ARREST IN SOUTH AFRICA OF SHIPS ASSOCIATED BY COMMON CONTROL OF STATE-OWNED COMPANIES

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CHAPTER 1. INTRODUCTION

I Subject Matter of the Dissertation

The possibility to arrest ships associated by common control in South Africa was introduced by the Admiralty Jurisdiction Regulation Act 105 of 1983 (hereinafter – the AJRA 1983). Thus, ss 3(7)(a)(iii) provides that a ship which is,

> 'owned, at the time when the action is commenced, by a company which is controlled by a person who owned the ship concerned, or controlled the company which owned the ship concerned, when the maritime claim arose'

may be arrested as an associated ship of a ship against, or in respect of, which the maritime claim sought to be enforced (the 'ship concerned') (ss 3(6) of the AJRA 1983).

It is customary to refer to ships wholly-owned by the same person or entity, albeit at different times, as 'sister ships' (International Convention for the unification of certain rules relating to Arrest of Sea-going Ships 1952, hereinafter – the 1952 Arrest Convention)[1] (or surrogate ships – see Australian legislation)[2] – this linkage is encompassed in the South African associated ship provisions but these provisions go further to include linkage through common majority ownership of the shares in ships and further still to include common control of the ship-owning companies of the ships involved – it is this last form of linkage that is referred to as 'true association'.[3] In this context, when a ship is not owned by the same person that owns the ship concerned but may be considered as an associated one under the relevant provisions of the AJRA 1983, the provisions permitting the arrest of such ship may be referred to as 'true associated ship arrest provisions'.[4] This terminology in relation to associated ships will be used in the present work as well.

This dissertation is concerned with the arrest of a ship not owned by a person liable and, moreover, a particular criterion which should be established in relation to it, a criterion of control, and not just control by any company but only by state-owned companies or enterprises. The problem related to the situation when a ship is controlled or owned by a state-owned company is the following. If the control over a shipowner

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[1] International Convention for the unification of certain rules relating to Arrest of Sea-going Ships 1952, adopted in Brussels on 10 May 1952, see Berlingieri. Vol. I. 282.
[2] An Act relating to Admiralty and maritime jurisdiction, 1988, ss 19.
[3] Hare J. *Shipping Law & Admiralty Jurisdiction in South Africa*. 104, Wallis M.J.D. *The Associated Ships and South African Admiralty Jurisdiction* (2010, published, doctoral thesis, University of KwaZulu-Natal) 90.
[4] Wallis. *Op. cit.* 90.

by the state would be enough to arrest a ship as associated by common control with a ship concerned, then depending on the number of state-owned ship-owning companies in the state a huge commercial fleet may be at risk of being arrested for the debt of another vessel. What is more, state ownership over a company may be based on different principles in comparison to ordinary private ownership. A state is not an ordinary market participant. It may also be a supervisor of the overall national market. In this regard, the application of true associated ships provisions to these types of companies may contradict the purpose of these provisions which is to allocate liability of a company to a true controller of it. Thus, the application of the provisions permitting the arrest of associated ships owned or controlled by state-owned companies or enterprises may have far-reaching outcomes.

II Aim

The aim of the dissertation is to determine whether there might not be persuasive grounds for amendment of the South African common control elements of the associated ships of the AJRA 1983 to address the problem of overreaching of true associated ships provisions with regard to the ships associated by common control of state-owned companies.

III Thesis

Two situations where the ships may theoretically be arrested as associated by common control of state-owned companies should be distinguished. One is that two ships may be commonly controlled by a particular state-owned company or enterprise. The other is that the association between ships may be established only due to the common control of companies that own them by the state itself.

In the first case, the problem of association of ships based on the state control over the relevant ship-owning companies does not even arise since the association is established at the company level and there is no need to rely on the overall state control to establish the association. In this regard, there is no risk that all ships under state-owned companies' control may be arrested for the debts of each other but only the ships controlled by a particular company.

The second case, in turn, creates more troubles for the application of the relevant provisions. If the association can be established at the state level on the basis of the state’s control of the shipowning companies, then the risk of the possibility of arresting all the ships owned or controlled by the state is fully realised. From the perspective of the current legislation, the association between ships by the common control of the

state over the ship-owning companies is enough to arrest one of them for the debt of another.

It will be argued that the solution to the problem is to amend the relevant provisions of the AJRA 1983 to exclude the possibility of arresting the ships associated only by common state control, i.e., without establishing association at the below (company) level.

IV Background to research subject

The background to this research subject is the problem South Africa's associated ship arrest provisions were developed to solve. This is single-ship companies and the means they provided to avoid shipowners' liability.

The arrest of ships associated by common control has been under discussion for some time in relation to single-ship companies' activities.[5] The development of the idea of single-ship companies began in the 1930s.[6] The purpose of their establishment was not primarily connected with the possibility of avoiding liability.[7] It was justified by taxation, operations and other convenience.[8] At the same time, the widespread use of such companies created the situation where a shipowner has only one ship and no other property and therefore its liability is limited by the value of this ship. It is also not always possible to satisfy the claims from such value since the vessel may be sold to another person or it may be impossible to arrest her and realise the asset through a judicial sale.[9] One of the most effective ways to deal with such companies is to allow the arrest and judicial sale of a ship not owned by the person liable but commonly controlled with the ship concerned (the arrest of ships associated by common control), which allows its creditors to pursue their claims against other property either owned by the debtor company or the person who controls the debtor company or owned by an entity controlled by the person or entity that controls the debtor company.[10]

However, provisions permitting the arrest of ships that are not owned by the persons liable on the claim being enforced were not included in the 1952 Arrest Convention. In the 1952 Arrest Convention, only sister ship arrest provisions were introduced. Sister ships were defined as ships wholly owned by the same person albeit at different times (para 2 of Art. 3 of the 1952 Arrest Convention). In South African

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[5] Berlingieri. Vol. II. 103.
[6] Wallis. *Op. cit*. 61.
[7] Boczek B.A. *Flags of Convenience: An International Legal Study*. 30, 36.
[8] Wallis. *Op. cit.* 82.
[9] Hofmeyr G. *Admiralty Jurisdiction Law and Practice in South Africa* 2 ed. 133-4.
[10] *Ibid.* 134.

law, this requirement was relaxed, and the ship may be arrested as a sister ship if 'the majority in number of, or of voting rights in respect of, or the greater part, in value, of, the shares in the ships are owned by the same persons' (ss 3(7)(b)(i) of the AJRA 1983).

The idea of sister ship provisions was a novelty only for the common law countries where the arrest of ships provisions were based on the idea of an action *in rem*.[11] The action arising out of the maritime incident within the admiralty proceedings could be brought only against *res*. The owner of such a ship was not personally liable for the incident, *res* was personified and formed the limit of the possible liability.[12] Therefore, traditionally, it was not permitted to arrest a ship other than the one against which the claim had arisen since an action brought as a result of the incident was an action against the ship involved.[13] The situation had been a little changed by the case of *The Dictator* [1892] P 304 where the procedural theory of action *in rem* has been accepted.[14] The main idea in this case is that an action *in rem* is a way to bring the shipowner into proceedings and not to appoint the ship as a proper defendant.[15] However, the state of affairs where a claim should be submitted against a ship concerned remained unchanged.

Civil law, in turn, was based on the other idea. There was no separate admiralty proceeding and therefore actions *in rem*. Under civil law, an action was brought against a person liable for the incident (action *in personam*).[16] In this regard, it was possible to attach not only the ship concerned but the other property owned by such a liable person.[17] The problem with this approach was that the claim should be made under the common procedural rules, and it was impossible to find jurisdiction in the place of the ship.

In South Africa, for example, the problem was solved by way of attachment to found jurisdiction.[18] This mechanism gives a claimant the right to find jurisdiction of the court in the place of the defendant's property and it is not needed to find any other grounds of jurisdiction (ss. 3(2)(b) of the AJRA 1983).[19]

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[11] Berlingieri. Vol. I. 282, see also Hofmeyr. *Op. cit.* 98.
[12] Hofmeyr. *Op. cit.* 98.
[13] *Ibid.*
[14] *Ibid*. 99.
[15] *The Indian Grace No. 2: Republic of India and Others v India Steamship Company Limited* [1998] 1 Lloyd's Rep 1 (HL). Part 'The Nature of the Admiralty Action *in Rem*'.
[16] Berlingieri. Vol. I. 282.
[17] *Ibid.*
[18] Hofmeyr. *Op. cit.* 188.
[19] *Ibid,* 189.

Both these problems in relation to the impossibility to arrest property other than a ship concerned in the common law countries and establishing the jurisdiction of the court in the place where the ship is moored were solved by the 1952 Arrest Convention. The 1952 Arrest Convention permitted to arrest the sister ships in Art. 3 and stipulated the jurisdiction of the court in the place where the ship was arrested in Art. 7.[20] However, both these decisions do not deal with the problem of single-ship companies.

The International Convention on Arrest of Ships 1999 (hereinafter – the 1999 Arrest Convention)[21] did not introduce the right to arrest ships associated by common control as well. At the same time, para 3 of Art. 3 of the 1999 Arrest Convention establishes that arrest of the ships,

> 'not owned by the person liable … shall be permissible only if under the law of the State where the arrest is applied for, a judgment in respect of that claim can be enforced against that ship by judicial or forced sale of that ship'.[22]

This compromise solution was due to the fact that the idea of arresting a ship not owned by the person liable for the claim was strongly opposed by representatives of almost all countries.[23] The opposition to the inclusion of such provisions revolved around the position that they influence the idea of separate legal personalities of artificial entities, and it is not a matter of maritime law but of company or corporate law.[24] Also, it was pointed out that the term 'control' used to describe the relations between the ship arrested and the ship concerned is too ambiguous and relates more to the company law rather than maritime law.[25] Therefore, this radical decision to introduce a general possibility of arresting the ship associated by common control was not welcomed by the international community.[26] It remained up to the national governments to decide whether the arrest of ships not owned by the person liable should be possible or not. Ultimately the compromise was necessary to gain more widespread acceptance of the Convention but it left open variation under domestic laws, subverting the aim of unification or harmonisation.

