrest, more public control over the arrest will result in fewer risks associated with the introduction of the arrest of associated ships.