SHIPPING GROUPS OF COMPANIES: THE PHENOMENON OF ONE-SHIP COMPANIES AND PROTECTION OF CREDITORS

BY

NICOLAOS MITSAKIS

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Institute of Comparative Law,
McGill University,
Montreal, Canada

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ABSTRACT

The study analyzes the problem of protection of creditors of one-ship companies constituting a related group. The legal principles governing group liability in the field of corporate law, maritime law and public international law are examined through the jurisdictions of Britain, Canada, France and Greece. There is a parallel debate in all the above fields of law and jurisdiction as to whether these group companies must be treated as independent entities or as part of a larger enterprise, the group. It is suggested that in accordance with the economic reality, shipping groups should be treated as single economic units. Therefore in case of the insolvency of a one group company, group liability should be imposed; i.e., when arrest of the vessel of a one-ship company is not possible, arrest of other ships of the group fleet should be permitted.

RÉSUMÉ

La présente étude analyse le problème de la protection des créanciers des groupes de societés possédant un seul bateau. Les principles légaux gouvernant la responsabilité du groupe en matière de droit des sociétés, de droit maritime et de droit international public sont examinés dans les systèmes juridiques canadien, britanique, français et grec. Dans ces divers secteurs du droit et juridictions, une même question se pose de savoir si ces groupes de sociétés doivent être traités comme des personnes autonomes ou comme parties d'un plus vaste ensemble. Nous soumettons dans le présent travail que les groupes propriétaires d'un bateau devait être traités comme une seule entité économique. De la sorte, en cas de faillite d'un tel groupe, leur responsabilité solidaire devrait être retenue; quand le saisie du bateau de ce groupe n'est pas possible, on devrait pouvoir saisir les autres bateaux des membres du groupe.

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PART ONE

Introduction

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INTRODUCTION

The economic and industrial life of the post Second World War era has been dominated by the phenomenon of groups of companies. In the shipping industry particularly, large corporate networks have been created not only because of the concentration process, but also due to the compartmentalization of single shipping enterprises into as many companies as the ships they own.

The complex corporate structure of shipping group companies has posed a great range of difficult legal issues such as problems of private international law, anti-trust law, law of aliens and fiscal law. This analysis, however, will concentrate on the issue of whether the liability of one-ship companies arising from the exploitation of a ship can be extended to other companies of the group. The solution to this problem is of significant importance for the protection of creditors because, as the situation stands now, one-ship companies have effectively limited claimants to proceedings against a small division of the whole enterprise, the artificial legal person and its sole asset, the ship.

The protection of creditors of one-ship companies belonging to a group is examined at three levels. Firstly, on the company law level, I discuss whether or not group

companies function independently and whether or not groups should be treated as single economic units with interests and functions of their own. Secondly, on the maritime law level a parallel movement is observed with respect to the only substantial asset of the single-vessel companies, the ship. In this field of law, the issue, coloured with the linguistic tradition to personify ships, is whether a claim against the vessel of a one-ship company can be enforced against the otherships of the group. Thirdly, on the public international law level I discuss whether state shipping enterprises with a group structure should be treated as their rival private group companies.

The solutions provided by company law, maritime law and public international law are not uniform in all countries. To illustrate this diversity the jurisdiction of four of the biggest maritime nations, Britain, Canada, France, and Greece are examined. These countries have been selected because Britain and Canada are among the most significant common law jurisdictions, whereas France and Greece represent examples of the civilian tradition. On the company law level, it has been necessary to enrich the comparative analysis of the above jurisdictions by examining the methodology of the E.E.C. proposals for a group legislation and the rich U.S. case-law on shipping groups. Similarly, on the level of maritime law

the scope of the analysis of creditors' protection has been broadened by an examination of the South African law on arrest of ships, the most developed maritime legislation with respect to problems created by one-ship companies.

This paper is divided into five parts. In Part One the historical evolution, structure and behaviour of shipping group companies are examined. On the basis of the above findings, in Part Two the protection of creditors is examined under the remedies of company law. There are two schools of thought as to the treatment of group companies. The first school of thought, known as corporate entity doctrine, holds that each group company should be treated individually and that the liability of one company cannot be extended to other corporations of the group. Britain, Canada, France and Greece adopt in principle the corporate entity doctrine. With a few exceptions where group liability has been imposed statutorily, the main qualifications of the corporate entity doctrine come from judicial decisions. British and Canadian courts have imposed group liability on the basis of a broad notion of equity and misrepresentation by means of the doctrine of lifting the corporate veil and the agency analysis. French courts have reached the same results by applying the principle of good faith and the theory of "group appearance". Greek courts have followed the example by the judicial construction

of de facto partnerships.

Under the second school of thought, the economic entity doctrine, groups are recognized as economic units with interests and functions prevailing over those of their constituent members. The proposed E.E.C. legislation of groups adopts the economic entity doctrine. The E.E.C. proposals, are based on two elements: firstly, there is a presumption that a company which holds a controlling interest in another forms with the latter a group; and secondly, there is recognition of the power of the parent to direct its controlled companies as a consideration of which the parent becomes liable for the liabilities of its subsidiaries.

Part Three examines the protection of creditors under the maritime principle of arrest of ships. The regime of the arrest of ships is governed by the 1956 Brussels International Convention on Arrest of Ships. Canada is not a party to this Convention and permits arrest only against the ship in connection with which a maritime claim arose. Britain, France and Greece have ratified the Convention and therefore permit arrest either of the ship in connection with which a maritime claim arose or against a "sister-ship". "Sister-ship" is not defined uniformly in the above three countries. In the U.K., "sister-ship" means any ship other than the offending ship that is beneficially owned by the person liable on the claim.

It has been suggested that the term "beneficial owner" refers to the group and that, thus, any ship belonging to other companies of the group can fall under the definition "sister-ship". In France there is debate as to whether "sister-ship" means any ship belonging to any person liable on the claim or to a liable owner or demise charterer only. With respect to the phenomenon of "one-ship" companies, French courts have developed the theory of "group appearance" according to which controlling and controlled companies are presumed to appear to third parties as one single entity, the group. Therefore, French courts have permitted the arrest of ships of other affiliated companies of the group. In Greece, sister-ship means a ship belonging to a liable owner or demise charterer. Greek courts have defeated one of the practices of shipping groups, the transfer of the "offending" ship of one-ship company to another company of the group. They have held that the "offending" ship, as a going concern, may be arrested in the hands of the new owner despite the change of ownership.

Part Four re-examines the solutions provided by the four jurisdictions studied on the issue of protection of creditors of shipping group companies. It is suggested that a group legislation based on the principles of the E.E.C. proposals appears the best way of protecting creditors of shipping

groups. The advantages of this solution, are both economic and legal. From an economic point of view, shipping group companies, the majority of which are private corporations, do not function as independent "profit centers". As the U.S. case-law illustrates, these companies subordinate their interests to those of the group for overall group profit maximization. From a legal point of view, the circumvention of the corporate entity doctrine either by the doctrine of lifting the corporate veil, the agency analysis or the theory of group appearance presents significant drawbacks. All these techniques are characterized by a lack of predictable criteria. Furthermore, it has been suggested that the doctrine of lifting the corporate veil is not a legitimate means to establish group liability. An example worth following is the South African legislation on arrest of ships. Aimed at defeating one-ship companies, the South African law extends the notion of sister-ship to cover any ship owned by companies being under the same control. Part Five examines the protection of creditors of state-shipping enterprises having a group structure. The main issues in this part are whether arrest of state-owned ships is permitted and whether state-owned companies can be held to be mere instrumentalities of the state that created them. Arrest of state-owned vessels is governed by the 1926 Brussels Convention for the

Unification of Certain Rules Concerning the Immunity of State-Owned Ships. The Convention adopts the restrictive sovereign immunity doctrine according to which arrest of state-owned ships which are used for commercial purposes is similar to that of privately owned ships. Britain and France have ratified the Convention whereas Greece has acceded to it. Canada not being a party to the Convention, reaches the same results by adopting the restrictive sovereign immunity doctrine as well.

State-shipping companies impose a very delicate problem. The majority of these companies are economicallly and bureaucratically dependent upon their creating state. In the above four jurisdictions, there appears to be an implicit recognition that these companies operating in centrally planned economies are by their nature more susceptible to control than private group companies. Therefore, provided that they are given a certain degree of independency, state-owned companies are considered to be separate from their controlling state.

In conclusion, it is suggested that the best way to defeat the widespread phenomenon of one-ship companies is a group legislation. Such a legislation should be based on the following principles:

(a) there should be a rebutable presumption that companies

with a common stock of above twenty five percent of their shares constitute a group;

(b) there should be recognition of the group interest as a consideration of which the group would become liable for the liabilities of its constituent members as long as this relationship exists.

(c) Enforcement of the claim against the group will be permitted only if creditors fail to obtain satisfaction from the group company concerned. Similarly arrest of ships belonging to other group companies should be permitted only if neither the ship in connenction with which the claim arose, nor a sister-ship is within the jurisdiction of the court.

CHAPTER ONE

THE EMERGENCE OF SHIPPING GROUPS AND THE NEED TO PROTECT CREDITORS

1.1 The application of the notion of limitation of liability in the shipping industry.

Shipping groups of companies are a new phenomenon of our industrialized society. Historically, they appear to be the cumulative result of the vital business need of limitation of liability. Limitation of liability is not a new concept in the history of commerce. The first seeds of this notion can be traced to Ancient Greece and Rome[1], the Roman concept of "peculium" being the most characteristic example.[2]

The limitation of liability has always played a pivotal role in the shipping industry. The reason for its importance being that ships require a high amount of investment and have by themselves such a high market value that they may be distinguished from more other assets. In addition, shipping has always been considered a risky adventure and therefore people engaged in maritime activities have always tended to spread and limit their risks.

One of the most ancient methods of limiting liability is the spread of ownership of a vessel.[3] A British vessel, for

example, can be divided into sixty-four equal shares and each share can be further divided into five parts.[4]

The most important device, however, of spreading the risks of running a shipping enterprise is the maritime principle of limitation of shipowners' liability. It is interesting to note that this principle was accepted in maritime law before the corporation became the standard form of business organization and before present forms of insurance protection were available.[5] The principle, now embodied in three International Conventions[6], allows shipowners to limit their liability to an amount approximately corresponding to the value of the ship from which the specific obligation arises.[7] Particular applications of this maritime originality are the two voluntary schemes on limitation of liability with respect to oil spillages: the Tanker Owners' Voluntary Agreement concerning Liability for Oil Pollution (TOVALOP); and the Contract Regarding an Interim Supplement of Tanker Liability for Oil Pollution (CRISTAL).[8]

In addition to the above, marine insurance indirectly plays a very important role in limiting liability by spreading the risks of conducting a shipping enterprise to a large number of underwriters. Insurance, also, has a maritime origin in that it was born in the Italian ports of the 15th Century and from there it was transferred to the Hanseatic

League before being accepted by Lloyd's.[9] Not only was insurance a maritime invention, but there is no other industry so thoroughly committed to it as the shipping industry. Almost every important possibility of loss or liability in the conduct of ocean shipping is normally insured against.[10]

It is observed, therefore, that the notion of limitation of liability is well-rooted in the shipping industry. The different ways in which it has been applied have transferred some of the costs of running a shipping enterprise to society at large.[11] The justification for the early and widespread adoption of the notion of limitation of liability is that shipping has been from very old times until the present an independent producer of wealth, an important lever of national industrial development, and a crucial element of military power.[12] States, therefore, were generally willing to make concessions for the benefit of that industry. Nevertheless, no other device has been so beneficial to the development of the shipping industry as that of corporations.

1.2 The historical, economic and legal background of corporations

The development of the notion of corporation is also connected with the shipping industry. The first seeds of the notion of corporation can be traced to the medieval Commenda

and societas maris used in the Mediterranean ports of that time.[13] Nevertheless, the notion of the modern corporation appears to be most closely related to the seventeenth century merchant companies founded for colonial undertakings. The oldest of these, the Dutch East India Company formed in 1602, was born through an association of shipping companies and may rightly be called the first corporation.[14]

There is no doubt that the introduction of the limited liability company was a major departure from the age old principles of property and contract on which the growth of trade and industry had prior to its appearance.[15]

From an economic point of view, corporations have permitted the accumulation of capital.[16] If one accepts that there is a correlation between economic progress and economies of scale, then our economic progress is largely the result of limited liability companies.[17]

From a legal point of view the recognition of corporations as legal persons is based on the assumption that a company is an independent economic unit in which the separation between the personality and assets of the company and those of its shareholders is watertight.[18] In other words, one of the underlying concepts of practically all corporate statutes is that the conflicting views of the different interest groups of the company, i.e., directors, managers,

shareholders, creditors and workers, will preserve its function as an independent entity.[19] The model corporation is, therefore, an economic unit with interests and functions of its own.

1.2 The application of the corporate device in the shipping industry: The emergence of groups of companies

In the shipping industry, where limitation of liability was always sought, limited liability companies became the most common form of conducting a shipping enterprise. Shipowners instead of personally owning a ship, preferred to own it through a shipping company incorporated for that exact purpose.[20] By doing so they could, in principle, benefit from the two main effects of incorporation:[21]

(a) creditors of the company cannot obtain satisfaction from the assets of the shareholders; the liability of the latter is limited to the capital invested by them; and

(b) shareholders' creditors have no right to the corporate assets.

Nevertheless, the way the corporate form has been used has created doubts as to whether some shipping corporations function as independent economic units and consequently whether their shareholders (individuals or corporate) should enjoy the benefits of limited liability. Before examining

those cases where corporations cease to function as independent economic units some light will be shed on the characteristics of shipping companies.

1.3.1 Characteristics of shipping companies

Shipping companies have always possessed characteristics which distinguish them from corporations in other industrial sectors.

1.3.1.1 Private companies, one-man companies.

The majority of shipping companies are private corporations. With exception of the biggest, shipping companies are not usually quoted on Stock Exchanges; but even when they are, large scale public subscriptions to form new undertakings are rare, as shipping has always been considered a highly risky undertaking.[22] As a result, the shares of a shipping company are normally in the hands of a few incorporators and frequently enough in the hands of one person who possesses an overwhelming influence and is entitled to practically the whole of the profits.[23]

1.3.1.2 Flag-of-convenience companies

Many shipping companies are incorporated in so-called flag-of-convenience countries.[24] These countries, apart from offering significant tax-advantages to shareholders, have very low capital requirements and permit what is most important from a business point of view, repatriation of profits.

However, shipowners have another special interest in incorporating their companies in these countries: their real interest is the flag of their vessels. Flags of convenience offer shipowners the possibility to significantly cut their operational costs. The reason for this being that flag-of-convenience countries do not enforce adequate safety standards or international labour regulations.[25] It is not surprising, therefore, that in 1985 approximately one-third of world bulk and tanker tonnage was registered under flags of convenience.[26]

1.3.2 The emergence of shipping groups of companies.

The shipping industry was not only pioneering in adopting limited liability companies but also one of the first in forming groups of companies. Shipping groups have been created either as the result of concentration of companies or as a consequence of the organizational restructuring of many shipping enterprises.

1.3.2.1 Concentration of shipping companies.

The tendency in recent years both with liner and tramp shipping companies has been to merge.[27] The reasons for this development are numerous and include, among other things, economies of scale, that is, a long-term possibility of a more economic service at lower costs with consequently improved tariffs. Also important are economies realized on

administration costs, improved prospects of raising more capital for new tonnage, rationalization of facilities and the long-term consideration of likely improvement on tonnage utilization and productivity.[28]

From a legal point of view, this concentration has been facilitated by the creation of joint ventures and the take-over bid technique.

A joint-venture is a company formed by the co-operation of two or more companies on a comparatively equal basis. Because each corporate partner in a joint venture will naturally wish to protect itself against any practice which might affect the return on its investment, there is effective pressure on all sides to ensure the autonomous function of the joint venture company.[29] Therefore, this type of company enjoys genuine independence in the sense that its interests are not identical with those of either of its constituent members.[30] Joint ventures, not being under common control and uniform direction, are not considered to be group companies.

A take-over bid may be defined as a technique of acquiring control of a corporation by making an offer to purchase part of the corporation's stock at a fixed price.[31] Usually, the bidder is itself a corporation, and the bid involves an amount of the target's stock sufficient to give the bidder effective control. In such a case, the effect of a

take-over bid is to convert an independent shipping corporation into a partially or wholly owned subsidiary; the latter being under the control and uniform direction of the parent becomes an indispensible part of the group.[32]

1.3.2.2 Decentralization of corporate activities

Many of groups of shipping companies have been created as a result of the decentralization of corporate activities. In the past, a big shipping company would have owned and operated several ships and simultaneously be time charterer of vessels of others. This structure, however, encompassed many business dangers for shipowners: the main danger being that a claim against the company could be enforced against all the assets of the corporation.[33] Therefore, in the shipping context, many shipowning companies instead of operating their own fleets under their own names, set up "dummies" to hold title of the ships.[34] These latter corporations are commonly referred to as one-ship companies. One-ship companies are a widespread phenomenon in the shipping industry mainly because of their isolation of each ship from potential liability of the other vessels of the group fleet. These separate single-vessel companies are organized in a complex series of interlocking superior and subordinate holding companies.[35] At the top of the pyramid there is usually a non-shipowning company in which purely operating responsibilities such as crewing,

provisioning, bunkering, engineering, maintenance, freight collection and cash management are centralized.[36] As a result of this structure, the non-shipowning company along with the one-ship companies it controls function as departments of a single unit, the group.

1.4 The need to protect creditors of group companies.

The need to protect creditors arises from the fact that shipping group companies do not function independently but often subordinate their interests to that of the group. In other words, it is very common in shipping groups that the profit goals are not prescribed by each subsidiary separately, but are usually set by the parent company with the objective of profit maximization of the group.[37] Therefore, although it might be more profitable for the one-ship companies that make-up the group to operate their vessel by themselves, the group interest will prevail and require that ships be operated by a non-shipowning group company. The reason for such strategy is that any claim arising in connection with the ship operation cannot in principle be enforced against the ship, since shipowners were not personally liable on the claim.[38]

Furtheremore, the objective of group profit maximization indicates that any conflict between the interest of the parent and that of the subsidiary, or between two group companies

will be solved according to the group's interest. In reality since directors of the controlled companies of the shipping group are appointed by the parent, it is highly unlikely that they will invoke the interest of their company against that of the group.[39] However, it is in the interest of creditors of shipping groups to know that dealings between group companies are not paper-transactions and that each corporation gets the profits reasonably expected from them.

In practice, all cases where creditors raise the issue of group liability have a common denominator: insolvency of the controlled shipping corporation. This may occur either because the profits and assets of the dependent company were reaped by the group or because the company was ab initio undercapitalized. Undercapitalization is quite a broad term.[40] It may be present in at least two forms:

(1) Where the total investment in the corporation in the form of debt and equity is adequate for the reasonably forseeable risks associated with the shipping business, but the debt is excessive compared to the capital supplied by shareholders; and

(2) Where the total investment in the controlled corporation in all forms is inadequate to run the business.[41]

Undercapitalization in either form is frequently present in shipping groups. The most dangerous situation from the

point of view of creditors' protection is that very often the capital of the one-ship companies is provided by the parent company in the form of a loan secured by a first rank mortgage over the vessel.[42] Therefore, if the company goes into liquidation, creditors have to rank behind the parent and take what is left, if anything at all.

In all of the above cases, it is in the interest of the creditors of shipping groups that the group stand behind the liabilities of its constituent companies. This is so, especially because creditors of shipping groups are frequently misled as to under which capacity the company with which they deal is acting.[43] Moreover, there is a tendency among creditors, based on the economic reality, to consider that they are doing business with the shipping group as a whole, a not unreasonable assumption since the group's commercial standing would be damaged by a reputation of abandoning its subsidiaries when they incurred financial difficulty.[44]

In conclusion, the phenomenon of concentration of companies which has been observed in the shipping industry from the beginning of the twentieth century has challenged the basic pre-supposition of company law that corporations always act as single independent economic units. In modern shipping life the idea of a corporation as an independent entity has been replaced by the emerging notion of the group as an

identifiable economic unit. As an American judge pointed out:

> "If... a controlling interest [in one corporation is acquired by another] the [acquired] company... will become a subsidiary of the acquiring company... and cease in fact, though not in law, to be an independent entity... The parent company will wish to operate the subsidiary for the benefit of the group as a whole and not necessarily for the benefit of that particular subsidiary."[45]

FIGURE 1:

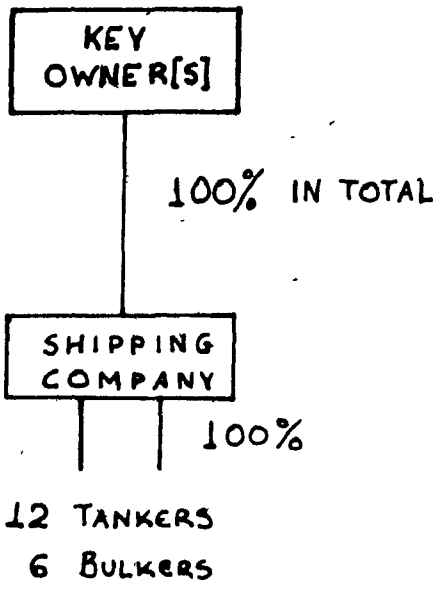


FIGURE 2:

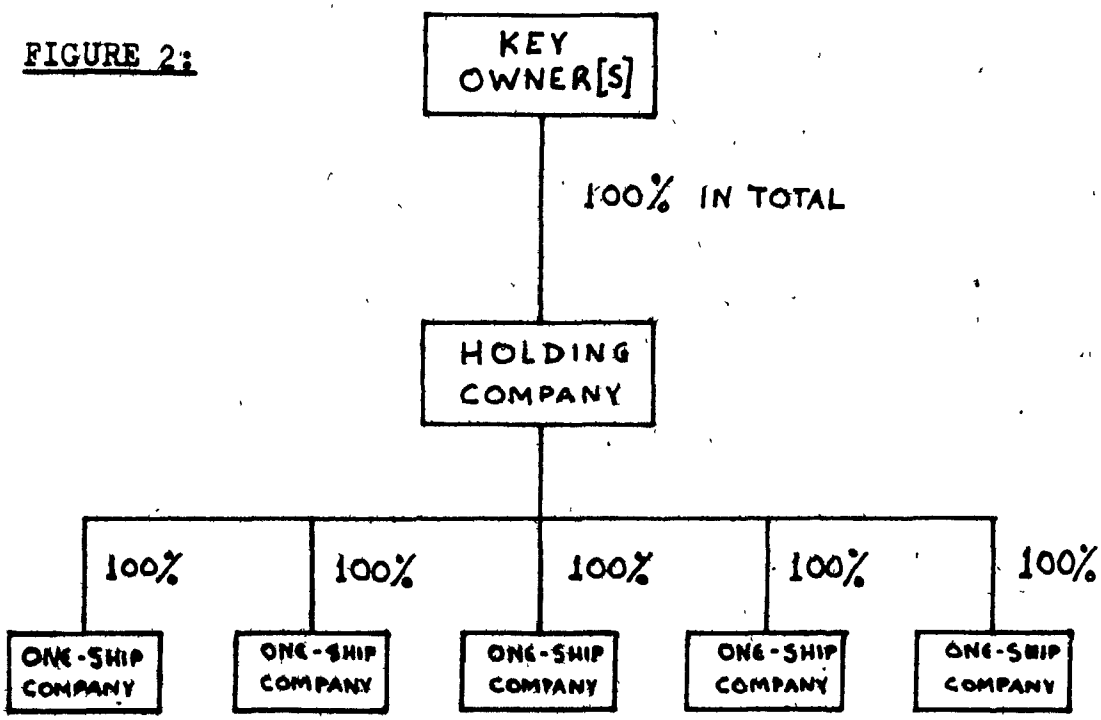
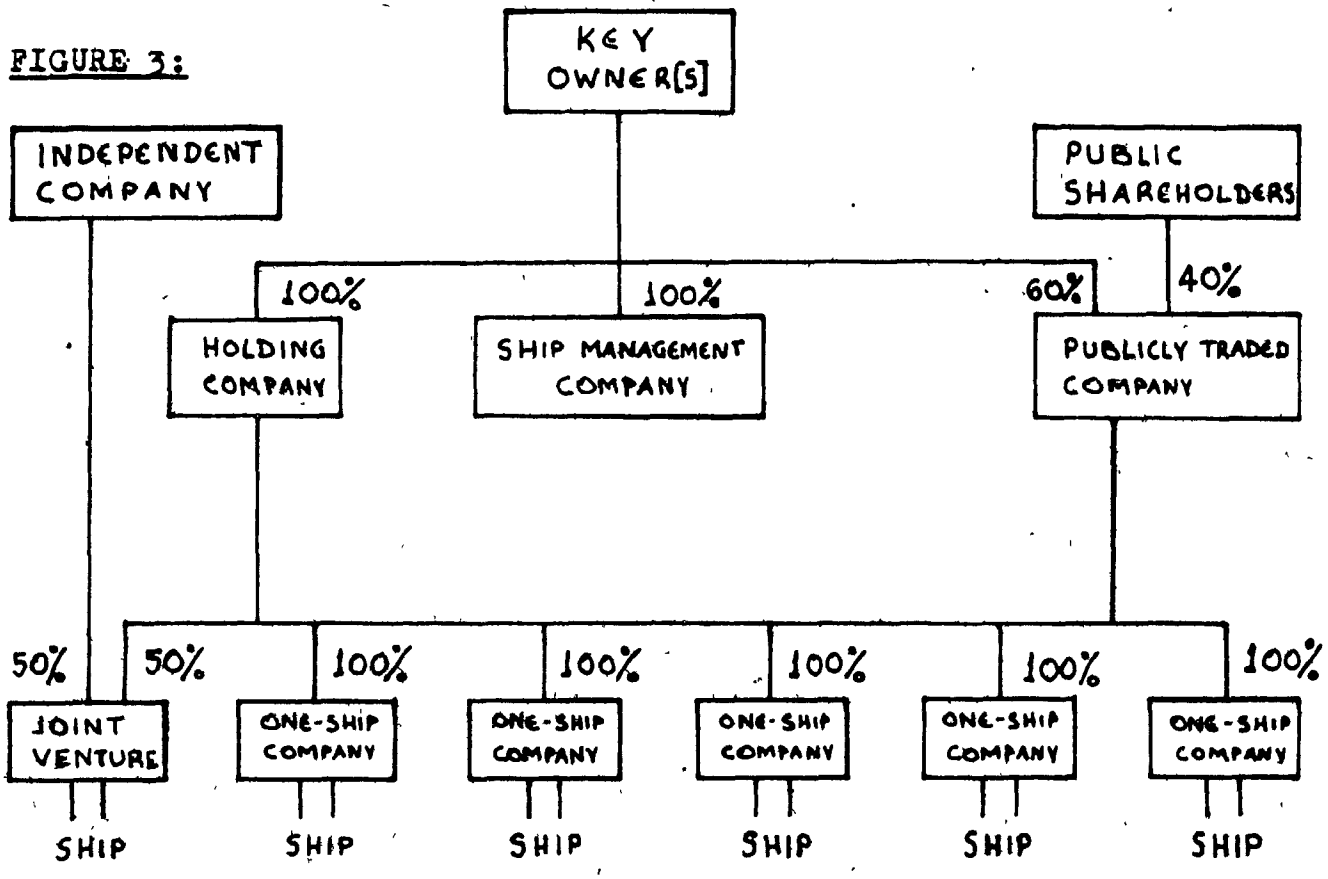


FIGURE 3:



SOURCE: The above figures are taken from L.D. Anderson, Jr., "Tanker and Shipping Loans" in *N.* Baughn & D.R. Mandich, eds, The International Banking Handbook (1983) at 190-1.

N.B. One of the companies in Figure 3 is a joint venture company and not a typical group company.

FOOTNOTES

1. See, W. Blackstone, Commentaries on the Laws of England (1860) 468-69; S. Williston, "History of the Law of Business Corporations before 1800" (1888) 2 Harv. L. Rev. 105 at 106; Note, "The Validity of Limited Tort Liability for Shareholders in Close Corporations" (1973-4) 23 Am. U.L. Rev. 208 at 209; E.E. Cohen, Ancient Athenian Maritime Courts (1973).

2. "Peculium" was a particular portion of property which a Roman citizen gave to a slave for conducting business in the name of his master. The peculiarity of this Roman principle was that any debt or liability arising in connection with these activities rendered the Roman citizen liable only to the extent of the "peculium" and not through all his property. For details see, D.L. Perrot, "Changes in Attitude to Limited Liability--The European Experience" in T. Ormnial ed., Limited Liability and the Corporation (1982) ch. 5 at 81.

3. O.C. Giles, Shipping Law, 7th ed. (1980) at 9 [hereinafter cited as Giles].

4. Merchant Shipping Act, 1894, section 5(i).

5. G. Gilmore & Ch. L. Black, Jr., The Law of Admiralty, 2d ed. (1975) at 822 [hereinafter cited as the Law of Admiralty]. Also, G. Grime, Shipping Law, (1978) at 178 [hereinafter cited as Grime].

6. These are the 1924 Brussels Convention on the Unification of Certain Rules Relating to the Limitation of Liability of Owners of Sea-Going Vessels, the 1957 Brussels Convention on the same subject, and the 1976 London Convention on Limitation of Liability for Maritime Claims. For the text of these Conventions see M.N. Singth, International Maritime Law Conventions (1983) vol. 4 at 2959, 2967 and 2976 respectively.

7. According to the 1976 Convention on Limitation of Liability for Maritime Claims, the limitation is 333,000 Units of Account plus 333 Units of Account for each ton exceeding 500 tons for personal injury; for property damage the limitation is 167,000 Units of Account plus

125 Units of Account for each ton exceeding 500 tons.

8. For details see Grime, supra, note 5 at 221-22.

9. Giles, supra, note 3 at 333. The Law of Admiralty, supra, note 5 at 54.

10. Ibid.

11. M. Dodd, "The Evolution of Limited Liability in American Industry: Massachusets" (1948) 61 Harv. L. Rev. 1351 at 1366-73; Note, "The Validity of Limited Tort Liability for Shareholders in Close Corporations" (1973-4) 23 Am. U.L. Rev. 208 at 219.

12. A.W. Calfurny, "The Political Economy of International Shipping: Europe versus America", (1985) 39 Int'l Organization at 90-1 [hereinafter cited as Calfruny].

13. The "societas maris" was a contract whereby a capitalist entrusted a sum of money to the shipowner who undertook to return a profit at the end of the voyage. For details see, M.T. Guerra Medici, "Limited Liability in Mediterranean Trade from the 12th to 15th century" in T. Orhnial, ed., Limited Liability and the Corporation (1982) ch. 5 at 126-9.

14. K. Macharzina, "Corporate Forms and Limited Liability in German Company Law" in T. Orhnial, ed., Limited Liability and the Corporation (1982) at 47. For the development of limited liability companies in Canada and England see B. Welling, Corporate Law in Canada. The Governing Principles (1984) at 86-112; C.M. Schmitthoff et al., Palmer's Company Law (1982) vol. 1 at 6-29. Also, T. Hadden, R.E. Forbes, R.L. Simmonds, Canadian Business Organizations Law (1984) at 8-34.

15. Liability may of course be limited not only by incorporating a company, but also by introducing "exemption clauses" to contractual relationships. Nevertheless, the problems arising from introducing limited liability by contract are important: (a) limited liability must be stipulated in every individual transaction; and
(b) the standard clause by which limited liability is introduced must necessarily comply to a reasonableness test.

The uncertainty of the test, as well as the hostile

attitude of all the countries' legislation to "clauses abusives", makes corporations the only effective way of limiting liability. For more details see: S.M. Waddams, The law of Contracts (1977) at 282-291. Also G.H.L. Fridman, "The Effect of Exclusion Clauses" (1969) 7 Atla L.R 281; B. Coote, "The Effect of Discharge by Breach on Exception Clauses" [1970] Camp. L. J. 221; J. Swan, B.J. Reiter, Contracts: Cases, Notes & Materials 2nd ed. (1982) ch. 6. The most important cases dealing with exculpatory clauses are: Suisse Atlantique Societe d'Armement Maritime S.A v. N.V. Rotterdamsche [1967] 1 A.C. 361 (H.L.); Karsales (Harrow) Ltd. v. Wallis [1956] 1 W.L.R.936 (C.A.); Photo Production Ltd. v. Securicor Transport Ltd. [1980] 1 All E.R. 556 (H.L.); Beaufort Realties Inc. v. Chomedy Aluminum Co. (1981) 116 D.L.R. (3rd) 193 (S.C.C.); The Bisso [1955] AMC 899.

16. For further details see: Sir J. Hicks, "Limited Liability: the Prosand Cons" in T. Orhnial,ed. Limited Liability and the Corporation (1982) ch. 1 at 12; P. Halpern, M. Trebilcock, S. Turnbull, "An Economic Analysis of Limited Liability in Corporation Law" (1980) 30 U. Toronto L.J. 117; also, F.H. Easterbrook & D.R. Fischel, "Limited Liability and the Corporation" (1985) 52 U. Chi. L. Rev. 89.

17. The Economist of 18 December 1926 emphatically espoused the economic virtues of limited liability: "The economic historian of the future may assign to the nameless inventor of the principle of limited liability, as applied to trading corporations, a place of honour with Watt and Stephenson, and other pioneers of the Industrial Revvolution. The genius of these men produced the means by which man's command of natural resources was multiplied times over; the limited liability company was the means by which huge aggregations of capital required to give effect to their discoveries were collected, organized and efficiently administered." Quoted in P. Halpern, M. Trebilcock, S. Turnbull, "An Economic Analysis of Limited Liability in Corporation Law" (1980) 30 U. Toronto L.J. at 118.