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[20] Berlingieri. Vol. I. 282.
[21] International Convention on Arrest of Ships 1999, adopted in Geneva on 12 March 1999.
[22] Such wording was chosen to avoid the situations where ships are arrested only to provide an additional mechanism for putting pressure on debtors, and to limit arrests of ships not owned by a person liable to instances in which such an arrest may lead to a judicial sale of a targeted ship. See Berlingieri. Vol. II. 103.
[23] Except for the delegates of the United Kingdom who proposed the following provisions to be added to the 1999 Arrest Convention, and delegates of Malta, Denmark, Finland, Norway, Sweden, Republic of Korea, see *Ibid*.
[24] *Ibid*. 103-4.
[25] *Ibid*.
[26] *Ibid*. 104.

Some jurisdictions, for example, the United States of America, deal with the single-ship companies problem by using company law methods and provisions such as the 'alter ego rule' to disregard such companies' corporate veils and treat them as a part of a single business entity.[27] Some other jurisdictions have their own ways to deal with it either and mostly these methods are also connected with company law rules.[28]

The distinctive feature of South Africa's associated ship arrest provisions is that they permit the arrest of ships associated by common control separately from and independently of the company law rules (ss 3(7)(a)(iii) of the AJRA 1983). There are unique provisions for the arrest of ships not owned by the person liable located within the admiralty proceedings statutory provisions. This fact gives some authors reasons to say that the arrest of ships not owned by a person liable in South Africa is not a kind of disregarding of corporate law, but a separate institution based on other principles.[29]

Basically, the idea of the arrest of ships associated by common control relates to the fact that different companies may be controlled by the same persons. In this situation, the person(s) who actually control the company may be liable for the claim against the shipowner of the ship concerned.[30] This situation may result in far-reaching outcomes, especially in relation to state-owned enterprises.

State-owned enterprises are particularly vulnerable to these provisions since, if it is possible to arrest their ships, then every ship belonging to a state-owned company, i.e., controlled by the state, may be arrested for the debts of other state-owned companies owning ships. Therefore, depending on the number of state-owned companies owning ships, a potentially huge commercial fleet would be at risk of being arrested for the debts of other state-owned companies. This may lead to a situation where the different state-owned companies may not even know that there is the possibility that their vessel may be arrested and, as a result, they cannot mitigate the risk of such an arrest and ensuing potential breach of contractual obligations in any way other than by avoiding ports in the jurisdiction where such arrests are permitted. It is not desirable for any legal system to create an uncontrollable risk. Moreover, it is not desirable for the countries themselves from the economic point of view since it potentially reduces the number of ships calling their ports.

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[27] *Aqua Stoli Shipping Ltd v Gardner Smith Pty Ltd* 460 F.3d 434, 445 (2d Cir 2006), *Swift & Co. Packers v Compania Colombiana Del Caribe SA* 339 US 684 (1950).
[28] Berlingieri. Vol. I. 291–311.
[29] Wallis. *Op cit.* 102.
[30] Berlingieri. Vol. II. 258.

Another problem is that the control over state-owned companies is sometimes based on principles other than the control over ordinary companies. The state acts not just as an investor in commercial relations but also as a supervisor of the market as a whole. Therefore, state control over companies does not necessarily mean that such companies' management relates to each other. One of the clearest examples of it is the situation where the company which is owned by the municipal government is treated as a company not associated with the one owned by the central government despite the fact that, formally, they are both owned by the state.[31]

This situation influences mostly the countries where a number of state-owned companies are present. In South Africa, several reported cases have dealt with the problem of association between the vessels controlled by state-owned companies.

The first one is the case of *MV Baconao*[32] where the association between two vessels was justified by the fact that both of them were controlled by the state. The court referred to Cuba's political and economic system to prove the fact that Cuba is a communist state and therefore an owner of the enterprises created therein.

On the contrary, in the case of *MV Le Cong*,[33] the association between two ships belonging to state-owned companies was not established since the companies had been created at different levels of government, central and municipal respectively.[34] One of the arguments of the court was that China is a socialist country and its legal, political and economic situation differs from the South African one drastically and therefore it was not proved that under Chinese law such companies should be treated as associated ones.[35]

There is a third situation in which the economy of a country is based on state ownership even though the economy is characterised or described as 'capitalist'.[36] This situation mostly relates to post-soviet countries where the free market was built on almost full state ownership of many enterprises in different spheres of the countries' economies. In this regard, for example in Russia, some spheres of economic activity

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[31] *International Marine Transport SA v MV "Le Cong"* [2005] JOL 16130 (SCA) 15, 17.
[32] *MV Baconao: Transportes del Mar SA v Jade Bay Shipping Co Ltd,* A119/95 (DCLD), Shipping Cases of South Africa C42 C55C–E, C59.
[33] *International Marine Transport SA v MV "Le Cong"* [2005] JOL 16130 (SCA).
[34] *MV "Le Cong" supra* [15].
[35] *MV "Le Cong" supra* [13], [17].
[36] The question of association between the companies controlled by the state was raised in the case *The Shipping Corporation of India Ltd v Evdomon Corporation* 1994 (1) SA 550 (A) 14-5. However, this case does not relate directly to the provisions of ss 3(7) of the AJRA 1983. The court dealt with the problem of disregarding of corporate veil under the South African company law provisions.

in the country remain monopolised by the state and are based on the activity of state-owned companies.[37]

As it follows from this that the economic context of a country results in the different possible structures of state-owned companies or enterprises in it, studying the economics of these countries may help to understand the possible situations which South African courts may face dealing with the arrest of ships associated by the common control of state-owned companies.

V Dissertation structure

The dissertation consists of six chapters. Chapter 2 deals with the understanding of the term 'control' under the current South African legislation. For that, it analyses the term 'control' under ss 3(7)(b)(ii) of the AJRA 1983 based on the case law. Next, this understanding is compared to the one under South Africa's company law provisions. The differences and similarities between admiralty and company law approaches are pointed out. As a result of that, the conclusion is made in regard to the content of the term 'control' under the relevant provisions of the AJRA 1983.

Chapter 3 deals with the possible structures of the state control of the companies owning the vessels. Also, in this chapter the economical bases of three countries are discussed, China, Russia, and Cuba. These countries were chosen because of the level of state control over the assets therein. This discussion is important to understand the possible negative outcomes of applicability of true associated ships provisions in relation to state-owned companies.

Chapter 4 deals with the problems in relation to the structures described in Chapter 3. Also, this chapter contains the possible solutions to the problems determined.

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[37] Abramov A., Radygin A., Chernova M. 'State-owned enterprises in the Russian market: Ownership structure and their role in the economy' (2017) 3(1) *Russian Journal of Economics* 8 10, see also Raikin E. 'Pre-Soviet, Soviet and Post-Soviet models of economic growth and development' (2005) 32(11) *International Journal of Social Economics* 968 1003–5.

CHAPTER 2. MEANING OF 'CONTROL'

I Introduction

This chapter deals with understanding of the term 'control' in the context of the arrest of ships which are not owned by the person(s) liable. This term is not defined in the AJRA 1983. Therefore, the main source regarding the meaning of the term is the case law. In this chapter, it will be demonstrated how the term 'control' is understood by South African courts. In turn, this matter will be useful in the analysis of the true association between the ships owned by state-owned companies which will be dealt with in the following chapters.

II Meaning of 'control' in true association provisions

As should be apparent from the discussion on the arrest of ships not owned by the person liable, one of the most important and difficult issues in this regard is the meaning of the term 'control' and its implementation on the international level.[38] It was concluded that this matter is closer to the company law by nature and therefore cannot be determined by the admiralty regulations. The institution of control over the company definitely relates to the company law more than to the maritime sphere. Nevertheless, South African law introduces this criterion in the AJRA 1983 (ss 3(7)(a)(iii) and 3(7)(b)(ii)) separately from and independently of the company law provisions.

III Applicable law

The issue of arresting ships associated by common control is a matter of procedural law.[39] Therefore, it should be governed by South African law as *lex fori*.[40] The opposite reasoning would contradict the ideas of such an institution at its core since it would

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[38] Berlingieri. Vol. II. 103.

[39] *Euromarine International of Mauren v The Ship "Berg"* 1984 (4) SA 647 (N) 655D-E. Also, it should be noted that it is not obvious in South Africa whether a claim against an associated ship is brought against a ship only or, in fact, an owner of such a ship. It depends on the theory of actions *in rem* closer to a judge or an author (procedural theory or theory of personification). There is a very reasonable position that even though an action is submitted against a ship, an owner of this ship is implicated because it is the owner who bears financial losses. To see otherwise is to hold to a fiction, see Wallis. *Op. cit.* 437. Nevertheless, it seems that the South African action *in rem* is based more on the personification theory despite the *obiter* stated by Wallis JA in the case *Transnet Ltd v Owner of the MV "Alina II"* [2011] JOL 27776 (SCA) 17-18. See for example the opposite view on the nature of an action *in rem* not stated *obiter*: *SA Boatyards CC v The Lady Rose* 1991 (3) SA 771 (C) 715F–H.

[40] It has not been disputed since the beginning of the application of the relevant provisions. See for example *Euromarine International of Mauren v The Ship Berg* [1986] 2 All SA 169 (A) 22.

make it impossible to enforce the claim against a ship in South Africa under South African law if the ship's nationality is other than South African.[41]

The more interesting issue is whether South African law or the law of the place of incorporation should apply to determine control over a company. It is seen from the case law that the control over the company should be established under South African law and be based on the interpretation of the relevant section of the AJRA 1983.[42] This conclusion seems to be reasonable since South African law establishes its own control criteria which may differ from such criteria in other jurisdictions and because the possibility of arresting the ship is a procedural law matter.

However, the control itself is a matter of fact rather than law.[43] The association between two ships must be proved on the basis of the balance of probabilities.[44] On the contrary, the matters of law should not be proved since the law is applied by courts and not proved by parties.[45] In turn, the relations within the company, in most cases, depend on the law of the place of the company's registration.[46] As a result, there is a complex structure where the relations within the company, which depend on the law of the place of incorporation, should be assessed in accordance with the criteria established by South African law.

