

Associated arrests of vessels and attachment of assets in France: How thick is the corporate veil?

In this update, we draw attention to an important issue that has been widely debated before the French courts in relation to associated arrests of vessels, and which has encountered varying outcomes since the eighties. Essentially, the issue is whether a creditor having a claim against a company may arrest, as security for its claim, assets not strictly owned by its debtor, but within the same associated ownership. This issue is particularly acute in the maritime sector where many vessels come to be owned by single ship companies created by shipowning groups to limit their liabilities.

Until the mid-nineties, the position adopted by the French courts was that if there was evidence of common beneficial interests between the debtor and the registered owner of the vessel (which was broadly understood to cover for instance the mere existence of common shareholders), an arrest of the vessel was possible to secure the arresting party's claim against the debtor. France was then one of the most favourable forums in the world for associated arrests.

However, the principle of "common beneficial interest" was subsequently replaced by the Cour de Cassation by a more stringent requirement: "fictitiousness". The arresting party now has to prove that its debtor or the shipowner is a legal "fiction" with no independent existence, and in particular no real financial/accounting autonomy, no independent assets, nor real autonomous activity and no autonomy for decision making. The corporate veil between the companies has to be pierced.

Yet, a decision rendered by the appeal court in Rennes¹ clearly shows again that this argument is still valid.

In this case, a bunker supplier arrested a vessel in France as security for its claims for outstanding bunkers delivered to 2 other vessels ordered by a company named Fedcominvest Europe. The registered owner of the vessel argued that it was an entity distinct from the bunker supplier's debtor. Upon a challenge, the first instance court confirmed the arrest. Upon appeal, the court of appeal confirmed that the vessel could be

¹ CA Rennes, 4 Feb. 2014, "VARTHOLOMEOS", DMF 2014.517. An appeal has been lodged before the Cour de Cassation which is still pending. The Cour de Cassation will only consider legal issues and not factual issues.

arrested on the ground it was very likely the registered owner was a fiction. The following were taken into account:

- The registered owner had no physical presence as its address was at a P.O. box or at the premises of the manager of the vessel ;
- The registered owner had no management independence as all its directors were the same as those of Fedcominvest Europe;
- The registered owner had no financial independence as the purchase of the arrested vessel was made with Fedcominvest Europe's funds and as Fedcominvest Europe continues to exercise its rights in the vessel through another company;
- The registered owner behaved in such a way in the proceedings that it confirmed its community of interest with Fedcominvest Europe and its manifest dependence on this company.

As suggested by this decision and previous other decisions, there are no specific criteria that may be absolutely decisive. Much will depend on how convincing the documents and facts may be.

Taking into account this decision and a number of previous decisions rendered by the French courts, the sorts of factors to be taken into account are not fixed, but the following can be relevant:

- Common management for both companies;
- Common shareholders;
- Common address and contact details / no physical address;
- Common employees / no employees;
- Common activity / no activity;
- Correspondence sent by a company on the headed paper of another;
- Bank account for payment to a company held by the other company and/or single bank account held by both companies;
- Payment of debts owed by a company by the other company.

So, what is the position today? Although the test to be satisfied by the arresting creditor is stricter than it used to be, associated arrests of vessels in France remain possible. Similar principles apply to the attachment of assets such as bank accounts / debts owed to the debtor.

If documents evidencing all or some of the above factors can be gathered by a creditor, the latter may be well advised to consider whether there may be assets in France / vessels

calling in France, beyond those strictly owned by its debtor, which could constitute security for its claims.

Author: Leïla Esnard

For further information, please refer to your usual contact, or info@lewiscolaw.com

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