18. For a classical analysis of the notion of limited liability companies see E.J. Cohn, C. Simitis, "Lifting the Veil in the Company Laws of the European Continent" (1963) 12 Int'l & Comp. L. Q. at 221. [hereinafter cited as Cohn & Simitis] Also F. Ascarelli, "Considerations on Companies and Personality" (1954) 1 Riv. Dir. Comm. at

245, 333, 421; S.J. Stoljar, Groups and Entities: An Inquiry into Corporate Theory (1973); M. Woods, "Lifting the Corporate Veil in Canada" (1957) 35 Canadian Bar Review 1176.

19. M.A. Eisenberg, "Megasubsidiaries: The Effect of Corporate Structure on Corporate Control" (1971) 84 Harv. L. Rev. at 1587; [hereinafter cited as Eisenberg]. V. Bringezu, "Parent- Subsidiary Relations under German Law"(1973) 7 Int'l Law. at 138; J.A.C. Hetherington, "Redefining the Task of Corporation Law" (1985) 19 U.S.F.L. Rev. 229-260.

20. Giles, supra, note 3 at 9; see also figure 1 at the end of this chapter.

21. Cohn & Simitis, supra, note 16 at 139.

22. A.E. Branch, The Elements of Shipping, 4th ed. (1977) at 163 [hereinafter cited as Branch].

23. These companies are called one-man companies. For details see Part Three, infra. For a classical analysis of one-man companies see, W. Fuller, "The Incorporated Individual: A Study of the One-Man Company" (1938) 51 Harv. L. Rev. 1373 [hereinafter cited as Fuller].

24. For details see, B. Boczek, Flags of Convenience: An International Legal Study (1962); R.S. Doganis & B.N. Metaxas; The Impact of Flags of Convenience (1976); U.N.C.T.A.D., "Action on the Question of Open Registries" TD/B/C.4/220 (May 1981) at 15.

25. The two biggest oil spillages were done by ships having a Liberian flag: Complaint of Barracuda Tanker Corp. (The Torrey Canyon) 1968 A.M.C. 1711, 281 F. Supp. 228 [S.D.N.Y. 1968] and In Re Oil Spill by the Amoco Cadiz 1984 A.M.C. 2123. For a discussion over the problems between the International Trade Federation (I.T.F.) and shipowners flying in their vessels flags of convenience see "Some Problems of the "Blacked Ship" reprinted from Fairplay, April 2, 1981 in J.L. Nelson, ed., (262) Current Issues in Ship Financing (1981) at 359. Also, The Camila M. [1979] 1 Lloyd's Rep. 26; The Nawala [1980] 1 Lloyd's Rep. 1; The Universe Sentinel [1980] 2 Lloyd's Rep. 523 (C.A.); The Hoegh Apapa [1983] 1 Lloyd's Rep. 154 (C.A.); The Uniform Star [1985] 1 Lloyd's Rep. 173 [Q.B.(Com.Ct.)].

26. Calfruny, supra, note 12 at 90.

27. Branch, supra, note 22 at 159-61.

28. Ibid.

29. T. Hadden, R.E. Forbes & R.L. Simmonds, Canadian Business Organizations Law (1984) at 620.

30. C.M. Schmitthoff, "Group Liability on Multinationals" in K.R. Simmonds, ed., Legal Problems on Multinational Corporations (1977) at 71. See figure 3 at the end of this Chapter.

31. Eisenberg, supra, note 19 at 1595; A Fleisher & R. Mundheim, Corporate Acquisition by Tender Offer, (1967) 115 U. Pa. L. Rev. at 317.

32. Control and uniform direction are essential elements for the existence of the group; see Chapters Seven and Fourteen infra.

33. In maritime law, this means against all other vessels of the defendant company. See "sister-ship" arrest in Part Three, infra.

34. Law of Admiralty, supra, note 5 at 841.

35. L.D. Anderson, Jr., "Tanker and Shipping Loans" in W.H. Baughn & D.R. Mandich, eds., The International Banking Handbook (1983) at 190 [hereinafter cited as Anderson]. Examples of such complex corporate structure can be found in the following cases: The Aventicum [1978] 1 Lloyd's Rep. 184 [Q.B. (Adm. Ct.)]; The Helene Roth [1980] 1 Lloyd's Rep. 477 [Q.B. (Adm. Ct.)]; The Maritime Trader [1981] 2 Lloyd's Rep. 153 [Q.B. (Adm. Ct.)]; The Saudi Prince [1982] 2 Lloyd's Rep. 255 [Q.B. (Adm. Ct.)]; Tribunal de Commerce de Rouen, April 1, 1980, (1980) D.M.F. at 426. Also, see figures 2 and 3 at the end of this chapter.

36. Anderson, supra, note 35 at 190. Branch, supra, note 22 at 160.

37. See, for example, North Pacific v. Pyramid Ventures 1984 A.M.C. 685; Equilease Corp. v. Samson 1984 A.M.C. 1591; U.S. Barite Corp. v. Harris 1982 A.M.C. 925.

38. For a detailed analysis of the significance of personal liability in the context of arrest of ships see Part Three, infra.

39. T. Hadden, R.L. Forbes & R.L. Simmonds, Canadian Business Organizations Law (1984) at 65.

40. For a discussion about undercapitalization of corporations see: H. Ballantine & G. Sterling, California Corporations Laws, 4th ed. (1981) at para. 298.02; B. Manning, A Concise Textbook on Legal Capital (1977); D. Barber, "Incorporation Risks: Defective Incorporation and Piercing the Corporate Veil in California" (1980-1) 12 Pac. L.J. 929 at 954 et seq. [hereinafter cited as Barber].

41. Barber, supra, note 40 at 955.

42. The Law of Admiralty, supra, note 6 at 841. Also, The Torrey Canyon 281 F. Supp. 228, 1968 A.M.C. 1711, reversed 409 F.2d 1015, 1969 A.M.C. 1442 (2d Cir. 1969); Equilease Corp. v. Samson 1984 A.M.C. 1591.

43. See, for example, Ariete Compania v. Commonwealth Tankship 1970 A.M.C. 1381; George H. Bennet Bryson & Co. v. Norton Lilly & Co. 1984 A.M.C. 2189; Bordagain Shipping Co. v. Saudi America Line S.A. et al. 1979 A.M.C. 1059; Richard J. Stephenson v. Star Kist Caribe Inc. 1979 A.M.C. 1459; Eagle Transport v. O'Connor 1979 A.M.C. 1991; The Cape Hatteras [1982] 1 Lloyd's Rep. 518; Tribunal de Commerce de Rouen, April 1, 1980, (1980) D.M.F. at 426.

44. D.D. Prentice, "Groups of Companies: The English Experience" in K. Hopt, ed., Groups of Companies in European Laws vol. 2 (1982) 93 at 107.

45. Jones v. H.F. Ahmanson & Co. 1 Cal. 3d 93, 112; 460 P.2d 464 (1969) per Traynor, C.J.

PART TWO

THE PROTECTION OF CREDITORS OF SHIPPING GROUPS UNDER THE REMEDIES OF COMPANY LAW

CH. 2 The corporate entity and economic doctrines

CH. 3 The protection of creditors of shipping group companies under the U.K. company law

3.1 The rule: Salomon v. Salomon & Co. Ltd.

3.2. Qualifications of the corporate entity doctrine

3.2.1 Statutory lifting of the corporate veil

3.2.2. The doctrine of lifting the corporate veil and the agency analysis

CH. 4 The protection of creditors of shipping group companies under the Canadian company law.

4.1 The rule: the corporate entity doctrine

4.2 Qualifications of the corporate entity doctrine

4.3 The application of the doctrine of lifting the corporate veil and agency analysis by the Canadian courts

CH. 5 The protection of creditors of shipping group companies under the French company law

CHAPTER TWO

THE CORPORATE ENTITY AND ECONOMIC ENTITY DOCTRINES

In the field of company law one can trace two schools of thought with respect to the treatment of parent-subsidiary relationships.[1]

The first and more traditional approach is usually known as the corporate entity doctrine or theory of legal separation.[2] This theory is based on the assumption that a corporation is and ought always function as an independent entity, and, therefore, the persoanality and assets of the company should be distinguished from that of their shareholders.[3] As a result or this absolute distinction between the legal personality of the parent company and that of its subsidiary, the parent-company cannot in its capacity as shareholder be held liable for the obligations of its wholly-owned subsidiary. Creditors, therefore, cannot recover from the parent.[4]

The argument in favour of the separation theory is that the creditors of the parent company and its dominated subsidiary may not be the same and that in the event of winding up the assets of each company have to be applied for the satisfaction of its own creditors and not for that of the

creditors of another company.[5] The reason being that if parent and subsidiary were treated as one economic unit, the imposition of group liability might be for the interest of the creditors of the subsidiary but not of those of the parent. If piercing the veil were allowed, the parent's creditors would be exposed to an additional and unexpected risk, that the parent's assets might be diverted to satisfy the claims of the subsidiary's creditors.[6] Protection of the parent's creditors, therefore, may be in conflict with the need to protect creditors of the subsidiary.

The second school of thought, the so-called economic entity doctrine[7], recognizes the separation between the personality and assets of the corporation from those of its shareholders only where this separation is in conformity with the economic reality.[8]

A typical case where the presumption of independency of a corporation is not in conformity with the economic reality occurs in a group situation. In groups, the parent company, not only owns the controlling interest in one or more other corporations, but handles them such that they have ceased to represent a separate enterprise and have become, as a business matter, more or less indistinguishable parts of a larger enterprise.[9]

The arguments in favour of the economic entity doctrine

is that if the principle of limited liability is justified in allowing an individual to incorporate his business in order to promote trade, it is not justified when a limited liability company which was functioning as single enterprise for many years, decided to further limit its liability and transfer additional risks to the public at large by creating artificial entities.[10] Furthermore, it is often purely a matter of organizational structure whether a particular activity of a group is carried out by a branch or a wholly-owned subsidiary. If the form of a branch office is chosen, it is clear that the parent will be fully liable for the debts of that branch. It is difficult to see, according to the supporters of this theory, why the position should be different if the parent company carries on business through a controlled subsidiary.[11] As the father of the theory of economic entity, A. Berle, pointed out:

> "The corporation is emerging as an enterprise bounded by economics, rather than as an artificial mystic personality bounded by forms of words in a charter, minute books, and books of account."[12]

Generally speaking, as a result of the domination of economic activities by groups, the trend of the modern corporate law is to move towards the economic entity doctrine. In particular, the protection of creditors of shipping groups will be examined under the company law of the U.K., Canada, France and Greece, and at the end of this chapter the E.E.C.

group legislation will be taken into consideration.

FOOTNOTES

1. For a general overview of the parent-subsidairy relationship see: O.E.C.D., International Investment and Multinational Enterprises: Responsibility of Parents for their Subsidiaries (1980); K. Hopt. ed., Groups of Companies in European Laws vol. 2 (1982); A. Petitpierre-Sauvain, ed., Droit des Societes et Groupes de Societes. Etudes Suisses de Droit Europeen, vol. 7 (1972); F. Wooldridge, Groups of Companies: The Law and Practice in Britain, France and Germany (1981); J. O'Donnovan, "The Cracking Facade of Limited Liability" (1984) 14 Queensl. L. Soc'y J. 115-124.

2. C.M. Schmitthoff, "Group Liability of Multinationals" in K.R. Simmonds, ed., Legal Problems of Multinational Corporations (1977) at 73; D.D. Prentice, "Groups of Companies: The English Experience" in K. Hopt, ed., Groups of Companies in European Laws vol. 2 (1982) at 100 [hereinafter cited as Prentice].

3. Prentice, supra, note 1 at 102; L.C.B. Gower, Principles of Modern Company Law (1979) at 97. The leading authority on this is Salomon v. Salomon & Co. Ltd. [1897] A.C. 22 (H.L.).

4. Prentice, supra, note 1 at 104. Schmitthoff, supra, note 1 at 78-9.

5. Schmitthoff, supra, note 1 at 74; Palmer's Company Law, 22nd ed., (1976) at para. 58-09; R. Posner, "The Rights of Creditors of Affiliated Corporations" (1976) 43 U. Chi. L. Rev. 499 [hereinafter cited as Posner].

6. Posner, supra, note 4 at 517.

7. A.A. Berle, "The Theory of Enterprise Entity" (1947) 47 Colum. L. Rev. 343 [hereinafter cited as Berle]; T. Hadden, R.E. Forbes & R.E. Simmonds, Canadian Business Organizations Law (1984) at 642.

8. Berle, supra, note 6 at 344, 348, 350.

9. Ibid. at 348. See also: B.D. Baysinger & H.N. Butler, "The Role of Corporate Law in the Theory of Firm" (1985) 28 L.J & Econ. 179-181; D.A. Wishart, "A Conceptual

Analysis of the Control of Companies" (1984) 14 Melb. U. L. Rev. 601-633.

10. A.H. Frey, et al., Cases and Materials on Corporations (1977) at 50; J.M. Landers, "A Unified Approach to Parent, Subsidiary, and Affiliate Questions in Bankruptcy" (1975) 42 U. Chi. L. Rev. 589; J.M. Landers, "Another Word on Parents, Subsidiaries and Affiliates in Bankruptcy" (1976) 43 U. Chi. L. Rev. 527.

11. Schmitthoff, supra, note 1 at 75; M.A. Eisenberg, The Structure of the Corporation: A Legal Analysis (1976) at 290.

12. Berle, supra.

CHAPTER TWO

THE PROTECTION OF CREDITORS OF SHIPPING GROUP COMPANIES UNDER THE U.K. COMPANY LAW

3.1 The rule: Salomon v. Salomon & Co. Ltd.

A particular feature of English corporate life, in shipping as in other industrial and commercial sectors, is the existence of large interrelated corporate networks.[1] British company law does not, however, recognize groups as economic units with interest and function of their own.[2] There is no definition of what technically constitutes a group in English company law. The only provision from which one can get an idea of what elements usually constitute a group relationship is that which defines the subsidiary company. According to section 736(1) of Companies Act, 1985[3], a company is treated as being a subsidiary of another (the parent) where the parent company

(a) is a member and controls the composition of the former's board of directors; or

(b) controls half in nominal value of the former's equity share capital.

From this provision, one can conclude that control and uniform direction are impliedly recognized as the constituting

elements of a group situation. Since groups are not recognized in English company law, the rule in that country is the corporate entity doctrine or theory of legal separation. This view was clearly established in the landmark case of Salomon v. Salomon & Co. Ltd.[4] which dealt with the phenomenon of a company dominated by a sole shareholder the so called one-man companies.

In that case the House of Lords, in a very powerful judgment, drew a sharp distinction between the corporation and its shareholders.[5] In the words of Lord Halsbury L.C.:

> "Either the limited liability company was a legal entity or it was not. If it was, the business belonged to it and not to Mr. Salomon. If it was not, there was no person and not thing to be an agent at all; and it is impossible to say at the same time that there is a company and there is not."[6]

Salomon's case clearly established the rule that when a corporation is dominated by a moral or legal person that does not create any additional liability for the company's controlling interest.

This rule has been upheld in several cases where the separate personality of shipping companies was challenged.[7] The most striking example is perhaps Henry Browne & Sons Ltd. v. Smith.[8] In that case the defendant caused the incorporation of a single vessel company in which he was the sole director and his wife the sole shareholder. The plaintiffs asked the Court to lift the corporate veil and hold

the controlling shareholder personally liable on the liabilities of the company. The Court, however, affirmed the separate personality of the undercapitalized one-man one-ship company and dismissed the action.[9]

3.2 Qualifications of the corporate entity doctrine.

Since the decision of the High Court in Salomon v. Salomon & Co. Ltd.[10] much time has lapsed and the way shipping business is conducted has changed radically. It is one thing to say that Salomon's decision was justified on the ground that the principal function of limited liability was to encourage commercial and industrial enterprise by shielding some of an individual's personal wealth from the hazards of a particular business;[11] it is quite another thing that the principle of limited liability would justify a shipping corporation which conducted its business as a single unit to divide itself into artificial, individually insulated one-ship companies. Groups of companies, therefore, require different treatment.

For this reason, although in British law Salomon's case is still the rule, there have been several cases in which the corporate entity doctrine has not been followed and instead groups have been recognized as economic entities. These cases of group recognition can be classified into two major

categories.

3.2.1 Statutory lifting of the corporate veil.

The first category includes those cases where the separate corporate personalities are denied by the statute itself and group companies are treated as one unit. From the point of view of protection of creditors of shipping group companies, the following two provisions of statutory piercing of the corporate veil are important.

The first case of statutory piercing of the corporate veil is provided in section 630(1) of the Companies Act. 1985.[12] Section 630(1) provides that if in the course of the winding up of a company, it appears that any business of the company has been carried on with the intent to defraud creditors, those persons that were knowingly parties to such conduct are to be personally liable for the liabilities of the company. For the section to apply:

(a) the company must be wound up;

(b) the person on whom liability is to be imposed must have "knowingly" been a party to the carrying on of the company's business;[13] and

(c) the company's business must have been conducted "with intent to defraud creditors".[14]

The second condition clearly indicates that where a parent dominates the management of its subsidiary, it will be

considered to have been a party to the carrying on of the subsidiary's business. Nevertheless, the major limitation with respect to using section 630 to protect creditors of insolvent subsidiary shipping companies, is the requirement of showing an intent to defraud. Thus, the strict standard for proving fraud greatly attenuates the effectiveness of the section as a means of providing an insolvent subsidiary's creditors with access to the parent's assets.[15]

The second provision allowing statutory piercing of the corporate veil in group accounts is contained in section 152 of the Companies Act, 1948[16]. This provision is of little importance to creditors of shipping group companies since the above disclosure requirements apply mandatorily only to public companies;[17] the majority of shipping companies are closely held corporations.[18]

3.2.2 The doctrine of lifting the corporate veil and the agency analysis.

In addition, groups have been treated as single units in several court decisions where it was found that the separate legal entities making up the group constituted an abuse of the corporate form. Although U.K. judges have been more reluctant than their American colleagues in treating groups as single economic units[19], there is a growing willingness on the part of the U.K courts to adjust legal thinking to the economic

reality. As was stated by Lord Denning M.R. in D.H.N. Food Distributors v. Tower Hamlets[20]:

> "... there is evidence of a general tendency to ignore the separate legal entities of various companies within a group, and look instead to the economic entity of the whole group."

Also, the same judge added in Littlewoods Mail Order Stores Ltd. v. I.R.C.[21]:

> "The doctrine laid down in Salomon's case has to be watched very carefully. It has often been supported to cast a veil over the personality of a limited company through which the courts cannot see. But that is not true. The courts can, and often do, pull off the mask. They look to see what really lies behind. The legislature has shown the way with group accounts and the rest. And the courts should follow suit."

British courts have used two techniques to circumvent the corporate entity doctrine in order to treat a group as a single economic entity: the agency analysis and the doctrine of lifting the corporate veil.

Although the agency and lifting the corporate veil techniques have been often used interchangeably[22], they have to be distinguished from a legal point of view.[23]

The doctrine of lifting the corporate veil, on the one hand, denies the separate corporate personality of the dependent companies and treats them as segments of the controlling company which, therefore, may become liable for the obligations of the former.[24]

The agency analysis, on the other hand, accepts the

existence of the dependent corporations and treats the dependent companies as agents of the dominating company which, therefore, as principal becomes ultimately liable.[25]

Despite this difference, the criteria for the application of each technique and the results at which they arrive, are in substance the same.

Unfortunately, it is impossible to extract from the cases in which groups have been treated as single units, principles possessing any predictive quality. Sole domination by the parent is not usually enough to trigger either the doctrine of lifting the corporate veil or the agency analysis.[26] The only acceptable exception to the corporate entity doctrine appears to be fraud as to the existence or a corporation.[27] The use of the term "fraud" in this context should not be understood in the sense in which the term is defined in criminal law. Rather, the courts seem to mean a kind of misrepresentation as to the existence of a corporate entity.[28]

The first case where some criteria as to the liability of the parent for the obligation of its subsidiaries were set was Smith, Stone and Knight Ltd. v. Birmingham Corp.[29] In that case Atkinson J. generalized the factors that could lead to a conclusion of group liability:[30]

(a) whether the profits were treated as profits of the parent or the subsidiary;

(b) whether the individuals involved in the day to day operations were appointed by the parent;

(c) whether the parent corporation was the "brains" behind the day to day operation;

(d) whether the parent corporation made policy and financial decisions that were merely carried out by the subsidiary;

(e) whether control by the parent was constant, as would be the case in a typical parent-subsidiary situation, or merely periodic as might occur in a typical corporation-shareholder situation.

In later cases the courts have taken into consideration not only the behaviour of the parent, but also that of the person whom the creditor contracted.[31] If the creditor has looked at a specific group company and not at the whole concern, he cannot subsequently invoke group liability.

In The Cape Hatteras[32], plaintiffs, owners of a shipyard at Las Palmas, made some repairments to the vessel which was then owned by a Liberian one-ship company. After the repairs, the ship was deleted from the Liberian Registry and the shipowning company dissolved. Plaintiffs, trying to recover the amount agreed for the repairs, argued that the contract was concluded not with the registered owners but with the operators of the ship, a company established in Switzerland.

The Court, after close examination of the contract for

the repairs of the ship, found that the agreement was concluded with the registered owners and that the plaintiffs in concluding the agreement relied on the owners only and not on the Swiss parent company.[33] As the Court stated:

> "The body of the agreement contained the word "owners" nine times;... of course it is not unkown in the world of shipping for a person who is not the registered owner to contract as if he were--a sub-charterer is an example. But in the ordinary way one would expect a contract made on behalf of "owners" to be made for the registered owners."[34]

In conclusion, one can say that although in the U.K. there is willingness on the part of the courts to take into consideration the economic reality created by groups, the prevailing rule is the corporate entity doctrine. In those cases where the corporate veil of group companies has been lifted, the attitude of the courts, as Professor Gowercomments, "smack(s) of palmtree justice rather than the application of legal rules."[35]

FOOTNOTES

1. D.D. Prentice, "Groups of Companies: The English Experience" in K. Hopt, ed., Groups of Companies in European Laws, Vol. II (1982) at 99 [hereinafter cited as Prntice]; J. Scott, Corporations, Classes and Capitalism (1979) at 67; C.M. Schmitthoff, "Group Liability of Multinationals" in K.R. Simmonds, ed., Legal Problems of Multinational Corporations (1977) at 72 [hereinafter cited as Schmitthoff]; F. Wooldridge, Groups of Companies: The Law and Practice in Britain, France and Germany (1981).

2. Prentice, supra, note 1 at 99; Schmitthoff, supra, note 1 at 73; C.M. Schmitthoff, "Salomon in the Shadow", [1976] J.B.L. 305.

3. Companies Act, 1982, reprinted in 8 Halsbury's Statutes of England and Wales (1985) at 671. Section 736 paragraphs (1) and (2) read as follows:
736(1): For the purposes of this Act, a company is deemed to be a subsidiary of another if (but only if)--
(a) that other either--
(i) is a member of it and controls the composition of its board of directors, or
(ii) holds more than half in nominal value of its equity share capital, or
(b) the first-mentioned company is a subsidiary of any company which is that other's subsidiary.
The above is subject to subsection (4) below in this section.
(2) For purposes of subsection (1), the composition of a company's board of directors is deemed to be controlled by another company if (but only if) that other company by the exercise of some power exercisable by it without the consent or concurrence of any other person can appoint or remove the holders of all or a majority of the directorships.

4. [1987] A.C. 22 (H.L.).

5. Ibid. at 31, 33, 38, 44, 46, 51. As Lord Macnachten emphatically stated at p. 51:
"The company is at law a different person altogether from the subscription to the memorandum; and though it may be that after incorporation the business is precisely the

same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them. Nor are the subscribers as members liable, in any shape or form, except to the extent and in the manner provided by the Act."

6. Ibid. at 31.

7. The Maritime Trader [1981] 2 Lloyd's Rep. 153; The Aventicum [1978] 1 Lloyd's Rep. 184; The Helene Roth [1980] 1 Lloyd's Rep. 477.

8. [1964] 2 Lloyd's Rep. 476.

9. [1897] A.C. 22.

10. [1964] 2 Lloyd's Rep. 476.

11. Sir J. Hicks, "Limited Liability: the Pros and Cons" in T. Orhnial, ed., Limited Liability and the Corporation (1982) at 18; Note, "The Validity of Limited Tort Liability for Shareholders in Close Corporations" (1973-74) 23 Am. U.L. Rev. 208 at 209-10.

12. Companies Act, 1985, reprinted in 8 Halsbury's Statutes of England and Wales (1985) at 595.

13. Section 630 paragraphs (1) and (2) read as follows:
630:
(1) If in the course of the winding up of a company it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person, or for fraudulent purpose, the following has effect.
(2) The court, on the application of the official receiver, or the liquidator or anycreditor or contributory of the company, may, if it thinks proper to do so, declare that any persons who were knowingly parties to the carrying on of the business in the manner above mentioned are to be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the court may direct.
Section 630 replaced section 332(1) of the Companies Act, 1948, 11 & 12 Geo. 6, c. 38.

14. For details see Prentice, supra, note 1 at 109-10; L.C.B.

Gower, Principles of Modern Company Law (1979) at 115.

15. Ibid.

16. The Companies Act, 1948, 11 & 12 Geo. 6, c. 38, reprinted in 5 Halsbury's Statutes of England (3d. ed.) (1968) at 120 as repealed by the Companies Act, 1981, Schedule 1, paragraph 2.

17. See L.J.Leigh & H.C. Edey, The Companies Act 1981: Text and Commentary (1981) at paras 11, 122.

18. See Chapter One, ante.

19. See Chapter 13 infra.

20. [1976] 1 W.L.R. 852 at 860 (C.A.).

21. [1969] 1 W.L.R. 1241 at 1254.

22. The following dictum of Lord Denning from Wallersteiner v. Moir [1974] 1 W.L.R. 991 at 1013 is characteristic of the interchangeable use of the agency anlysis and the doctrine of lifting the corporate veil:
"I am quite clear that [the corporations] were just the puppets of Dr. Wallersteiner. He contolled their every moment..., they were his agents to do as he commanded. He was the principal behind them. I am of the opinion that the court should pull aside the corporate veil and treat these concerns as being his creatures for whose doings he should be, and is, responsible."

23. For details, see B. Welling, Corporate Law in Canada: The Governing Principles (1984) at 130-40; E.P. Palmer, D.D. Prentice & B. Welling, Canadian Company Law: Cases, Notes and Materials (1978) at 3-21 et seq.; P. Martel, "Et si la voile corporatif n'existait pas?"(1985) 45 R. du B. 448 at 454; see also discussion at Chapter Fourteen, infra.

24. See for example the decision of Lord Denning in D.H.N. Food Distributors Ltd. v. Tower Hamlets London Borough Council [1976] 1 W.L.R. 852 at 860:
"The three companies should, for present purposes, be treated as one, and the parent company, D.H.N., should be treated as that one."

25. See for example, Smith, Stone and Knight Ltd. v.

Birmingham Corp. [1939] 4 All E.R. 116; Tunstall v. Steigman [1962] 2 Q.B. 593; Brydges & Salmon v. The Swan [1968] 1 Lloyd's Rep. 5.

26. Schmitthoff, supra, note 1 at 74.

27. The Maritime Trader [1981] 2 Lloyd's Rep. 153 at 157; The Saudi Prince [1982] 2 Lloyd's Rep. 255 at 260.

28. D. Barber, "Incorporation Risks: Defective Incorporation and Piercing the Corporate Veil in California" (1980-81) 12 Pac.L.J. 829 at 847.

29. [1939] 4 All E.R. 116.

30. Ibid., at 121.

31. For example in Henry Browne & Sons Ltd. v. Smith [1964] 2 Lloyd's Rep. 476 at 479 (Q.B.), the Court relied on the fact that plaintiffs stipulated the contract with the one-man, one-ship company "to whom alone the plaintiffs were looking for payment."

32. [1982] 1 Lloyd's Rep. 518.

33. Ibid. at 521. In that case although plaintiffs had a possessory lien or statutory right in rem against the defendants, they preferred to apply for a Mareva Injunction against some insurance money payable to the defendants.

34. Ibid. at 521.

35. L.C.B. Gower, Principles of Modern Company Law (1979) at 138.

CHAPTER FOUR

THE PROTECTION OF CREDITORS OF SHIPPING GROUP COMPANIES UNDER THE CANADIAN COMPANY LAW.

4.1 The rule: corporate entity doctrine.

Canadian company law does not provide for group legislation.[1] There is only a general definition of holding and subsidiary companies in the Canada Business Corporations Act[2], according to which, a company is defined subsidiary of another if it is controlled by the latter company.[3] Furthermore, a company is deemed to be controlled by another if the other holds shares with more than fifty per cent of the votes for the purpose of electing directors.[4]

The rule set in Salomon v. Salomon & Co. Ltd.[5] is recognized in Canada but with several significant qualifications. According to section 43(1) of the Canada Business Corporation Act.

> "the shareholders of a corporation are not, as shareholders, liable for any liability, act or default of the corporation except under subsection 36(4), 140(4), or 219(5)."

It is evident from s. 43(1) that in principle a parent company will not be liable for the obligations of its dominated subsidiary unless one of those exceptions enumerated in the article occur.[6]

4.2 Qualifications of the corporate entity doctrine.

The first exception to the rule of limited liability of a corporate shareholder arises under section 36(4) of the C.B.C.A. This section provides that shareholders are liable personally to creditors of their corporation in the event of an improper reduction of return capital. Similarly, under section 219(4), (5) of the C.B.C.A. shareholders are in some circumstances liable personally to creditors of their corporation following dissolution and distribution to shareholders of corporate assets.[7] Directors, under section 114 of the C.B.C.A., are liable to employees, f.e.the crew of the ship, of the company for services performed within their term. Much more important from the point of view of creditors' protection in the context of parent-subsidiary relationship are the provisions of the federal Bankruptcy Act.[8] Creditors of shipping groups are entitled to apply to the court to examine the appropriatness of the consideration given or received by a bankrupt subsidiary under any "reviewable transaction" that has taken place with an affiliated corporation within twelve months prior to the bankruptcy.[9] Furthermore, there is a presumption that dealings between related corporations are not arm's length transactions and, therefore, are reviewable.[10] This presumption of economic identity along with the definition of related

corporations provided in section 4(2) of the Bankruptcy Act clearly shows how close Canadian law is to adopting the economic entity doctrine. In particular, section 4(2)(c) provides that two corporations are related if:

(i) controlled by the same person or group of persons
(ii) each of which is controlled by one person and the person is related to any member of a related group that controls the other corporation,
(iii) one of which is controlled by one person is related to any member of a related group that controls the other corporation,
(iv) one of which is controlled by one person and that person is related to each member of an unrelated group that controls the other corporation,
(v) one of which is controlled by a related group a member of which is related to each member of an unrelated group that controls the other corporation, or
(vi) one of which is controlled by an unrelated group member of which is related to at least one member of an unrelated group that controls the other corporation.

Moreover, section 108(1) of the federal Bankruptcy Act provides for subrogation of the claim of the parent company until all claims of the other creditors have been satisfied, unless the transaction was in the opinion of the trustee or of the court a proper transaction.[11]

4.3 The application of the doctrine of lifting the corporate veil and agency analysis by the Canadian courts.

Canadian courts have followed the example of the positivist lawmaker and used in several cases the equitable doctrine of lifting the corporate veil. Canadian judges in treating groups as single economic units have mixed the agency

analysis with the doctrine of piercing the corporate veil, a confusion also found, as said above, in the judgements of the U.K. courts.[12] There is uncertainty in Canada as to the criteria that can establish liability of the parent for the obligations of its dependent corporations. In the majority of cases, however, Canadian courts seem to have adopted as exceptions to the theory of legal separation the fraud of the separate existence of the affiliated corporation.[13]

In Pacific Rim Installation Ltd. v. Tilt-Up Construction Ltd.[14] plaintiffs brought an action against two group companies claiming jointly and severally against them for the balance due under a subcontract for labour and materials at a construction project. On the facts of the case, the person who controlled the two companies caused the first to enter into the head contract with the owner regarding the subconstruction project, while representing to the plaintiff that the second group company was the proper party to contract with regarding the subcontract. Subsequently, the first corporation concluded with the second affiliated company a standard subcontract agreement. When the contract money was paid by the owner to the first corporation, the money was syphoned off leaving the corporation a mere shell. The second group company disclaimed any liability for the balance due under the subcontract alleging the insolvency of the first

affiliated corporation.

The court in lifting the corporate veil and establishing group liability relied on the presence of an element of misrepresentation and emphasized that the existence of the two separate corporate entities was intended to defraud creditors.[15]

In conclusion, although the corporate entity doctrine is still the rule in Canada, there have been a growing number of cases where the economic reality created by groups has been taken into consideration. Bill 20, which was presented in the National Assembly of Quebec in December 18, 1984, is the most advanced proposal in Canadian company law in respect of the resolution of problems faced by creditors of group companies. Bill 20[16] explicitly states that:

> La personalite juridique d'une personne morale ne peut etre invoquee a l'encontre d'un tiers de bonnne foi des lors que cette personnalite sert a masquer la fraude.[17]

FOOTNOTES

1. See T. Hadden, R.E. Forbes & R.L. Simmonds, Canadian Business Organizations Law (1984) at 625 et seq. [hereinafter cited as Hadden, Forbes & Simmonds]; P. Martel, "Et si la "Voile Corporatif" n'Existait pas?" (1985) 45 R. du B. 448 [hereinafter cited as Martel]; P. Halpern, M. Trebilcock & S. Turnbull, "An Economic Analysis of Limited Liability in Corporation Law" (1980) 30 U. Toronto L.J. 117 [hereinafter cited as Economic Analysis of Corporations]; A. Wilson et al., "Corporate Law Overview: Recent Jurisprudential and Legislative Documents" (1983) 8 Can. Bus. L.J. 177 [hereinafter cited as Wilson]; I.R. Feltham, "Lifting the Corporate Veil" in Law Society of Upper Canada: Special Lectures (1968); M. Woods, "Lifting the Corporate Veil in Canada" (1957) 35 Can. Bar Rev. 1176.