Therefore, 'control' exists at two levels.[47] The first level is the matter of fact, i.e., the actual relations within the company. This fact is established in accordance with the law applicable to such relations, in most cases the law of the place of incorporation. The second level is the matter of law, i.e., the assessment of the established relations in accordance with South African law and the answer to the question of whether such relations constitute control under South African law.

This issue is not abstract and has its practical implications as it will be shown below. It is important to draw this distinction to deal with control in relation to state-owned companies.

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[41] It is the core idea of an action *in rem* that it is not subject to the 'usual jurisdictional limitations, territorial or otherwise'. The same is applicable to the attachment of the property to found jurisdiction, see Hofmeyr. *Op. cit.* 116, 188.
[42] *MV Heavy Metal: Belfry Maritime Ltd v Palm Base Maritime SDN BHD* 1999 (3) SA 1083 (SCA) [5]–[7] by Smalberger JA.
[43] *Palm Base Maritime SDN BHD v Serva Ship Ltd and others* [1998] 3 All SA 363 (C) 373.
[44] Wallis. *Op. cit.* 155. See also the case *Bocimar NV v Kotor Overseas Shipping Ltd* 1994 (2) SA 563 (A) 581C–F.
[45] Schwikkard P.J., van der Merwe S.E., et al. *Principles of Evidence*. 5th ed. para 1.2. This statement does not relate to foreign law since the rules of foreign law are a matter of fact for the South African courts which should be proved on the basis of the balance of probabilities.
[46] *MV Heavy Metal: Belfry Maritime Ltd v Palm Base Maritime SDN BHD* 1999 (3) SA 1083 (SCA) [8] by Smalbenger JA
[47] Hare. *Op. cit.* 109.

IV Control under the AJRA 1983

(a) General considerations

Despite that the term 'control' being crucial for the purposes of arresting the ships which are not owned by the person(s) liable for the claim being enforced, the AJRA 1983 does not define it. Therefore, the main legal source regarding this matter is case law.

One of the most important cases dealing with it is the case *MV Heavy Metal: Belfry Maritime Ltd v Palm Base Maritime SDN BHD*.[48] In this case, it was held that control over the company should be understood as overall control over the fate of the company and not day-to-day management.[49]

The control also does not mean that the vessels should or should not be part of one fleet with a common purpose.[50] In this regard, the basic idea of control is that the person(s) with the majority voting rights (shares) in the company obtains the power to control the fate of the company (direct control).[51] However, there are also situations where this power is held by other persons (indirect control).[52]

The situations regarding control of the company may be different and therefore it is almost impossible to give an exhaustive definition of this term.[53] It seems that the closest description of control is as follows – the power to determine the fate or the destiny of the company.[54] This power may belong to the majority shareholders. Generally, it depends on the company structure and actual relations within the company.

(b) Direct and indirect control

Despite the fact that the AJRA 1983 does not define 'control', it states that control over the company may be direct or indirect (ss 3(7)(b)(ii)). In general, there are two main positions regarding the definition of direct and indirect control. The first one is that there is only real power to control which may be realised directly by person(s) owning

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[48] 1999 (3) SA 1083 (SCA).
[49] *MV Heavy Metal: Belfry Maritime Ltd v Palm Base Maritime SDN BHD* 1999 (3) SA 1083 (SCA) [8] by Smalberger JA. Also, this view is commented in Hofmeyr G. *Op. cit.* 141.
[50] *E E Sharp & Sons Ltd v MV Nefeli* 1984 (3) SA 325 (C) 327B.
[51] Hofmeyr. *Op. cit.* 141. See also *Zygos Corporation v Salen Rederierna AB* 1985 (2) SA 486 (C) 489B–D.
[52] It is also worth mentioning that a person merely holding 50 % of the shares in the company does not have the power to control the company either directly or indirectly since they cannot determine the destiny of the company by their own will, see *Louis Dreyfus Armateurs SNC v Tor Shipping Ltd* [2006] 3 All SA 464 (D) [54], [55].
[53] Hare. *Op. cit.* 109.
[54] Ibid. 108.

the voting rights in the company or indirectly by other persons.[55] In this regard, the court should establish the real power to control the company either directly or indirectly. The second position is that there are two types of control stipulated in the AJRA 1983, direct control, i.e., *de jure* control which is realised by the person(s) control the majority of voting rights and therefore is entitled to determine the destiny of the company and indirect control, i.e., *de facto* control which is realised by person(s) other than one(s) who have the direct rights to determine the company's destiny.[56] According to this position, the existence of either *de jure* or *de facto* control is enough to establish control over the company by the respective person(s) even if the real control may be realised only by the person(s) who control the companies *de facto*.[57] For instance, according to this position if two companies are owned by the same nominee shareholder it will be enough to establish the common control of them despite the fact that the nominee shareholder may not have the real power to control these companies.[58]

The second position is stated in the most authoritative case in this regard considered by the Supreme Court of Appeal, *MV Heavy Metal: Belfry Maritime Ltd v Palm Base Maritime SDN BHD.*[59] At the same time, this position was criticised by some authors. Even though it was comprehensively discussed in some very authoritative works it is necessary to consider its possible problems at least briefly.

(c) MV Heavy Metal

The ship *Heavy Metal* (the associated ship) was arrested as a ship associated with the *MV Sea Sonnet* (the ship concerned). The association between these ships was established since it was held that the shares of both owners of the *Heavy Metal* and the *MV Sea Sonnet* were owned by the same Cypriot advocate (Mr Lemonaris) who acted most likely as a nominee for the actual shareholders.[60] The owner of the *Heavy Metal* applied to set the arrest aside based on the fact that Mr Lemonaris was only a nominee for the actual shareholders of owners of the associated ship and the ship concerned who were not connected with each other.[61] However, one of the companies engaged in

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[55] *MV Heavy Metal: Belfry Maritime Ltd v Palm Base Maritime SDN BHD* 1999 (3) SA 1083 (SCA) [76], [77] by Farlam JA.
[56] *MV Heavy Metal supra* [11] by Smalberger JA.
[57] *MV Heavy Metal supra* [11] by Smalberger JA.
[58] *MV Heavy Metal supra* [23] by Smalberger JA.
[59] 1999 (3) SA 1083 (SCA).
[60] *MV Heavy Metal: Belfry Maritime Ltd v Palm Base Maritime SDN BHD* 1999 (3) SA 1083 (SCA) [11] by Smalberger JA.
[61] *MV Heavy Metal supra* [11] by Smalberger JA.

the case failed to provide the court with the information regarding its actual beneficiaries and therefore it was not proved that the actual owners of the companies were not the same or connected.[62] The court found in favour of the initial applicant and dismissed the application made by the owners of the *Heavy Metal* to the Appellate Court.[63]

This case raised several issues relating to the possibility of arresting an associated ship. However, for the purposes of this part, only one will be dealt with, in particular, the correlation of direct and indirect control over the company.

The judgment was supported by four of five judges. However, the reasoning for it was divided as well (three to one judges). It is necessary to consider the arguments of both views since they demonstrate the difference between the two positions with regard to the understanding of control.

The majority's (3) reasoning was as follows:

> '…if the person who has de jure power happens to control, at the relevant times for such control, both companies concerned (ie the company which owns the guilty ship and the company which owns the targeted ship), the statutory requirement of a nexus between the two companies will have been satisfied. This is the position in which Lemonaris found himself.'[64]

It follows from the quotation above that Smalberger JA, for the majority's judgment, considered that the statute establishes two types of power to control the company (1) direct (by the actual shareholders even nominee ones) or (2) indirect (by the beneficiaries) and one of them is enough to establish the statutory *nexus* between two ships and treat them as associated.

With respect, this argument may be subject to some sort of criticism which was also stated in the reasoning of the minority in the present case. This reasoning is discussed below. At the same time, the judge also states that this conclusion is only an outcome of the decision of companies to do business in secrecy.[65] Therefore, some authors concluded that if the two companies have one nominee shareholder and are not connected with each other in any other ways and prove it, the court will not likely decide on the existence of common control among them.[66] However, this interpretation

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[62] *MV Heavy Metal supra* [20] by Smalberger JA.
[63] *MV Heavy Metal supra* [23] by Smalberger JA.
[64] *MV Heavy Metal supra* [11] by Smalberger JA.
[65] *MV Heavy Metal supra* [15] by Smalberger JA.
[66] Hare. Op. cit. 112-113. It is also significant to note the assessment of this judgement by Hare.: 'The Heavy Metal majority reasoning struck fear into the hearts of many operators of one-ship companies, particularly those structured and situated in Greece and Cyprus, where local attorney nominee

does not follow from the reasoning of Smalberger JA directly, or without further speculation.

On the contrary, the minority judgment delivered by Farlam JA stated:

> 'Real, not apparent, control is what is B required and a nominee shareholder who can be directed by a *mandamus* from a court as to how he is to vote at a general meeting cannot be said to be in control of the company…
>
> In my view, what Parliament had in mind when it enacted the subsection was that there was only one criterion, namely power to control and that, whether it is directly or indirectly exercised, there can be only one person who has it for the purposes of the subsection. There are not two repositories of power to control for purposes of the subsection – only one. If someone has indirect power to control it must follow that the ostensible holder of direct power does not have it within the meaning of the subsection.'[67]

The same view was expressed by Marais JA:

> '…As between the company and the person who is registered as the holder of the majority of its shares, the person so registered has power de jure to control the company even although he is a mere nominee. But non constat that the beneficial shareholder's power to control directly his nominee and thereby indirectly the company is merely power de facto. In short, it is fallacious, in my opinion, always to equate indirect control with control de facto. I think the truth of the matter is that, depending on the facts of each particular case, indirect control may be exercised sometimes de facto and sometimes de jure. Whether the deeming provision must be read as extending to indirect power which exists only de facto, but not de jure, it is not necessary to decide. What seems to me to be plain is that it must extend at least to indirect power which exists de jure.'[68]

The above statements express the opinion that the AJRA 1983 stipulates that the two companies should be deemed to be controlled by one person if such a person has the real power to control both. This merely means that there may not be two sources of control over the company. If the person has the real power to control it should be considered as a person who *de facto* controls such a company irrespective of whether

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shareholders are common'. In fact, this judgment makes it necessary to check that a possible nominee shareholder is not a nominee shareholder for any other enterprise. It is impractical and destroys the completely lawful institution of nominee shareholding. See for details Wallis. *Op. cit.* 289–291.

