

Associated ownership and enduring claims - buyer beware

Like a handful of other maritime jurisdictions, South Africa is regarded as "arrest-friendly". Creditors enjoy a range of rights which help them enforce their maritime claims. These generally include a right to arrest vessels owned directly by the debtor and also, unusually, a right to arrest vessels under 'associated' or indirect ownership. Often, therefore, action in South Africa, and other jurisdictions offering similar rights, can result in a creditor obtaining security (in return for releasing a vessel from arrest) for a claim which is to be resolved in another jurisdiction, even where that other jurisdiction would not have ordered the provision of security. So, jurisdictions like South Africa and a few others offer advantages to creditors which may not exist elsewhere.

The Hanjin rehabilitation shows how creditors can take advantage of these rights. Having lost its financing banks' support the day before, on 31 August 2016 Hanjin filed for receivership before the Korean courts, asking for its assets to be frozen. The South African courts were not asked to ratify these Korean rehabilitation proceedings, so creditors could respond with applications in South Africa (and elsewhere) seeking to protect their interests in affected vessels and cargo. The South Africa proceedings sought to preserve their claims, including where there had been a change of vessel ownership, unless that change had previously been approved by the courts. The validity of these actions is presently untested, and this article issues a note of caution to potential buyers of vessels.

Taking the Hanjin example further, in a bid to recover unpaid loans, the Korea Development Bank started to sell a number of Hanjin vessels, beginning shortly before the Korean courts placed Hanjin into liquidation, in February 2017, and this may later result in a test of the creditors' actions in South Africa. The question for any potential purchaser is whether, following ownership change, the courts will still treat any affected vessels as subject to the creditors' action (assuming that the ownership change had not been previously approved), resulting in those vessels still being treated as 'fair game' as regards debts or other liabilities accrued before the sale.

While the specifics will always be a matter for local lawyers, in South Africa there are broadly two categories of claim which may survive a change of ownership, and where (subject always to time bar) proceedings may be commenced to recover debts and other liabilities arising before the sale:

- The maritime lien – covering crew wages, salvage, damage done by a vessel, and largely obsolete claims for bottomry and respondentia bonds;
- A prior arrest application – where, for example, before an ownership change, arrest papers relating to an existing claim were issued.

There is nothing controversial about a maritime lien surviving a change in ownership, the logic being that, from a policy perspective, such claims ought to be given special protection. The second category is therefore the one of primary interest to potential buyers, especially in South Africa, where there is a difference of opinion on creditors' rights over a vessel which has changed ownership:

- One view is that in the case of a vessel under *associated* ownership, if the defendant was the owner when the writ was issued, any subsequent ownership change does not affect the claimant - the action has been validly commenced by the issue of a writ against the former associated owner, and the claim and the action survive the ownership change.
- Another view is that, first, the owner of the property to be arrested must be liable for the claim personally, and that if at the time of the arrest he is not, or no longer, liable, the vessel *may not* be arrested; second, an arrest infringes a constitutional right against deprivation of property, and the courts will interpret the constitution so as not to infringe that right; third, surely one cannot arrest an *associated* vessel after a change in ownership where, in the circumstances here considered, one could not arrest the vessel which gave rise to the claim – the claim therefore is extinguished.

So where does this leave a creditor and any new owner, in the second category? This is very much a question for local lawyers, but it might be argued that the proper approach in South Africa, following an ownership change, is that neither the vessel concerned nor any associated vessel represents 'fair game' any longer.

The most important point, however, for prospective buyers, is that clean title does not always mean 'absolutely clean' title. Legal developments in all maritime jurisdictions, including South Africa, need to be watched and advice should be taken in specific transactions to ensure unencumbered title, which is what the buyer is entitled to in return for the price. Any risk with that might cause the buyer to rethink either the price or the purchase itself.

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