2. S.C. 1974-75-76, c.33 [hereinafter cited as C.B.C.A.].

3. C.B.C.A., s. 2(4); Also, A.B.C.A., s. 2(4); O.B.C.A., s.1(2); Q.C.A., ss 123.1 and 123.2.

4. C.B.C.A., s.2(3); also, A.B.C.A., s. 2(3); O.B.C.A., s. 1(3).

5. [1897] A.C. 22 (H.L.).

6. For details about statutory provisions of lifting the corporate veil see Economic Analysis of Corporations, supra, note 1 at 120-2.

7. Also, section 140(4) of the C.B.C.A. makes a shareholder liable as constructive director on a unanimous shareholders' agreement.

8. R.S.C., c.14. For the provisions of the proposed Insolvency Act, Bull C-17, 2nd Sess., 32nd Parl., 32 Eliz. II, 1983-84, see Hadden, Forbes & Simmonds, supra, note 1 at 144.

9. Sections 73-75 of the Bankruptcy Act.

10. Section 3 in conjunction with section 4 of the Bankruptcy Act.

11. This subrogation rule is analogous to the U.S. "Deep Rock Doctrine". For details see Hadden, Forbes & Simmonds, supra, note 1 at 145.

12. See for example, De Salaberry Realties Ltd. v. M.N.R. (1974) 46 D.L.R. (3d) 100 (Fed. C.T.D.); affd (1976) 70 D.L.R. (3d) 706; Clarkson Co. v. Zhelka (1967) 64 D.L.R. (2d) 457(Ont., H.C.). For a critical analysis of the Canadian case-law see D. Welling, Corporate Law in Canada. The Governing Principles (1984) at 127-131.

13. See: Wilson, supra, note 1 at 179-80; Martel, supra, note 1 at 448 et seq.; Saskatchewan Economic Development Corp. v. Patterson-Boyd Manufacturing Corp. [1981] 2 W.W.R. 40, 6 Sask. R. 325 (C.A.); Maxymych v. Kleinstein (1985) 12 C.L.R. 255 (Que. S.C.); Berger v. St. Jean [1984] C.S. 407; Cofrages Industriels Cremazie Ltd. v. Duval & Gilbert Inc. [1983] C.S. 536.

14. (1978) 5 B.C.L.R. 231 (Co. Ct.).

15. Ibid. at 233-4.

16. Martel, supra, note 1 at 452.

17. J.C. Rivard, "Un Voile Corporatif a Lever Encore" (1985) 17 Barreau No. 5, 10.

CHAPTER FIVE

THE PROTECTION OF CREDITORS OF SHIPPING GROUPS UNDER FRENCH COMPANY LAW

5.1 The rule: corporate entity doctrine.

The phenomenon of corporate group activity is also a familiar characteristic of French commercial life but at this stage no legislation has been passed to deal with group activities.[1] In France, due to the influence of the German Konzernrecht[2], there have been several attempts to pass a bill regulating groups. The most important of these attempts, the "Proposition Couste" of 1978, was a combination of the German law of affiliated enterprises and that of the E.E.C. proposals.[3] As a result of the reaction and pressure exercised by the French industrial and shipping circles upon the French government, this Bill has never been passed. Pending some initiative from the E.E.C., the French government postponed any group regulation.[4]

As a consequence French law follows, at least in principle, the corporate entity doctrine. A famous French case illustrating the applicability of the doctrine is the Fruehauf case.[5] The American company Fruehauf controlled a French subsidiary Fruehauf-France. The latter had contracted

to supply the Societe des Automobiles Berliet with trailers which were to be used as part of the equipment for lorries which Berliet had sold to the People's Republic of China. The American parent instructed the French subsidiary to annul the contract because it contravened American legislation. Berliet refused to co-operate and threatened an action for damages. The directors who represented the French minority interests resigned and filed a suit against the parent. The plaintiffs succeeded because the French Court held that the directors of a subsidiary must consider the interests of their own company and not those of the group.[6]

5.2 Qualifications of the corporate entity doctrine.

The rule, however, that the parent company is not responsible for the debts of the dependent companies has several qualifications.

Firstly, wholly-owned subsidiaries have a limited existence in France.[7] The rule is that at least seven persons are required to incorporate a limited liability company.[8] Nevertheless, according to Art. 9 of the Law of July 24, 1966, the acquisition of all the shares by a sole shareholder does not result in an automatic dissolution of the corporation; the sole shareholder is given one year to regularise the situation by transferring some of the shares to other persons.

Alternatively, he may dissolve the company.[9] If he does not do so, every interested party, especially every creditor, is entitled to ask for the dissolution of the company after one-year.[10]

Secondly, the bankruptcy of the subsidiary can be extended to the parent, or to other companies of the group, if there has been confusion over the activities of the companies or if the companies appear to third parties as one enterprise.[11]

Thirdly, in some cases where there has been abuse of the corporate form, creditors have been protected by invocation of the principle of good faith.[12] In a recent case which occupied the Tribunal de Grande Instance de Strasbourg[13], a subsidiary agreed with the plaintiffs to buy some industrial material under the condition that the ownership would remain with plaintiffs until the full payment of the price. Before payment was made the subsidiary transferred the material to the parent who acquired it as an allegedly bona fidei third party. The problem, consequently, was whether the distinct legal personalities of the two companies could lead to the conclusion that the parent had acted bona fidei. The Court held that since the selling and purchasing corporations were under the same control and direction, it could not accept that the acquiring company had acted in good faith.[14] The economic

ties between the parent and subsidiary and the community of their interests could not justify the presumption of separateness between controlling and dominated enterprises in this case.[15]

In conclusion, one can say that French courts have tried to fill the void created by the lack of group legislation. To this extent, creditors are protected by the presumption of group existence that the French courts have inferred once the elements of control and uniform direction are proved.

FOOTNOTES

1. See c.f. R. Houin, "Les Groupes de Societes en Droit Francais" in K. Hopt, ed., Groups of Companies in European Laws vol. 2 (1982) at 45 [hereinafter cited as Houin]; J. Calais-Auloy, "Protection des Associes et Creanciers des Groupes de Societes en Droit Francais" in Droit des Groupes de Societes, ed. by Centre de Droit des Affaires de Rennes (1972) at 147-154 [hereinafter cited as Calais-Auloy]; P. Bezard et al., Les Groupes de Societes. Une Politique Legislative (1975) at 203-205; F. Wooldridge, Groups of Companies: The Law and Practice in Britain, France and Germany (1981) [hereinafter cited as Wooldridge].

2. Konzernrecht is the German law on groups of companies. For an analysis of the Konzernrecht see: Wooldridge, supra, note 1; N.C. Sargent, "Beyond the legal entity doctrine: Parent- Subsidiary Relations under the W. German Konzernrecht" (1985) 10 C.B.L.J. 327-358; V. Beingenzu, "Parent-Subsidiary Relations under the German Law" (1973) 7 Int'l Law. 138; R. Mueller & G. Galbraith, The German Stock Corporation Law (1966).

3. For an analysis of the Proposition Couste see Y. Guyon, "Examen Critique des Projets Europeens en Matiere de Groupes de Societes" in K. Hopt, ed., Groups of Companies in European Laws vol. 2 (1982) at 155 et seq.

4. Ibid. at 156.

5. Trib. Corr. Paris, decision of May 22, 1965, (1965) J.C.P. 14274 bis.

6. Ibid. See P. Leleux, "The Affaire Fruehauf" [1972] J.B.L. 66; C.M. Schmitthoff, "Multinationals in Court" [1972] J.B.L. 103.

7. Houin, supra, note 1 at 46.

8. Ibid.

9. Ibid. at 47.

10. Ibid.

11. Art. 101 of the Law of July 7, 1967. Cour de Cassation, decision of May 22, 1975, (1975) Rev. Trim. Dr. Com. 866; Cour de Cassation de Commerce, decision of October 15, 1974, (1975) Rev. Trim. Dr. Com. 530.

12. Calais-Auloy, supra, note 1, at 153; E.J. Cohn & C. Simitis, "Lifting the Veil in the Company Laws of the European Continent" (1963) 12 Int'l & Comp. L.Q. 189 at 205-210.

13. Decision of December 13, 1983, (1985) Revue des Societes 95; The theory of "group appearance" developed by the French courts is also based on the principle of good faith. The theory is discussed in details in Chapter Nine. See, also, Calais-Auloy, supra, note 1 at 153.

14. Decision of December 13, 1983, (1985) Revue des Societes at 97-8.

15. Ibid.

CHAPTER SIX

PROTECTION OF CREDITORS OF SHIPPING GROUP COMPANIES UNDER THE GREEK COMPANY LAW.

6.1 The rule: corporate entity doctrine.

In Greek company law the rule applied is the corporate entity doctrine.[1] The only provision that may give a clue of what will be defined as a group in Greece is article 17(4) of Law No. 2190 which provides that a subsidiary is a company in which at least half of the capital is owned by the parent company. One can conclude therefore, that control is implicitly recognized as the dominating element of a parent-subsidiary relationship.

6.2 Qualifications of the corporate entity doctrine.

Nevertheless, Greek law does not follow the theory of legal separation strictly, and in several cases it has treated groups as single economic entities. Creditors of shipping companies, therefore, may find the following provisions of statutory lifting of the corporate veil useful.

Firstly, one-man companies and, consequently, wholly owned subsidiaries are permitted under Greek law.[2] A creditor, however, is entitled to ask the court to dissolve such a company any time he feels his interests are

threatened.[3] In addition, according to art. 44(2) of Law No. 3190/1955 the parent company of a wholly owned subsidiary is fully liable for all the debts of these subsidiaries. This responsibility, however, extends to those liabilities which were created during the period in which the parent company held all the shares.[4]

Furthermore, Greek law applies the principle of subrogation of claims[5] which is analogous to the American "Deep Rock Doctrine".[6] According to this principle if shareholders have granted loans to their company, they may not recover the capital until after all other debts of the company have been paid.[7] If the loans have been repaid in contravention of the rule and if the company at a later date makes default in payment of debts incurred against third parties, the shareholders become personally liable to the company's creditors to the extent of the amounts repaid.[8]

Greek courts have, in a limited number of cases, established liability of the parent for the obligations of its controlled companies. This has been done mainly by the application of the principles of good faith[9] and misrepresentation[10] as applied in the interpretation of contracts. Therefore, where a creditor was led to believe that he was dealing with the parent company of the group and it transpired that the contracting party was an

undercapitalized subsidiary, the veil of the latter company was pierced and the parent was held to be directly liable on the claim.[11]

The treatment of groups as single economic units is rather segmentary in Greece, because Greek courts, unlike French courts, have failed to provide creditors with an equitable doctrine similar to the theory of "group appearance". Since, however, in civilian legal systems the theory of today is the practice of tomorrow[13], it should be mentioned that the Greek legal theory clearly favours the view that companies that create a group appearance should be treated as de facto partnerships.[14] If this approach is accepted by Greek courts, every participating company will be jointly and severally liable for the obligations of the group.

FOOTNOTES

1. Art. 1(1) of Law No. 3190/1955.

2. Art. 47 a(2) of Law No. 2190/1920.

3. Art. 44(1) of Law No. 3190/1955.

4. Art. 44(2) of Law No. 3190/1955. See, also, E.J. Cohn & C. Simitis, "Lifting the Veil in the Company Laws of the European Continent" (1963) 12 Int'l & Comp. L.Q. at 214-5 [hereinafter cited as Cohn & Simitis].

5. Art. 33 of Law No. 3190/1955. See Cohn & Simitis, supra, note 4 at 215. Also, E.A., 189/1943 (1943) EEN, 194.

6. See Taylor v. Standard Gas & Electric Co. 306 U.S. 307 (1939).

7. Art. 33(3) of Law No. 3190/1955.

8. Art. 33(2) of Law No. 3190/1955. Also, articles 537, 538 and 539 of the Greek Bankruptcy Law which defines that transactions done within the "suspicious" period are reviewable by the courts, are relevant.

9. Art. 200 of Greek Civil Code.

10. Art. 147 of Greek Civil Code.

11. E.A., 236/1978, (1979) NoB. 445.

12. For further details about the theory of "group appearance" see Chapter Nine, infra.

13. Cohn & Simitis, supra, note 4 at 190.

14. C. Pampoukis, Company Law (1976) at 108 [in Greek]; P. Levantis, Partnerships and Corporations, vol. 1 (1977) at 128, 136.

CHAPTER SEVEN

THE PROTECTION OF CREDITORS OF GROUP COMPANIES UNDER THE E.E.C. PROPOSALS

The European Community in its efforts to harmonize the legislations of its member-states made two proposals to regulate European based groups of companies.[1] The first effort to pass rules regulating the parent-subsidiary relationship can be found in the Commision's proposal for a Statute for European Companies.[2] However, since the Statute because of problems such as participation of employees in the supervisory board, has been blocked, the Commission tried to overcome these difficulties by way of a Directive based on Art. 54(3)(g) of the E.E.C. Treaty.[3] The study of these proposals is necessary from a practical point of view because:

(a) Britain, France and Greece are members of the Community and any Community legislation takes precedence over their national laws.[4]

(b) from a theoretical point of view, because these proposals reflect the trends of the modern European Company law.

The E.E.C. proposals have moved in the direction of accepting the economic entity doctrine.[5]

According to the E.E.C. legislation there are two

fundamental elements, the concurrent existence of which is a manifestation of a formation of a group: control and uniform direction.[6] When this exists depends upon the factual situation of each case. Nevertheless, both the Statute and the Directive make proof of the existence of a group easier by a series of legal presumptions.

Firstly, a corporation in which another company holds the majority is presumed to be dependent on the latter.[7]

Secondly, it is presumed that the dependent company and the controlling corporation form a group.[8]

These presumptions, however, do not constitute conclusive evidence of the existence of a group; the parent company may rebut the presumption and prove that even though the element of control exits, there is no group structure.[9]

7.1 Protection of Creditors of group companies under the Directive.

Under the Directive groups of companies can be either of two kinds: contractual or de facto groups.[10]

Contractual concerns are formed by agreements between two companies whereby one corporation subjects its direction to another company or obligates itself to transfer all its profits to it.[11] De facto concerns are groups formed by de facto control and uniform direction exercised in the absence

of any enterprise agreement.[12] The distinction is important because the consequences and scope of protection of creditors are different in each type or group.

7.1.1 Contractual groups

In a contractual concern the parent company is entitled to direct the subsidiary, even to the latter's disadvantage provided that this is for the benefit of the group.[13]

The price paid by the parent for its right to direct the subsidiary is that the controlling group company will be liable for the obligations of the dependent company arising prior to the conclusion of the contract or during the contractual period.[14] Nevertheless, proceedings may be brought against the parent company only after the creditor has addressed a written demand to the subsidiary and has not been satisfied.[15]

In addition to the above, creditors are protected by significant disclosure requirements. The Directive imposes requirements of notification and disclosure upon all parents based on their shareholdings in the dependent corporation. A dependent corporation must be notified of a shareholding of 10 percent and of any subsequent acquisition of additional 5 percent blocks of its shares.[16] The shareholding notified must be recorded in the annual records of the dependent corporation and if specific percentage rates are reached, it must be

disclosed according to national laws.[17]

7.1.2. De facto groups

In a de facto concern, the dominating enterprise must refrain from using its power to direct the dependent corporation.[18] The rule, therefore, is the independent function of the group companies as a result of which the controlling company is not accountable for liabilities of its dependent corporations. However, as soon as the parent company uses its power to direct its subsidiary, the parent becomes liable to the dependent company and to the company's creditors and minority shareholders for any damage incurred as a result of such influence.[19] To ensure an arm's length compensation the directors of the de facto subsidiary are required to report all the dealings of their company with the parent every year ("report of dependence").[20] All transactions, measures taken, and omissions induced by or serving the interest of the dominating enterprise must be reported. The auditors and, thereafter, the general meeting of the dependent corporation, must examine the report of dependence.[21]

7.2 Protection of creditors of group companies under the Statute.

Under the Statute, once the two elements of control and

uniform direction coexist, a group relationship is always established. There is no distinction, therefore, between contractual and de facto groups.[22] However, there is implied recognition in the Statute that cases of doubt as to whether a group situation exists will always remain. For this reason, creditors or any interested party are entitled to apply to the European Court of Justice to determine whether or not a group exists.[23] If the Court determines that a parent-subsidiary relationship exists, the following will be the situation for the creditors.

The parent company has the power to direct the subsidiary, even to the latter's disadvantage as long as this serves the interests of the group.[24] The price to be paid by the parent for its right to direct the subsidiary is that it will be liable for the debts and liabilities of the dependent group companies during the existence of dependence.[25] Nevertheless, proceedings may be brought against the controlling undertaking of a group only where the creditor has first made written demand for payment from the dependent group company and failed to obtain satisfaction.[26]

Furthermore, the Statute provides for strict disclosure requirements of a group relationship. A corporation which is part of a group shall register in the European Commercial Register and publish in the company journals the group to

which it belongs, the position it occupies and if it is a dependent company, the name of the controlling group undertaking.[27]

FOOTNOTES

1. For more details about the E.E.C. proposals see inter alia: K. Hopt, ed., Groups of Companies in European Laws vol.2 (1982); A. Petitpierre-Sauvain, Droit des Societes et Groups de Societes vol.7 (1972); Les Groupes de Societes, ed. by the Faculty of Law of Liege (1973).

2. O.J. C 124 of 10/10/1970, Supplement to Bul. E.C. 8-1970 [hereinafter cited as Statute].

3. Only the pre-draft proposal for a Ninth Directive is available: E.C. DOK No. XI/328/74-2, E.C. No. XI/593/75-D [hereinafter cited as Directive].

4. See article 189 of the E.E.C. Treaty. See also, Van Gend en Loos, case 26/62, [1963] E.C.R. 1; Costa v. ENEL, case 6/64, [1964] E.C.R. 585; Simmenthal, case 106/77, [1978] E.C.R. 629. For details, see, A. Parry & J. Dinnage, E.E.C. Law, 2d ed. (1991) at 37 et seq.

5. For more details about the economic entity doctrine see Chapter Five, ante.

6. Art.223(1) of the Statute. Art. 2(1)of the Directive.

7. Art. 223(2) of the Statute. Art. 2(2) of the Directive.

8. Ibid.

9. Art.225(1) of the Statute.

10. For a detailed examination of the Ninth Directive see: K. Boehlhoff & J. Budde, "Company Groups-The E.E.C. Proposals for a Ninth Directive in the Light of the Legal Situation in the Federal Republic of Germany" (1984) 6 Journal of Comparative Business and Capital Market Law 163-167 [hereinafter cited as Boehlhoff & Budde]; Y. Guyon, "Examen Critique de Projets Europeen en matiere de Groupes de Societes" in K. Hopt, ed., Groups of Companies in European Law (1982) vol.2 155.

11. Art. 13 of the Directive.

12. Art.7 of the Directive.

13. Articles 24 and 25 of the Directive. See also, Boehlhoff & Budde, supra, note 10 at 179.

14. Art. 29 of the Directive.

15. Art. 29(1) of the Directive. See, Boehlhoff & Budde, supra, note 10 at 178-9.

16. Art. 4 of the Directive.

17. Art. 6 of the Directive. See, Boehlhoff & Budde, supra, note 10 at 175

18. Art. 7(1)(b) of the Directive.

19. Art. 7 in conjuction with art. 11 of the Directive. See, Boehlhoff & Budde, supra, note at 176-7.

20. Art. 8 of the Directive.

21. Art. 8(2),(3) of the Directive.

22. Art. 223(2) of the Statute. For a detailed analysis of the Statute see, P. Sanders, European Stock Corporation (1969).

23. Art. 225 of the Statute.

24. Article 240 in conjuction with art. 240(a) of the Statute.

25. Art. 240(b) in conjuction with art. 239(1) of the Statute.

26. Art. 239(2) of the Statute.

27. Art. 226 of the Statute.

PART THREE

12.3 Interpretation of the term "beneficial ownership" by the Canadian courts.

CHAPTER EIGHT

THE PRINICIPLE OF ARREST OF SHIPS: FUNCTION AND REGIME UNDER THE 1952 BRUSSELS CONVENTION

8.1 The function of the concept of arrest of ships in the field of maritime law.

From the point of view of maritime law creditors of shipping companies can be divided into three categories, depending on the nature of their claim. In the first category falls those creditors whose claim is recognized as a maritime lien.[1] The second category includes creditors who have a claim arising in connection with the operation of a ship but which is not a maritime lien;[2] creditors of the first and second categories are usually described as maritime creditors since their claim exists with respect to a certain ship. The third category includes those creditors who have a non-maritime claim and, therefore, can be described as general creditors.

Of the above categories maritime lienees are in the most advantageous position. The reason for this priority is that a maritime lien is a property right that attaches to the vessel as soon as the event which creates the lien occurs and travels with the ship irrespective of any further disposition of the vessel.[3] Maritime creditors of the second category are in the

next most advantageous position since in addition to the remedies of general law they also have at their disposal the specific remedies of maritime law.

Nevertheless, maritime and general creditors have one common interest: to attach the property of the defendant in order to obtain security for their claim. If the property of the defendant is a vessel, the means to this end is the principle of the arrest of ships.[4]

9.2 Arrest of ships in civil and common law countries.

It has been argued that the arrest of ships had a more or less uniform character in the years before 1800[5]. This maritime principle, however, following the two major legal traditions, developed differently in civil and common law countries.[6]

In civil law countries arrest of ships is a particular application in the maritime field of the general principle of conservatory attachment, or "saisie conservatoire", existing in the terrestial law.[7] According to this general principle, a creditor may obtain security over any of the assets of his debtor by producing prima facie evidence of his claim. Thus, arrest of ships as applied in civil law countries has three particular characteristics:

(a) it is allowed to both maritime and general claimants

indiscriminately. Therefore, not only a salvor but also the constructor of the shipowner's house may arrest the latter's vessel;[8]

(b) it permits the seizure of any of the vessels of the defendant irrespective of whether this asset is the ship in connection with which the claim arose or any other ship owned by him;[9]

(c) arrest of ships is connected with personal liability; therefore, it is permitted only under the condition that the ship belongs to the person liable.[10]

(d) the arrest of a ship is neither connected with the discussion of the case on its merit nor does it confer to the arresting claimant the status of a preferred creditor.

By contrast, in common law countries the arrest of ships was always connected with actions in rem.[11] As a matter of fact, the crucial element for arresting a ship was not the personal liability of the defendant but the fact that the obligation arose out of the use and exploitation of the ship. Although the general nature of the action in rem continues to be an issue of unresolved debate[12], the results of such an approach were the following:

Firstly, arrest of ships was permitted not for any claim, but only for those claims which were recognized as maritime

liens.[13]

Secondly, personal liability of the defendant shipowner was not a requirement for arrest; what was important was that the claim had arisen in connection with the operation of the ship.

Thirdly, arrest was permitted only against the ship in connection with which the claim arose.[14]

Fourthly, the right to bring an action in rem leads to jurisdiction on the merits and it confers to the claimants the status of a preferred creditor.[15]

9.3 The 1952 Arrest Convention: An attempt at harmonization

The differences in law and practice which developed in the two main legal systems with respect to the principle of arrest of ships needed to be harmonized. Maritime law has a universal character not only because it is grounded in common sources and traditions known as the "law of the sea"[16], but also because it corresponds to the international character of shipping. Shipping activities are not restricted to the transportation of goods or passengers between the ports of only one country but they are usually carried on between several countries, covering different continents. It was, therefore, extremely important for maritime litigants to know which vessels and for which claims they could arrest, and for

shipowners to confront a uniform regime in the ports of different countries.

The 1952 International Convention of the Arrest of Seagoing Ships[17] purported to meet this exact need. The Convention attempted to find a new harmony by adopting a middle-way compromise between the civil and common law approaches.

Of the countries under consideration, the U.K., France and Greece have ratified the Arrest Convention. Canada, is neither a party to this Convention nor has it adopted the provisions relating to the sister-ship action in rem.[18]

However, even in the above three countries that have ratified the Arrest Convention the regime of arrest of ships is not uniform.[19] Generally speaking, there are two schools of thought as to the effect of international treaties on the national order.[20] On the one hand some countries like France and Greece accept that international treaties, once ratified, become automatically part of the national law and take precedence over adverse national legislation.[21] On the other hand, other countries do not view treaties as part of the law of the land without further legislative action, even though they have become internationally binding. With very limited exceptions this is the law in Britain. Because of this principle, treaties are usually ratified only after Parliament

has enacted the necessary implementing legislation.[22]

This procedure was followed by the U.K. in the case of the 1952 Arrest Convention. Britain first enacted in 1956 the Administration of Justice Act[23] which contained to a great extent the provisions of the Convention. The Convention was, however, only ratified in 1959. The 1956 Administration of Justice Act has been superseded by the Supreme Court Act, 1981[24], which comes closer to the letter and spirit of the Arrest Convention.

France and Greece have incorporated the Convention into their national law. Nevertheless, these countries maintained their domestic legislations with respect to the arrest of ships in those cases that are not covered by the Convention.[25]

For the purposes of this analysis the following provisions of the Convention are apposite:

Art. 2: A ship flying the flag of one of the contracting States may be arrested in the jurisdiction of any of the contracting States in respect of any maritime claim, but in respect of no other claim ...

Art. 3
1. Subject to the provisions of para. 4 of this Article and of Article 10, a claimant may arrest either the particular ship in respect of which the maritime claim arose, or any other ship which is owned by the person who was, at the time when the maritime claim arose, the owner of the particular ship even though a ship arrested be ready to sail; but no ship other than the particular ship in respect of which the claim arose, may be arrested in respect of any of the maritime claims enumerated in Article 1(1), o), p) or q).
2. Ships shall be deemed to be in the same ownership when all the shares therein are owned by the same person or persons.
4. When in the case of a charter by demise of a ship the

charterer and not the registered owner is liable in respect of a maritime claim relating to that ship, the claimant may arrest such ship or any other ship in the ownership of the character by demise subject to the provisions of this Contention, but no other ship in the ownership of the registered owner shall be liable to arrest in respect of such maritime claims.

The provisions of this paragraph shall apply to any case in which a person other than the registered owner of a ship is liable in respect of a maritime claim relating to that ship.

Under the regime of the Convention, therefore, a creditor who attempts to arrest a ship must fulfill the following conditions.

Firstly, his claim must be one of the maritime claims mentioned in Art. 1(1) letters (a) to (q).[26] Furthermore, maritime creditors do not have to produce full evidence but only allege the existence of a maritime claim. That means that it is not necessary even for them to establish a prima facie case in support of their claim nor to prove that their claim is certain, liquid or exigible.[27]

Secondly, importance is primarily placed on the operation or exploitation of the ship. Therefore, the ship in connection with which the claim arose, the offending ship, is always subject to arrest.[28] Personal liability of the defendant shipowner comes into consideration only secondarily and only for the purpose of arresting a "sister-ship".[29]

Thirdly, arrest proceedings are confined to only one ship, but that ship may either be the ship in connection with which the claim arose, or a "sister-ship" of that ship. The

term "sister-ship" is not clearly defined in the text of the Arrest Convention. Different interpretations have been proposed as to the meaning the drafters of the Arrest Convention intended to give to the words "sister-ship". These interpretations agree that when the shipowner is liable on the claim, "sister-ship" is any other ship in his ownership.[30] The main disagreement is as to the definition of "sister-ship" when a person other than the shipowner is liable on the claim.[31] As a result, British, French and Greek courts have defined "sister-ship" differently when a charterer is liable on the claim.

Fourthly, all the shares of the ships must be owned by the same persons.[32]

Therefore, with respect to groups of shipping companies, the Arrest Convention imposes two restrictions on the protection of creditors of one-ship companies.

The first stringent is that the different one-ship companies that constitute the group are different legal persons. Therefore, the liability of one group company cannot be extended to the other or to the group as a whole, unless the economic entity doctrine is followed.[33] Thus it appears that one-ship companies have effectively limited creditors to proceedings against the "offending" ship only.

The second restriction is that of requiring that the two

vessels, the offending ship and the "sister-ship", shall be owned by the same person in respect of all the shares therein.[34] It is evident that in a group situation with a complex corporate structure such a requirement, if taken literally, will constitute an insurmountable hurdle.

There is a trend in the jurisdictions under examination to take into consideration the economic reality created by shipping groups and defeat the practice of one-ship companies. The efforts of the courts of these jurisdictions are concentrated on extending the notion of "sister-ship" arrest so as to cover ships belonging to other companies of the group. Each of these countries has proposed different solutions to achieve this aim. Therefore, the protection of creditors of one-ship companies through the principle of arrest of ships will be examined separately as it is applied in France, Greece, the United Kingdom and Canada.

FOOTNOTES

1. There are two Conventions on Maritime Liens. The first is the 1926 Brussels Convention for the Unification of Certain Rules of Law relating to Maritime Liens and Mortgages and the second is the 1967 Brussels Convention on the same title. For the text of the Conventions see M.N. Singth, International Maritime Law Conventions (1983) Vol. 4 at 3053 and 3059 respectively. For a definition of maritime liens see W. Tetley, Maritime Liens and Claims (1985) at 37-41 [hereinafter cited as Tetley]; E.F. Ryan, "Admiralty Jurisdiction and the Maritime Lien: A Historical Perspective" (1968) 7 Western Ont. L. Rev. 173 at 194-199; R. Rodiere, Droit Maritime (1979) at para. 118; Emmanuel du Pontavice, Le Statut des Navires (1976) at para. 134 et seq.

2. This claim will be generally described as "maritime claim" following the definition of Art. 1(1) of the 1952 Brussels Convention for the Unification of Certain Rules relating to the Arrest of Seagoing Ships.

3. Art. 8 of the 1926 Convention on Maritime Liens and Mortgages. Also, Art. 7 of the 1967 Convention on Maritime Liens and Mortgages.

4. The term is used in accordance with article 1(2) of the Arrest Convention which reads as follows: "Arrest means 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 judgement." For the application of the principle of arrest of ships in the different countries see L. Hagberg, ed., Maritime Law: Arrest of Vessels (1976) vol. 1.

5. For further details see W. Tetley, "Attachment, Mareva Injuntion and Saisie Conservatoire" [1985] L.M.C.L.Q. 58 at 67; F.L. Wiswall, The Development of Admiralty Jurisdiction and Practice since 1900 (1970) at 16; A. Browne, A Compendious View of the Civil Law and of the Law of Admiralty. (1802) Vol. 2 at 435.

6. D. Rhidian Thomas, "The sister-ship action "in rem" [1979] L.M.C.L.Q. 158; D.C. Jackson, Enforcement of Maritime Claims (1985) at 157.

7. R. Rodiere, Droit Maritime:Le Navire (1980) at para. 187 [hereinafter cited as Rodiere]; E. de Pontavice, Le

Statut de Navires (1976) at para. 302 [hereinafter cited as Pontavice].

8. Rodiere, supra, note 7 at para. 189.

9. Ibid. at para. 200.

10. Ibid. at para. 199; du Pontavice, supra, note 7 at para. 351.

11. D.C. Jackson, Enforcement of Maritime Claims (1985) at 6; E.F. Ryan, "Admiralty Jurisdiction and the Maritime Lien: A Historical Perspective" (1968) 7 Western Ont. L. Rev. 173 [hereinafter cited as Ryan]; D.N. Rogers, "Admiralty Jurisdiction in Canada: Is There a Need for Reform?" (1985) 16 Journal of Maritime Law and Commerce 467 at 468-9; G. Gilmore & Ch. L. Black, Jr., The Law of Admiralty, 2d.ed., (1975) at 19, 493.

12. There have been proposed three theories as to the nature of actions in rem:
(a) the personification theory which is widespread in the U.S. Admiralty law. For details see, G. Gilmore & Ch. Black, The Law of Admiralty, 2d ed., (1975) at 589-622 [hereinafter cited as Law of Admiralty]; O.W. Holmes, Jr., The Common Law (1881) at 25-34; Note, "Personification of Vessels" (1964) 77 Harv. L. Rev. 1122.
(b) The procedural theory. This theory was advanced by Marsden in Select Pleas in the Court of Admiralty, (1897) vol. 1 at 22.
(c) The conflict theory. This theory was originally advanced by Roscoe in Admiralty Practice, 5th ed., (1931) at 44-48. In more recent times it has been restated by Ryan, supra, note 11 at 173. For a discussion of these theories see Tetley, supra, note 1 at 35-6.

13. Ryan, supra, note 11 at 173; Rodiere, supra, note 7 at 200.

14. The "Beldis" (1936) P. 51; 53 Ll. L. Rep. 255 in which Sir Boyd Merriman overruled the decision of Fry L.J. in The Heinrich Bjorn. In this later case, the Court allowed the necessariesman to arrest any of the property belonging to the person who owes the debt, including a sister-ship. These two decisions are discussed in Tetley, supra, note 1 at 463 et seq.

15. D.C. Jackson, "Admiralty Jurisdiction--The Supreme Court Act 1981" [1982] L.M.C.L.Q. 236 at 240.

16. For details see Law of Admiralty, supra, note 12 at 5; Tetley, supra, note 1 at 2-21; A.N. Yannopoulos, "The Unification of Maritime Law by International Conventions" (1965) 30 Law & Cont. Prob. 370 at 371.