[67] *MV Heavy Metal: Belfry Maritime Ltd v Palm Base Maritime SDN BHD* 1999 (3) SA 1083 (SCA) [76], [77] by Farlam JA.

[68] *MV Heavy Metal supra* [14] by Marais JA.

they control it directly or indirectly.[69] Either direct or indirect control should be *de facto* control, i.e., real control in order to establish the true association between two ships under the meaning of ss 3(7)(b)(ii) of the AJRA 1983.

It is suggested that the difference between direct and indirect control is as follows. If the company is controlled by beneficial owners through the nominee shareholder, the real power to control the company belongs to the beneficial owners and not to the nominee shareholder. This situation is described by the AJRA 1983 as the 'indirect power to control' the company. In other cases, the power to control the company may be held by the registered shareholders of the company. This situation is described as the 'direct power to control'. In any case, such power should be real, and it cannot be held by a fully controlled nominee shareholder. The correlation between indirect and direct control cannot be described as *de facto* and *de jure* respectively.[70]

There is another significant concern regarding this matter. The Constitution of South Africa establishes that 'No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.' (ss 25(1)).[71] As a result, it is unlikely that in case of ambiguity, legal provisions may be interpreted in favour of the deprivation of property rather than its preservation. Otherwise, this deprivation of property may be considered arbitrary since the legal provisions do not state expressly that such property may be deprived and the link between the property owner and the person liable is too remote.[72]

From the constitutional point of view, it hardly may be concluded that the existence of a common nominee shareholder would be enough to state that the deprivation of the property in the form of the arrest of an associated ship is grounded especially in a situation where it is the common practice to have the same nominee shareholder for a number of companies as it was in the case of Mr Lemonaris.[73] In this case, if the principals of Mr Lemonaris were different persons then the ship to be arrested did not belong to neither the debtor nor the controller of the debtor and the

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[69] Wallis. *Op. cit.* 299. Wallis. states that the phrase '*de facto*' means 'In fact, in reality; in actual existence, force, or possession *whether by right or not*.' It does not seem that this approach to find the literal meaning of phrases or words really relates to the matter by itself. However, the idea behind it is clear. The control over the company cannot be realised by two types of persons at the same time, i.e., according to Smalberger's terminology, the one performing *de jure* control and the other performing *de facto* control.

[70] Hofmeyr. *Op. cit.* 143.

[71] The Constitution of the Republic of South Africa of 1996.

[72] *First National Bank of South Africa t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of South Africa Limited t/a Wesbank v Minister of Finance* 2002 64 SATC 471 67.

[73] Wallis. *Op. cit.* 398.

claim may be satisfied from the property not controlled or owned by the actual debtor. This situation constitutes 'arbitrariness'.

The arrest of an associated ship may result in either the judicial sale of a ship not owned by a person liable or the necessity to provide security to release the ship arrested. Both these cases constitute the 'deprivation' of property.[74] Therefore, it seems to be incorrect to interpret ss 3(7)(b)(ii) of the AJRA 1983 as stipulating that the existence of *de jure* power to control the company without the real power to do so gives rise to the possibility to arrest the ship associated by such control. The opposite conclusion would contradict ss 39(1) of the Constitution which stipulates that any law should be interpreted in such a manner which promotes 'the purpose, spirit and objects of the Bill of Rights'.[75]

In the face of the above, the preferable interpretation of ss 3(7)(b)(ii) of the AJRA 1983 should be the one given by Farlam JA and Marais JA and not the interpretation of the majority in the *MV Heavy Metal* case. It seems to be questionable to imply in the wording of the relevant provisions that there may exist two sources of control over the company at the same time. However, the judgment of the majority remains the most authoritative, and it should be considered as the interpretation which binds the courts of lower instances.[76]

Therefore, even though the position that there is only one power of control of the company, i.e., the real power to determine the fate of the company, seems to be more reasonable, it has to be accepted that control over the company would mean either *de facto* control, i.e., control realised by the beneficiaries of the company, or *de jure* control, i.e., the one realised by the actual shareholders of the company even nominee ones, and one of these types of control would be enough to establish the association.

V 'Piercing the corporate veil'

(a) Introduction

Even though the AJRA 1983 stipulates the control criterion to establish the association between two vessels, the term 'control' itself is more common for company law. In the case of *MV Heavy Metal* discussed shortly above, Smalberger JA stated:

> 'Where these two functions happen to vest in different hands, it is the latter which, in my view, the Legislature had in mind when referring to 'power' and hence to

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[74] *Euromarine International of Mauren v The Ship "Berg"* 1984 (4) SA 647 (N) 655D-E.
[75] Wallis. *Op. cit.* 291–293.
[76] *Elstead Ltd v MV Bulk Joyance and Others: MV Bulk Joyance* 2014 (5) SA 414 (KZD) [16].

> 'control'. In South African legal terminology that means (essentially for the reasons given by the Court a quo at 1998 (4) SA 479 (C) at 492C-F ('the reported judgment'); see also s 195(1) of the Companies Act 61 of 1973) the person who controls the shareholding in the company.'[77]

The majority judgment in the case expressly relies on the company law rules to describe the power to control the company. However, Wallis criticised this statement for such reliance on the Companies Act 61 of 1973 in connection with the control under true associated ships arrest provisions of the AJRA 1983.[78] This criticism will be discussed in more details below.

Therefore, it is important to determine what is 'control' under the company law rules and if there are differences between company law and admiralty law regarding this matter. In order to do so, the current Companies Act 71 of 2008 which was adopted after the *MV Heavy Metal* case needs to be analysed.

(b) Companies Act 71 of 2008

The Companies Act 71 of 2008 uses the term 'control', with the meaning that is close to the one in the AJRA 1983, i.e. the power to determine the fate of the company, in two situations. One is in the context of the attribution of the company's activities to the persons controlling the company. The other is in the context of piercing the corporate veil.

Both these situations should be discussed to establish where and how the control criterion is applicable under the company law rules.

(i) Rule of attribution.

Firstly, the control over the company may imply the attribution of thoughts and actions of the 'directing mind' of the company to this company.[79] This is necessary primarily for the imposition of delictual (direct as opposed to indirect or vicarious) or criminal liability upon the company.[80] One of the requirements under which such liability may be imposed is the personal fault of the delinquent.

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[77] *MV Heavy Metal: Belfry Maritime Ltd v Palm Base Maritime SDN BHD* 1999 (3) SA 1083 (SCA) [8] by Smalberger JA.
[78] Wallis. *Op. cit.* 282.
[79] See the famous judgment of the House of Lords *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1914] 1 KB 432, 436; [1915] AC 71. In this case, Viscount Haldane L.C. stated 'My Lords, a corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation.'
[80] Yeats J.L, de la Harpe R et al *Commentary on the Companies Act of 2008.* 2-153.

The company is an abstraction without its own mind or ability to act (or fail to act) and therefore it cannot be at fault, so it is needed to attribute the state of mind or actions of some natural person to it.[81] In this case, the control means that a controlling person may determine the activities of the company and therefore their state of mind and actions may be attributed to the company to find out if such a company was at fault or not.[82] The determination of who is in control of the company is mostly based on the company's charter documents such as articles of incorporation.[83] In most cases, the 'directing mind' would be the board of directors, however, it may also be an operational director or a head of a certain company's branch who is in *de facto* control of the relevant operation of the company.[84]

At the same time, it should be noted that the rule of attribution should apply only if the company cannot be found liable under the ordinary company rules of the agency or vicarious liability for delict.[85]

(ii) Disregarding the corporate veil

The second understanding of the control under the company law rules may be more important for present purposes. The power to control the company should be established in order to disregard the corporate veil under ss 20(9) of the Companies Act 71 of 2008. In some cases, where it is in line with certain criteria established in common law, the legal separateness of a company from its shareholders or directors may be disregarded.[86]

In general, it is possible to distinguish two types of disregarding the corporate veil. The first one is the traditional veil piercing. It treats the persons behind the veil, i.e., the shareholders, as if their assets were those of the company and as such available to creditors to look for the satisfaction of their claims against the company, i.e., to sue the shareholders and if successful to levy execution against their assets.[87] Another possible situation is 'reverse veil piercing'. It, in turn, entails a creditor to satisfy the claim against its debtor from the assets of a company of which its debtor is the controlling shareholder, i.e., treating the assets of the company as assets available for

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[81] *Ibid.* 2-152.
[82] *Ibid*.
[83] *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 3 All ER 918 923.
[84] *Northview Shopping Centre (Pty) Ltd v Revelas Properties Johannesburg CC and another* [2010] 3 All SA 422 (SCA) [21], [22].
[85] Yeats. *Op. cit.* 2-157-8.
[86] *Ibid.* 2-162.
[87] Blackman. *Commentary on the Companies Act*. 2-6.

the satisfaction of claims against that company's shareholder.[88] Control under these circumstances has to be established in order to determine who would be liable for the actions of the company or the shareholder in case of disregarding the corporate veil.[89]

(c) Common law

(i) Company a 'mere façade'

The criterion of '*mere façade'* is essential to make it possible to disregard the corporate veil. It basically means that disregarding the corporate veil should be possible if the separate legal personality of a company has been abused as a '*mere façade*' concealing the true facts regarding its activities.[90]

There are two types of situations in which the company may be treated as a *mere façade*.[91] The first one is that the company is treated as not a separate legal personality but rather as an 'alter ego' or 'instrumentality' for the persons in control. The second one is that the controlling person uses the company for their benefit with fraud, dishonesty or other improper way.[92] These situations are not mutually exclusive but, in many cases, complement each other. It is necessary to emphasise that it is crucial to determine that the company is used in some improper way in order to disregard its corporate veil. It is definitely not prohibited by South African law to create some single-purpose vehicles or other companies as long as such a company is not a sham.[93]

(ii) 'Alter ego' or 'instrumentality'

As it was mentioned above, disregarding the corporate veil is possible if the company is used as an 'alter ego' or 'instrumentality' for its shareholders or other beneficiaries and is not treated as a separate legal entity but one aimed at promoting the shareholders' or other beneficiaries' sole interests.[94] In other words, the corporate veil of such a company may be disregarded when the person controlling the company benefits from the legal personality of this company when such a company is not actually separate.[95] However, an 'alter ego' criterion does not mean that the company should be fully used as a 'mask' and there need not have been an intention of the

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[88] *Ibid.* 4-142-1. Yeats. *Op. cit.* 2-174, see an example of reverse veil piercing in the English judgment by Lord Denning MR *DHN Food Distributors Ltd v London Borough of Tower Hamlets* [1976] 1 WLR 852 859F–H.
[89] See for example *Board of Executors Ltd v McCaffery* 2000 (1) SA 848 (SCA) [10].
[90] *Cape Pacific Ltd v Lubner Controlling investments (Pty) Ltd and others* 1995 (4) SA 790 (A) 796, 800.
[91] Yeats. *Op. cit.* 2-166.
[92] *Cape Pacific Ltd v Lubner Controlling investments (Pty) Ltd and others* 1995 (4) SA 790 (A) 791.
[93] See for example *Airport Cold Storage (Pty) Ltd v Ebrahim* 2008 (2) SA 303 (C) 306-7.
[94] Yeats. *Op. cit.* 2-171.
[95] Ibid.

shareholders to create a separate enterprise from the commencement of the company's existence, and it is not necessary that the shareholders must have intended to create the company as a *mere façade* from its inception or incorporation. The corporate veil may be lifted even though the company was created as a separate legal personality however afterwards it has been used as a 'mask'.[96]

Therefore, the company may be recognised as an 'alter ego' or 'instrumentality' in cases where such use of the company's separate personality contradicts the legal requirements. An 'alter ego' itself does not create a situation where disregarding of corporate veil is possible, but it is possible where such an 'alter ego' is used as a 'mask' and this use violates other persons' rights.

(iii) Fraud, dishonesty or other improper conduct

The conduct of the company should be improper to disregard its corporate veil. However, the question is what level of impropriety should exist. In the case *Lategan and another NNO v Boyes and another*,[97] Le Roux J concluded that fraud is essential to lift the corporate veil of the company, he stated that.

> '…the fact that the second defendant, well-knowing what the terms of the amending agreement were, now takes a sharp point on prejudice does not constitute a fraud on the plaintiffs, although it offends one's sense of equity…'.

Therefore, the lack of equity caused by the existence of the company does not constitute the possibility to disregard the corporate veil without fraud on the part of such a company.

In the case of *Botha v Van Niekerk*[98] and some later cases[99] this requirement was relaxed, and it was held that the conduct dishonest or improper in ways other than fraud could provide grounds for disregarding a company's separate legal personality. It was pointed out again that a mere lack of equity in relations between parties did not constitute grounds to disregard the corporate veil and that the corporate veil may be lifted only in rare cases where specific circumstances occur justifying such lifting.[100]

Therefore, the company law rules allow disregarding the corporate veil only if specific criteria are met. The essential ground is that the company shall be a '*mere*

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[96] *Ibid.* 2-166.
[97] 1980 (4) SA 191 (T) 201-2.
[98] 1983 (3) SA 513 (W). The case is published in Afrikaans and cited in English in Yeats J.L. *Op. cit*. 2-168.
[99] See for example *Nel and others v Metequity Ltd and another* 2007 (3) SA 34 (SCA) [11], [12].
[100] *Botha v Van Niekerk* 1983 (3) SA 513 (W). The case is published in Afrikaans and cited in English in Yeats. *Op. cit*. 2-168.

façade' in the specific relationship regarding which the corporate veil is lifted. This, in turn, involves two situations. The first situation is the one when the company is used in the specific relationship as an 'alter ego' or 'instrumentality' for other beneficial persons. The second is the one where there is fraud, dishonesty, or other improper conduct in the use of a separate legal personality of the company. The abuse or impropriety in this concept should be conducted by a person who is in control of the company.

Therefore, the control in this concept belongs to the person(s) who use the company as their mask and get the benefits from the company's fraudulent, dishonest or other improper conduct. In this regard, the control should be established in relation to the specific circumstances of the case under which the question of disregarding the corporate veil arose.[101]

(d) Differences between admiralty and company law rules

For the present work, the control under the company law rules should be understood as one for the purposes of disregarding the corporate veil rather than for the attribution provisions. It is due to the fact that the institution of disregarding the corporate veil is much closer to the arrest of ships associated by common control than the rule of attribution. Disregarding the corporate veil allows imposing the liability for the company's actions upon the other person(s), the same idea is behind the arrest of ships not owned by the person liable since it makes it possible to satisfy the claims from the arrested ship which does not belong to the person(s) actually liable for the claims being enforced and is not actually involved in the incident.

As it is seen from the analysis above, the main difference in this regard is that lifting the corporate veil under the company law rules may be realised only in cases where the controlling person(s) get the benefits from the company's activity and the conduct of such a company contradicts the legal requirements. On the other hand, to arrest the ship associated by common control it is not needed to establish improper conduct of the company it is enough to prove the common control between the owner of the ship associated and the owner of the ship concerned.

This difference may be demonstrated through the comparison of two cases, with very similar facts, namely that of *The Shipping Corporation of India Ltd v Evdomon Corporation*,[102] decided on company law principles, and *MV Baconao: Transportes*

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[101] Yeats. *Op. cit.* 2-172, 2-172A.
[102] *The Shipping Corporation of India Ltd v Evdomon Corporation* 1994 (1) 2 All SA 11 (A).

Del Mar SA v Jade Bay Shipping Co Ltd,[103] decided under the true associated ship arrest provisions.

(i) The Shipping Corporation of India Ltd v Evdomon Corporation

The circumstances of the case were that the Government of India chartered the vessel *Kavo Peiratis* under the voyage charter. The voyage was completed successfully, and the cargo was discharged. After that, the Government paid part of the debt to the disponent owner of the vessel, Evdomon Corporation, but failed to pay the balance in the amount of $ 109,962.47.[104]

Afterwards, Evdomon Corporation found out that the vessel *MV Vallabhbhai Patel* (the vessel), then located in South Africa, belonged to the Shipping Corporation of India, the private company allegedly controlled by the Government of India. Evdomon applied for the vessel's attachment to found the jurisdiction of the South African court preparatory to pursing its claim in an action to recover the balance. The charter, in turn, contained the arbitration clause under which all the disputes arising out of the charter should be settled by the arbitration in India. However, the Government of India allegedly engaged in delaying tactics as a result of which the dispute might be considered for several years.[105] The attachment of the vessel was granted at first instance but the Shipping Corporation of India took that decision on appeal.

In the Appellate Court, it was established that the Shipping Corporation of India was a state-owned enterprise which was controlled by the state in the form of the Government of India.[106] The Government of India controls all except for 204 of the 7,000,000 shares issued. Those 204 shares belong to the executives of the company. The disposal of these shares was subject to the approval of the President of India.[107] However, the court decided that it was not proven that the Shipping Corporation of India was used for fraudulent activities and therefore there were no grounds to disregard its corporate veil.[108] As a result, the attachment was set aside.[109]

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[103] *MV Baconao: Transportes del Mar SA v Jade Bay Shipping Co Ltd*, A119/95 (DCLD), Shipping Cases of South Africa C42.
[104] *The Shipping Corporation of India Ltd v Evdomon Corporation* 1994 (1) 2 All SA 11 (A) 12.
[105] *The Shipping Corporation of India Ltd supra* 13.
[106] *The Shipping Corporation of India Ltd supra* 15.
[107] *The Shipping Corporation of India Ltd supra* 14.
[108] *The Shipping Corporation of India Ltd supra* 25.
[109] *The Shipping Corporation of India Ltd supra* 25(3).

(ii) MV Baconao: Transportes Del Mar SA v Jade Bay Shipping Co Ltd

The circumstances of this case are very similar to the case of *The Shipping Corporation of India*. The claim arose out of the charterparty between Jade Bay Shipping Co Ltd (Jade Bay) as the shipowner and Cuflet Chartering of Havana, Cuba (Cuflet), as the charterer. Cuflet was a company fully owned by the Cuban government. The charterer failed to fulfil its obligation under the charterparty. The charter contained an arbitration clause in favour of arbitration in London.[110] Jade Bay applied for the security arrest of the *MV Baconao* as an associated ship belonging to Transporters del Mar SA, a company owned by Mambisa allegedly owned by the Cuban government in the same way as Cuflet was owned. The arrest was granted.

Transporters del Mar SA applied to set the arrest aside on the ground that it had not be proved on the basis of the balance of probabilities that *MV Baconao* was an associated ship.[111]

In the course of the hearings, it was proven by Jade Bay that Transportes Del Mar SA was controlled by Mambisa and that Mambisa was controlled by the Cuban government. Therefore, it was held that Cuflet and Transporter Del Mar SA were controlled by the same entity in the form of the Cuban government.[112] As a result, the application was rejected, and the arrest remained in force. The issue of fraud on the part of Cuflet, Transportes Del Mar SA, Mambisa, or the Cuban government did not arise.

(iii) Differences between the two cases

The difference between the approaches of company law and admiralty law rules respectively is evident from these two cases with very similar circumstances. If the company law stipulates the criterion of fraudulent or other improper conduct and specifically states that disregarding the corporate veil may be possible only in rare cases where such improper conduct occurs, the admiralty law actually 'disregards' the corporate veil in all cases where the common control between two shipowners is established.[113] This results in the outcomes of the above cases. When in the case of the *Shipping Corporation of India* where control over the company by the Government of India was established, the attachment of the vessel was set aside since there was no

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[110] *MV Baconao: Transportes del Mar SA v Jade Bay Shipping Co Ltd*, A119/95 (DCLD), Shipping Cases of South Africa C42 C43A–C.
[111] *MV Baconao supra* C43A–C.
[112] *MV Baconao supra* C58-C59A.
[113] Staniland H. 'The Arrest of Associated Ships in South Africa: Lifting the Corporate Veil Too High?' (1997) 9 *U.S.F. Mar L.J.* 405 423.

fraud in the activity of the shipowner, *MV Baconao* remained arrested, and the question of fraud did not even arise. The outcome of the *MV Baconao* case if the arrest of an associated ship would be possible only in the existence of fraud cannot be assessed. However, it is clear, that the standard for proving the association under the admiralty law provisions is much more relaxed in comparison to disregarding the corporate veil under the company law rules.