17. For the text of this Convention see M.N. Singth, International Maritime Law Conventions (1983) vol. 4 at 3101 [hereinafter cited as Arrest Convention]; for a commentary on the Arrest Convention see P. Manca, International Maritime Law (1970) vol. 1 at 93.

18. For details see Chapter Twelve, infra.

19. See, Report of the International Subcomittee on the revision of the 1952 Convention for the unification of certain rules relating to arrest of seagoing ships, Comite Maritime International, Arrest--21/X--84; Also, R. Achard, "La XXXIIIe Conference du C.M.I. a Lisbonne, (1985) D.M.F. 515 at 518.

20. These two schools of thought are the dualistic and the monistic doctrines. The dualistic doctrine points out that the essential difference of international and municipal law consists primarily in the fact that the two systems regulate different subject-matter. International law is a law between sovereign states whereas municipal law applies within a state and regulates the relations of its citizens with each other and with the executive. By contrast, the monistic theory supports the supremacy of international law even within the municipal sphere coupled with the view that an individual is a subject of international law. For more details, see I. Brownlie, Principles of Public International Law, 3d ed., (1979) at 32-6; H. Kelsen, General Theory of Law and the State (1945) at 332-80; H. Lauterpacht, Private Law Sources and Analogies to International Law (1950) at 58.

21. Art. 55 of the French Constitution; art.28(3) of the Greek Constitution. See H.J. Steiner & D.F. Vagts, Transnational Legal Problems (1976) at 624-5 [hereinafter cited as Steiner & Vagts].

22. Steiner & Vagts, supra, note 32 at 624.

23. 1956 (4 & 5) Eliz. 2, c. 46.

24. 1981 U.K. c. 54, schedule 7.

25. See France and Greece, Chapters Nine and Ten, infra.

26. The enumeration is exclusive and not indicattive: Cour d'appel de Rouen, April 15, 1982, GME--Atlantico (1982) D.M.F. 744. The characterization of a claim as maritime claim is done by strict interpretation of the Convention. For the situation in Belgium see, L. Delwaide, "Saisie Conservatoire des Navires de Mer en Belgique" (1984) D.M.F. 248 at 249 [hereinafter cited as Saisie Conservatoire en Belgique]. Also, Rodiere, supra, note 9 at para. 199. With respect to the notion of maritime claim see Tribunal de commerce d'Anvers, October 2, 1969, (1974) Dr. Europ. Transp. 277; Tribunal de premiere instance d'Anvers, February 1, 1974, (1974) Dr. Europ. Transp. 277; Tribunal de premiere instance d'Anvers, April 26, 1976, (1977) Dr. Europ. Transp. 119. Cour de Cassation, July 17, 1984, GME-Atlantico, (1985) D.M.F. 154 (the breah of a contract of selling a ship does not give rise to a maritime claim); Cour d'appel de Rouen, February 9, 1984, Ganvie, (1985) D.M.F. 156.

27. Art. 1(4) of the Arrest Convention. See, also, Saisie Conservatoire en Belgique, supra, note 21 at 249 in which the following cases are referred as establishing the rule that a simple allegation of a maritime claim is sufficient: J. Sais. Anvers, February 15, 1973, Siba-Edolo, (1973) J.P.A. 17; J. Sais. Anvers, November 19, 1976, Agios Nikolaos; Cour d'appel d'Anvers, February 14, 1977, Thetis; J. Sais. Anvers, December 18, 1980, Evmits. Also, Tribunal mixte Commercial Noumea, November 17, 1979, La Bonita, (1980) D.M.F. 223 at 225.

28. Art. 3(1) of the Arrest Convention.

29. Art. 3(4) of the Arrest Convention. Tribunal of first instance of Anvers, May 4, 1976, Volta-Wisdom, (1977) Dr. Europ. Transp., 113.

30. Art. 3(1) of the Arrest Convention. Tetley, supra, note 1 at 463.

31. Art. 3(4) of the Arrest Convention. Tetley, supra, note 1 at 463.

32. Art. 3(2) of the Arrest Convention.

33. For a discussion about the economic entity doctrine see Chapter Three, ante.

34. See art. 3(2) of the Arrest Convention.

CHAPTER NINE

THE PROTECTION OF CREDITORS OF SHIPPING GROUP COMPANIES UNDER THE FRENCH LAW ON ARREST OF SHIPS

9.1 The sources of the French law on arrest of ships.

French law of arrest of ships has a duality of sources. The first is the 1952 Arrest Convention which France ratified and adopted by virtue of Decree No. 58-14 of January 4, 1958. The Arrest Convention applies to ships flying a flag of a state which is a party to the Convention.[1] In addition, French courts have extended the application of the Arrest Convention to ships of third countries provided that the claim is a maritime claim from those included in Art. 1(1).[2]

The second source is the internal law as codified by Decree No. 67-967 of October 27, 1967 and amended by Decree No. 71-161 of February 24, 1971. The domestic French law has a residuary character and applies to arrest cases which do not involve any external factor[3] or which have international elements but the claim is not a maritime claim arising from those claims included in article 1(1) of the Arrest Convention.[4]

The regime of the Arrest Convention is different from that of the domestic French law. Under the regime of the

Convention only a maritime creditor can arrest a ship. Nevertheless, all he has to do is allege the existence of a maritime claim; not prove it.[5] By contrast, under the domestic French law, every claimant is entitled to arrest a ship, but the creditor has to round his claim in principle.[6] Depending on which regime is applied, the consequences of the arrest of ships may be different for creditors of affiliated shipping companies.

9.2 Protection of creditors of shipping group companies under the Arrest Convention

9.2.1 Arrest of the offending ship

Art. 3(1) of the Arrest Convention provides for the arrest of the ship in connection with which the claim arose, the so-called "offending" ship. This Article does not distinguish between maritime lienees and other maritime claimants. Both are entitled to arrest the offending ship.

According to the general principles of maritime law, claimants whose claims are not maritime liens will lose their right to arrest the offending ship if the ship has been sold and transferred to a new owner.[7] For the same reason it seems that a non-maritime lienee creditor will lose his right to arrest the offending ship when a charterer is liable on the claim and the ship has been redelivered to its owner.[8] The

correctness of this interpretation is not, however, always accepted. The Arrest Convention has played a pivotal role in this confusion because it does not qualify the right to arrest the offending ship when the claimant is not a maritime liener.

An example of the confusion the courts experience in connection with this issue can be found in the decision of the Cour d'appel de Rouen of June 19, 1934.[9] On the facts of the case, creditors supplied necessaries to the Liberian registered ship "Atlantic-Mariner" while it docked in a Spanish port. The order was given by the captain of the ship in writing, but it was mentioned that the necessaries were supplied on behalf of the charterers without any further specification. The charterers failed to pay the amount due. Creditors attempted to arrest the ship in connection with which the claim arose after the charter party had expired and the vessel delivered to the owners.

The Cour d'appel de Rouen allowed the arrest of the "offending" ship on the ground that in the absence of any restrictions in the text of the Convention, the expiration of the charter party does not deprive creditors of their right to arrest the chartered ship.[10]

It is evident, however, from Art. 9 of the Arrest Convention that such an interpretation is not in conformity with the spirit of the Arrest Convention and the intention of

its drafters. More specifically, Art. 9 explicitly states that the Convention shall not be construed "as creating any maritime liens which do not exist under such law [applied by the Court which had seisin of the case], or under the Convention on Maritime Liens and Mortgages, if the latter is applicable." There is, therefore, a double connection between the Arrest Convention and the 1926 International Convention on Maritime Mortgages and Liens[11] which France has also ratified[12], in the sense that:

(a) the Arrest Convention does not create any new maritime liens; and

(b) some of the maritime claims for which arrest is permitted under the Arrest Convention are recognized as maritime liens by the 1926 Convention on Maritime Mortgages and Liens.

Thus, any interpretation of the creditor's right to arrest the offending ship should be considered in the light of the above.

If the claim is in the nature of a maritime lien, arrest of the offending ship is permitted irrespective of any change of ownership or expiration of the charter party. The question of which law determines the existence and priorities between maritime liens in case of a conflict of laws is not yet solved[13], but in France the tendency is to apply the lex

fori.[14] French law recognizes the following as maritime liens:[15]

(a) court costs for the sale of the ship;

(b) costs of the harbour;

(c) wages of the master and crew;

(d) claims for salvage and general average;

(e) claims for collision, damage to ports, claims for personal injuries to the passengers and crew, claims for loss or damage to the luggage or goods carried on board the ship; and

(f) claims arising from contracts made by the master, out of the home port, in accordance with his legal power in view of keeping the ship safe or for the continuation of the voyage.

If the maritime claim is not a maritime lien, the right of the claimant to arrest the offending ship should be preserved as long as the conditions which created it remain the same. Therefore, if the shipowner who was liable on the claim has sold the offending ship, a creditor whose claim is not a maritime lien should not be entitled to arrest the ship in the hands of the new owner. Similarly, when the charterer is liable on the claim, arrest of the offending ship in the hands of the innocent shipowners should be permitted only during the period of the charter party.

For these reasons, with great respect, I think that the above decision of the Cour d'Appel de Rouen[16] although correct as to the result was erroneous as to the ratio decidendi. The court ought first to have examined whether the supply of necessaries was recognized as a maritime lien in France and only once such a lien was found to exist, to have permitted the arrest of the offending ship despite the expiration of the charter-party.[17]

9.2.2 Arrest of the "sister-ship".

If the offending ship cannot be arrested, a creditor may in the alternative arrest another ship of the defendant, the so-called "sister-ship". "Sister-ship" has a different meaning depending on the capacity of the person liable on the claim. According to article 3(1) of the Arrest Convention if the shipowner is liable on the claim, "sister-ship" is any ship in the same ownership as the offending ship. Article 3(4) of the Arrest Convention which defines the "sister-ship" when a person other than the shipowner is liable on the claim, is not very clear. French scholars have been divided on the meaning of this paragraph.

According to the first interpretation, article 3(4) of the Arrest Convention shall be construed as meaning that "sister-ship" is any ship belonging to persons having possession and control of the ship similar to that of the

registered owner.[18] These persons are according to this view either the demise charterer (alinea 1) or a time charterer with demise of the ship (alinea 2) but not a simple time charterer.[19]

According to the second interpretation, "sister-ship" is any other ship belonging to the person liable on the claim.[20] The supporters of this opinion argue that time charterers with demise of the ship are included in the term demise charterers of alinea (1) of para. (4). Therefore, alinea (2) refers to any persons other than the owner or demise charterer, i.e., time or voyage charterers.[21] Thus, if a time or voyage charterer is personally liable on a maritime claim, any of his ships will be subject to arrest, though only one of them may be arrested. This latter interpretation has gained ground recently and is consistently applied by the French courts.[22]

9.2.3 The notion of sister-ship in the context of shipping group companies: the theory of "group appearance".

The sister-ship provisions of the Arrest Convention have been undermined by the phenomenon of one-ship companies which comprise a group. The fact that every one-ship company has a distinct personality and that the ship is the only asset of the defendant company has resulted in limiting creditors to proceedings against the offending ship only. Nevertheless, arresting the offending ship may be difficult because either

the ship has been sold, or has sunk or is difficult to locate. Therefore, creditors of one-ship companies frequently require courts to extend the notion of sister-ship to other ships of the group fleet. They base their request on the following grounds:[23]

(a) Since the debtor company is a "dummy" corporation incorporated in the activities of the group and created only for organizational reasons, the group as a whole should be held liable and stand behind the liabilities of its constituent members.

(b) Since the ships belonging to the group companies are ultimately ships of the group, they are owned by the same person or persons and are therefore sister-ships.

French courts have responded to this need to protect creditors of one-ship companies by developing the theory of "group appearance". According to this theory, there is a presumption that related corporations appear to third parties as one single entity, the group;[24] therefore, the ships of the different one-ship companies are considered to be sister-ships and arrest is allowed.

The conditions to be fulfilled for the theory to apply are the following:

(a) There should be an external element which will constitute the basis for the group appearance.[25] Such an element

can be the fact that a company is controlled by another[26], or that the group companies have common address[27], or that the ships are operated by the same person[28], or even the fact that the debtor company and the ship under arrest have a common or similar name.[29]

(b) There should be good faith of the creditor in believing that he was dealing with the group as a single entity.[30]

This good faith of the claimant is presumed to exist once the external element of group appearance is established. Therefore, it is up to the group companies concerned to rebut this presumption by proving that either the companies do not have economic ties or the claimant is not acting in good faith.[31]

The leading case of the theory of group appearance is the decision of the Tribunal de Commerce de Rouen of April 1, 1980 with regard to the vessel "Aliakmon-Prosperity".[32] The facts of this decision are typical of what is sometimes described as "maritime fraud".[33] The shipping group Almar created several one-ship companies incorporated under the laws of flag-of-convenience countries, especially that of Liberia. Almar also owned 33 percent of a Dutch corporation which acted as charterer of some of its vessels. Aliakmon Maritime Corporation was one of these one-ship companies whose vessel was chartered to Duffel. As a result of unpaid necessaries

provided to the vessel on behalf of the charterer, the creditors, a French company, attempted to arrest as sister-ship a ship belonging to one of the corporations of the group Almar.

The defendant shipowning company of the sister-ship applied to set aside the arrest on the following grounds:[34]

(a) that the maritime claim arose in connection with a ship that belongs to a company different from that of the arrested ship; and

(b) since the charterer was personally liable on the claim the Convention permits the arrest either of the ship in connection with which the claim arose or of another ship of the time charterer.

The Court did not accept the above argumentation. On the facts of the case, since the chartering company had such close economic ties with the group, the Court presumed that the charter party was fictitious and, therefore, the ship was operated in reality by the shipowning company.[35] Furthermore, the different group companies were controlled by the same shareholders, had the same address in Liberia and their ships were operated by the same demise charterer. Therefore, the Court found that creditors got the impression that they were dealing with the group Almar whose vessels were considered to be "sister-ships" of the ship in connection with which the

claim arose.[36]

As a result, the Court did not apply para. (4) but para. (1) of Art. 3 of the Arrest Convention. The Court in treating the group Almar as one entity, held the group liable on the claim by extending the notion of "sister-ship" to any ship of the group fleet.

9.3 The protection of creditors of groups of companies under the domestic French law

Under the regime of the domestic French law both maritime and general creditors are entitled to arrest any of the ships owned by the person liable on the claim.[37]

A problem that arose under the domestic French law, was whether creditors could arrest the ship in connection with which the claim arose, when the charterer was liable on the claim. French scholars are divided on this issue.[38]

One school of thought, led by E. du Pontavice and R. Achard, argues that creditors can arrest the offending ship during the period of the charter party because the immobilization of the ship does not affect the right of a shipowner to collect the hire.[39]

R. Rodiere, on the other hand, has observed that only the charter party can tell whether a shipowner is entitled to collect the hire despite the arrest of the ship.[40] Therefore,

he is in principle against the arrest of the offending ship when the time charterer is liable on the claim.

French courts have adopted a middle position. If the creditor of the time charterer knew that he was contracting with the time-charterer and, therefore, issued a receipt in the name of the latter, such creditor cannot subsequently either arrest the chartered ship or invoke the theory of "group appearance". [41]

Furthermore, the theory of group appearance has been applied more easily under the domestic French law than under the Arrest Convention. This situation prevails because article 10(2) of the Law of June 18, 1966 establishes the presumption that in the absence of any publication of the charter party, the shipowner is deemed to operate the ship for his own benefit. [42]

FOOTNOTES

1. Art. 8(1)in conjunction with Art. 2 of the Arrest Convention. For a comment on the relationship between the Arrest Convention and French domestic law see A. Vialard, "La Saisie Conservatoire de Navire pour Dettes de l'Affreteur a Temps" (1985) D.M.F. 579 at 580-2 [hereinafter cited as Vialard]; also, W. Tetley, Maritime Liens and Claims (1985) at 440 [hereinafter cited as Tetley].

2. Vialard, supra, note 1 at 581; Tetley, supra, note 1 at 440; Trib. Com. Bordeaux, July 28, 1969, Lady-Laura, (1970) D.M.F. 111; Trib. Com. Saint-Nazaire, September 19, 1973, Rocco-Piaggio, (1978) D.M.F. 734; Cour d'appel de Rouen, July 19, 1984, Atlantic-Mariner, (1985) D.M.F. 167.

3. Art. 3(4) of the Arrest Convention. Also, Vialard, supra, note 1 at 582; Tetley, supra, note 1 at 440. Trib. Com. Bordeaux, July 28, 1969, Lady-Laura, (1970) D.M.F. 111; Cour d'appel de Rouen, April 15, 1982, GME-Atlantico, (1982) D.M.F. 744.

4. Vialard, supra, note 1 at 582.

5. Art. 1(4) of the Arrest Convention. See, also, Trib. Mixte Com. Noumea, November 17, 1979, La Bonita (1980) D.M.F. 223 at 225. The Court explicitly stated: "... selon la Convention internationale de Bruxelles de 1952, ... il n'est nullement necessaire que la creance soit certaine, liquide et exigible; qu'il suffit qu'elle soit simplement allegue par l'auteur de la saisie conservatoire."

6. R. Rodiere, Droit Maritime: Le Navire (1980) at paras 198-9 [hereinafter cited as Rodiere]; E. du Pontavice, Le Statut des Navires (1976) at paras 356-7. Also, Cour d'appel de Rouen, June 22, 1973, (1973) D.M.F. 91; Cour d'appel de Rouen, January 26, 1973, (1973) D.M.F. 544 at 548. Cour d'appel de Rennes, July 30, 1975, Pointe du Minou, (1976) D.M.F. 223; Trib. adm. Marseille, June 8, 1972, (1972) D.M.F. 740. Cour d'appel d'Aix, March 1, 1977, Daring, (1978) D.M.F. 529. It is at the judge's discretion, however, to grant a "saisie conservatoire": Rodiere, supra, at para. 402.

7. E. de Pontavice, Le Statut de Navires (1976) at para. 355

[hereinafter cited as du Pontavice].

8. The wording of section 21(4) of the Supreme Court Act, 1981, is, therefore, preferable in that it states clearly that the person liable on the claim at the time when the action arose shall be the beneficial owner at the time the action is brought.

9. Cour d'appel de Rouen, June 19, 1984, Atlantic-Mariner, (1985) D.M.F. 167.

10. Ibid. The Court stated: L'art. 3(4) de la Convention ne limite pas la possibilite de saisir le navire affrete a la seule periode de l'affretement, il interdit seulement la saisie d'autres navires appartenant aux proprietaires."

11. For the text of this Convention see M.N. Singth, International Maritime Law Conventions (1983) vol. 4 at 3053.

12. France brought this Convention into force by Law of February 19, 1949 replaced by the Law No. 67-5 of January 3, 1967.

13. Tetley, supra, note 1 at 550 et seq.

14. Rodiere, supra, note 6 at 142; see also, Cour d'appel d'Aix-en-Provence, December 3, 1983, Namrata, (1984) D.M.F. 743; Cour d'Aix, January 6, 1982, (1984) D.M.F. 341. By contrast, professor A. Vialard in "De Quelques Aspects Theoritiques du Regime les Privileges Maritimes" (1984) D.M.F. 323, is in favour of the law of the ship's flag. So are Battifol and Lagarde in Droit International Prive, 7th ed., (1983) at para. 503.

15. J. Villeneau in a summary of the French law on liens in Tetley, supra, note 1 at 577. The maritime liens are ennumerated in Art. 2 of the 1926 Convention on Maritime Liens and Mortgages, and art. 31 of Law No. 67-5 of January 3, 1967 by which France ratified the 1967 Convention. For more details see Tetley, supra, note 1 at 97, 126, 148, 198, 176, 187, 257.

16. June 19, 1984, Atlantic-Mariner, (1985) D.M.F. 167.

17. This solution was followed by the Cour d'appel d'Aix, December 3, 1983, Namrata, (1984) D.M.F. 743; Chambre

com. de la Cour de cassation, January 19, 1983, SICCNA, (1984) D.M.F. 328; Contra, Cour d'appel de Rouen, September 24, 1981, Jonan-Sky, (1983) D.M.F. 49. Also, see, Vialard, supra, note 1 at 584.

18. du Pontavice, supra, note 7 at para. 352.

19. The opinion of professor du Pontavice is based on a decision of the Cour d'appel de Mansourah (Egypt), March 15, 1969, (1971) D.M.F. 741 in which the Arrest Convention was applied.

20. Vialard, supra, note 1 at 583; B. Achard, Note on the decision of Cour d'appel de Rouen, June 19, 1984, Atlantic Mariner, (1985) D.M.F. at 167.

21. Ibid.

22. Cour de Cassation, July 17, 1984, (1985) D.M.F. 154; Trib. Com. Rouen, April 1, 1980, (1980) D.M.F. 426; Cass. Com., January 18, 1983, (1984) D.M.F. 328.

23. See P. Emo, Note on the decision of Trib. com. Rouen, April 1, 1980, Aliakmon-Prosperity, (1980) D.M.F. 426 at 429.

24. See the decision of the Trib. com. Marseille, April 27, 1976, Willy Reith, (1979) Dr. Europ. Transp. 634 [hereinafter cited as The Willy Reith]. The Court at p. 640 stated the theory of group appearance as follows: "Attendu qu'en vertu de la theorie de l'apparence dont la juisprudence fait ainsi application, une personne peut passer aux yeux de tiers pour titulaire de droits, d'un etat ou d'un pouvoir, alors qu'en realite elle ne l'est pas et si cette personne accomplit un acte juridique avec un tiers de bonne foi, cette acte pourra etre maintenu et declare opposable auveritable titulaire du droit, lorsque deux elements seront reunis pour constituer l'apparence juridique: un element materiel comportant tout les signes exterieurs de la situation veritable, un element psychologique constitue par l'erreur commise sur le vu de la situation exterieure." See also, Tribunal de Commerce de Marseille, April 27, 1976, (1976) Scapel 46; Trib. Com. Noumea, November 17, 1979, (1980) D.M.F. 227.

25. The Willy Reith, supra, note 24 at 640.

26. Ibid. See, also, Trib. Com. Rouen, April 1, 1980,

Aliakmon-Prosperity, (1980) D.M.F. 426 [hereinafter cited as The Aliakmon-Prosperity].

27. The Aliakmon-Prosperity, supra, note 26 at 427.

28. Ibid.

29. See P. Marquet, Note on the decision of the Cour d'appel de Rouen, April 15, 1982, (1982) D.M.F. 744 at 749.

30. The Willy Reith, supra, note 24 at 640.

31. The Aliakmon-Prosperity, supra, note 26 at 427.

32. (1980) D.M.F. 426 affirmed by Cour d'appel de Rouen, October 27, 1983, (1984) D.M.F. 238.

33. A. Tinayre, "Le Fraude Maritime et le Connaissement", Communication a l'Association Francaise du Droit Maritime (A.F.D.M.) (1983) D.M.F. 365.

34. Trib. Com. Rouen, April 1, 1980, Aliakmon-Prosperity, (1980) D.M.F. 426 at 427.

35. Ibid. See also, Cour d'appel d'Aix, February 26, 1981, Atrytone, (1982) D.M.F. 77 at 83.

36. Ibid. at 427.

37. Rodiere, supra, note 6 at para. 189; du Pontavice, supra, note 7 at para. 355.

38. Vialard, supra, note 1 at 587.

39. Du Pontavice supra, note 7 at para. 351; R. Achard, Note, (1984) D.M.F. 331; Chambre arbitrale maritime de Paris, decision No. 458, November 2, 1982, (1983) D.M.F. 246.

40. Rodiere, supra, note 6 at para. 189.

41. Cour d'appel de Pau, December 6, 1984, Spartan, (1985) D.M.F. 589.

42. See du Pontavice, supra, note 7 at para. 67. Cour d'appel de Rouen, May 11, 1984, Dover, (1985) D.M.F. 162; Cour de Cassation, May 10, 1983, Julia, (1984) D.M.F. 269.

CHAPTER TEN

THE PROTECTION OF CREDITORS OF AFFILIATED SHIPPING COMPANIES UNDER THE GREEK LAW ON ARREST OF SHIPS.

10.1 The sources of the Greek law on arrest of ships.

Like the French law, the Greek law on arrest of ships has a duality of sources. The first source is the Arrest Convention. The Convention is part of the Greek law by virtue of Legislative Decree 4570/1966, and applies to those cases that involve a ship flying the flag of a country which is a party to the Convention.[1] The other source of law is the domestic Greek law which applies to disputes between Greek parties or parties not covered by the Convention.[2]

10.2 Interpretation of the Arrest Convention by the Greek courts.

Greek courts have not dealt with the issue of whether the right of a maritime creditor to arrest the offending ship by virtue of Art. 3(1) of the Convention shall depend on the nature of the claim. The dominant opinion in the legal theory, however, is that the Arrest Convention implicitly recognizes the distinction of maritime claims to maritime liens and other claims.[3]

Under Art. 9 of the Greek Code of Private Maritime Law,[4]

the existence of maritime liens, as well as of other rights in rem, is determined by the law of the flag of the ship, but the priorities between them are determined by the lex fori, that is the Greek law.[5]

Greece has ratified neither the Brussels Convention of 1926 for the Unification of Certain Rules relating to Maritime Liens and Mortgages nor the 1967 Convention of the same title.[6] Greek legislation has severely limited the number of maritime liens for the purpose of protecting the mortgagee and enhancing the attractiveness of Greek ships as a financing proposition.[7] According to Art. 205 of the Greek Code of Private Maritime Law the following set of circumstances is considered to give rise to maritime liens:

(a) Custodia legis;[8]

(b) claims for master's and crew's wages;

(c) salvage;

(d) collision damages;

(e) special legislative rights.

Therefore, a creditor who tries to arrest a ship in Greece by virtue of Art. 3 of the Arrest Convention has to examine whether his claim is recognized as a maritime lien by the law of the flag of the ship. If so, his right to arrest the offending ship is unaffected by any disposition of the vessel;[9] otherwise, he may be obliged to establish prima facie

evidence that the same conditions that existed at the time when the cause of action arose still exist at the time that the action is brought.

Furthermore, Greek courts have interpreted Art. 3(4) of the Arrest Convention as only permitting the arrest of ships of demise charterers or of persons having possession and control of the ship similar to that of the registered owner.[10]

With respect to the problems created in the context of shipping group companies, particularly because of the phenomenon of one-ship companies, Greek courts have not developed a theory of "group appearance" such as that developed by the French courts.[11] Greek courts have attempted to circumvent the corporate entity doctrine by using the "siege reel" criterion of incorporation to attack one-ship companies.[12] Under Greek law, a company is recognized as a legal entity if it is incorporated under the law of the country where its real seat is, that is the source of the direction of the company.[13] The majority of the shipping companies controlled by Greek shipowners are incorporated in Panama and Liberia, but their source of management is Greece. Therefore, the Greek Supreme Court in its decision No. 461/1978[14] ruled that such shipping companies are de facto partnerships and, consequently, the individual or corporate shareholders will be jointly and severally liable for group

liabilities. Thus, in that case, the parent company was held liable for the liabilities of its wholly-owned subsidiary with the result that any of the vessels of the former could be arrested.[15] Nevertheless, because of the significance of the shipping industry in the Greek economy, soon after the above decision of the Supreme Court the Greek Parliament passed a bill which introduced for shipping companies, specifically, the criterion of the country of incorporation.[16] In conclusion, therefore, one can say that Greek courts have interpreted the provisions of the Arrest Convention narrowly without taking into consideration the economic reality of shipping group companies.

10.3 The domestic Greek law on arrest of ships.

Under domestic Greek law, arrest of ships is permitted for any type of claim.[17] However, the claimant must show the court that

(a) he has a good arguable case;[18] and

(b) there is urgency, or that there is a risk, that without obtaining security he will be in a position to enforce any eventual, final and enforceable title.[19]

Personal liability of the shipowner whose ship is under arrest is required in principle.[20] Nevertheless, a ship may be arrested for libilities of the demise charterers, but in that case the claim has to arise in connection with the

operation of a ship.[21]

Of significant importance for creditors of affiliated group companies is the requirement that the existence of a charter-party must be recorded with the Shipping Register.[22] If not recorded, the shipowner is presumed to operate the ship for his own benefit.[23] In the context of shipping group companies such a requirement means that a shipowner cannot assert the existence of a fictitious charter-party in order to exonerate himself from personal liability. Third parties have the option either to rely on this presumption or to accept that despite the lack of publicity the ship was de facto operated by a demise charterer. Such de facto operation of a ship may happen when, for example, the operator is directly involved with the negotiation and conclusion of contracts of affreigtment, employment of crew, or receives all the profits from the operation of the ship.[24]

Furthermore, the practice by one-ship companies of transferring a ship from one company to another corporation of the group, so as to avoid arrest, has been attacked under Art. 479 of the Greek Civil Code. This article provides that where through a contract the entire assets or all of the shares are transferred, the transferee is responsible up to the value of the property transferred for the debts of the transferor pertaining to the property so transferred.[25]

Since in one-ship companies it is very common that the ship is the whole property of the company, Greek courts have consistently applied this provision to hold the acquiring company liable for the obligations, of the buyer. The courts, in holding the purchaser company responsible, require one more element, i.e., that the acquiring company knew that the ship it obtained was the only asset of the transferor. Nevertheless, because of the widespread practice of one-ship companies, and especially when the transfer is between companies of the same group, this knowledge is held to exist constructively.[26]

FOOTNOTES

1. Art. 8(1) of the Arrest Convention. For details about the arrest of ships in Greece see, P.C. Panagopoulos, Maritime Law vol. 1 (1976) at 39 et seq.; Gr. J. Timagenis, "Arrest of Ships in Greece" [1984] L.M.C.L.Q. at 90-100 [hereinafter cited as Timagenis].

2. Greek courts have not made use of art. 8(2) of the Arrest Convention which allows the arrest of a ship flying the flag of a non-contracting state. See, Timagenis, supra, note 1 at 90.

3. C.N. Rocas, Maritime Law (1965) at 125, 134 (in Greek).

4. Art. 9 of the Greek Code of Private Maritime Law (G.C.P.M.L.) reads as follows: "Rights in rem shall be governed by the law of the state whose flag she flies." translation from Th. B. Karatzas & N.P. Ready, The Greek Code of Private Maritime Law (1982) at 6 [hereinafter cited as Karatzas and Ready].

5. E.A. 1036/ 1974, 25 EEmp. D. at 418; E.A. 1064/1974, 2 END at 213; E.A. 4383/1974, 26 E Emp. D. at 477; for details see A. Antapassis, "Jurisprudence Maritime Hellenique", (1978) D.M.F. at 51-2. Contra, P.P.P. 300/1973, (1973) Argo at 47; P.P.P. 439/1973, 25 E Emp. D. at 416; P.P.P. 752/1973, 2 END at 15 where the Court accepted that the ranking is also governed by the law of the flag of the ship.

6. For the text of these two Conventions see M.N.Singth, International Maritime Law Conventions, vol.4 (1983) at 3053 and 3059 respectively.

7. A. Antapasis, "Jurisprudence Maritime Hellenique" (1978) D.M.F. at 51-2; Sotiropoulos from W.Tetley, Maritime Liens and Claims (1985) at 561.

8. Art. 38 of Law 4502/1966.

9. Art. 207 G.C.P.M.L. reads as follows: "If a ship is alienated by contract, a lien shall continue to exist provided it is recognized in a judgement given against the transferee of the ship, but it shall be extinguished if the relevant action is not brought within three months

from the contract of alienation being registered in the register of ships."

10. E.P.A. 639/1979, 31 E Emp. D. 324 at 326.

11. See, Chapter Nine, infra.

12. There are two theories as to the capacity of a legal person. According to the first theory the capacity of a legal person is determined by the law of the country of incorporation, whereas, according to the second, it is determined by the country of its real seat.

13. Art. 10 of the Greek Civil Code.

14. 1978 EEmp. D. at 416. See also, P.P.P.A. 1712/1975, 3 END at 456. P.P.P.A. 333/1975, 1 END at 274; P.P.P.A. 13528/1975, 3END at 533; E.P.A.A. 7064/1975, 4 END at 529. For more details see A. Antapassis, "Jurisprudence Maritime Hellenique" (1978) D.M.F. at 48-9.

15. A.P.A. 401/1978, (1978) E Emp. D. at 416.

16. Law 791/1978: Greek Official Gazette: A. 309/6.7.1978. Also, the E.E.C. Convention on the Mutual Recognition of Companies and Legal Persons of February 29, 1968 which likewise adopts the incorporation test as its guiding principle [(1969) 12 Bull. E.C. Suppl. No. 2]. The Convention is not yet in force.

17. Greek Civil Code (G.C.C.) article 633 in conjunction with art. 720.

18. G.C.C. art. 690.

19. G.C.C. art. 688.

20. Art. 102 of the G.C.P.M.L. which reads as follows: "... creditors shall not be entitled to bring proceedings in personam against the shipowner, or take protective or executory measures, any measures already taken being ipso iure annulled." From Karatzas & Bealy, supra, note 4.

21. Art. 106 of the G.C.P.M.L. The Act speaks about a "ship-operator" which includes a demise charterer but not a time or voyage charterer. However, the term is much broader and in some cases it is held to be equivalent to the English expression "disponent owner".

22. Art. 105 of the G.C.P.M.L.

23. Ibid. See, also, C. Rocas, "Jurisprudence Hellenique" (1965) D.M.F. at 440-5.

24. Gr. Timagenis, "Recent Greek Court Decisions of Interest to International Maritime Lawyers" [1985] 16 Journal of Maritime Law and Commerce at 276 [hereinafter cited as Recent Greek Court Decisions].

25. Recent Greek Court Decisions, supra, note 24 at 275; E.P., 1220/1982, (1983) 11 ENΔ 66.

26. Ibid.

CHAPTER ELEVEN

THE PROTECTION OF CREDITORS OF SHIPPING GROUP COMPANIES UNDER THE U.K. LAW ON ARREST OF SHIPS

11.1 The source of the U.K. law on arrest of ships.

Arrest of ships in Britain is subject to the jurisdiction of the Admiralty Court.[1] In Admiralty one can proceed either *in rem* or *in personam*.[2] The peculiarity of the Admiralty jurisdiction is, however, the action *in rem*; i.e., one can disregard the question of whether or not the defendant is subject to the jurisdiction of the court and where one of his vessels comes within grasp, one can proceed against the ship.[3] The origin of this peculiar jurisdiction was the existence of a maritime lien and, therefore, initially in Britain arrest of ships was permitted only for those claims recognized as maritime liens.[4]

The *Administration of Justice Act, 1956*[5], as amended by the *Supreme Court Act, 1981*[6], brought the British legislation closer to the regime of the *1952 Arrest Convention*.[7] The arrest procedure has been extended to a great number of claims arising in connection with the operation of a ship.

Nevertheless, since the U.K. actions *in rem* have always been connected with Admiralty jurisdiction, the right to

arrest a ship is a privilege only available to maritime creditors. In fact, general creditors, were deprived of the benefit of obtaining security from any assets of their debtor until 1975 when Lord Denning introduced the Mareva Injunction.[8]

11.2 Relationship of the Supreme Court Act with the Convention.

The Supreme Court Act of 1981 is a difficult enactment to interpret. Both the Supreme Court Act and the Administration of Justice Act have raised many issues, some of which have not yet been solved.[9] Therefore, it is of great practical importance to examine whether it is possible to interpret the ambiguous provisions of the British legislation by reference to the Arrest Convention.

In the U.K. the established rule was that any doubtful points of the domestic law could not be solved by reference to an International Convention unless the statute made an express reference to such source of law.[10] In the late 1960's, however, English judicial theory and practice showed a willingness to depart from the established rule in circumstances where a reference would assist in resolving ambiguity.[11] This latter development has been followed by the Admiralty and Appellate Courts in their efforts to interpret

the arrest of ships provisions of the 1956 and 1981 Acts.[12] As a result, although the Convention is not a superior source of law in the U.K. as it is in France and Greece, it has been used by British courts to clarify the doubts and ascribe to the Act the meaning Parliament must be assumed to have intended.[13]

11.3 The arrest procedures of the Supreme Court Act, 1981.

The core of the arrest provisions of the 1981 Act are paragraphs (3) and (4) of s. 21 which read as follows:[14]

Section (3):
In any case in which there is a maritime lien or other charge on any ship, aircraft or other property for the amount claimed, an action in rem may be brought in the High Court against that ship, aircraft or property.

Section (4):
In the case of any such claim as is mentioned in section 20(2)(e) to (r), where--
(a) the claim arises in connection with a ship; and
(b) the person who would be liable on the claim in an action in personam ("the relevant person") was, when the cause of action arose, the owner or charterer of, or in possession or in control of, the ship,
an action in rem may (whether or not the claim gives rise to a maritime lien on that ship) be brought in the High Court against--
(i) that ship, if at the time when the action is brought the relevant person is either the beneficial owner of that ship as respects all the shares in it or the charterer of it under a charter by demise; or
(ii) any other ship of which, at the time when the action is brought, the relevant person is the beneficial owner as respects all the shares in it.

Unlike the Convention, therefore, which provides for a unitary regime of arrest of ships, the Act provides two arrest

procedures: The one is at the exclusive disposal of maritime lienees[15] and the other is available to all maritime creditors.[16]

11.3.1 The arrest procedure of para. (3): Maritime lien.

The only condition to be fulfilled for section (3) to apply is the existence of a maritime lien.[17] Britain has neither ratified nor acceded to either the 1926 or the 1967 Conventions on Maritime Liens and Claims.[18] The U.K. courts apply the lex fori to determine the existence and priorities between maritime liens.[19] Therefore, arrest of ships according to s.21(3) is only permitted for one of the followingclaims which are recognized in Britain as maritime liens.[20]

(a) salvage services;

(b) collision;

(c) claims by master and crew for unpaid wages, and

(d) disbursements.

To these traditional maritime liens, should be added, the so-called special legislative rights, such as claims of the dock and harbour authorities and Marshal's fees and expenses.[21]

If the claim is one of the above maritime liens, the creditor is entitled to arrest the ship on which the lien exists irrespective of any disposition of the vessel. Nevertheless, quite often maritime lienees are not able to

enforce their lien upon the particular ship because either the ship is not within the jurisdiction or it has disappeared. The remedy to this problem is the "sister-ship" arrest.[22] Maritime lienees are entitled to arrest another ship of their debtor but in this case their lien is not extended to the "sister-ship".[23] Therefore, the conditions provided in section 21(4) of the Act have to be fulfilled.

11.3.2. The arrest procedure of para.(4): statutory lien.

The arrest procedure of para.(4) is available for claims enumerated in art. 20(2) letters (e) to (r) of the Supreme Court Act.[24] These claims correspond to a great extent with those of article 1(1) of the Arrest Convention.[25] The common characteristic of these maritime claims is that they permit an action in rem only in connection with the ship in respect of which the claim arose, i.e., the ship receiving the damage. Therefore, when the claim is based on damage received by a ship, the arrest procedure of art. 21(4) is not available and a claimant may proceed only in personam.[26]

The arrest procedure of s. 21(4) of the Supreme Court Act presents, however, some significant differences from that of article 3 of the Arrest Convention. In particular, there is a closer inter-connection between arrested vessel and personal liability in the British legislation than in the Arrest Convention.[27] Therefore, in addition to the existence of a

maritime claim s.21(4) of the Supreme Court Act, imposes the following additional conditions:

(a) personal liability of the owner, charterer or other person in possession or control of the ship at the time when the cause of action arose;[28] and

(b) beneficial ownership of the ship by the person liable at the time the action is brought.[29]

If all these conditions are fulfilled a claimant may arrest either the ship in connection with which the claim arose or a sister-ship. In either case only one ship may be arrested.[30] Nevertheless, defendants are not entitled to invoke the prohibition of arresting a second ship when claimants had previously arrested on good faith a ship which they believed to belong to the defendants. This rule was established in The Stephan J.[31] On the facts of this case plaintiffs had arrested an alleged "sister-ship" of the defendant shipowners. Shortly after the ship was released, because it became clear to the plaintiffs' solicitors that the information provided to them by Lloyd's Intelligence Service was erroneous with respect to her ownership. When plaintiffs attempted to arrest the offending ship, the Admiralty Registrar refused to issue a warrant on the ground that s. 21(8) of the Supreme Court Act permits the arrest of only one ship for the same cause of action. On appeal by the

plaintiffs, the issue went in front of the Admiralty Court. The Court held that on the facts of the case it would be unfair if erroneous information given and received in good faith, in answer to a proper inquiry, where to lead to a situation in which no ship belonging to the correct defendants could be arrested.[32]

11.4 Arrest of the offending ship.

The offending ship is defined differently in the Supreme Court Act than in the Arrest Convention. Unlike the Arrest Convention where offending ship is always the ship in connection with which the claim arose[33], under s. 21(4) of the Supreme Court Act this ship must be beneficially owned at the time the action is brought by the person liable on the claim. Therefore, in principle, if the ship was sold or the charterer was liable on the claim, the ship cannot be arrested in the hands of the innocent shipowner, irrespective of whether or not the charter-party had expired.

This rule has, however, two qualifications which bring the British legislation close to the provisions of the Arrest Convention.

The first qualification is that demise charterers are equated to beneficial owners according to s. 21(4)(i) of the Supreme Court Act, 1981.[34] The clear wording of the Supreme

Court Act ended a long dispute between the English courts as to whether or not demise charterers were considered to be beneficial owners of the ship they controlled.

In The Andrea Ursula[35] Brandon, J., was of the opinion that demise charterers having full possesion and control and getting all the benefits from the use of the ship were beneficial owners of it. However, in The I Congresso del Partido[36] and The Father Thames[37] Robert Goff, J., and Sheen, J., respectively, held that demise charterers did not qualify as beneficial owners. The Supreme Court Act adopted a middle position. Although demise charterers do not technically fall within the definition of beneficial owners, the Act implicitly recognizes that demise charterers are owners pro haec vice of the ship and, therefore, arrest of the offending ship in the hands of the demise charterers is allowed.[38] As a result, the Supreme Court Act differs from the Arrest Convention only in that when a time or voyage charterer is liable on the claim, arrest of the offending ship in the hands of the innocent owner or demise charterer is not possible.

The second qualification which brings the British legislation closer to the letter of article 3(1) of the Arrest Convention arises from the recognition as statutory rights in rem of those maritime claims for which section 21(4) applies.[39] Statutory rights in rem are considered in Britain

as a new sort of maritime lien created by the implementation of the Arrest Convention.[40] Statutory rights in rem and maritime liens, however, have to be distinguished.

Unlike maritime liens, statutory rights in rem do not come into existence upon the happening of the event on which a claim might be made, but upon the institution of proceedings.[41] If proceedings have not started, the right to arrest a ship is lost by any change of ownership of the vessel.[42]

The definition of the exact point of time at which the action is considered to be brought is, therefore, crucial for the protection of creditors. In The Monica S.[43] Brandon, J., ruled that an action in rem is initiated upon the issue of the writ. Therefore, this case established the rule that after that time a sale of the ship does not affect the right to arrest the ship for which the writ was issued.[44]

In the context of shipping groups of companies where the vessels of the group are easily transferred from one company to another company of the same concern, the emergence of such a statutory right in rem is of great importance to maritime creditors. A typical example where the ownership of the ship was transferred from one company to another company of the group after the issue of the writ, was The "Helene Roth".[45] Plaintiffs, a firm of ship handlers in Montreal, made

disbursements for the vessel Royal Clipper at the request of the shipowners. Since the latter did not pay the agreed amount, plaintiffs issued a writ to arrest the "sister-ship" Helene Roth which belonged to the same shipowners. After the issue of the writ, the shipowners transferred the ownership of the ship to another company of the same group. The dispute was as to whether the validity of the writ could be extended.

Mr. Justice Sheen, in front of whom the case was presented, permitted the renewal of the writ in rem.[46] In his words:

> "... if a writ in rem is issued before any change in the ownership of the ship has occured, a subsequent change of ownership would provide good cause for renewing the writ, unless those who have the conduct of the action have obviously not pursued it with diligence."[47]

11.5 Arrest of the "sister-ship"

The definition of "sister-ship" created problems similar to those confronted by the French and Greek courts in interpreting article 3(4) of the Arrest Convention. In particular it has been disputed whether "sister-ship" could be a ship belonging to a charterer being personally liable on the claim.[48] British authorities have approached the issue in three different ways.

According to the first approach, the emphasis placed on the ship, "sister-ship" should be any other ship in the same ownership as the offending ship.[49] Therefore, a ship

belonging to a charterer could not be considered as "sister-ship".

According to the second approach, the emphasis placed on the elements of control and possession of the ship, "sister-ship" is any other ship belonging to an owner or demise charterer liable on the claim.[50] Therefore, a ship belonging to time or voyage charterers could not be considered a "sister-ship".

According to the third approach, the emphasis placed on personal liability, "sister-ship" is any other ship belonging to the person liable on the claim.[51]

The issue was not directly considered by the British courts until recently. The judges, however, in their explanations of the effect of s. 3(4) of the Administration of Justice Act, 1956, have consistently used phrases which appear more consistent with the first approach, that of the inter-relationship between ownership of the offending ship and that of the "sister-ship". Nevertheless, the opinions of the judges were all obiter dicta and made without the benefit of full argument and without consideration of the kind of practical situation in which the issue under discussion would assume profound importance.[52]

In The Banco[53], Lord Denning laying down the principle that only one ship at a time may be arrested said:

> "The Admiralty jurisdiction in rem may be invoked either against the offending ship or against any other ship in the same ownership, but not against both."[54]

Shortly after the statute was passed, Mr. Justice Willmer in The St. Elefterio[55], said that the purpose of the Act is to confer

> "the right to arrest either the ship in respect of which the cause of action is alleged to have arisen or any other ship in the same ownership."[56]

In The Eschersheim[57] the ratio of the case was whether the plaintiffs claim fell within any of the paragraphs in s.1, subs.(1) of the Administration of Justice Act, 1956, thus would give the Court Admiralty jurisdiction. The following dictum of Lord Diplock had, however, a great impact on the interpretation of the sister-ship action in rem.

> "It is clear that to be liable to arrest a ship must not only be the property of the defendant to the action but must also be identifiable as the ship in connection with which the claim made in the action arose (or a sister-ship of that ship)."[58]

The Maritime Trader[59] was the first English case which directly dealt with the issue. In that case, Sheen J., followed the opinion of Lord Diplock in The Eschersheim[60], but he felt it necessary to emphasize that he reached the same conclusion simply because he felt compelled by authority to reject the broader interpretation of the sister-ship arrest.[61]

In the meanwhile, the matter came to the attention of a commonwealth and colonial court. In The Ledesco Uno[62], the High Court of Hong Kong favoured the second approach. The Court's decision was based on the principle that demise charterers have control and possession of the ship similar to that of the shipowners. Therefore, the Court held that the term "sister-ship" could be extended so as to cover any other ship belonging to demise charterers if the latter were liable on the claim.[63] In the words of the Court:

> "...the other ship wholly owned by a demised charterer may be described as a "sister-ship" in the like or the same ownership as a ship in connection of a claim on an action in personam."[64]

In The Permina 108[65] the Court of Appeal of Singapore viewed the statutory provision as unambiguous and saw no justification for a restrictive association between ownership of the offending ship and the "sister-ship".[66] In the result, the Court upheld that a "sister-ship" was any ship belonging to the person liable on the claim.[67]

This ambiguity as to the definition of the "sister-ship" seems to have been solved by a decision of the English Court of Appeal in the Span Terza.[68] The decision of the Court of Appeal, however, has to be regarded carefully because the appealhad to be heard ex parte and in a great hurry.

On the facts of the case, plaintiffs, owners of the vessel Neptunia, let their ship under a time charter to the

defendants owners of the vessel Span Terza. When defendants breached the time charter, the shipowners sought to arrest a vessel belonging to the time charterers as a "sister-ship".

The majority of the Court of Appeal considered that "charterer" in the relevant provision of the Administration of Justice Act, 1956 included all types of charterer. In the words of Sir David Cairns:

> "If only a demise charterer were meant, one would of course have expected the word "demise" to have been inserted before the word "charterer". Alternatively the word "charterer" could have been omitted altogether, because a demise charterer would be included in the words "the person in possession or control."[69]

Therefore, the majority construed section 3(4) of the Administration of Justice Act as entitling claimants to arrest either the offending ship or any other ship of the person liable on the claim.[70]

Lord Justice Donaldson, dissenting, favoured the interpretation of "charterers" as including demise charterers only. In reaching this conclusion, he relied on article 3(4) of the Arrest Convention which he thought limited its effect to "non owner-like charterers", i.e., demise charterers.[71] It should be mentioned that the wording of the Supreme Court Act, 1981 is different from that of the Administration of Justice Act, 1956. The phrasing of s. 3(4)(b) of the 1956 Act focused on the ship in connection with which the claim arose and, therefore, defined "sister-ship" as a ship "beneficially owned

as [the offending ship] aforesaid". On the contrary, the phrasing of the Supreme Court Act focuses on the person liable on the claim and defines "sister-ship" as a ship beneficially owned by the relevant person. If the term "relevant person" were limited to owners or demise charterers only, a claimant having a claim against the time or voyage charterers could arrest neither the offending ship nor a "sister-ship".[72] Therefore, the broad interpretation of the term "sister-ship" so as to cover any ship owned by the person liable seems to be necessary. The Supreme Court of Hong Kong has accepted this interpretation in The Sextum.[73] In that case the Court overruled the decision in The Ledesco Uno[74] and followed the majority of the Court of Appeal in The Span Terza.[75]

11.6 The notion of sister-ship in the context of shipping groups.

The most important difference between the Arrest Convention and the Supreme Court Act, 1981 is the requirement of beneficial ownership of all the shares of the ship by the person liable on the claim.[76]

The term "beneficial ownership" was introduced for the first time by the Administration of Justice Act[77] as an attempt to take into consideration cases where the legal title to a ship is in one person whereas the equitable title, the

real ownership interest, is in another.[78] Typical examples of a beneficial owner are the beneficiary under a trust, and the unregistered owner.

There is debate in Britain as to the meaning of the term "beneficial owner" in the context of shipping groups. In particular it is disputed whether or not the group as a single entity could be considered a beneficial owner of the ships registered in the name of the different one-ship companies that constitute the group.[79] There have been two approaches to the issue.

According to the first approach the corporate entity doctrine ~~is a barrier~~ to the examination of the beneficial ownership of the shares of the ship when the legal owner is a company.[80] The only way to treat the group as beneficial owner of the one-ship company is to lift the corporate veil of the individual one-ship companies that constitute the group when equity so requires.[81] This approach has been adopted by Sheen, J., in The Maritime Trader[82] and The Saudi Prince.[83]

In The "Maritime Trader"[84] plaintiffs let their vessel to a German chartering company. Due to a dispute arising from the charter party, the shipowners arrested a vessel belonging to a wholly-owned subsidiary of the chartering company. The problem that arose, therefore, was whether the arrested ship was beneficially owned in respect of all the shares therein by

the parent company, the person who would be liable on the claim in an action in personam.

Mr. Justice Sheen, refused to accept the parent company as beneficial owner of the ship or its subsidiary. Following the corporate entity doctrine, the learned judge held that a corporate shareholder is not the owner but only has an interest in the assets of the subsidiary company.[85] Therefore, the ship could be held to be in the same ownership only if the veil of the subsidiary could be lifted.[86] Nevertheless, on the facts of the case the wholly-owned subsidiary was operating as a shipowning company for over four years and, therefore, the evidence did not suggest that defendants "obscured from view a mask of fraud rather than the true face of the corporation."[87] In The "Saudi Prince"[88] plaintiffs, cargo-owners, sued the shipowners for damages to their cargo. In order to obtain security for their claim, plaintiffs arrested the sister-ship Saudi Prince. Defendants applied to set aside the arrest on the ground that before the issue of the writ, the ship was transferred to another company of the group. One of the problems that arose was whether, despite the change of ownership, the ship was ultimately under the same beneficial ownership.

Mr. Justice Sheen found that on the facts of the case the Court ought to lift the corporate veil and hold that the ship

was under the same beneficial ownership despite the change of legal ownership.[89] In reaching this result Sheen, J., pointed out some factors which led him to consider that the dominating shareholder of the companies concerned was the beneficial owner of the ship. These factors were that:

(a) the dominating shareholder of the group used the different business names of the group companies indiscriminately, for the purpose of obnubilation;[90]

(b) in the Register book published by Lloyd's Register of Shipping the change of ownership of the ship was not recorded;[91]

(c) there was not a good business purpose for the vendor company to sell the ship to its subsidiary;[92]

(d) after the disputed change of ownership, the running, management and operation of the ship continued in exactly the same way as before;[93]

(e) there were no accounts produced by the acquiring company which might have shown that the company owned and operated the ship in reality;[94]

(f) the acquiring company had only three shareholders, the two of which were appointed as nominees merely to divest the principal shareholder of shares in name only.[95]

According to the second approach, the term "beneficial ownership" is a case of statutory piercing of the corporate

veil.[96] Therefore, courts are entitled to look behind the different corporate personalities of the one-ship companiesand if the economic reality so requires, establish that the ship under arrest is in the beneficial ownership of the group. This approach has been adopted by Slynn, J., in The Aventicum.[97]

On the facts of the case, plaintiffs were the consignees of a cargo of newsprint damaged on board the vessel Aventicum. After the cause of action arose, the ship changed legal ownership several times. When the cause of action arose the vessel belonged to Armadora, a Panamanian company which was owned by a company called Scalottas. Thereafter the vessel was transferred to Longan Shipping Ltd., which was also owned by Scalottas. A few months later, Lougan was purchased by Anglo-Norse, a company owned by eight Singaporeans and subsequently the vessel was transferred to Loquat Shipping Ltd., a company created by Anglo-Norse. The plaintiffs alleged that the different companies to which the ship was sold were part of a big shipping group and, therefore, the ship did not change any beneficial ownership.

Mr. Justice Slynn held that the term "beneficial ownership" entitled courts to neglect the corporate entity doctrine and examine whether the shipowning company is effectively owned by an individual or another company. In his

opinion, when there is a dispute as to the beneficial ownership of the ship, "the Court in all cases can and in some cases could look behind the registered owner to determine the true beneficial ownership."[98]; and he continued:

> "I have no doubt that on a motion of this kind it is right to investigate the true beneficial ownership... I of course remember the case of Salomon v. Salomon & Co., but of course it is plain that s.3(4) of the Act intends that the Court shall not be limited to a consideration of who is the registered owner or who is the person having legal ownership of the shares in the ship; the directions are to look at the beneficial ownership. Certainly in a case where there is a suggestion of trusteeship or a nominee holding, there is no doubt that the Court can investigate it."[99]

In examining, however, the controlling interest of these companies, Slynn, J., found that the acquisition of the ship by Anglo-Norse broke the chain of the same beneficial ownership.[100] He was of the opinion that the beneficial owners of Anglo-Norse were not the owners of Scalottas despite the fact that some evidence pointed out to the opposite conclusion.[101] The factors which the Court considered insufficient to rebut the presumption that Anglo-Norse was another affiliated company of Scalattas were the following:

(1) all the companies considered had the same address in Singapore;[102]

(2) the memoranda of agreements for the sale of the Aventicum to the different companies were the same;[103]

(3) every time the vessel was sold at the same price and the

mortgages were taken by the same bank;[104]

(4) throughout these changes of ownership the vessel was subject to a time charter, in each case between the sellers respectively and a holding company of the group;[105]

(5) the companies had some common directors and the same managers and solicitors;[106]

(6) the dominant shareholders of Anglo-Norse were directors of Longan prior to the sale of the ship to Anglo-Norse.[107]

From the two approaches mentioned above, the interpretation that Slynn J., gave to the term "beneficial ownership" is preferable for many reasons.

Firstly, it is suggested that lifting the corporate veil is not a legitimate technique to establish group liability when inequitable results follow from the application of the corporate entity doctrine.[108]

Secondly, beneficial ownership is a term much broader than lifting the corporate veil. Lifting the corporate veil covers those cases where the subsidiary was a device or sham designed to defraud the plaintiffs.[109] However, beneficial ownership covers not only those cases that there have been fraud or misrepresentation as to the existence of the subsidiary, but also those where a person (the parent company)

gets some benefits from the fact that another (the subsidiary) is under its control and direction. By limiting beneficial onwership to those cases only where the veil of the subsidiary can be lifted, courts in reality impose a much stricter condition than that laid down by the Act.

Thirdly, if the term beneficial ownership could be invalidated by the corporate entity doctrine in case the registered owner is a company and not an individual, the Act would lose much of its practical importance and would in reality apply only when the shipowner has not incorporated his business.[110]

In conclusion, one observes that apart from the dichotomy of interpretations of the term "beneficial ownership", there is no agreement among the English judges as to the criteria that could hold the group beneficial owner of the shares of the group ships. Some of the criteria that Sheen, J., considered relevant in The Saudi Prince were rejected by Slynn, J., in The Venticum. Therefore, creditors of shipping group companies encounter the same uncertainty as that of observed in the field of the U.K. company law in the application of the principle or arrest of ships.

FOOTNOTES

1. For the arrest of ships in Britain see inter alia: D.C.Jackson, Enforcement of Maritime Claims (1985) [hereinafter cited as Jackson]; W.Tetley, Maritime Liens and Claims (1985) [hereinafter cited as Tetley]; W.Goffey, "Arrest of Ships" [1975] L.M.C.L.Q. 34; A.M.Tettenborn, "The Time-Charterer, the One-Ship Company and the Sister-Ship Action in rem" [1981] L.M.C.L.Q. 507; S.J.Tabbush, "Arrest of Ships Owned by Charterers" [1982] L.M.C.L.... 585; D.C.Jackson, "Admiralty Jurisdiction--The Supreme Court Act 1981" [1982] L.M.C.L.Q. 236.

2. Jackson, supra, note 1 at 4, 5. P.T.Grime, Shipping Law (1978) at 13 [hereinafter cited as Grime].

3. Grime, ibid.

4. The Veldis (1936) P.51; 55 Ll.L.Rep. 255. Jackson, supra, note 1 at 8; Grime, supra, note 2 at 14.

5. 1956 (4&5) Eliz. 2, c.46.

6. 1981 U.K. c.54, schedule 7.

7. The injunction takes its name from its legal source, namely, Mareva Compania Naviera S.A. v. International Bulkcarriers S.A. [1975] 2 Lloyds Rep. 509. For more details about the Mareva Injunction see: Tetley, supra, at off note 1 at 445-450; Jackson, supra, note 1 at 187-191; Ch.Baker, "La Notion de la Saisie Conservatoire en Droit Anglais, la "Mareva Injunction" (1979) D.M.F. 111; F.Meisel, "The Mareva Injunction--Recent Developments" [1980] L.M.C.L.... 38; D.E.Charity, "Mareva Injunctions: A Lesson in Judicial Acrobatics" (1981) 12 J.M.L.C. 349; D.N.Rogers, "The Action in rem and Mareva Injunction": The Need for a Coherent Whole" (1983) 14 J.M.L.C. 513. The Mareva Injunction has been recognized by the Supreme Court Act, 1981, in section 37(3).

9. See, for example, the discussion as to the meaning of "sister- ship" arrest and the interpretation of the term "beneficial owner" in paragraphs 11.5 and 11.6, infra.

10. Regina v. Wilson (1877) 39 S.D. 42; Hogg v. Tove & Co.

Ltd. (1935) Ch. 497; for details see, R.D.Thomas, "The Sister-Ship Action in rem" [1979] L.M.C.L.Q. 158 at 160 [hereinafter cited as Thomas].

11. Saloman v. Commissioners of Customers and Excise [1967] 2 Q.B. 740; see Thomas, supra, note 10 at 160.

12. The Father Thames [1979] 2 Lloyd's Rep. 364 at 371. The Tolten (1946) 79 Ll. L. Rep. 349 where Scott, L.J., stated: "If there is a doubt about some rule or principle of our national law and one solution of the doubt would conform to the general law and the other would produce divergence, the traditional view of Admiralty judges is in favour of the solution which will promote uniformity. For this there are two good reasons, first because that course will probably be the true reading of our legal development, and, secondly, because uniformity of sea law throughout the world is so important for the welfare of maritime commerce that to aim at it is a right judicial principle."

13. The Andrea Ursula [1971] 1 All E.R. 821, [1971] 1 Lloyd's Rep. 145; The Banco [1971] 1 Lloyd's Rep. 49; The Escherheim [1976] 2 Lloyd's Rep. 1; The Lejesco Uno [1978] 2 Lloyd's Rep. 99; The Father Thames [1979] 2 Lloyd's Rep. 364; The Maritime Trader [1981] 2 Lloyd's Rep. 153 at 155; The Span Terza [1982] 1 Lloyd's Rep. 225 at 230; The Antonis Lemos [1985] 1 Lloyd's Rep. 283(H.L.).

14. They replaced section 3(3) and (4) of the Administration of Justice Act, 1956. In particular section 3(4) read as follows:
"In the case of any such claim ... being a claim arising in connection with a ship, where the person who would be liable on the claim in an action in personam was, when the cause of action arose, the owner or charterer of or in possession or in control of the ship, the Admiralty jurisdiction of the High Court ...may ...be invoked in an action in rem against:
(a) that ship, if at the time when the action is brought it is beneficilially owned as respects all the shares therein by that person, or,
(b) any other ship which, at the time when the action is brought, is beneficially owned as aforesaid."

15. Section 21(3) of the Supreme Court Act, 1981.

16. Section 21(3) of the Supreme Court Act, 1981.

17. It should be mentioned that personal liability of the shipowner is not always a condition for the creation of a maritime lien; for details see Tetley, supra, note 1; Jackson, supra, note 1.

18. For the text of these conventions see M.N.Singth, International Maritime Law Conventions vol. 4 (1983) at 3053 and 3059 respectively.

19. Banker's Trust Int'l v. Todd Shipyards (The Halkyon Isle) [1980] 2 Lloyd's Rep. 325, 1980 A.M.C. 1221. For details see Tetley, supra, note 1 at 545-550; Jackson, supra, note 1 at 17, 332 et seq.

20. F.D.Rose, "Summary of the U.K. law" in Tetley, supra, at 617.

21. Tetley, supra, note 1 at 46 et seq.

22. Section 21(4)(ii) of the Supreme Court Act, 1981.

23. Thomas, supra, note 10 at 167.

24. For a detailed analysis of these claims see Jackson, supra, note 1 at 37 et seq.

25. Claims as to the ownership and possession of the ship, claims between co-owners, claims in respect of a mortgage or charge on a ship or any claim for the forfeiture or condemnation of a ship can be enforced only against that particular ship: section 21(2) of the Supreme Court Act, 1981, which corresponds to art. 3(1) of the Arrest Convention.

26. D.C.Jackson, "Admiralty Jurisdiction--The Supreme Court Act 1981" [1982] L.M.C.L.Q. 236 at 239.; Tetley, supra, at 466.

27. S.J.Tabbush, "Arrest of Ships Owned by Charterers" [1982] L.M.C.L.Q. 585 at 589 [hereinafter cited as Tabbush].

28. Section 21(4)(b) of the Supreme Court Act.

29. Section 21(4)(i) and (ii) of the Supreme Court Act.

30. Section 21(8) of the Supreme Court Act. Also, The Banco

[1971] 1 Lloyd's Rep. 49; The Berny [1977] 2 Lloyd's Rep. 533; The St. Elefterio [1957] 1 Lloyd's Rep. 283; The St. Merriel [1963] 1 Lloyd's Rep. 63; The Stephan J. [1985] 2 Lloyd's Rep. 344; The Permina Samudra XIV [1978] 1 Lloyd's Rep. 315.

31. The Stephan J. [1985] 2 Lloyd's Rep. 344.

32. Ibid. at 346.

33. Art. 3(1) of the Arrest Convention.

34. Tabbush, supra. note 27 at 586-7; D.C. Jackson, "Admiralty Jurisdiction--The Supreme Court Act 1981" [1982] L.M.C.L.Q. 236 at 243.

35. [1971] 1 Lloyd's Rep. 145 at 147.

36. [1977] 1 Lloyd's Rep. 536 at 561.

37. [1979] 2 Lloyd's Rep. 364 at 367.

38. Tabbush, supra. note 27 at 586-7.

39. See Jackson, supra. note 1 at 207 et seq.

40. Ibid.; Grime, supra. note 2 at 39-40.

41. Ibid.

42. Ibid.

43. [1967] 2 Lloyd's Rep. 113.

44. Ibid. at 132.

45. [1980] 1 Lloyd's Rep. 477.

46. Ibid. at 480.

47. Ibid.

48. D.C. Jackson, "Admiralty Jurisdiction--The Supreme Court Act 1981" [1982] L.M.C.L.Q. 236 at 244-5. Tabbush, supra. note 27 at 585.

49. Tabbush, supra. note 27 at 585.

50. A.M. Tettenborn, "The Time Charterer, the One-Ship Company and the Sister Ship Action in rem" [1981] L.M.C.L.Q. 507 at 508 [hereinafter cited as Tettenborn].

51. D.C. Jackson, "Admiralty Jurisdiction--The Supreme Court Act 1981" [1982] L.M.C.L.Q. 236 at 245; Tabbush supra, note 27 at 587; Thomas, supra, note 10 at 162, 166.

52. Thomas, supra, note 10 at 166.

53. [1971] 1 Lloyd's Rep. 49.

54. Ibid. at 53.

55. [1977] 1 Lloyd's Rep. 283.

56. Ibid. at 285.

57. [1976] 2 Lloyd's Rep. 1.

58. Ibid. at 7.

59. [1981] 2 Lloyd's Rep. 155 [hereinafter cited as The Maritime Trader].

60. [1976] 2 Lloyd's Rep. 1.

61. The Maritime Trader, supra, note 59 at 156.

62. [1978] 2 Lloyd's Rep. 99.

63. Ibid. at 101, 104.

64. Ibid. at 104.

65. [1978] 1 Lloyd's Rep. 311.

66. Ibid. at 313.

67. Ibid.

68. [1982] 1 Lloyd's Rep. 225.

69. Ibid. at 231.

70. Ibid.

71. Ibid. at 230.

72. D.C. Jackson, "Admiralty Jurisdiction--The Supreme Court Act 1981" [1982] L.M.C.L.Q. 236 at 245; Tabbush, supra, note 27 at 587.

73. [1982] 2 Lloyd's Rep. 532 at 534-5.

74. [1978] 2 Lloyd's Rep. 99.

75. [1982] 1 Lloyd's Rep. 225.

76. The Arrest Convention speaks about mere ownership of the vessel and therefore it is up to the national courts to determine whether legal or beneficial ownership is meant. For details see Chapters Nine and Ten, ante.

77. Section 3(4) of the Administration of Justice Act.

78. The Andrea Ursula [1971] 1 Lloyd's Rep. 145 at 147; The I Congresso del Partido [1977] 1 Lloyd's Rep. 536 at 560: "I have reached the conclusion 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..." per R. Goff, J.

79. See Thomas, supra, note 10 at 167; Jackson, supra, note 1 at 76-8; Tettenborn, supra, note 50 at 509; S.K. Robinson, "Arresting the Misconception" [1982] L.M.C.L.Q. 261 [hereinafter cited as Robinson].

80. Robinson, supra, note 79 at 262-3; Jackson, supra, note 1 at 77.

81. Ibid.

82. [1981] 2 Lloyd's Rep. 153.

83. [1982] 2 Lloyd's Rep. 255.