In these terms, the difference between understanding control under the company law and admiralty law provisions are as follows. The control in admiralty is the power to determine the fate of the company, such as that a majority shareholder would have, and this power may be exercised directly or indirectly. On the contrary, under the company law provisions, control is the power to determine the actions of the company under specific circumstances and get the benefits from fraud, dishonesty or other impropriety of such a company's activities. In this regard, control over the company should be established in relation to the situation concerned. In admiralty proceedings, the control is the overall power to determine the fate of the company despite the real influence of such control on the situation which is the ground for the dispute.

(e) Nature of the arrest of ships associated by common control

It was established that despite the fact that disregarding the corporate veil and arrest of ships associated by common control aimed at the same purpose – to impose the liability of the company upon the person(s) controlling it, the criteria for the arrest of the ship not owned by the person(s) liable and disregarding the corporate veil are distinct. There are two main differences regarding this. Firstly, to disregard the corporate veil, it is needed to establish fraud, dishonesty or other improper conduct of the company and controlling person(s), it is not needed in order to arrest a ship associated by common control. Secondly, to disregard the corporate veil, control should be established regarding the specific actions of the company which are the grounds for the claims against the controlling person(s), to arrest a ship associated by common control with the ship concerned, it is needed to find the overall control over the shipowner without referring to the specific actions or activities.

However, the question is whether such differences make disregarding the corporate veil and determining the association between the two ships completely different institutions. Answering this question Wallis stated:

> 'As a justification for the wholesale departure from fundamental principles of company law embodied in the true associated ship arrest it is almost entirely lacking. It is a myth that should be laid to rest and it would be highly desirable to

> stop using this language to describe the purpose or nature of the associated ship arrest provisions.'[114]

Proving it, Wallis demonstrates that the 'one-shipping companies' against which activities 'true association provisions' were introduced in most cases are created for completely legitimate and honest purposes.[115]

It is definitely not prohibited by law to establish one-ship companies. Also, as analysed above, it is true that there are significant differences between disregarding the corporate veil and true associated ships provisions. However, it does not certainly mean that these institutions are completely different at their core. Moreover, it does not seem that creating such a distinction would be useful.

The application of the true associated ships provisions is based on determining relations within the company which are regulated by the company law provisions. It is the sphere of company law to establish the association, not maritime law.[116] If these institutions would be completely differentiated it may result in a situation where it may be impossible to use the company law rules in relation to associated ships. It is not a desirable outcome, especially concerning institutions serving the same purposes, namely, to treat shareholders as liable for the companies' debts and treat assets of the company as being owned by its shareholders.

Also, in favour of the relatedness of these two institutions it also speaks the discussion around the true associated ships provisions to be incorporated in the 1999 Arrest Convention. One of the main arguments against it was that the issue of control with regard to arrest of ships associated by common control is the issue of company law rather than maritime law.[117] In most countries, the arrest of ships associated by common control is realised through the company law means.[118]

The arrest of ships associated by common control may in some cases be also considered a kind of merger of traditional veil piercing and 'reverse veil piercing'. This conclusion is supported by the fact that it may be needed to establish true association between two ships to establish which entity is in control of the shipowning company

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[114] Wallis. *Op. cit.* 103.
[115] *Ibid.* 102.
[116] Berlingieri. Vol. II. 103-4.
[117] *Ibid*. 103-4.
[118] *Ibid.* 291–311.

concerned (direct veil piercing)[119] and to find the ship belonging to another company controlled by the same entity (reverse veil piercing).[120]

Therefore, the true associated ships provisions are disregarding the corporate veil by its nature but with the maritime and admiralty specifics which should be taken into account when dealing with them.[121]

VI Conclusion

This chapter dealt with understanding the term 'control' and the nature of the arrest of ships associated by common control. The main conclusions are as follows.

Control over the company is the power to determine its fate or destiny, which means making the most important decision within the company. In ordinary cases, such power belongs to the majority shareholder(s).

The majority's judgment in the *MV Heavy Metal* case states that the existence of common control between two ships by the actual shareholders, even nominee ones, is enough to establish the association between these ships. There is an alternative position which states that to establish the association between the ships it should be proved that the power to control the ship-owning companies is real or actual despite such control is direct, i.e., performed by shareholders or other person(s) entitled to control the company through control of the voting rights within it, or indirect, i.e., performed by person(s) who are not entitled to control the company through control of the voting rights within it but actually do so, for example, beneficiaries.[122] However, majority's judgment in the *MV Heavy Metal* is the most authoritative judgment in this regard today.

Control over a company under the company law rules differs from the one under the admiralty provisions. The main differences are the following. To disregard the corporate veil, there should be fraud, dishonesty or other improper conduct of the company and controlling person(s) and therefore the control should be established in relation to certain activities of the company which are the grounds for the dispute.

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[119] Yeats. *Op. cit.* 2-162-3.

[120] Blackman. *Op. cit.* 4-142-1, Yeats. *Op. cit.* 2-174, *DHN Food Distributors Ltd v London Borough of Tower Hamlets* [1976] 1 WLR 852 859F–H.

[121] Also, some authoritative authors name the arrest of ships by common control 'disregarding the corporate veil', see for example Hofmeyr. *Op. cit.* 134, Hare J. *Op. cit.* 108, Berlingieri. Vol. II. 102. It is also described as a 'form of statutory veil piercing' by Farlam JA in case *MV Heavy Metal: Belfry Maritime Ltd v Palm Base Maritime SDN BHD* 1999 (3) SA 1083 (SCA) [22] by Farlam JA.

[122] The meaning of the term 'beneficiaries' may also be not straightforward. However, the definition of this term and problems arise with regard to it is not the subject matter of the present work. Now, it is enough to state that beneficiaries for the purposes of the dissertation are the persons entitled to control the company through their nominee shareholders and to take the company's profit.

This contrast does not mean that the true associated ships provisions differ completely in nature from the rules on disregarding the corporate veil. The aims of both are the same and therefore the arrest of ships associated by common control can be considered as disregarding the corporate veil, taking into account the specifics of admiralty law. Otherwise, it would be impossible to use the company law rules for establishing the association between two ships by analogy. It is not a preferable outcome for the legal order.

CHAPTER 3. STRUCTURE OF STATE CONTROL

I Introduction

Chapter 2 dealt with the understanding of the term 'control' under South African law. The main conclusion is that control is the power to determine the fate of the company, i.e., to decide on the most important issues in it. It is accepted that this power may be realised *de jure,* i.e., by the registered shareholders of the company even by nominee ones, or *de facto*, i.e., by persons other than the registered shareholders. This position is formulated in the *MV Heavy Metal* case[123] by the Supreme Court of Appeal and therefore has the most authority for all South African courts at least until there will be some amendments to the AJRA 1983 or judgment of the Supreme Court of Appeal or Constitutional Court on this matter with a different conclusion.

Chapter 3, in turn, deals with a more practical view of the problem of the implication of this legal construction upon the state-owned companies. One of the most effective ways to do so is to determine some of the most troublesome points and analyse them. Firstly, the possible structures of ownership of vessels within state-owned companies will be considered. Secondly, the political and economic regimes of three different states, Cuba, China, and Russia will be described. The element common to them is that a big part of their economy is operated by state-owned companies.

In this part of the work, state-owned companies are understood as any types of artificial entities which are owned or controlled by the state.

II State Control of a Company[124]

(a) Introduction

There are five main situations where the vessels controlled by state-owned companies may be recognised as associated ones. In this part, it will be given a brief description of these ownership structures.

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[123] 1999 (3) SA 1083 (SCA) [11], [23] by Smalberger JA.

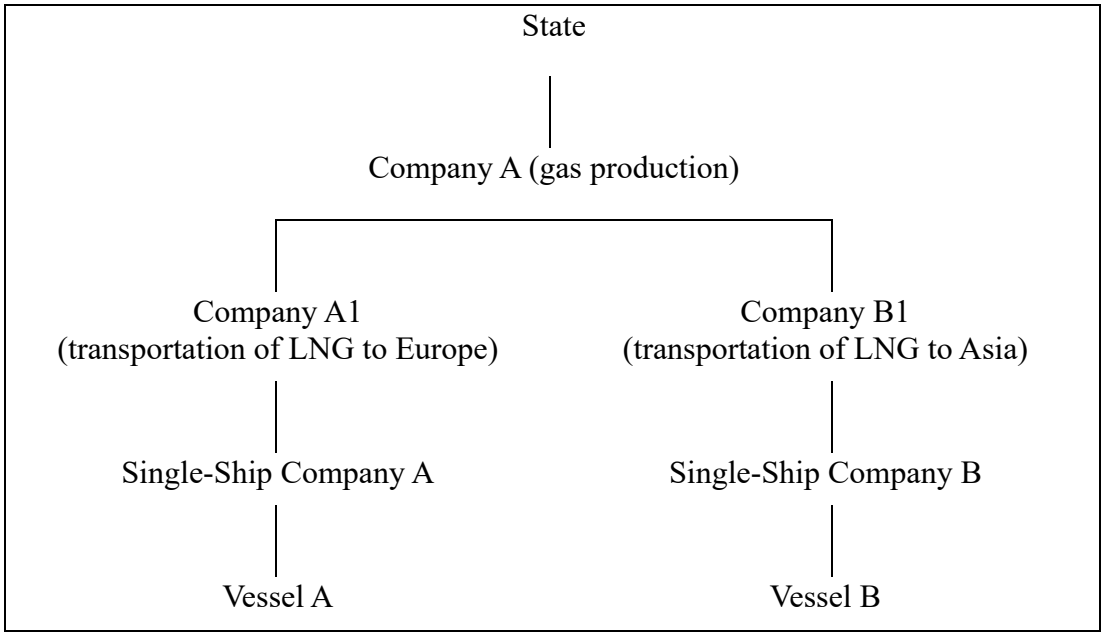
[124] It is necessary to mention that the foreign state immunity which is guaranteed under South African law does not apply to foreign states 'in proceedings relating to a commercial transaction entered into by a foreign state' (ss 4(1)(a) of the Foreign State Immunity Act 87 of 1981). Therefore, the issue of state immunity in relation to the subject matter of the present work is not relevant and will not be discussed in the future. The main conclusion in this regard is that the South African courts have jurisdiction to consider the disputes on the arrest of ships controlled by state-owned companies when such ships participate in commercial activities. See *The Shipping Corporation of India Ltd v Evdomon Corporation* 1994 (1) 2 All SA 11 (A) 23.