84. [1981] 2 Lloyd's Rep. 153,

85. Ibid. at 157.

86. Ibid.

87. Ibid.

88. [1982] 2 Lloyd's Rep. 255.

89. Ibid. at 260.

90. Ibid. at 256.

91. Ibid. at 257.

92. Ibid. at 258.

93. Ibid.

94. Ibid. at 258-9.

95. Ibid. at 260.

96. Tettenborn, supra, note 50 at 509; Thomas, supra, note 10 at 167.

97. [1978] 1 Lloyd's Rep. 184.

98. Ibid. at 187.

99. Ibid.

100. Ibid. at 190.

101. Ibid.

102. Ibid. at 188.

103. Ibid.

104. Ibid.

105. Ibid.

106. Ibid.

107. Ibid. at 189.

108. See Chapter Fifteen, ante.

109. See discussion accompanying footnotes 80-95, ante; also, see Chapter Three, ante.

110. Tettenborn, supra, note 50 at 509.

CHAPTER TWELVE

THE PROTECTION OF CREDITORS OF SHIPPING GROUP COMPANIES UNDER THE CANADIAN LAW

12.1 The source of the Canadian admiralty law.

Canada has not ratified nor acceded to the 1952 Arrest Convention nor has it adopted the provisions relating to "sister-ship" arrest.[1]

In Canada, due to the British influence, arrest of ships is connected with the Admiralty jurisdiction of the Federal Court. A creditor who tries to arrest a ship has to comply with section 43 paragraphs (2) and (3) of the Federal Court Act[2] which reads as follows:

(2) Subject to subsection (3), the jurisdiction conferred on the Court by section 22 may be exercised in rem against the ship, aircraft or other property that is the subject of the action, or against any proceeds of sale thereof that have been paid in court.

(3) Notwithstanding subsection (2), the jurisdiction conferred on the Court by section 22 shall not be exercised in rem with respect to a claim mentioned in paragraph 22(2) (e), (f), (g), (h), (i), (k), (m), (n), (p), or (r) unless at the time of the commencement of the action, the ship, aircraft or other property that is the subject of the action is beneficially owned by the person who was the beneficial owner at the time when the cause of action arose.

12.2 Arrest of the ship in connection with which the claim arose.

12.2.1 Protection of maritime liegees.

Under the Canadian law a maritime creditor can arrest only the ship in connection with which the claim arose. This right to arrest the ship, however, depends on the nature of the claim. If the claim is recognized in Canada as a maritime lien the creditor is best protected from the practices of one-ship companies, because he is entitled to enforce his claim against the ship irrespective of any change of ownership.[3]

Canada is not a party to the 1926 International Convention on Maritime Liens and Mortgages nor to the 1967 Convention on the same subject.[4] Under Canadian law the following set of circumstances are recognized as sources of maritime liens:[5]

(a) costs and expenses for the arrest;[6]

(b) salavage;

(c) damage caused by a ship;[7]

(d) claims for seamen's and master's wages;[8]

(e) master's disbursements;[9] and

(f) pilotage.[10]

To these traditional maritime liens the so-called special legislative rights that are granted to some Canadian authorities by specific statutory provisions are added.[11]

In questions of conflict of lien laws, Canada recognizes the law of the place where the lien arose deeming the question

of whether the lien accrues or not to be substantive.[12] The ranking of liens is deemed to be procedural and therefore ranking is determined by the lex fori, i.e., Canadian law.[13] Once the lien is granted by the foreign law, enforcement of the lien is possible in Canada without need of personal liability of the shipowner.

In Marlex Petroleum Inc. v. The ship "Hai Rai" and Shipping Corporation of India Ltd.[14] plaintiffs tried to arrest the ship Hai Rai in Canada in order to enforce a maritime lien granted to them by the U.S. law for bunkers supplied to the vessel. The supply of bunkers was made on behalf of the charterers and, therefore, shipowners were not personally liable on the claim.

In the Court of the first instance, the Trial Judge did not permit the arrest of the ship on the ground that by virtue of section 43(3) a claim for necessaries could not be enforced by an action in rem where the owners of the vessel were not personally liable.[15] In deciding so, the Trial Judge considered The Stranghill[16] and The Ioannis Daskalelis[17], but distinguished them as cases in which, on the facts disclosed by the pleadings and statements of the Court, the owners of the vessel would have been personally liable.[18]

On appeal, the Federal Court of Appeal had to consider the problem of whether a maritime lien arising under U.S. law

could be enforced by an action in rem in Canada, although the owner was not personally liable.[19] The Court of Appeal reversing the decision of the Trial Judge held that both in The Strandhill[20] and The Ioanna Daskalelis[21] there was no suggestion that the personal liability of the shipowner was a condition for the recognition of the lien as enforceable in Canada; and the Court concluded:

> The limitations applicable to a mere statutory right in rem are not in principle necessarily applicable to a maritime lien. They are two different things... Otherwise, the limitation imposed by subsection 43(1) of the Act on the in rem jurisdiction of the Court with respect to a claim mentioned in para. 22(2)(m) -- that it shall not be exercised unless at the time of the commencement of the action the ship is beneficially owned by the person who was beneficial owner at the time when the cause of action arose -- would deprive the lien of one of its principal effects."[22]

12.2.2 Protection of other maritime creditors.

If the claim is not a maritime lien, maritime creditors may be entitled to arrest the ship in connection with which the claim arose, but in such a case they have to comply with the requirements of s. 43(3).[23] The conditions for this section's application are the following:

(a) existence of one of the claims mentioned in section 43(3). The enumeration is not exclusive, so that one may say that these claims cover practically any claim arising in connection with the operation of a ship;[24]

(b) personal liability of the defendant shipowners; and

(c) same beneficial ownership of the ship at the time when the cause of action arose as the time when the action is brought.[25]

The requirement of personal liability is not explicitly stated in section 43(3) of the Federal Court Act as a condition to arrest. Nevertheless, Canadian judges have interpreted section 43(3) as not altering the requirement of personal liability of the shipowners which existed prior to the enactment of the Federal Court Act.[26] As a result, when a claim is not a maritime lien, arrest of the ship for the liabilities of a time or voyage charterer is not possible in Canada.

It is not clear whether or not arrest of the offending ship for liabilities of the demise charterer is possible in Canada. The answer depends on whether or not demise charterers could be deemed to be "beneficial owners" of the chartered ship. The issue has not yet been examined by Canadian courts. One may wonder, therefore, whether Canada would follow the opinion expressed by R. Goff, J., in The I Congresso del Partido[27], or that of Brandon, J., in The Andrea Ursula[28] and statutorily enacted in s. 21(4) of the Supreme Court Act.[29]

Canadian courts have not thoroughly examined the term "beneficial ownership" in the context of shipping groups. In

"The Friedrich Busse"[30] the issue of whether or not the parent of the group could be held beneficial owner of the shares of the group fleet arose secondarily. Therefore, the opinion of the Court constitutes obiter dictum. In that case the claim was against the parent company whereas the ship arrested was owned by a wholly owned subsidiary of it. The Court, without analyzing the term "beneficial ownership" assumed that in the absence of any challenge from the shipowners, the parent company was the beneficial owner of the shares of the ship of its subsidiary.[31] Because of the widespread phenomenon of one-ship companies it is the task of the Canadian courts, therefore, to lay down the criteria of when a one-ship company is beneficially owned by its parent.

12.3 Statutory rights in rem in the U.K. and Canada.

A significant difference between the U.K. and Canadian Admiralty law is that whereas maritime claims enumerated in section 21(4) of the Supreme Court Act are considered to give rise to a statutory lien, those maritime claims of section 43(3) of the Federal Court Act are considered as giving rise to a statutory right in rem only.[32] The difference is of great practical importance because under the U.K. law, upon the issue of the writ the statutory lien is unaffected by subsequent dealings.[33] By contrast, the leading Canadian authorities have held that a maritime creditor whose claim is

not of the nature of a maritime lien, does not become a secured director and, therefore, his right to arrest the ship in connection with which the claim arose is affected by any change of the beneficial ownership. In Coastal Equipment Agencies Ltd. v. The "Comer"[34] Noel J., held that an

> "... action in rem does not give any privilege or lien or preference whatsoever, and the claimant for necessaries seems to me to be in the same position as an ordinary unsecured creditor."[35]

Noel J.'s view was adopted in Benson Bros. Ship-building v. The "Miss Donna"[36] where the Court held that arresting a ship did not give the necessariesman a statutory lien such as to make him a secured creditor.[37]

In conclusion, it seems that section 43 paras (3) and (4) of the Federal Court Act which provides for the right to arrest a ship, should be interpreted as permitting arrest of the offending ship only. However, if the claim is recognized as a maritime lien in Canada, then sub-section (2) applies and the claimant need prove only the existence of a maritime lien.[38] If the claim is not a maritime lien but is another claim arising in connection with the operation of a ship, subsection (3) applies. In this latter case, a claimant has to prove that the ship is under the same beneficial ownership and that the owner is liable on the claim.

FOOTNOTES

1. W. Tetley, Maritime Liens and Claims, (1985) at 466 [hereinafter cited as Tetley].

2. R.S.C. 1970 (2nd Supp.), c.10.

3. Orient Leasing Co. v. The Ship "Kosei Maru" [1979] 1 F.C. 670, 94 D.L.R. (3d) 668; McCain Produce Co. Ltd. v. The Ship M.V. "Rea" [1978] 1 F.C. 686, 80 D.L.R. (3d) 105; Marlex Petroleum v. The Ship "Hai Rai" and the Shipping Corporation of India Ltd. 1984 A.M.C. 1649, (1984) N.R. 1. See also, J.G. Castel, Canadian Conflict of Laws, 2d ed., (1986) ch. 12 at 126 et seq. [hereinafter cited as Castel].

4. For the text of these two Conventions see M.N. Singth, International Maritime Law Conventions, vol. 4 (1983) at 3053, 3059 respectively.

5. Tetley, supra, note 1 at 564.

6. Ibid. at 95; International Maritime Banking v. The Dora [1977] 2 F.C. 513; Osborn Refrigeration Sales & Service v. The Atlantean I [1979] 2 F.C. 661.

7. Tetley, supra, note 1 at 173. Goodwin Johnson Ltd. v. The Ship "Scow" A.T. & T. No. 28 [1954] S.C.R. 513; Lincoln Pulpwood Co. Ltd. v. M.V. Rio Casma [1935] Ex.C.R. 120; Ultramar Canada Inc. v. Pierson Steamship Ltd. (1982) 43 C.B.R. (N.S.) 9; [1983] E.T.L. 404.

8. Tetley, supra, note 1 at 103; Llido v. The Lowell Thomas Explorer [1980] 1 F.C. 339.

9. Tetley, supra, note 1 at 185; Sidley v. The Dominion (1986) 5 Ex.C.R. 190; Sylvester v. The Gordon Gauthier (1895) 4 Ex.C.R. 354.

10. Tetley, supra, note 1 at 203; Osborn Refrigeration v. The Atlantean I [1979] 2 F.C. 661; The Premier Heard (1856) 6 L.C.R. 493.

11. Tetley, supra, note 1 at 42 et seq.

12. The Strandhill [1926] S.C.R. 680; Todd Shipyards Corp.

v. Altema Compania Maritima S.A. et al. (The Ioannis Daskalelis) [1974] S.C.R. 1248, [1974] 1 Lloud's Rep. 174, 32 D.L.R. (3d) 571.

13. Ibid.

14. 1984 A.M.C. 1649, (1984) 53 N.R. 1.

15. 1982 A.M.C. 1395 at 1397.

16. [1926] S.C.R. 680.

17. 1973 A.M.C. 176, [1974] S.C.R. 1248, [1974] 1 Lloyd's Rep. 174.

18. 1982 A.M.C. 1395 at 1398.

19. 1984 A.M.C. 1649 at 1651.

20. [1926] S.C.R. 680.

21. 1973 A.M.C. 176, [1974] 1 Lloyd's Rep. 174.

22. 1984 A.M.C. 1649 at 1655,6.

23. It is inconceivable that a maritime lienee would try to arrest a ship by virtue of para. (3) for two reasons:
(a) unlike section 21(4) of the Supreme Court Act the Federal Court Act does not provide for "sister-ship" arrest;
(b) the lienee has to comply with the additional requirements of para. (3).

24. Martel, supra, note 3 at 127. See section 22(1) and opening words of section 22(2) of the Federal Court Act. Also, Anglophoto Ltd. v. The Ship Ikaros [1976] 1 F.C. 393, 66 D.L.R. (2d) 277; Santa Maria Shipowning and Trading Co. S.A. v. Hawker Ind. Ltd. and Bethlehem Steel Corp. [1976] 2 F.C. 325, 89 D.L.R. (3d) 699, 12 N.R. 69.

25. Section 43(3) of the Federal Court Act.

26. [1973] F.C. 1232 at 1236. See also, The Heiwa Maru v. Bird & Co. (1923) I.L.R. 78; The Mogileff [1921] P. 236; Coastal Equipment Agencies Ltd. v. The Comer [1970] Ex. C.R. 13.

27. [1977] 1 Lloyd's Rep. 536.

28. [1971] 1 Lloyd's Rep. 145.

29. See discussion in Chapter Eleven, ante.

30. 134 D.L.R. (3d) 201.

31. Ibid. at 263.

32. Tetley, supra, note 1 at 236-7.

33. The Monica S. [1967] 2 Lloyd's Rep. 113; for details see Chapter Eleven, ante.

34. [1970] Ex. C.R.13.

35. Ibid. at 31, 33. See, Tetley, supra, note 1 at 245.

36. [1978] 1 F.C. 379.

37. Osborn Refrigerator Sales & Service v. The Atlantean I [1979] 2 F.C. 661 at 680-1; Dredging v. The Calgary Catalina [1970] Ex.C.R. 1006 at 1008.

38. Marlex Petroleum Inc. v. The Ship Hai Pai and the Shipping Corporation of India Ltd. 1984 A.M.C. 1649 at 1656.

PART FOUR

SECOND THOUGHTS ON THE PROTECTION OF CREDITORS OF SHIPPING GROUP COMPANIES

CH. 13 The economic model behaviour of shipping groups.

13.1 Centralized and decentralized group model behaviour.

13.2 Inapplicability of the decentralized model of group behaviour to shipping groups.

CH. 14 The model legal approach to shipping groups.

14.1 Criticisms of the doctrine of lifting the corporate veil.

14.2 The application of the doctrine of lifting the corporate veil by the U.S. courts.

14.3 Illegitimacy of the doctrine of lifting the corporate veil in treating groups as single entities.

14.4 Critisim of the agency analysis.

14.5 Criticism of the theory of "group appearance".

14.6 The principles on which a shipping group legislation should be based.

14.7 The South African arrest of ships legislation.

CHAPTER THIRTEEN

THE ECONOMIC MODEL BEHAVIOUR OF SHIPPING GROUPS

13.1 The centralized and decentralized model of group behaviour.

The examination of the protection of creditors under the remedies of company law and the maritime principle of arrest of ships made it apparent that there is a growing number of cases in which shipping groups have been treated as single economic units and group liability established.

Nevertheless, although there is a common denominator in all the cases where group liability has been established, i.e., total domination of the subsidiary by the parent company[1], the legislations examined approach the issue of shipping group companies differently. On the one hand, those countries that adopt the corporate entity doctrine treat groups as single economic units only exceptionally by applying either the doctrine of lifting the corporate veil or the agency analysis.[2] On the other hand, those jurisdictions that adopt the economic entity doctrine treat groups as a complex relationship of rights and obligations, a particular aspect of which is the imposition of group liability.[3]

The choice to apply the economic or the corporate entity

doctrine to protect creditors of shipping group companies must be based on a careful examination of the economic and legal consequences of such a solution.

From an economic point of view the contradiction between the corporate and the economic entity doctrines reflects the dispute as to the model of group behaviour.[4] There are two opposite schools of thought as to the model of group behaviour.

The first model group behaviour called, for the purposes of this analysis, "centralized group behaviour" favours involvement of the parent company in the management of the subsidiary.[5] According to this approach, subjection of the interest of the subsidiary to the interest of the parent is a prerequisite for efficient management, rational organization and consequently group profit optimization.[6]

The second model group behaviour, called "decentralized group behaviour", favours that a multi-unit shipping enterprise ought to operate the individual units not as components of a single enterprise, but rather as individual "profit centers."[7] Under this approach, the profits of the group will be maximized by maximizing the profits of each constituent corporation. This can happen only if there is intra-group competition and only if the separate corporate units are treated as independent profit centers.[8]

From the laws examined, one observes that the E.E.C. legislation has clearly adopted the centralized model behaviour as the basis for regulating groups of companies. The U.K., Canadian and Greek law are closer to the decentralized model of group behaviour while the French theory of "group appearance" is mid-way between these two models.

13.2 Inapplicability of the decentralized model of group behaviour to shipping groups.

Between these two models, the centralized model of group behaviour appears to be the rule in the conduct of shipping enterprises. The decentralized model of group behaviour that is advanced by Prof. Posner, was patterned upon the behaviour of groups constituted by big public corporations.[9] The great majority of shipping companies, however, are privately traded.[10] The different structures of public and private corporations affects the behaviour of groups constituted by either type of company.

Large groups in which a decentralized group behaviour is observed, are characterized by two elements:

(a) many of the group corporations are not in the same line of business and, therefore, it is natural that in a group engaged in a number of unrelated businesses every company will function as an independent profit center;[11] and

(b) within publicly held companies there is such a diversity of interests among shareholders, creditors, managers and employees that the group public company is forced to a certain extent to function independently.[12]

On the other hand, in shipping groups these two elements are absent. Shipping group companies are engaged in the same line of business and their shares are in the hands of a few incorporators who are frequently also directors, and quite often creditors, of the group companies.[13] In many cases, the companies that constitute a shipping group are not independent producers of wealth but mere instruments of conducting the controlling interest's business. Therefore, the starting point of the E.E.C. group legislation, the presumption of subjection of the interests of the subsidiary to that of the group and the treatment of the group as a single unit, appear to be closer to the economic and managerial reality of shipping groups.

FOOTNOTES

1. See for example, The Saudi Prince [1982] 2 Lloyd's Rep. 255; The Willy Reith (1979) Dr. Europ. Transp. 634; Trib. Com. Rouen, April 1, 1980, Aliakmon-Prosperity, (1980) D.M.F. 426.

2. See discussion of British, Canadian, French and Greek laws in Part Two, ante.

3. See the E.E.C. proposals on group legislation in Chapter Eleven, ante. The economic entity doctrine has been also adopted by the German and Brazilian company law; for details see, F. Wooldridge, Groups of Companies: The law and Practice in Britain, France and Germany (1991).

4. For details, see J.M. Landers, "A Unified Approach to Parent, Subsidiary, and Affiliate Questions in Bankruptcy" (1975) 42 U. Chi. L. Rev. 589; R. Posner, "The Rights of Creditors of Affiliated Corporations" (1976) 43 U. Chi. L. Rev. 499 [hereinafter cited as Posner]; J.M. Landers, "Another Word on Parents, Subsidiaries and Affiliates in Bankruptcy" (1976) 43 U. Chi. L. Rev. 527 [hereinafter cited as Landers]; D.A. Wishart, "A Conceptual Analysis of the Control of Companies" (1984) 14 Melb. U.L. Rev. 601; F.H. Easterbook & D.R. Fischel, "Limited Liability and the Corporation" (1985) 52 U. Chi. L. Rev. 89.

5. Ibid. See also, H. Raiffa, Decision Analysis (1968) 238-295; P. Sanders, European Stock Corporation (1969) at 246.

7. Posner, supra, note 4 at 513.

8. Ibid. at 514.

9. Ibid. at 513. Landers, supra, note 4 at 532-3.

10. See Chapter One, ante.

11. Posner, supra, note 4 at 513-4

12. Landers, supra, note 4 at 533; D. Cowan Bayne, The Philosophy of Corporate Control (1986) at 23 et seq.

13. See Chapter One, ante.

CHAPTER FOURTEEN

THE MODEL LEGAL APPROACH TO SHIPPING GROUPS

The comparative analysis of the protection of creditors of shipping group companies in the jurisdictions examined has shown that the use of the doctrine of lifting the corporate veil, the agency analysis and the theory of group appearance contain many disadvantages in protecting the creditor from prejudice.

14.1 Criticisms of the doctrine of lifting the corporate veil.

The most significant drawback of the doctrine of lifting the corporate veil is that it does not provide predictable solutions.[1] Courts and commentators have failed to establish specific criteria as to when the corporate veil of the individual group companies has to be lifted and group liability established. The following are the reasons for the unpredictability of the criteria for the application of the doctrine:

Firstly, groups of companies present such a complexity and variety of issues that it is extremely difficult for courts to foresee in advance all the situations that the doctrine of lifting the corporate veil could apply.[2]

Secondly, unlike a group legislation which regulates the

entire group relationship, the doctrine of lifting the corporate veil touches only a particular aspect of the parent-subsidiary relationship, i.e., the liability of the parent for the obligations of its controlled subsidiary.[3] This fragmentary approach results in judges having to define the criteria for the application of the doctrine within the realm of the corporate entity doctrine, which is often contradictory and always difficult.

Thirdly, the doctrine is an equitable remedy. The definition of what is fair depends ultimately upon the subjective judgement of each judge. There is, therefore, a tremendous diversity of opinions on what are the contours of equity in the context of a parent-subsidiary relationship.[4] One should recall, for example, that some of the factors Sheen, J., found as establishing group liability in The Saudi Prince[5] were rejected by Slynn, J., in The Aventicum.[6]

The most striking example, however, of the unpredictability of the doctrine in the context of shipping groups of companies can be found in the U.S. case-law on shipping groups.

14.2 The application of the doctrine of lifting the corporate veil by the U.S. courts.

The U.S. approach to shipping group companies presents two characteristics:

firstly, although the corporate entity doctrine is followed, there have been an extremely large number of cases where the courts have pierced the corporate veil of the individual shipping companies and treated groups as single units;[7]

secondly, American courts have used a great variety of criteria to determine when it is equitable to pierce the corporate veil and establish group liability.

Echoing the decentralized model of group behaviour, the starting point of the American law is the presumption that shipping group companies function as independent profit centers. Therefore, related corporations are entitled to a presumption of separateness.[8] In order to rebut this presumption creditors have to prove that the group does not function in accordance with the decentralized model of group behaviour, but that there is a subjection of the interests of the subsidiary to those of the group.[9] In this respect, American courts have consistently held that mere opportunity to exercise control over the subsidiary is not sufficient, but creditors have to show actual domination of the subsidiary by

its parent.[10] Stock ownership by itself is, therefore, insufficient to charge a parent company for the obligations of its subsidiary.[11] Actual domination, on the other hand, can be proved if creditors fulfill the conditions of the so-called "two-prong test".[12]

The first condition, often termed the "formalities requirement", refers to such unity of interest and ownership that the corporate formalities of keeping separate corporate records, issuing stock, avoiding commingling of funds have not been preserved.[13]

The second condition, known as "the fairness test" refers to the notion that equity has to be restored when there is abuse of the corporate form.[14]

Nevertheless, while the definition of whether formalities are kept is a matter of fact depending upon the evidence of the claimant, the definition of what is fair is a very subjective issue. American courts have used a great variety of criteria to define the contours of equity in the context of a parent-subsidiary relationship.

In some cases American courts have held that it is unfair that the formalities were not kept.[15] In other cases the determining factor seems to have been the appropriation of business chances and opportunities by the other companies of the group to the disadvantage of the subsidiary company.[16] In

North Pacific v. Pyramid Ventures[17] the shipowners tried to enforce an arbitration award against the chartering company for breach of the charter party. Nevertheless, after the arbitation decision, the parent company shifted operations from the defendant corporation to other companies controlled by the group so that the chartering company was ultimately stripped of all its assets. Plaintiffs, therefore, asked the Court to pierce the corporate veil and establish group liability.

The Court in doing so, relied on a well-established U.S. rule, the "business opportunity rule". According to this rule directors or any controlling interest of a company is held accountable for appropriating opportunities or properties in which a corporation has a "tangible expectancy".[18] In the words of the Court:

> "Though no customers refused to deal with Bulkcarriers, and though no fault of its own, the company lost two lucrative charters-to its own agent and to a previously inactive corporation. It lost these charters because [the parent company] perceived the looming encumbrance of a judgement against Bulkcarriers and saw a simple, but seemingly effective, means of avoidance... [the parent] shifted operations among these companies as if they were one. The interest of justice requires that I treat them no differently."[19]

Other courts have focused on the undercapitalization of the dependent companies.[20] In Equilease Corp. v. Samson[21] a dispute arose between the underwriters of the vessels of the group and the one-ship companies that made up the group as to their capital structure. On the facts of the case, the parent

company of the group put itself ahead of other legitimate creditors by transferring its vessels to one-ship corporations and causing them to grant first preferred ship mortgages in its favour. The underwriters, therefore, required the Court to put aside the mortgages.

The Court found that the insurance company had previously had financial problems with the group and despite that it decided to enter into agreement with it.[22] The Court decided though to pierce the corporate veil on the ground that the one-ship companies were so grossly undercapitalized that creditors were deceived as to the financial position of the group companies.

> "Hence [the parent company] cannot put itself ahead of other legitimate creditors by transferring the boats to three controlled corporations, and then taking a preferred first mortgage on the vessels, the amount thereof representing capitalization of its investment in those vessels."[23]

In some other cases the crucial criterion was whether claimants were misrepresented as to the separate personality of the group company.[24]

In Eagle Transport v. O'Connor[25] shipowners obtained an arbitration award against charterers for breach of the charter-party. Since the chartering company was grossly undercapitalized and dominated by its parent, the shipowners requested the Court to pierce the corporate veil and establish group liability. The Court in that case arrived at a

conclusion contrary to that of Equilease Corp. v. Samson.[26] Although the court found that the company was in fact highly undercapitalized, it did not pierce the corporate veil because plaintiffs were aware of the defendant's undercapitalization and nevertheless consented to the charter-party agreement.[27]

> "...of particular importance ... was whether the plaintiff-creditor seeking to pierce the corporate veil of the debtor had been fraudulently misrepresented to believe that he was dealing with a financially responsible entity."[28]

In some other cases American courts have distinguished between contract and tort creditors and have treated the latter more favourably.[29] In these cases they have pierced the corporate veil and established group liability on the ground of sole stock-ownership despite the lack of evidence of domination of the subsidiary by its parent.

In The Amoco Cadiz[30], Standard Oil Company, an international oil company, had organized a fleet of tankers registered in different one-ship companies and operated by its subsidiary Amoco Oil Company. One of these one-ship companies, the Amoco Transport Company, was the registered owner of the vessel Amoco Cadiz which went aground in the territorial waters of France and caused one of the worst oil spillages in the history of sea transport. The French Government and other individuals whose business's were harmed by the pollution attempted to impose on the super-parent

personal liability for the damage done by the pollution. They succeeded. As the Court pointed out:[31]

> "where the parent has created a network of companies that come into existence and complement one another for the benefit of the parent, the parent can be held liable for the tortious acts of its subsidiaries."[Emphasis added]

In conclusion, one can observe that the American judges have used the doctrine of lifting the corporate veil in order to establish group liability more often and in a much broader sense than their U.K. and Canadian colleagues have. Nevertheless, the weakness of the "two-prong test" used by the U.S. courts has been the determination of the abstract notion of fairness. In several cases one finds not only contradictory judgements, but also that lower courts' determination have frequently been reversed by appelate courts applying precisely the same equitable criteria.[32]

14.3 Illegitimacy of the doctrine of lifting the corporate veil in treating groups as single entities.

It is suggested by scholars such as B. Welling and P. Martel that the doctrine of lifting the corporate veil is not a legitimate means to establish group liability.[33] The effect of the doctrine when applied in the context of groups of companies is to deny the distinct legal personality of the controlled companies and treat the subsidiaries of the group as instrumentalities of the cotrolling company. This effect

of the corporate entity doctrine has been attacked on two grounds.

Firstly, many corporate statutes specifically state that corporations have the rights of natural persons;[34] therefore, denial of their legal personality is not possible.

Secondly, many corporate statutes provide as well that the issue of a certificate of incorporation is to be taken as conclusive evidence that the corporation has come into existence.[35] Therefore, it is strongly argued that on a statutory basis, as well as through reliance on Salomon's case[36], judges simply do not have the power to ignore the separate existence of a corporation in the name of some unarticulated notion of justice and fair play.[37]

14.4 Criticism of the agency analysis.

The agency analysis is a much preferable technique to apply to group liability. In applying the agency analysis courts do not deny the legal personality of a group company, but instead they treat it as a fully existent legal person which, however, has subordinated its interests to those of the parent.

The major problem with the agency analysis is that only in very rare cases is there an explicit agency agreement. In all other cases courts have to set down the criteria according

to which the subsidiary is serving the role of the agent of the parent-principal.[38] It is in isolating those criteria establishing group liability that causes problems. The main obstacles in this respect are the presumptions of independent function of every corporation and the rule established in Salomon v. Salomon Co.[39], according to which a controlling interest cannot be held to be principal of the business of its controlled company. Therefore, the courts must distinguish between the situation where the company is acting as an agent of its controlling interest from those where the controlling interest is merely exercising the prerogative of control.[40] This distinction is very fine and not easily defined, especially because of the multiplicity of factors and situations that shipping group cases present. In order to circumvent this difficulty the followers of the doctrine of lifting the corporate veil propose a broad test of misrepresentation: the decisive point is whether the parent company or the directors of the dependent company misrepresented creditors as to the independent function of their company.[41] If "yes", then equity requires the protection of creditors by treating parent and subsidiary as sole entity. If there has been no misrepresentation, then the risk of subrogation of the interest of the subsidiary to that of the group is included in the price and, therefore,

creditors of shipping groups need not be protected.[42]

The drawback of the misrepresentation test is that it applies mainly to contract claimants who have, at least in principle, the opportunity to investigate the financial situation of the group company and stipulate a price that will reflect the higher risks they assume. This does not apply, however, to a very important category of creditors, tort claimants.[43] tort claimants. Usually, tort creditors do not have the opportunity to investigate prior to the moment when the cause of action arises whether or not the shipping company was part of a group, whether or not the group was treating the company as an independent profit center, or what the financial position of the company is.[44] Furthermore, not all contract creditors are given the possibility to investigate the financial situation of the shipping group company with which they have dealings.[45] In reality this possibility is given to a few sophisticated contractual creditors, like banks and other large financial institutions.[46] Ordinary contractual creditors may find that the costs of acquiring adequate information as to the function of the shipping group company are disproportionate to the value of the transaction, or may lack the necessary bargaining power to ask for additional guarantees from the group.[47] Therefore, the misrepresentation test covers only some of the cases where equity requires that

shipping groups be treated as single economic entities.[48]

In addition, the allocation of the burden of proof to creditors who in most cases lack access to evidence that could help them establish an agency relationship seems to be unjustifiable. The emphasis placed upon this procedural consideration was decisive in the outcome of most of the decided cases.[49] To shift the burden to the group company, the presumption of independent corporate existence must be done away with and group legislation established.

14.2 Criticism of the theory of "group appearance".

In comparison with the doctrine of lifting the corporate veil or the agency analysis, the theory of "group appearance" presents the significant advantage of shifting to the group companies the burden of proving that they were functioning independently.[50]

Nevertheless, the main drawback of the theory is that in some cases the theory exceeds the object of protecting creditors whereas in other cases it is too little to fulfill its function. The reason for this controversy is that the criteria used by the theory to establish group appearance do not always correspond to the economic reality created by groups.

In particular, French courts have held that the criterion of an external element of group appearance may be based on

real or apparent facts.[51] French courts have considered as apparent facts which could establish group liability, the similar name of two companies[52], their common address[53] or that the company liable on the claim and the ship under arrest had the same name leaving thus creditors with the impression that the ship belonged to the debtor entity.[54] In some of the above cases where group liability was based on an apparent group appearance, some of the companies considered were functioning independently in reality. Therefore, the underlying reason of protecting creditors, i.e., subjection of the interest of the subsidiary to that of the group, did not exist and the imposition of group-liability was unjustified.

Furthermore, the second critierion, that of the good faith of the creditors, may be seriously questioned in the case of contract creditors. The phenomenon of one-ship companies is so well known in the shipping industry that it is very doubtful whether a creditor could validly allege that his counter-party in the agreement was not the particular one-ship company but the whole shipping group.

14.6 The principles on which a shipping group legislation should be based.

The comparative examination of the doctrine of lifting the corporate veil, the agency analysis and the theory of "group appearance"indicates that a group legislation of the type which the E.E.C. proposals incorporate is the best solution to the problems created in the context of shipping group companies. Such statutory regulation has to allow shipping group companies under common control and direction to operate as one entity, but it must establish liability of this economic entity, the group, for the obligations of its participating members.[55]

In order to achieve these aims a statutory group legislation should be based on the following prinicples:

firstly, there should be a rebutable presumption that shipping companies under the same control constitute a group;

secondly, there should be recognition of the group interest as a result of which the parent company of the group should be given the power to direct its subsidiaries even to the latters' disadvantage; and

thirdly, group liability should be imposed. Therefore, when a group company cannot meet its obligations, creditors should be entitled to obtain satisfaction from the other companies of the group.

The advantages of a statutory solution to the protection of creditors of shipping groups or companies are both economic and legal.

Firstly, such a solution is in accordance with the economic reality created by the intra-group structure and behaviour.[56]

Secondly, the presumption that controlling and controlled company constitute a concern is not conclusive. The onus, therefore, is on the group companies concerned to produce the necessary evidence to prove that despite the existence of a controlling shareholding the companies were functioning independently.[57] This shift of burden of proof, from the creditors to the group company, is justified since it is easier for the company to produce evidence to rebut the presumption than it is for the creditor to produce evidence to sustain the presumption.

Thirdly, the imposition of group liability where the presumption of control is established does not only comply with the requirements of equity but also serves the other very important purpose of law, predictability.

14.7 The South African arrest of ships' legislation.

The above principles of statutory protection of creditors of shipping group companies have been incorporated in the

South African law on arrest of ships. As a result, the South African law on arrest of ships represents the most developed piece of maritime legislation with respect to shipping groups of companies. The Admiralty Jurisdiction Regulation Act 105 of 1983[58] provides that a maritime claim may be enforced by an action in rem:

(a) if the claimant has a maritime lien over the ship to be arrested;[59] or

(b) if the owner of the ship to be arrested would be liable to the claimant in an action in personam in respect of the cause of action concerned.[60]

If these conditions are fulfilled, a creditor may arrest either the "offending" ship or an "associated ship".[61] The novelty, therefore, of the South African legislation is the notion of "associated ship" which purports to defeat the practice of one-ship companies. In particular the following provisions of the Admiralty Jurisdiction Regulation Act 105 are apposite:

> Section 3(6):
> Subject to the provisions of subsection (9) an action in rem, other than such an action in respect of a maritime claim contemplated in paragraph (a), (b) or (c) of the definition of "maritime claim", may be brought by the arrest of an associated ship instead of the ship in respect of which the maritime claim arose.
> Section (7):
> (a) For the purposes of subsection (6) an associated ship means a ship, other than the ship in respect of which the maritime claim arose--
> (i) owned by the person who was the owner of the ship

concerned at the time when the maritime arose; or
(ii) owned by a company in which the shares, when the maritime claim arose, were controlled or owned by a person who then controlled or owned the shares in the company which owned the ship concerned.
(b) For the purposes of paragraph (a):
(i) ships shall be deemed to be owned by the same persons if all the shares in the ships are owned by the same persons;
(ii) a person shall be deemed to control a company if he has power, directly or indirectly, to control the company.
(c) If a charterer or subcharterer of a ship by demise and not the owner thereof, is alleged to be liable in respect of a maritime claim, the charterer or subcharterer, as the case may be, shall for the purposes of subsection (b) and this subsectionbe deemed to be the owner.

The Act, therefore, extends the notion of "sister-ship" so as to cover ships that belong to other shipping companies of the group. In order to achieve this goal the Act adopts a two-step approach.

Firstly, it stipulates that a person who directly or indirectly has the power to control a company shall be deemed to be in control of it.[62]

Secondly, it provides that ships that are owned by companies which are controlled by the same person are deemed to be associated ships and, therefore, as such are susceptible to arrest.[63]

The core of the South African legislation is the existence of power to control a company. The South African law provides a very broad definition of control and therefore, it is up to the courts to define its contours.[64] Accordingly,

South African courts have held that the "nature" of control exercised over a ship belonging to a group company other than that personally liable on the claim, implies overall control and not day to day management.[65] As to the degree of control required, the South African approach is that it is up to the courts to define it in concrete on the facts of each case.[66] The underlying rationale of the South African approach is that a quantitative threshold will always be a crude test and, therefore, proof of existence of control on the basis of qualitative criteria is preferable.

This latter point appears to be a major difference between the South African legislation and group regulation of the type contained in the E.E.C. proposals. In the E.E.C. group legislation the existence of control is not a burden that claimants must prove but there is instead a presumption that shareholding above a certain percentage leads to control.[67] The advantage of the South African legislation is flexibility whereas that of the E.E.C. proposals is certainty. In comparing these two approaches, it seems that the E.E.C. solution is preferable for the following reasons:

(a) access to evidence that will help creditors to establish control over the company concerned is not always possible. Therefore, it seems preferable as a matter of policy to establish a presumption that shareholding over

a certain threshold leads to a situation of control;

(b) since arrest of ships is a quick procedure available to creditors only for the purpose of obtaining security, the above presumption of control is more in conformity with the nature of this procedure whereas a detailed analysis of the degree of control is better when the case is decided on its merits;[68]

(c) the presumption of control on the basis of a quantitative threshold is not such a crude test as may initially appear.[69] The presumption is rebutable. Furthermore, the presumption covers those cases where the high participation of a company in the capital of another company probably leads to a control situation. In those cases where the quantitative threshold is not reached, creditors are still protected but they have to prove the existence of control.

FOOTNOTES

1. B. Welling, Corporate Law in Canada. The Governing Principles (1984) at 128 et seq. [hereinafter cited as Welling]; E.E. Palmer, D.D. Prentice & B. Welling, Canadian Company Law: Cases, Notes and Materials, 2d ed. (1978) at 3-15.

2. J.M. Landers, "Another Word on Parent, Subsidiaries and Affiliates in Bankruptcy" (1976) 43 U.Chi.L.Rev. 527 at 534; F.d. Easterbrook, "Limited Liability and the Corporation" (1985) 52 U.Chi.L.Rev. 89 at 109 et seq.

3. H. Motomura, "Protecting Outside Shareholders in a Corporate Subsidiary: A Comparative Look at the Private and Judicial Roles in the U.S. and Germany" (1980) Wash. L. Rev. 62 at 72.

4. St. Gates, "Disregarding the Corporate Entity in favour of Beneficial Ownership and Control" (1984) 12 Austl. Bus. L. Rev. 162-194.

5. [1982] 2 Lloyd's Rep. 200.

6. [1978] 2 Lloyd's Rep. 184.

7. For the application of the doctrine in the different States see: M.C. Paetrella, "Piercing the Corporate Veil in Michigan" (1983) 61 U. Det. J. Urb. L. 81-103; J. Brewster, "Piercing the Corporate Veil in Montana" (1983) 44 Mont. L. Rev. 91-111; J.F. Farrington, "Piercing the Connecticut Corporate Veil" (1983) U. Bridgeport L. Rev. 109-143; P.A. Carteaux, Corporations--Shareholders Liability-- Louisiana: A Balancing Test for Piercing the Corporate Veil" (1984) 58 Tul. L. Rev. 1089-1106; D.L. Speer, "Piercing the Corporate Veil in Maryland: An Analysis and Suggested Approach" (1985) 14 U. Balt. L. Rev. 311-334; S.J. Grishan, "Piercing the Corporate Veil in Alabama: In Search of a Standard" (1984) 35 Ala. L. Rev. 311-328.

8. See, E.A. Williams v. McAllister Brothers Inc. 1976 A.M.C. 558; American Renaissance Lines Inc. v. Saxis Steamship Co. 1974 A.M.C. 1375.

9. C.T.I. v. Uiterwyk Corp. 1983 A.M.C. 67 where the

Court stated:
"A presumption of separateness is afforded to interrelated corporations: in order to overcome the presumption and pierce the veil, plaintiffs must prove either total domination or fraudulence in the transaction."

10. The Neapolis 1968 A.M.C. 1565; Emile A. Williams v. McAllister Brothers Inc. 1976 A.M.C. 558; Crown Central v. Cosmopolitan 1979 A.M.C. 1654; Pitria Stat v. Monsanto 1984 A.M.C. 94; Kanian v. Berwind 1974 A.M.C. 131.

11. The Neapolis 1968 A.M.C. 1565; Crown Central v. Cosmopolitan 1979 A.M.C. 1654; Horgan v. Italsider S.p.A. 1981 A.M.C. 1293.

12. For details see, D. Barber, "Incorporation Risks: Defective Incorporation and Piercing the Corporate Veil in California" (1980) 12 Pac. L.J. 829 at 846 et seq. [hereinafter cited as Barbre]; W.V. Vitali, "A Further Tear in the Corporate Veil; Implied Indemnity by Shareholders" (1985) 15 Queensland Law Review 392. Also, Dow Chemical v. Rascator Maritime 1985 A.M.C. 523; Kirno Hill v. Holt 1980 A.M.C. 254; Fisser et al. v. Int'l Bank 1961 A.M.C. 307; Ross Ind. v. Gretke Oldendorff 1980 A.M.C. 1397.

13. Barber, supra, note 12 at 848.

14. Ibid. at 849.

15. See, Ariate Compania v. Commonwealth Tankship 1970 A.M.C. 1381; T.T.T. Stevedores v. Jagat Vijeta 1981 A.M.C. 2446.

16. See, Bordagain Shipping Co. v. Saudi-Amer. 1979 A.M.C. 1059; U.S. Barite v. Haris 1982 A.M.C. 925.

17. 1984 A.M.C. 685.

18. See, David J. Greene & Co. v. Dunhill International Inc. 249 A.2d 427, 434-5 (Ch.1968); Sinclair Oil Corp. v. Levien 280 A.2d 717 (Del. Sup. Ct. 1971).

19. North Pacific v. Pyramid Ventures 1984 A.M.C. 665 at 695 per F.G. Cassibry, D.J.

20. See, Fanfan v. Berwind 1974 A.M.C. 131; Ross Ind. v. Gretke Oldendorff 1980 A.M.C. 1397; Mobil Sales v. Xenakis 1980 A.M.C. 770.

21. 1984 A.M.C. 1591.

22. Ibid. at 1593.

23. Ibid. at 1599.

24. See, George W. Bennet Bryson & Co. v. Norton Lilly & Co. 1974 A.M.C. 2189; Fisser et al. v. International Bank 1961 A.M.C. 307; The Tug Michele 1974 A.M.C. 2637.

25. 1979 A.M.C. 1991.

26. 1984 A.M.C. 1591.

27. Eagle Transport v. O'Connor 1979 A.M.C. 1991 at 1993.

28. Per C.C. Hincks, Ct.J., in Fisser et al. v. International Bank 1961 A.M.C. 306 at 317, 282 F.2d 231 at 239.

29. See, The Amoco Cadiz 1984 A.M.C. 2123; U.S.A. v. Pusbey & Sons Inc. 1973 A.M.C. 2639. A contrary conclusion was, however, arrived at: Ine Luisa 1970 A.M.C. 319; Richard J. Stephenson v. Star Kist Caribe Inc. 1979 A.M.C.1459; Cunningham v. Rendez-Vous 1983 A.M.C. 1367; Andrew Martin v. Stork-Werkspoor 1980 A.M.C. 2459; Baker v. Raymond Int'l 1982 A.M.C. 2752.

30. 1984 A.M.C. 2123.

31. Ibid. For details on the application of the doctrine of piercing of the corporate veil to tort cases see: Note, "Should Shareholders be Personally Liable for the Torts of their Corporations?" (1967) 76 Yale L.J. 1190; R.B. Zimet, "The Validity of Limited Tort Liability for Shareholders in Close Corporations" (1973) 23 Am. U.L. Rev. 208; Barber, supra, note 12 at 850.

32. For a critical analysis of the U.S. application of the doctrine of lifting the corporate veil see, Zimet, supra, note 31 at 216 et seq.; A.S. Lopez, "The Alter Ego Doctrine: Alternative Challenges to the Corporate Form" 30 U.C.L.A. L. Rev. 129.

33. Welling, supra, note 1 at 131-140; P. Martel, "Et si le "Voile Corporatif" n'Existait pas?" 1985 45 R. du B. at 453.

34. See, for example, section 15(1) of Canada Business Corporations Act which reads as follows:
"A [legal person] has the capacity and... the rights, powers and privileges of a natural person." A similar provision is contained in article 62 of the Greek Civil Code.

35. See, for example, sections 9 and 249(2) of Canada Business Corporations Act.

36. [1897] A.C. 22 (Eng. H.C.)

37. Welling, supra, note 1 at 140.

38. Ibid. at 133 et seq.

39. [1897] A.C. 22.

40. E.E. Palmer, D.D. Prentice & B. Welling, Canadian Company Law: Cases, Notes and Materials, 2d. ed. (1978) at 3-22.

41. Welling, supra, note 1 at 146; R. Posner, "The Rights of Creditors of Affiliated Corporations" (1976) 43 U. Chi. L. Rev. 499 at 519 et seq. [hereinafter cited as Posner].

42. Posner, supra, note 41 at 503.

43. Ibid. at 519-520; J.M. Landers, "Another Word on Parents, Subsidiaries and Affiliates in Bankruptcy" (1976) 43 U. Chi. L. Rev. 527 at 534 [hereinafter cited as Landers]; Welling, supra, note 1 at 146.

44. Prof. Welling proposes the "neighbor" principle to protect tort creditors. According to this principle, a company must be capitalized so as to cover the reasonably foreseeable risks arising from its activities. Nevertheless, there is no agreement as to when a corporation is deemed to be adequately capitalized. There have been proposed two tests:
(a) the financial analysis test, and
(b) the insurance test.
for details see Welling, supra, note 1 at 148-9; Barber, supra, note 12 at 856-7; Zimet, supra, note 31 at 217.

45. Landers, supra, note 43 at 530.

46. Ibid. at 531, 534.

47. L.D. Anderson, Jr., "Tanker and Shipping Loans" in W.H. Baughn & D.R. Mandish, eds., The International Banking Handbook (1983) at 190.

48. Landers, supra, note 43 at 530.

49. See for example, The Aventicum [1978] 1 Lloyd's Rep. 184; The Maritime Trader [1981] 2 Lloyd's Rep. 153.

50. For details see Chapter Nine, ante.

51. See, The Willy Reith (1979) Dr. Europ. Transp.634. Also, J. Calais-Auloy, "Protection des Associes et Creanciers des Groupes de Societes en Droit Positif Francais" in Droit des Groupes de Societes ed. by Centre de Droit des Affaires de Rennes (1972) at 153.

52. Cour de Cassation, December 13, 1967, Immobiliere Lambert D. 1968, J, 337, PL.

53. Trib. Com. Rouen April 1, 1980, Aliakmon-Prosperity, (1980) D.M.F. 426.

54. P. Marquet, Note on the decision of the Cour d'Appel de Rouen, April 15, 1982, (1982) D.M.F. 744 at 749.

55. D. Aronofsky, "Piercing the Transnational Corporate Veil: Trends, Developments, and the Need for Widespread Adoption of the Enterprise Analysis" (1985) 10 N.C.J. Int'l L.& Comp. Reg. 31-66; see also, Chapter Seven, ante.

56. See Chapter, Thirteen, ante.

57. See C.M. Schmitthoff, "Group Liability of Multinationals" in K.R. Simmonds, ed., Legal Problems of Multinational Corporations (1957) at 62 [hereinafter cited as Schmitthoff].

58. For details see, A. Rycroft, "Changes in South African Admiralty Jurisdiction" [1984] L.M.C.L.Q. 417 [hereinafter cited as Rycroft]; International Bar Assotiation, ed., The Arrest and Enforced Sale of Ships in South Africa (1985) at 5 et seq. [hereinafter cited

as Arrest in S. Africa].

59. Section 3(4)(a) of the Admiralty Jurisdiction Regulation Act 105.

60. Section 3(4)b) of the Admiralty Jurisdiction Regulation Act 105

61. Section 3(5) of the Admiralty Jurisdiction Regulation Act 105.

62. Section 3(7)(a)(ii) of the Admiralty Jurisdiction Regulation Act 105.

63. Section 3(7)(b)(ii) of the Admiralty Jurisdiction Regulation Act 105. For details see Rycroft, supra, note 58 at 419.

64. Rycroft, supra, note 58 at 419.

65. E.E. Sharp & Sons Ltd. v. M.V. Nefeli, 1984 (3) 325 (c), cited in Annexure C of the Arrest in S. Africa, supra, note 58 at 1.

66. Zygos Corp. v. Salen Rederierna AB 1985 (2) 486 (c) cited in Annexure C of the Arrest in South Africa, supra, note 58 at 2.

67. See Chapter Seven, ante.

68. The term "arrest" is used in accordance with article 1 of the Arrest Convention.

69. See Schmitthoff, supra, note 57 at 82.

PART FIVE

STATE-SHIPPING ENTERPRISES: PROTECTION OF CREDITORS AND IMMUNITY

CH. 15 The phenomenon of state shipping enterprises

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Ch. 19 Immunity of state-shipping enterprises in Greece.

19.1 Arrest of ships owned by foreign states and state shipping companies.

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CHAPTER FIFTEEN

THE PHENOMENON OF STATE-SHIPPING ENTERPRISES

15.1 Involvement of states in shipping.

The traditional image of states according to which state activities were confined to those traditionally characterized as sovereign acts was abandoned many years ago.[1] The shipping industry, due to its strategic importance, was among the first business activities in which states were involved.[2] Both capitalist and socialist countries have been engaged in the maritime transport business, but the spectacular increase of the number of state-owned shipping enterprises is due mainly to the nationalized commercial fleets of Eastern bloc and Third World countries.

During the last decade the Eastern bloc countries have so expanded their shipping activities that it is believed that the Bloc's cargo fleet has a capacity over three to four times the capacity necessary to carry their national general cargo trade.[3] Furthermore, many Third World countries have seen the shipping industry as a vital sector for increasing their national income. In the early 1960s many Less Developed Countries (L.D.Cs) began to focus on the international shipping industry as a key mechanism of dependency.[4] A few

years later, in 1965, a Committee on shipping was formed within U.N.C.T.A.D. which recommended significant changes to the level and structure of freight rates and on the pattern of trade routes linking center and periphery.[5] When the Committee's recommendations were rejected by the maritime powers, L.D.Cs began programs to develop national fleets.[6] As a result many L.D.Cs have bought national fleets which they operate as state monopolies.

15.2 The structure of state shipping enterprises and the implications of sovereign immunity.

The heavy involvement of states in shipping led to a significant amount of litigation involving foreign sovereigns.[7] It is generally expected that this trend will continue, if not increase, because many state have shipping enterprises have adopted operation models similar to those used by privately owned shipping groups. An example of the fact that many state-owned shipping enterprises have a group structure similar to that of their private competitors is The I Congresso del Partido.[8]

In that case, a contract for the sale of sugar was made between a Cuban state trading enterprise known as "Cubazucar" as sellers and a Chilean company known as "Iansa" as buyers. The shipments of sugar from Cuba to Chile were made by several

Cuban vessels. The two vessels in connection with which the claim arose were the Playa Larga and Marble Islands. The first was owned by the State of Cuba, it was operated by state company, Mambisa, and was sub-chartered to the seller Cuban state company under a voyage charter.[9] The Marble Islands, on the other hand, was owned by a Liechtenstein corporation and flew the Somali flag. She was chartered on a demise charter to Mambisa, and Mambisa had sub-chartered her to another Cuban state enterprise on behalf of Cubazucar.[10]

What we see in this case is typical of the structure of nationalized shipping enterprises. The registered owner of the ship is the state or a state owned company; nevertheless, the operator of the ships that belong to the state or to its entities is another non-shipowning, state-controlled company. There is, in other words, a great similarity with the group structure of shipping companies operating in the capitalistic economies.[11] The state owned company which manages and operates the state-owned vessels plays the role of the non-shipowning holding company of the group which operates the group vessels in order to isolate the registered owners from the possibilities of liability in personam.[12] It is evident that the managing state-owned company is the key to understanding the functioning of state shipping enterprises, and therefore these "autonomous" governmental entities have to

be examined carefully.

From a legal point of view these entities have a separate legal personality which distinguishes them from government departments. Thus, they are able to sue and be sued, enter into contracts, be liable in tort, hold and dispose property, have their own name, and keep assets and liabilities distinct from those of the sovereign state.[13]

From an economic point of view, however, these entities are financially or bureaucratically dependent upon the state that created them. The state finances these entities either by making periodic appropriations or by providing them with capital assets, and generally the profits are remitted to the state.[14] Moreover, it is the state that exercises general direction over the entity in the sense that the directors of the entity are appointed by and report their activities to their government.[15] Therefore, the elements of uniform direction and control which justify the treatment of shipping groups as single economic entities[16] is present in state shipping enterprises. Nevertheless, the particular problem that state shipping enterprises create is the difficulty of bringing an action against astate, because of its sovereign immunity. The problems that arise in connection with the protection of creditors of state shipping enterprises can be narrowed down in the following three issues:

(a) whether or not creditors are entitled to attach any property of the state and in particular the ship in connection with which the claim arose;

(b) whether or not creditors are entitled to arrest a sister-ship of the offending ship; and

(c) whether or not sister-ship arrest can be given a broad meaning so as to include a ship belonging to a state entity other than that owning the offending vessel.

Since actions *in rem* against state-owned ships are intimately connected with the immunity of foreign states from suit in the courts of forum, it is necessary to make some general comments on the issue of sovereign immunity.

15.3 Immunity of states: trends in the modern law.

15.3.1 Immunity from jurisdiction and immunity from execution.

Sovereign immunity is two-fold in nature: it connotes that a state does not fall under the jurisdiction of foreign courts (immunity from jurisdiction), and that its property located in a foreign territory is not subject to attachment and execution (immunity from execution).[17]

The doctrine was formulated in the nineteenth century during which period states confined their activities to those traditionally recognized as being properly within the sphere of state duties and responsibilities.[18] The maxim *par in*

par em non habet jurisdictionem was justified by the principles of independence, equality and dignity of states.[19]

15.3.2 Absolute and restrictive immunity.

However, given the increasing involvement of states in industrial, financial and commercial activities, the doctrine of sovereign immunity has been subject to re-examination since the First World War. Generally speaking, there have been two trends as to whether sovereign immunity should be granted for activities of the state.

On the one hand, socialist nations, in accordance with their political philosophy and economic interest, adopt the doctrine of absolute immunity.[20] Therefore, they suggest that all acts of the state are jure imperii, and all state ships perform an exclusive public service, even if they are engaged in commercial operations.[21] The Soviet Union has pointed out many times that any restriction of the doctrine of sovereign immunity is "a device invented by bourgeois states for the specific purpose of wrecking ... and subjecting the Soviet economy to the economies of the capitalist states."[22]

Capital-market countries, on the other hand, adhere to the view that the doctrine of sovereign immunity was never intended to include the new and extended functions which governments are currently assuming. Therefore, in these countries it is accepted that a distinction should be made

between different types of state activity and, consequently, immunity should be granted only for acts of public and not for those of private nature.[23]

The core of the restrictive immunity doctrine, therefore, is the distinction between acta iure imperii and acta iure gestionis.[24] The underlying rationale of the distinction is that when a state engages in business in competition with private persons or corporations, this competition would be unfair if the competing state were not answerable in the courts of the state where the business is transacted.[25] According to this approach states engaged in commercial transactions are subject to the jurisdiction of the forum, and ships operated for commercial purposes are subject to arrest.

15.4 Immunity of state-owned ships: The 1926 Brussels Convention.

In the field of maritime law, the distinction between acta iure imperii and acta iure gestionis was adopted very early. The distinction, therefore, between state-owned vessels that serve a public purpose and those that are engaged in commercial transactions was stipulated in art. 11 of the 1910 Brussels Collision Convention[26] as well as in art. 14 of the 1910 Brussels Salvage Convention.[27]

Much more important in this respect is the 1926 Brussels

Convention for the Unification of Certain Rules Concerning the Immunity of State-Owned Ships.[28] At the core of the Convention are articles 1 and 2 which read as folows:

Article 1

Sea-going ships owned or operated by States, cargoes owned by them, and cargoes and passengers carried on State-owned ships, as well as the States which own or operate such ships and own such cargoes shall be subject, as regards claims in respect of the operation of such ships or in respect of the carriage of such cargoes, to the same rulesof liability and the same obligations as those applicable in the case of privately-owned ships, cargoes and equipment.

Article 2

As regards such liabilities and obligations, the rules relating to the jurisdiction of the Courts, rights of actions and procedure shall be the same as for merchant ships belonging to private owners and for private cargoes and their owners.

The regime of the 1926 brussels Immunity Convention, therefore, is based on a double distinction.

Firstly, it distinguishes between acts of a public and private nature and explicitly states that for claims arising in connection with the operation of state-owned ships or in respect of the carriage of such cargoes the restrictive immunity doctrine applies.[29]

Secondly, it distinguisnes between vessels used exclusively for governmental purposes and ships used for commercial purposes at the time when the cause of action arises.[30]

Therefore, a creditor can arrest a state-owned ship if

(a) his claim arose in connection with the operation of

the vessel or in connection with the carriage of cargoes[31], and

(b) if the offending ship was used at the time when the cause of action arose for commercial purposes.[32]

Nevertheless, it should be mentioned that by virtue of article 1 of the 1926 Brussels Immunity Convention sush issues as which is the offending ship or whether sister-ship arrest is permitted are solved by reference to the 1956 Arrest Convention.[33]

The 1926 Brussels Immunity Convention has been ratified by a comparatively limited number of countries. Of the countries under examination, Britain and France have ratified it while Greece has acceded to it. By contrast, Canada, the U.S. and the Eastern Bloc countries have neither ratified nor acceded to it.

FOOTNOTES

1. L.J. Bouchez, "The Nature and Scope of State Immunity from Jurisdiction and Execution" (1979)10 Neth. Yb. Int'l L. 3 at 6 [hereinafter cited as Bouchez]; H. Lauterpacht, "The Problem of Jurisdictional Immunities of Foreign States", 1951 B.Yb.I.L. 221; P.J. Kincaid, "Sovereign Immunity of Foreign State-Owned Corporations" (1976) Journal of World Trade Law 110.

2. See, generally, N. Matsunami, Immunity of State Ships (1924); Dickinson, "The Immunity of Public Ships Employed in Trade." (1927) 21 Am. J. Int'l L. 108; Note, " International Law--Immunity of Foreign Sovereign from Suit--Suit Against a Government-Owned Vessel", (1939) 39 Colum. L. Rev. (1939) 510.

3. A. Branch, Elements of Shipping, 5th ed. (1981) at 367 [hereinafter cited as Branch]; A.W. Calfruny, "The Political Economy of International Shipping: Europe versus America" (1985) 39 INT'L ORGANIZATION 79 at 103 [hereinafter cited as Cafruny]. Atlantic Council, The Soviet Merchant Marine: Economic and Strategic Challenge to the West, (1978).

4. Calfruny, supra, note 3 at 99; L.M.S. Rajwar et al., Shipping and Developing Countries (1971); U.N.C.T.A.D., "Establishment or Expansion of Merchant Marines in Developing Countries", TD/26/Supp. 1 (Geneva, 1967).

5. L. Juda, "World Shipping, U.N.C.T.A.D., and the N.I.E.O." (1981) 35 INT'L ORGANIZATION 493. Cafruny, supra, note 3 at 99, 103.

6. K.P. Simmonds, "Admiralty Practice under the Foreign Sovereign Immunities Act--A Trap for the Unwary" (1980) 12 J. Mar. L. & Comm. 109 at 109 [hereinafter cited as Simmonds].

7. Ibid.

8. [1983] A.C. at 279; [1981] 2 Lloyd's Rep. 367.

9. Ibid. at 370.

10. Ibid.

11. See generally Government Enterprise: A Comparative Study ed. by W. Friedmann & J. Garner (1970) at 303-314

[hereinafter cited as Friedmann]; P.C. Bouton, "The Liability of Foreign Government Entities: First National City Bank v. Banco Para El Commercio Exterior De Cuba" (1985) 8 B.C. Int'l & Comp. L. Rev. 127 at 129 [hereinafter cited as Bouton].

12. See Part Three, ante.

13. Friedmann, supra, note 14 at 315; Boulon, supra, note 14 at 129; United Nations Dept. of Economic and Social Affairs, "Organization, Management and Supervision of Public Enterprises in Developing Countries" 64 U.N. Doc. ST/TAO/M/65 [hereinafter cited as U.N. Study].

14. Friedmann, supra, note 14 at 321; Boulon, supra, note 14 at 130.

15. Friedmann, supra, note 14 at 320, 326; U.N. Study, supra, note 13 at 64.

16. See Chapter Four, ante.

17. Bouchez, supra, note 1 at 5.

18. Ibid. at 6

19. Ibid. at 7.

20. A.N. Yiannopoulos, "Foreign Sovereign Immunity" (1983) 57 Tulane L. Rev. 1274 at1290 [hereinafter cited as Yiannopoulos]; M. Osakwe, "A Soviet Perspective on Foreign Sovereign Immunities: Law and Practice" (1983) 23 Va. J. Int'l L. 13; M.M. Boguslavsky, "Foreign State Immunity: Soviet Doctrine and Practice" (1979) 10 Neth. Yb Int'l L. 167.

21. Yiannopoulos, supra, note 23 at 1290.

22. M. Singer,"Abandoning Restrictive Sovereign Immunity: An Analysis in Terms of Jurisdiction to Prescribe" (1985) 26 Harv. Int'l L.J. 1 at 6.

23. See generally: L. Condorelli and L. Sbolci, "Measures of Execution against the Property of Foreign States: The Law and Practice in Italy" (1979) 10 Neth. Yb Int'l L. 197; R. Higgins, "Execution of State Property: U.K. Practice" (1979) 10 Neth. Yb Int'l L. 35; K. Hirobe, "Immunity of State Property: Japanese Practice" (1979)

10 Neth. Yb Int'l L. 233; H.M. Kindred, "Foreign Governments before the Courts" (1980) 58 Can. Bar. Rev. 602; J.F. Lalive, "Swiss Law and Practice in Relation to Measures of Execution against the Property of a Foreign State" (1979) 10 Neth. Yb Int'l L. 153; S.D. Metzger, "Immunity of Foreign State Property from Attachment or Execution in the U.S.A." (1979) 10 Neth. Yb Int'l L. 131; I. Seidl--Hohenveldern, "State Immunity: Federal Republic of Germany" (1979) 10 Neth. Yb Int'l L. 55; H. Fox, "Enforcement Jurisdiction, Foreign State Property and Diplomatic Immunity" (1985) 34 Int'l & Comp. L.Q. 115.

24. Art. 1-14 of European Convention on State Immunity, May 16, 1972, 11 I.L.M. 470 (signed by a number of member states of the Council of Europe); art. 3 of 1954 Resolution of Institut de Droit International, 45 Annuaire (1954) Vol. II at 294; Bouchez, supra, note 1 at 8-10; section 1603 (d) of the Foreign Sovereign Immunities Act, 1976. For detailed studies of the F.S.I.A. see Simmons, supra, note 9 at 109-121; Yianopoulos, supra, note 23 at 1274 et seq.; G.M. Badr, "Recent Developments in the Dynamics of Sovereign Immunity" (1982) 30 Am. J. Comp. L. 678.

25. Sir Robert Phillimore in The Charkieh (1873) LR 4 A. and E 59.

26. For the text of the Convention see M.N. Singth, Int'l Maritime Law Conventions, vol. 4 (1983) at 2954 [hereinafter cited as Singth].

27. For the text of this Convention see Singth, supra, note 29 at 3084. The idea that state-owned commercial vessels are not entlited to immunity was also embodied in the 1958 Geneva Conventions on the High Seas and the Territorial Sea and the Contiguous Zone.

28. For the text of this Convention [hereinafter cited as 1926 Brussels Immunity Conventtion] see Singth, supra, note 29 at 3096.

29. Art. 1 of the 1926 Brussels Immunity Convention.

30. Art. 3(1) of the 1926 Brussels Immunity Convention.

31. Articles 1 and 2 of the 1926 Brussels Immunity Convention.

32. Art.3(1) of the 1926 Brussels Immunity Convention.

33. See Chapter Eight, ante.

CHAPTER SIXTEEN

IMMUNITY OF STATE SHIPPING ENTERPRISES IN THE U.K.

Before the introduction of the State Immunity Act, 1978,[1] the United Kingdom had followed the doctrine of absolute sovereign immunity. As a result, British courts did not hear any claims against foreign sovereigns, and consequently the issue of arrest of state-owned ships never arose. The leading authorities in this respect were The Parlement Belge[2], a ship used by the Belgian Navy for delivery of mail, and The Porto Alexandre[3], a vessel owned by the Portuguese government and used for the carriage of freight.

A development of the greatest importance began when the issue of immunity in rem in respect of commercial matters came before the Privy Council in 1976. In The Philippine Admiral[4] the Republic of the Philippines claimed immunity in respect of a vessel which it owned and used solely for commercial purposes. The action was for payment of goods supplied and disbursements made for the ship, and for breach of a charter party. The Privy Council carefully reviewed all the leading cases on sovereign immunity. The Parlement Belge[5], it thought, was to be explained on the grounds that it was primarily used for state purposes--delivery of the mail. It

thus had not been necessary, argued the Privy Council, for The Porto Alexandre[6] (where the use of the vessel was entirely private) to have followed The Parlement Belge[7] and granted immunity. Indeed, The Porto Alexandre[8] was to be regarded as wrongly decided. Finding themselves free from any obligation to follow The Porto Alexandre[9], the Privy Council decided that immunity would not be granted in respect of actions in rem against trading vessels. In the words of the Court:

> "In this country--and no doubt in most countries in the western world--the state can be sued in its own courts on commercial contracts into which it has entered and there is no apparent reason why foreign states should not be equally liable to be sued in respect of such transactions."[10]

Shortly after The Philippine Admiral[11] the U.K. passed the State Immunity Act, 1978.[12] This Act enabled Britain to ratify the 1926 Brussels Convention for Immunity of State-Owned Ships[13] and to align the U.K. law with the European Convention on State Immunity[14] signed by Britain on the 16th of May, 1972.

16.1 Arrest of ships owned by foreign state and state shipping companies.

The State Immunity Act, 1978 in section 3 has adopted the distinction between acta iure imperii and acta iure gestionis. With respect to the arrest of state-owned ships used for commercial purposes there are some special provisions

incorporated in section 10 of the State Immunity Act, 1978.[15]

According to section 10(6), a distinction is made depending on whether or not the state owned ship in connection with which the claim arose belongs to a state party to the 1926 Brussels Convention on Immunity of State-Owned Ships. If it is a party to the Convention, the regime of the Convention applies. Where a state is not party to the Convention, the issue of sovereign immunity will be considered in accordance with the State Immunity Act, 1978.