(b) State-owned companies related to each other

The first situation exists where true association between two ships may be established if the state-owned company owns or controls the companies owning or controlling vessels. This situation is demonstrated in Scheme 1.

In this scheme, there is a company which, for instance, produces gas. This company, in turn, creates two separate companies to transport its goods to Europe and Asia. Management of these companies is aimed at one purpose to generate profits for their parent company.

Scheme 1. State-owned companies related to each other

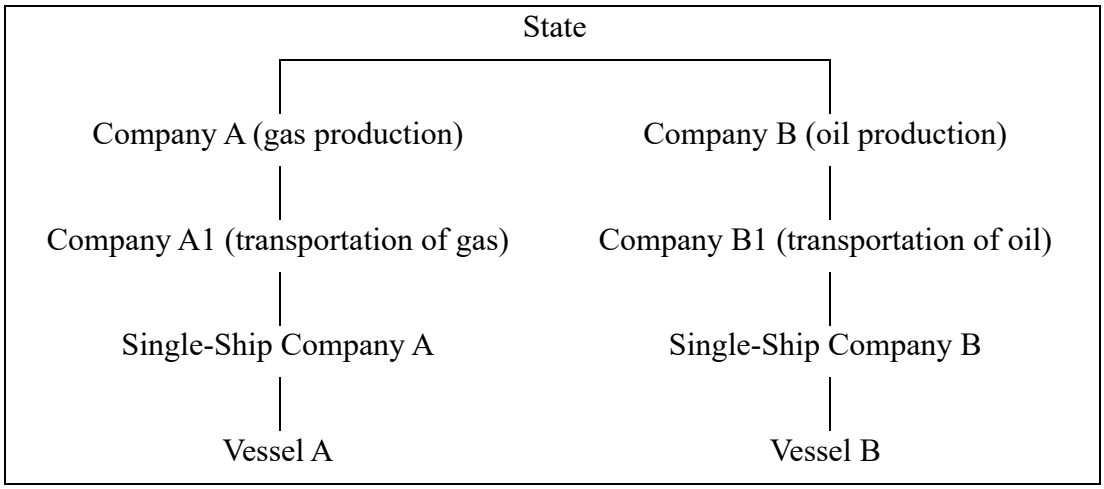


(c) State-owned companies not related to each other

The second situation occurs when two state-owned companies are created for completely different purposes and their activities are not related to each other. For instance, this is the case where such companies act in different spheres of the economy. For example, if one state-owned company produces gas and after that transports it to its counterparties, and another state-owned company produces oil and transports it. Vessels controlled by such companies may theoretically be considered associated.

The diagrammatic depiction of their relationship is provided in Scheme 2 below.

Scheme 2. State-owned companies not related to each other



At the same time, in this construction, the activities of these two companies are completely separated from each other, they have different management and different structure. Moreover, often the state exercises its powers in relation to them through different state bodies. It is not completely correct to perceive the state as a single organism in these cases. The different departments and state bodies in their daily management do not always interact with each other.

(d) State using the mechanisms of single-ship companies

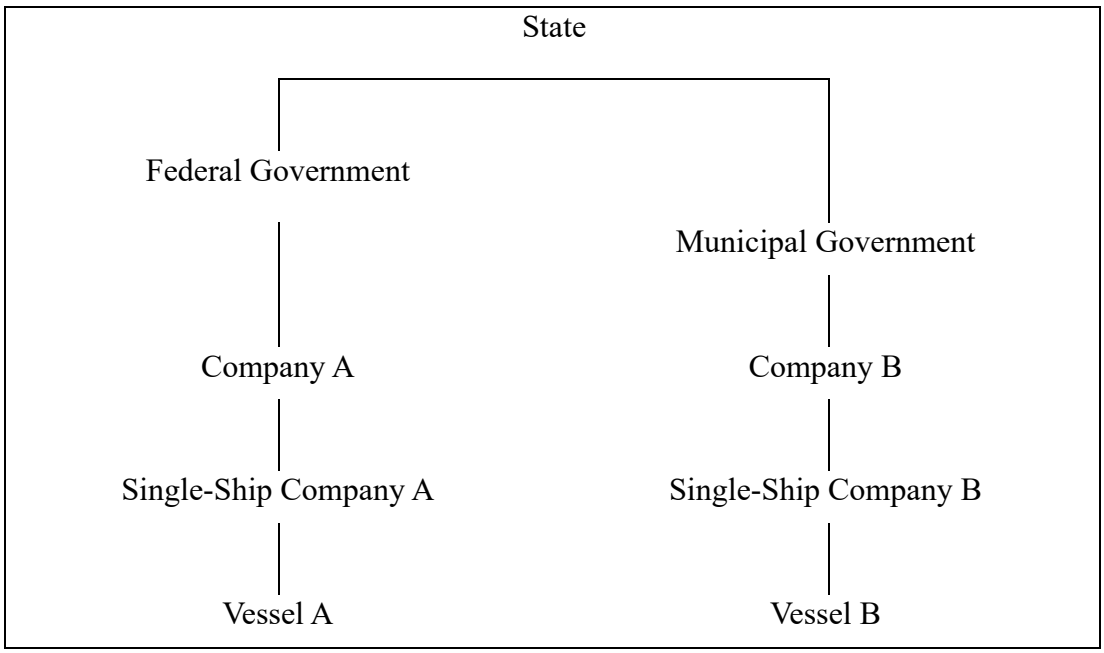
The third possible situation occurs when the state directly uses the mechanism of single-ship companies or creates an intermediary company which after that creates single-ship companies. In this situation, the companies owning the ships do not have their own economic purposes at all and are used for convenience purposes and other advantages. Their structure scheme may be similar to Scheme 1 or Scheme 2. The distinctive feature of this situation is that the companies established perform the same economic functions. The ships in this context are operated as one commercial fleet.

(e) State-owned companies created on the different levels of the state

The fourth situation is rather unusual and exists only in countries with divided systems of taxation at central and provincial or municipal levels. In this case, state-owned companies may be created by central state bodies and provincial or municipal bodies separately. In this regard, the question is whether these state-owned companies are related to each other at all since the most important decisions on their fate are made by bodies on different levels of the state. The possible structure in this regard is

demonstrated in Scheme 3. This situation will be discussed in more detail below with regard to the case *International Marine Transport SA v MV "Le Cong"*.[125]

Scheme 3. State-owned companies created on the different levels of the state



(f) Informal control of a company by the state

The fifth situation is the informal control of a company by the state. The state has the ultimate power to impose its will on the natural and legal entities within its borders. This may be done through different mechanisms from tax preferences to imposition of liability and conclusion of government contracts.

In this case, it is not necessary for a company to be formally controlled by the state. The fate of the company may be decided by means other than control over voting rights. Due to the fact that the main criteria to establish control of the company is the power to determine the fate of such a company, then informal control should be taken into account as well.

The state is not just a shareholder who is directly interested in the success of the particular company but the supervisor over the state economy in general. In this regard, it would be not completely correct to consider the state an ordinary shareholder in the company without some additional influence on the position or decisions of other shareholders. Therefore, even though the state may not legally enjoy the privileges in relation to its shares and voting rights, there are informal mechanisms to influence the decision-making process within the company. The state is the most powerful player in

[125] [2005] JOL 16130 (SCA).

the market because it creates its own rules. This should be borne in mind when discussing state-owned companies' activity in the shipping sector.[126]

III Brief description of the market of China, Russia, and Cuba

(a) Introduction

The schemes demonstrated above do not occur in a vacuum. They are simple reflections of existing ownership structures in relation to state-owned companies in different jurisdictions. The most problematic ones in this regard are the jurisdictions in which state-owned companies predominate in the economy. This domination may create a situation where a lot of different companies are controlled by the state and if there are a number of them that own ships it would mean that a lot of the vessels could, at least theoretically, be considered associated and arrested for the debts of each other. For illustration purposes, Chinese, Russian, and Cuban jurisdictions will be discussed. However, there are many more states with the same or similar market structure.

In order to illustrate the problems generally described above it is important firstly to understand the general components of the market in the states under consideration. It is not necessary for present purposes to look at the particular parts of their company law regulations since a general understanding of state ownership in these countries would be enough for the theoretical comprehension of the mentioned problems.

In this part, more attention will be paid to the Russian jurisdiction. There are two main reasons for that. The first one is that the situation in Russia is not as straightforward as in the other jurisdictions. Even though the Russian economy is based on capitalist ideology, and its legislation is in line with the free-market principles, the amount of state ownership is still very high there. In this regard, there are more hidden or informal mechanisms of state control over the economic sphere. The second one is that I have more expertise in Russian jurisdiction and can say more regarding it compared to the other two which nevertheless are also important for the present work.

(b) China

Chinese economy as a socialistic one was aimed at decreasing the level of private property in favour of state-owned enterprises and constant and 'fair' distribution of resources. This situation was unchanged at least before 1973 when the drift to the

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[126] This issue was arisen by Wallis, but he did not propose a clear solution to this problem. See Wallis. *Op. cit.* 315-6.