The conditions for arresting a state-owned ship under the Act are quite complicated. Firstly, the Act makes a distinction between states and state-controlled companies and consequently it grants immunity only to states.[16] Thus, state shipping corporations are in principle deprived from immunity unless the proceedings relate to acta iure imperii and the state itself would be immune.[17]

Secondly, the claim which is or would be the subject of Admiralty proceedings shall arise in connection with acta iure gestionis of the state.[18] The distinction of acta iure imperii and acta iure gestionis is not, however, always clear because there is doubt as to whether one should focus on the nature or the purpose of the act.[19] Thus, in The I Congresso del Partido[20] one of the issues was whether the act of the Republic of Cuba in withdrawing Playa Larga and Marble Islands

and not delivering the cargo to the purchasers was an act done *jure imperii* or *jure gestionis*. The Republic of Cuba argued that the breach of the contract was an act of the Government based on a foreign policy decision, i.e., the breaking of diplomatic relations with the regime of General Pinochet, and therefore Cuba was entitled to claim sovereign immunity.[21]

The House of Lords, however, laid down the rule that the test for immunity is the nature of the transaction rather than its purpose.[22]

> "If immunity was to be granted the moment that any decision taken by the trading state were shown to be not commercially, but politically, inspired, the "restrictive" theory would almost cease to have any content and trading relations as to state-owned ships would become impossible. It is precisely to protect private traders against politically inspired breaches, or wrongs, that the restrictive theory allows states to be brought before a municipal court."[23]

Thirdly, the Act determines that "references to a ship or cargo belonging to a state include references to a ship or cargo in its possession or control or in which it claims an interest."[24] Thus, a vessel or a foreign state is not only a state-owned vessel; it may also be a privately owned vessel operated by the state under either demise or voyage or time charter party. A *prima facie* claim of possession or control of the ship is not sufficient, but the foreign sovereign must produce evidence to satisfy the court that its claim is neither merely illusory, nor founded on a defective title.[25]

Fourthly, the ship ought to be used, or intended for use, for commercial purposes at the time when the cause of action arose.[26]

In addition to the above conditions of the State Immunity Act which refer only to the issue of sovereign immunity, the conditions of section 21 (3), (4) of the Supreme Court Act, 1981[27] have also to be fulfilled in order that a state controlled ship be arrested.[28]

If all these conditions are met, creditors are entitled to arrest either the offending ship or a "sister-ship". In the latter case, however, both the ship in connection with which the claim arose and the "sister-ship" have to be in, or intended for, commercial use.[29]

Since state shipping enterprises are organized in a way similar to that of shipping groups run by private persons, to are the most important considerations from the point of view of creditors' protection:

(a) whether or not the separate legal personality of state shipping corporations should be disregarded so that the state and its bureaucratically and financially dependent companies be treated as one entity; and

(b) whether or not a vessel owned by a state shipping company can be considered to be "sister-ship" of a ship owned by the state.

Neither the State Immunities Act nor the English authorities are clear on these issues.

In The I Congresso del Partido[30] plaintiffs, owners of the cargo laden on Marble Islands, had a claim against the state shipping company Mambisa, and therefore brought a sister-ship action in rem against I Congresso which they believed was also owned by Mambisa. It turned out that the sister-ship was owned by the Republic of Cuba. Therefore, plaintiffs brought a second sister-ship action in rem against I Congresso claiming that the Republic of Cuba was personally liable to the plaintiffs for damages for non-delivery of the cargo.

The first action failed because the sister-ship was not owned by the person who was named in the action as personally liable on the claim.[31]

The second action raised the very interesting issue of whether the state of Cuba could be deemed to be personally liable on the claim because of its preponderent administrative and financial influence over Mambisa.[32] It was alleged that the liability of the Republic of Cuba was not based on contract but on a claim in tort for detinue or conversion of the cargo.[33] After the non-delivery of the cargo to plaintiffs, Marble Islands, while she was on high seas, was acquired by the Cuban government and Mambisa ceased being the

demise charterer and became managing operator of the ship on behalf of the Cuban Government. Consequently, the legal possession of the cargo laden on the ship passed from Mambisa as disponent owner to the Cuban Government itself which sold the cargo to another Cuban state controlled company. Through this company the cargo was eventually passed to the People's Republic of Vietnam.[34]

In the Court of Appeal, Lord Denning was of the opinion that the Cuban Government induced its state organization to repudiate the contract, and that after it had acquired the vessel, it adopted, by its conduct, the repudiation as its own.[35] Therefore, he thought that Mambisa was an instrumentality of the Government of Cuba, and, consequently, he held the latter personally liable on the claim.

The thin majority of the House of Lords was of the same opinion.[36] Lord Diplock speaking for the majority, held, that after the acquiring of the vessel by the Cuban Government, Mambisa became an agent of its Government.[37] As the evidence disclosed, everything that was done by the master was done on the express directions of the Cuban Government.[38] Therefore, the majority held that the Cuban Government became a bailee of the cargo laden on the ship, and in that capacity it was personally liable to the plaintiffs.[39]

By contrast, the strong minority opinion pointed out the

distinction between the personality of the state on the one hand, and the different legal personality of the state shipping company on the other.[40]

> "The commercial transaction was not that of the Cuban state, but of an independent state organization. The status of these organizations is familiar in our Courts, and it has never been held that the relevant state is in law answerable for their actions."[41]

Therefore, the minority thought that it was Mambisa that repudiated the contract and that if any wrong--contractually or delictually--was done as regards the cargo it was done by Mambisa.[42]

The decision of the House of Lords in The I Congresso del Partido[43] must be examined in the light of the previous case-law of the U.K. courts. In C. Czarnikow Ltd. v. Centralia Handly Zagranicznego Rolimpex[44] a case also decided by the House of Lords, the locus was on the relationship between a state owned company and the government which created it. On the facts of this case, the Polish state corporation Rolimpex contracted to sell sugar to C. Czarnikow Ltd., an English company. When the Polish Minister of Foreign Trade and Shipping banned the export of sugar, Rolimpex was unable to meet its contractual obligations. Rolimpex then claimed thata force majeure clause, which excused performance if prevented by government intervention, released it from liability for non-performance of the contract. The plaintiff

contended that because Rolimpex was a Polish state enterprise, the actions of the Polish government could not be separated from those of Rolimpex; therefore, the government's intervention was not beyond the seller's control, as required for the force majeure clause to be effective.

The House of Lords, however, ruled that Rolimpex and the Polish government were not the same entity.[45] The Court considered that the state owned company had a separate personality and, therefore, the state treasury was not responsible for those of the state.[46] Although the state corporation was under the general supervision of a government minister, the evidence suggested that "the sellers make their own decisions about their own business and have substantial freedom in day-to-day activities."[47]

The decision of the House of Lords in The I Congresso del Partido[48] can be reconciled with that in Czarnikow v. Rolimpex[49] only if one accepts that there are certain limits on the control that states can exercise over their corporate entities and that control over those limits should render the state corporation the alter ego of its government.[50] Nevertheless, what has not been defined is the amount of control that makes a state corporation agent of its government. Therefore, the issue is open and it is the task of the U.K. courts to lay down the criteria for considering an

implied agency in the state-state owned company relationship.

Furthermore, attention shall be drawn on the fact that creditors involved in business dealings with foreign sovereigns should carefully examine whether there is a treaty between the U.K and the foreign sovereign in question and whether this treaty contains specific provisions as to the arrest of state-owned ships. An example of such treaty is the Protocol to the Treaty on Merchant Navigation[51] signed in 1968 between the U.K. and Soviet Union. Articles 2 and 3 of this Treaty require notice to be given to a Soviet Consul before a warrant of arrest is issued in an action in rem against a Soviet ship or cargo on that ship, and prohibits execution on Soviet ships or cargoes.[52]

Therefore, a creditor should be fully aware that although the State Immunity Act endeavours to apply the restrictive immunity with respect to jurisdiction and execution, there are special provisions in certain treaties signed by the U.K. that still maintain abosolute immunity.

16.2 Crown immunity.

The doctrine of restrictive immunity has been adopted in the U.K. only with respect to foreign sovereigns. With respect to the Crown, absolute immunity still exists.[53] Therefore, according to section 29(1) of the Crown Proceedings

Act, 1947[54], as affirmed by section 24(2)(c) of the Supreme Court Act, 1981[55], no maritime lien or statutory right in rem can arise against a Crown ship.

FOOTNOTES

1. 26 & 27 Eliz. 2, c.33; reprinted in 48 Halsbury's Statutes of England 85 (3rd ed. 1978) [hereinafter cited as Act].

2. (1880) 5 P.D. 197

3. (1919) 1 Ll. L. Rep. 191 (C.A.); [1920] P. 30. See also, The Jupiter [1924] P. 236; The Jassy [1906] P. 207; The Gagara [1919] P. 95; The Cristina [1938] A.C. 485.

4. [1976] 1 Lloyd's Rep. 234 (P.D.); [1977] A.C. 373.

5. (1880) 5 P.D. 197.

6. (1919) 1 Ll. L. Rep. 191; [1920] P. 30.

7. (1880) 5 P.D. 197.

8. (1919) 1 Ll. L. Rep. 191; [1920] P. 30.

9. Ibid.

10. The Philippine Admiral, [1976] 1 Lloyd's Rep. 234, at 248.

11. Ibid.

12. 26 & 27 Eliz. 2, c.33; reprinted in 48 Halsbury's Statutes of England 85 (3rd ed. 1978)

13. For the text of this Convention see M.N. Singth, International Maritime Law Conventions, Vol. 4 at 3096.

14. For the text of this Convention see 11 I.L.M. 470. Article 30 of this Convention provides that the Convention does not apply to claims relating to the operation of sea-going vessels owned or operated by a contracting state. Therefore, the purpose of article 30 is to leave undisturbed the application of the 1926 Brussels Immunity Convention as between member-states of the Council of Europe that are parties to it. For further details see I. Sinclair, "The European Convention of State Immunity, (1973) 22 Int'l & Comp. L.Q. 254 at 281.

15. Section 10 of the State Immunity Act, 1978, reads:
"1. This section applies to--

(a) Admiralty proceedings; and
(b) proceedings on any claim which could be made the subject of Admiralty proceedings.

2. A State is not immune as respects
(a) an action in rem against a ship belonging to that state; or
(b) an action in personam for enforcing a claim in connection with such a ship, if, at the time when the cause of action arose, the ship was in use or intended for use for commercial purposes.

3. Where an action in rem is brought agaisnt a ship belonging to a State for enforcing a claim in connection with another ship belonging to that State, subsection (2)(a) above does not apply as respects the first-mentioned ship unless, at the time when the cause of action relating to the other ship arose, both ships were in use or intended for use for commercial purposes.

4. A State is not immune as respects--
(a) an action in rem against a cargo belonging to that State if both the cargo and the ship carrying it, were, at the time when the cause of action arose, in use or intended for use for commercial purposes; or
(b) an action in personam for enforcing claim in connection with such a cargo if the ship carrying it was then in use or intended for use as aforesaid.

5. In the foregoing provisions references to a ship or cargo belonging to a State include references to a ship or cargo in its possession or control or in which it claims an interest; and, subject to subsection (4) above, subsection (2) above applies to property other than a ship as it applies to a ship.

6. Sections 3 to 5 above do not apply to proceedings of the kind described in subsection (1) above if the State in question is a party to the Brussels Convention and the claim relates to the operation of a ship owned or operated by that State, the carriage of cargo or passengers on any ship or the carriage of cargo owned by that State on any other ship."

16. The State Immunity Act, 1978, supra, note 1 at section 14(1).

17. Ibid. at section 14(2). For more details see: G.R.

Delaume, "The State Immunity Act of the United Kingdom" (1979) 73 Am. J. Int'l L. 185; G.R. Delaume, "Economic Development and Sovereign Immunity" (1985) 79 Am. J. Int'l L. 319; R. Higgins, "Execution of State Property: United Kingdom Practice" (1979) 10 Neth. Yb Int'l L. 35 at 37. For more details see D.C. Jackson, Enforcement of Maritime Claims, (1985) at 120-1; W. Tetley, Maritime Liens and Claims, (1985) at 427-8.

18. The State Immunity Act, 1978, supra, note 1 at section 10(1) and (2)(b).

19. L. J. Bouchez, "Nature and Scope of State Immunity from Jurisdiction and Execution" (1979) 10 Neth. Yb Int'l L. 3 at 14; Also, see A. Weiss, "Competence et incompetence des tribuneaux a l'egard des etats etrangers", (1923) RdC Vol.1 at 546; H. Fox, "Enforcement Jurisdiction, Foreign State Property and Diplomatic Immunity" (1985) 34 Int'l & Comp. L.Q. 115 at 126; M. Singer, "Abandoning Restrictive Sovereign Immunity: An Analysis in Terms of Jurisdiction to Prescribe" (1985) 26 Harv. Int'l L.J. 1 at 24.

20. [1977] 1 Lloyd's Rep. 536, [1978] 1 All E.R. 1169, [1978] Q.B. 500 (Goff, J.) ; [1980] 1 Lloyd's Rep. 23, [1981] 1 All E.R. 1092 (C.A.); [1981] 2 Lloyd's Rep. 367, [1981] 2 All E.R. 1064 (H.L.).

21. This argument was accepted by R. Goff, J., sitting in the Admiralty Court, The I Congresso del Partido, [1977] 1 Lloyd's Rep. 536 at 557; also, it was accepted by Waller L.J. in the Court of Appeal, The I Congresso del Partido, [1980] 1 Lloyd's Rep. 23 at 35.

22. [1981] 2 Lloyd's Rep. 376.

23. Ibid. per Lord Wilberforce.

24. The State Immunities Act, 1978, supra, note 1 at section 10(5).

25. Juan Ysmael & Co. v. Indonesian Government [1954] 2 Lloyd's Rep. 175; [1954] 3 W.L.R. 531; Also, in The I Congresso del Partido, Goff, J., rejected the proposition that a more rigorous test of ownership or rightto possession or control should be required once the restricteddoctrine of immunity was accepted and he affirmed the Ysmael test: [1977] 1 Lloyd's Rep. 536 at

549, 557.

26. The State Immunity Act, 1978, supra, note 1 at section 10(2)(b). D.C. Jackson, Enforcement of Maritime Claims, (1985) at 121.

27. 1981 U.K. c. 54, schedule 7.

28. For details see Chapter Eleven, ante.

29. The State Immunity Act, 1978, supra, note 1 at section 10(3).

30. [1981] 1 Lloyd's Rep. 367.

31. The I Congresso del Partido, [1977] 1 Lloyd's Rep. 536 at 551. This action was not further appealed.

32. Ibid, at 550.

33. Ibid, at 551.

34. The I Congresso del Partido, [1981] 2 Lloyd's Rep. 367 at 380 (H.L.).

35. The I Congresso del Partido, [1980] 1 Lloyd's Rep. 23 at 31 (C.A.).

36. The majority was made by the judgements of Lord Diplock, Lord Keith of Kinkel and Lord Bridge of Harwich, Lord Wilberforce and Lord Edmund-Davies dissenting.

37. The I Congresso del Partido, [1981] 2 Lloyd's Rep. 367 at 380.

38. Ibid, at 381.

39. Ibid, at 381, 382, 383.

40. Ibid, at 378.

41. Ibid, per Lord Wilberforce.

42. Ibid.

43. Ibid.

44. [1978] 2 Lloyd's Rep. 305; [1979] A.C. 351. Other

important cases in this respect are Trendtex Trading Corp. v. Central Bank of Nigeria, (C.A.) [1977] 1 Lloyd's Rep. 581; [1977]1 Q.B. 529. In this case one of the issues was whether the Central Bank of Nigeria was an alter ego of the Nigerian government and therefore immune from suit under the doctrine of sovereign immunity. The Court of Appeal found that according to its constitution, its power and duties, and its activities, the Bank was a separate entity with independent status. In Baccus S.R.L. v. Servicio Nacional del Trigo [1956] 3 All E.R. 715 (C.A.), the issue was whether defendants were an entity separate from the Spanish state. The Court of Appeal in holding defendants a department of the state relied on the fact that they were not a company limited by shares.

45. C. Czarnikow Ltd. v. Rolimpex, [1979] A.C. 351 at 373.

46. Ibid. at 369.

47. Ibid.

48. [1981] 2 Lloyd's Rep. 367.

49. [1979] A.C. 351; [1978] 2 Lloyd's Rep. 305.

50. See generally, Note, "The Separate Entity Fiction Exposed: Disregarding Self-Serving Recitals of Juridical Autonomy in Nationalization Cases, (1983) 6 Fordham Int'l L.J. 288 at 303; P.E. Bouton, "The Liability of Foreign Government Entities: First National City Bank v. Banco Para El Commercio Exterior De Cuba" (1985) 8 B.C. Int'l & Comp. L. Rev. 127; R.D. Lee, "Jurisdiction over Foreign States for Acts of their Instrumentalities: A Model for Attributing Liability" (1984) 94 Yale L.J. 394.

51. Cmnd 5611. R. Higgins, "Execution of State Property: United Kingdom Practice" (1979) 10 Neth. Yb Int'l L. 35 at 42, 52 [hereinafter cited as Higgins]

52. Higgins, supra, note 54 at 52. In order to implement its obligations under the Treaty on Merchant Navigation the U.K. passed the State Immunity (Merchant Shipping) (U.S.S.R.) Order 1978 [SI 1978 No. 1524] which provides: "3. Notwithstanding section 13(4) of the State Immunity Act 1978, no application shall be made for the issue of a warrant of arrest in an action in rem against a ship owned by the Union of Soviet Socialist Republics or cargo

aboard it until notice has been served on a consular officer of that State in London or in the port at which it is intended to cause the ship to be arrested.
4. Notwithstanding section 13(4) of the State Immunity Act 1978, no ship or cargo owned by the Union of Soviet Socialist Republics shall be subject to any process for the enforcement of a judgement or for the enforcement of terms of settlement filed with and taking effect as a Court order."

53. For details see, W. Tetley, Maritime Liens and Claims, (1985) at 428; D.C. Jackson, Enforcement of Maritime Claims (1985) at 121.

54. (1947), 10&11 Geo. 6 c. 44.

55. 1981 U.K. c. 54, Schedule 7.

CHAPTER SEVENTEEN

IMMUNITY OF STATE SHIPPING ENTERPRISES IN CANADA.

In 1982 Canada passed the State Immunity Act[1] which ended a long debate in the Canadian courts in respect of sovereign immunity.[2]

The Canadian Act adopts the doctrine of restrictive sovereign immunity as regards both immunity from jurisdiction[3] and immunity of execution.[4] Therefore, a state is not immune from jurisdiction if the acts from which the claim arose are considered to be acta iure gestionis,[5] and it is not immune from execution if the property sought to be attached was used for commercial activities.[6] Furthermore, the Act explicitly states that the nature of the transaction, rather than its purpose, is decisive in characterizing a state act as public or private.[7]

17.1 Arrest of ships owned by foreign states and state shipping companies.

With respect to the arrest of state-owned ships the State Immunity Act has confirmed the evolution marked by art. 43(7)(c) of the Federal Court Act[8] as well as of section 750(9)(c) of the Canada Shipping Act.[9] According to art. 7 of the State Immunity Act, neither a foreign state, nor its ships

and cargo are immune from claims. in personam or in rem resulting from commercial activity. The conditions for the arrest of a state-owned ship are as follows:[10]

Firstly, arrest is permitted for any of those claims enumerated in section 43(3) of the Federal Court Act, provided that they arise in connection with acta iure gestionis of the state. It is important to note that according to Canadian law, the possibility to invoke immunity is given not only to states but also to agencies of foreign states.[11] Therefore, Canadian courts have the discretion to determine whether or not the state shipping company is an agency of the government that created it. In order to do so, the courts have to consider, among other things, the functions of the entity, the way it is constituted and the government's control on it.[12]

In Lorac Transport Ltd. v. The Atra[13] plaintiffs attempted to arrest the cargo loaded on board the ship for damages arisingout of breach of a contract of affreightment. Thedefendants, a state corporation of the Islamic Republic of Iran, pleaded immunity on the grounds that they were a department of the Ministry of Energy, and hence, part and parcel of the Government of Iran.

The Court, after taking into consideration the fact that the governmental entity was a company limited by shares, dismissed the claim of immunity. In the words of the Court:

> "The test to be applied lies in the realm of function and control. It is necessary to look to all the evidence to see whether the defendant was under governmental control and exercised governmental functions to such extent as to constitute it a department of state in the real and not fictional sense."[14]

Secondly, the ship must be owned or operated by the state[15] in the sense that the foreign sovereign possesses it or exercises control over it.[16]

Thirdly, the ship arrested ought to be used, or intended for use, in a commercial activity at the time the action arose or the proceedings were commenced.[17]

For these last two conditions the British law applies mutatis mutandis in Canada.[18] Since in Canada only arrest of the offending ship is permitted[19], the issue of "sister-ship" arrest does not arise.

17.2 Crown immunity

Arrest of ships owned by the Crown is not permitted according to the Crown Liability Act.[20] Section 2 of the above Act defines a "Crown ship" as a ship owned or being in the exclusive possession of the Crown.[21]

FOOTNOTES

1. S.C. 1980-81-82, c. 95.

2. W. Tetley, Maritime Liens and Claims, (1985) at 429 [hereinafter cited as Tetley]. See, also, The Canadian Conqueror [1962] S.C.R. 598, (1962) 34 D.L.R. (2d) 628; Allan Construction v. Venezuela [1968] C.S. 523; Mellenger et al. v. New Brunswick Development Corp. [1971] 1 W.L.R. 604, [1971] 2 All E.R. 593; Government of Democratic Republic of the Congo v. Venne (1971) 22 D.L.R. (3d) 669, [1971] S.C.R. 997.

3. The State Immunity Act, 1982, supra, note 1 at sections 4 and 5.

4. Ibid. at s. 11. For more details see C. Emanuelli, "Commentaire: La Loi sur l'Immunite des Etats" (1985) 45 Revu B. 81 at 109 [hereinafter cited as Emanuelli].

5. The State Immunity Act, 1982, supra, note 1 at section 5. Emanuelli, supra, note 4 at 99.

6. Ibid. at section 11(1)(b).

7. Ibid. at section 2. See, also, Emanuelli, supra, note 4 at 99.

8. R.S.C. 1970, 2nd Supp. c.10.

9. Bill C-75, Sept. 24, 1985, s. 750(9)(c).

10. See Emanuelli, supra, note 4 at 103; Tetley, supra, note 2 at 429.

11. The State Immunity Act, 1982, supra, note 1 at section 2. According to it, "Agency of a foreign state means any legal entity that is an organ of the foreign state but that is separate from the foreign state." Emanuelli, supra, note 4 at 95.

12. Ibid. at 96.

13. (1984) 9 D.L.R. (4th) 129.

14. Ibid. at 137.

15. Section 43(7)(c) of the Federal Court Act, 1970, and

Section 7(a) of the State Immunity Act, 1982.

16. Section 7(3) of the State Immunity Act, 1982.

17. Section 43(7)(c) of the Federal Court Act, 1970 in conjunction with section 7(2)(1) of the State Immunity Act, 1982.

18. See Chapter Sixteen, ante. Creditors should examine whether there is a treaty between Canada and a foreign sovereign in question and whether this treaty has specific provisions as to the arrest of state-owned ships.

19. See Chapter Twelve, ante.

20. R.S.C. 1970, c.C-38.

21. See, Tetley, supra, note 2 at 109.

CHAPTER EIGHTEEN

SOVEREIGN IMMUNITY OF STATE SHIPPING ENTERPRISES IN FRANCE

18.1 Arrest of ships owned by foreign states and state shipping companies.

France has ratified the 1926 Brussels Convention on Immunity of State-Owned Ships[1] which explicitly permits the arrest of ships used for commercial purposes.[2] Nevertheless, since this Convention applies in principle to contracting states and only exceptionally, under the condition of reciprocity, to non-contracting states[3], the majority of state-shipping enterprises are not affected by the Convention.

In those cases where the Convention does not apply the solution to the problem of sovereign immunity of state shipping enterprises is provided by the general principles of public international law.[4] Thus, French courts have accepted that immunity can be invoked only by sovereign states but not by governmental entities or by state shipping companies.[5] If the state-owned ship, however, is used for commercial purposes, immunity is not granted and consequently the ship may be arrested.[6]

The question of whether the theory of group appearance can be applied by analogy to state shipping enterprises having

a structure similar to private shipping groups has not yet been examined by the French authorities.

18.2 Arrest of ships owned by the French state.

On a national level absolute immunity of execution is granted to a French state and to its state controlled companies.[7] Therefore, arrest of a ship belonging to the French state or to one of its controlled companies is not possible in France.

FOOTNOTES

1. France ratified the 1926 Brussels Convention in July 27, 1955.

2. Article 1 in conjunction with art. 3 of the 1926 Brussels Convention.

3. Art. 6 of the 1926 Brussels Convention.

4. R. Rodiere, Droit Maritime: Le Navire, (1980) at 236-7 [hereinafter cited as Rodiere]; P. du Pontavice, Le Statut de Navires, (1976) at 325 [hereinafter cited as du Pontavice]. For problems of sovereign immunity in connection with non-maritime litigation see Ian Paulsson, "Sovereign Immunity from Jurisdiction: French Case law Revised" (1985) 11 Int'l Law. 277.

5. Cour de Cassation, req. February 19, 1926, 1929 D.P. 1.73, note R. Savatier. Rodiere, supra, note 4 at 237; du Pontavice, supra, note 4 at 325.

6. Cour de Cassation, February 25, 1969, [1969] Dr. Europ. Transp. 744; Tribunal de Commerce de Rouen, April 11, 1953, 1953 D.M.F. 405; Tribunal de Commerce de la Rochelle, October 14, 1964, 1967 D.M.F. 62. See, also, W. Tetley, Maritime Liens and Claims, (1985) at 432.

7. Rodiere, supra, note 4 at 237; du Pontavice, supra, note 4 at 325. Tribunal de Commerce du Havre, September 9, 1920, Revue Internationale de droit maritime XXXII; Tribunal de Commerce de la Seine, November 21, 1927, Revue de droit maritime compare (Dor), supplement 6 at 23.

CHAPTER NINETEEN

IMMUNITY OF STATE-SHIPPING ENTERPRISES IN GREECE

Greece has acceded but not yet ratified the 1926 Brussels Convention on Immunity of State-Owned Ships.[1] Therefore, arrest of state-owned ships in Greece is totally governed by the Greek Law: Greece adopts the restrictive sovereign immunity doctrine as to immunity from jurisdiction both with respect to foreign sovereigns and to the Greek state.[2] In respect of the immunity from execution, however, one must distinguish between immunity of foreign states and that of the Greek state itself.

19.1 Arrest of ships owned by foreign states and state shipping companies.

Arrest and execution of ships owned by foreign sovereigns is permitted in Greece provided that the following conditions are fulfilled:

(a) the claim shall arise in connection with transactions of private nature;[3]

(b) the ships must be used for commercial purposes;[4] and

(c) the claimant must obtain permission for arrest or execution from the Greek Minister of Justice.[5]

It should be mentioned that the right to invoke immunity

of execution is granted only to states or government entities but not to state owned companies.[6] Therefore, with respect to arrest of ships belonging to state shipping companies the same provisions as to private persons apply and the permisssion of the Minister of Justice is not necessary.[7]

The issue of whether state controlled companies can be held to be agents or instrumentalities of their state has not been squarely examined by the Greek courts. Nevertheless, the prevailing opinion is that the separate personality between the state and its controlled shipping company has to be preserved.[8] Therefore, it seems that in Greece it is not possible to treat these companies as mere divisions of the whole state shipping enterprise and consider ships belonging to state controlled companies "sister-ships" of state owned vessels.

19.2 Arrest of ships owned by the Greek state.

Absolute immunity from execution is granted to the Greek state as well as to its state controlled companies.[9] Therefore, arrest of ships belonging to the Greek state or Greek owned companies is not possible in Greece.

FOOTNOTES

1. For the text of this Convention see M.N. Singth, International Maritime Law Conventions, vol. 4 (1983) at 3096. Greece has ratified the Convention in

2. Art. 3(2) of the Greek Code of Civil Procedure. See also, E.A. 5781/1975, (1975) Nob. 89; E.A. 364/1950, (1950) EEN: 277; P.A. 26534/1967, (1968) Nos. 283; P.A. 17540/1958, (1959) EEN. 84; P.A. 7630/1960, (1961) EEN. 154. For details of the Greek citation system see Gr. J. Timagenis, "Greek Shipping Case Law" [1976] L.M.C.L.Q. 46.

3. M.P. 2924/1977, 9 D. 99; E.A. 5781/1975, (1975) Nos. 89.

4. M. Thes. 1822/1931, 32 E.Emp.D. 419; M.P. 2924/1977, 9 D. 99.

5. Ibid. See, also, articles 909, 925 of the Greek Code of Civil Procedure.

6. M.Pr.A. 3490/1977, 25 Nob. 773; I. Brinias, Execution, vol. 1(1983) at 294 [hereinafter cited as Brinias].

7. P.P. 595/74, 25 E.Emp.D. 225; M. Thes. 1822/1981, 32 E.Emp.D. 419; M.P. Thes. 863/1983, 37 Arm. 407.

8. Brinias, supra, note 6 at 294; P. Markezinis, "The State Sovereign Immunity in the Public and Private International Law" (1974) 5 D. 603 at 631-2.

9. Brinias, supra, note 6 at 295; art. 9 of Law No. 2097/1952. See, also, A.P. 109/1971, 19 Nos. 601; E.Thes. 176/1969, 37 EEN. 272; M.P.A. 2311/1971, 38 EEN. 762; M.P.P. 454/1971, 38 EEN. 857; M.P.Ef. 303/1970, 25 Arm. 62.

CONCLUSION

In the shipping industry private and state shipping enterprises are organized in groups. The best conclusion to the problems created by shipping groups, especially in respect of creditors' protection, is a statutory regulation of the activities and liabilities of group companies. Such a group legislation should be based on the following principles:

(a) accomolation of legal solutions to the economic and managerial reality created by shipping groups. Therefore there should be a rebutable presumption that shipping companies under the same control function as a single entity and conduct their business in the interest of the group;

(b) imposition of group liability once a group situation is established. Thus, in case of insolvency of one group company the liability or that company should be extended to the company controlling the group;

(c) regulation of groups on an international level. The activities of shipping group corporations exceed the boundaries of a state, and, therefore, any statutory regulation must take into account the multivariate character of shipping groups.

The above principles of group regulation should apply not

only to shipping groups run by private persons but also to those controlled by states. The equal treatment of either type of shipping groups seems justified on the following grounds:

(a) state controlled shipping groups are in direct competition to groups run by private pesons. Competition would be distorted if group liability were imposed only on groups controlled by private persons and not to those controlled by states;

(b) it will be politically embarassing if states themselves, that have to render justice, use operational methods of the capital market economy to maximize their profits to the disadvantage of their competitors and creditors.

In the field of maritime law, the arrest of ships must incorporate the above principles of group legislation. The revision of the 1952 Brussels Convention on Arrest of Ships presents the ideal opportunity to clarify some of the grey areas of the Convention and defeat the practice of one-ship companies constituting a group.[1]

In particular the revised Convention should clarify whether or not the offending ship should always be subject to arrest and whether or not "sister-ship" is any ship owned by the person liable on the claim.

It is suggested in this paper that the right to arrest

the offending ship should depend on the nature of the claim. If the creditor's claim is in the nature of one of the maritime liens recognized by the 1967 Liens Convention, arrest of the ship should be permitted irrespective of any change of ownership of the ship.[2] If, however, the claim does not give rise to a maritime lien, arrest of the offending ship would be permitted only if the ship is owned at the time when the action is brought by the person liable on the claim. Furthermore, "sister-ship" should be given a broad meaning so as to cover a ship, other than the offending ship, which is owned by the person liable on the claim.[3]

In order to defeat the practice of one-ship companies a revised Arrest Convention must extend the notion of "sister-ship" so as to permit arrest of any ship of the group fleet. This goal can be achieved through the application of a series of legal tests.

Firstly, creditors should be alleviated from their burden of proving that two or more shipping companies are under the same control. Therefore, a threshold of shareholding should be established, above which there should be a presumption that the controlling interest controls the company. The definition of such a quantitative threshold is an arbitrary decision. Nevertheless, it is widely accepted that a company whose stock is held in excess of 25 percent by another company shall be

deemed to be controlled by the latter.* In those cases where the above quantitative threshold is not reached, creditors should bear the burden of proving the existence of control.

Secondly, the existence of control should trigger a second rebutable presumption that companies under common control and direction operate as a group.

Thirdly, if the above two presumptions have not been rebuted by the companies concerned, arrest of other ships of the group fleet should be permitted provided that:

(a) all the shares of the ships under arrest are controlled by the same person. If all the shares are not controlled by the same person, the ship belongs to a joint venture and not to a shipping group;

(b) neither the offending ship nor a "sister ship" should be within the jurisdiction because if they are, extension of liability to the other ships of the group will not be justified.

FOOTNOTES

1. See R. Achard, La XXXIIIe Conference du C.M.I. a Lisbonne" (1985) D.M.F. 515; C.M.I., "Report of the International Subcomittee on the Revision of the 1952 Convention for the Unification of certain Rules relating to Arrest of Seagoing Ships," Arrest-216-84.

2. Achard, supra, note 1 at 518; C.M.I., "Draft Revision of the International Convention for the Unification of certain Rules Relating to the Arrest of Sea-Going Ships", Lis/Arrest-30 [hereinafter cited as Draft Convention].

3. Article 3(1) and (2) of the Draft Convention, supra, note 2 at 5,6.

4. The 25 percent threshold can be found, for example, in article 10 of the O.E.C.D. Model Double Taxation Convention for the Avoidance of Double Taxation with Respect to Taxes on Income and Capital, and section 20 of the AKtG (German law on related companies).

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