'socialist market economy' was announced by the Communist Party of China.[127] The decision to abandon the planning economy in favour of the 'socialist market economy' was finally accepted by the Fourteenth National Congress of the Chinese Communist Party.[128] The reform developed very slowly[129] and only in 1993, the first Company Law of the People's Republic of China (hereinafter – the 1993 Company Law of China)[130] was enacted.[131] Following that, in 1999, the Constitution of China was amended as well. Due to these amendments, the private economy was recognised as an '*important component of the country's socialist market economy*'.[132] However, even at those times, the company law in China remained unclear and fragmented even though the 1993 Company Law of China systematised the legal provisions on this matter.[133] This was caused by the fact that the 1993 Company Law provided general principles of law and gave little detail regarding their implications.[134] However, it was the first time the category of private legal entities separated from their owners or shareholders was introduced in Chinese law. In general, the 1993 Company Law of China created two types of companies, limited liability companies and joint stock companies.

The modern Chinese company legislation was born in 2005 with the amendments to the Company Law of China (hereinafter – the 2005 Company Law of China).[135] These amendments created a well-developed system of Chinese company law. At this stage, private enterprises were fully introduced into the Chinese legal system. For example, the requirement for the minimum number of shareholders in limited liability companies has been removed which opened the way for the sole shareholder companies.[136] Also, the transaction, restructuration and other rules were

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[127] Yu K.B., Krever B. 'The High Frequency of Piercing the Corporate Veil in China' (2015) 23 *Asia PAC. L. REV.* 63 65
[128] Yu G. 'Adaptive Efficiency and the Economic Development in China: The Definition and Enforcement of Property Rights' (2009) 11 *Australian Journal of Asian Law* 82 86
[129] Yu K.B. *Op. cit.* 66.
[130] The Companies Law of the People's Republic of China, adopted at the 5th Meeting of the Standing Committee of the Eighth National People's Congress on December 29, 1993.
[131] Godwin A. 'The Internal Logic behind the Evolution of Company Law in China - Do Legal Origins Matter?' (2013) 14 *Australian Journal of Asian Law* 255 259.
[132] *Ibid.*
[133] *Ibid*. 260.
[134] Yu K.B. *Op cit.* 67.
[135] Companies Law of the People's Republic of China, adopted at the 5th Meeting of the Standing Committee of the Eighth National People's Congress on December 29, 1993, as revised at the 18th Meeting of the Standing Committee of the Tenth National People's Congress on October 27, 2005.
[136] Yu K.B. *Op cit.* 73.

amended. The right to pierce the corporate veil was introduced as well.[137] In general, Chinese company law was 'shifted to a more modern footing'.[138]

As a result of the constant development in the third quarter of the XX century and the beginning of the XXI century, Chinese law was shifted from a fully state-based economy to the introduction of private entrepreneurship into a socialist market economy. However, that does not mean that the Chinese economy stopped being based on the state in its vast part. For example, in 2017, approximately 39% of the assets were owned by state-owned enterprises.[139]

It is important also to note that the government in China does not always exercise its power to control the company where it has the shares. The state in these relations has a dual role. First of all, the state is the owner of the company's property as an ordinary shareholder and is interested in protecting its assets and maximising the gain.[140] However, the state is also the ultimate supervisor over the market situation and its decision may be dictated not by the interests of a specific state-owned enterprise but by the general interests of the state's economy. The fact that the interests of a specific enterprise are not paramount for the state should be borne in mind when dealing with the possible attribution of the state's acts to the company.

(c) Russia

From the legal point of view, the Russian market is free and based on the principles of protection of private property.[141] However, in reality, the situation is completely different.[142] One of the possible explanations for this phenomenon is that the Russian economy did not rebuild itself completely after the collapse of the Soviet Union in which private property and private entrepreneurship were highly restricted.[143] What transformation, had been achieved, was stopped, or at least slowed down, by the current government for political reasons.[144] Determination of the reasons why the

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[137] Wu M. 'Piercing China's Corporate Veil: Open Questions from the New Company Law' (2007) 117 *The Yale Law Journal* 329 330-1.
[138] Yu K.B. *Op cit.* 73.
[139] Zhang Ch. *How Much Do State-Owned Enterprises Contribute to China's GDP and Employment?* available at https://documents.worldbank.org/en/publication/documents-reports/documentdetail/449701565248091726/how-much-do-state-owned-enterprises-contribute-to-china-s-gdp-and-employment, accessed on 20 September 2023.
[140] Lin H., He Y., Wang M., Huang Y. 'The State-Owned Capital Gains Handover System and managerial agency cost: Evidence from central state-owned listed companies in China' (2020) 36 *Finance Research Letters* 2.
[141] Art. 8(2), 34 of the Constitution of the Russian Federation, adopted on 12 December 1993 as revised on 1 July 2020.
[142] See for example the background of the YUKOS case in *YUKOS Universal Limited v the Russian Federation* PCA Case No. AA227. 73.
[143] Abramov. *Op cit.* 10.
[144] Gaydar Ye., A. Radygin et al. *Economy of the transformation period*. 365

Russian economy remains so dependent on the state is not the subject matter of the present work. At the same time, it is important to understand the structure of the Russian market in order to better understand the challenges which are related to the arrest of the ships associated by common control of Russian state-owned companies.[145]

(i) Historical background

The Russian economy is based on free market principles. This is stipulated in the Constitution of the Russian Federation of 1993 (hereinafter – the Russian Constitution)[146]. Article 8(2) states that private, state and municipal ownership is acknowledged and protected equally. Also, Art. 34 stipulates that everyone has the right to use their own skills and property for entrepreneurship and other activity not prohibited by law. The same article prohibits the activity aimed at bad faith competition and monopolisation. This is the constitutional basis of the Russian economy.[147] Other legislation is based on the same principles. The main idea is that the government does not enjoy any preferences in economic relationships and cannot oppress other market participants.

Even though the Russian Constitution prohibits monopolisation, there are some spheres which are monopolised by the state due to 'their nature'. They are listed in Art. 2 of Federal Law No. 147-FZ dated 17 August 1995 'On Natural Monopolies'.[148] For example, pilotage of the vessels in ice is one of these spheres.

Such wording of the Russian Constitution may relate to the phenomenon that is called by some authors 'constitutional fears'.[149] These fears are mostly connected with the Soviet Union's legacy. Due to these fears, the authors of the Russian Constitution sought to reflect the principles opposite to those which were the basis for the Soviet communist society.[150] One of these bases was the restriction of the private initiative of the citizens and the monopolisation of the economy. That is why it was needed to stipulate the economic rights of people expressly in the Russian Constitution. Ironically, it was the Soviet Union's legacy that led Russia to the current state of affairs

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[145] For example, this issue arose before the English court in relation to the Ukrainian state-owned shipowner BLASCO in case *The 'Nazim Khikmet'* [1996] 2 Lloyd's Rep. 362 363–5.
[146] Constitution of the Russian Federation, adopted on 12 December 1993 as revised on 1 July 2020.
[147] Avakyan S.A. *Constitutional Law of Russia*. 5th ed. Vol. 1. 349.
[148] Federal Law No. 147-FZ dated 17 August 1995 'On Natural Monopolies', as amended by Federal Law No. 170-FZ dated 11 June 2021.
[149] Krasnov M.A. 'Constitutional Fears' (2014) 6 *Constitutional and Municipal Law* 3 4.
[150] *Ibid.*

where the big part of economic spheres is monopolised by state-related or state-owned companies.[151]

One of the most important characteristics of the Soviet economy was the high level of centralisation thereof.[152] The first step of the economic transformation of post-Soviet countries, including Russia, was privatisation and decentralisation of the assets. In the course of this process, Russian resources controlled by national bureaucracies originally were transferred to private persons who, in turn, were controlled by or agreed with the national bureaucracy.[153] As a result, these persons started to play an important role in Russian policy and became part of the oligarchic regime of the late 1990s.[154]

Centralisation of powers which started in the early 2000s inevitably led to the centralisation of the economy.[155] In this situation, the state took control over the economic activity of market participants. It created a situation where the assets become controlled or owned by the state or state-related organisations.[156] As a result of this process, the number of state-owned assets increased.

Another reason for this is that the Russian economic transformation has not been achieved fully and therefore some spheres of the economy remain in the state's hands predominantly such as gas and oil production and trading, the banking sphere, air transport, electric power and others.[157] As a result of this, Russia in the course of transformation to a state based on the free-market principles remained the one with the high level of state participation in economic relations. This includes the transportation of goods and international transactions.

(ii) Current state of affairs

Nowadays, about 30 % of the market capitalisation is controlled by state-owned enterprises.[158] At the same time, there is no special legal treatment of the companies with state participation. They act as ordinary joint stock companies generally.

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[151] Abramov. *Op cit.* 10.
[152] Raikin. *Op. cit.* 1003.
[153] *Ibid*. 1005.
[154] Zudin A.Yu. 'Oligarchy as a Political Problem of Russian Post-Communism' (1999) 1 *Social Studies and Modernity* 45 62.
[155] Tsakaev A.Kh. 'Centralization of Government Control as a Basis for the Transition to the Mobilization Model of the Russian Economy' (2022) 33 *Studies on Russian Economic Development* 598 600.
[156] *Ibid.*
[157] Abramov. *Op. cit.* 10
[158] *Ibid.* 11.

It is worth mentioning that Russian law stipulates the special types of organisations which are supposed to be under state control, i.e., state corporations, public law companies (ss 11, 14 of s 3 of Art. 50 of the Civil Code of the Russian Federation, hereinafter – the Civil Code of Russia), and state funds.[159] However, the number of these companies participating in international transactions is very low and predominantly they are created in the spheres of nuclear energy, space development and other fields where the state undertakes special obligations to ensure the stability of some sensitive economic areas such as banking and reinsurance.[160]

The biggest Russian shipowner Sovcomflot Public Joint Stock Company is a state-owned company as well.[161] At the same time, there is not any special legal status thereof or any indication of such a status. This company is created and acts as an ordinary joint stock company in accordance with the Civil Code of Russia and Federal Law No. 208-FZ dated 26 December 1995 'On Joint Stock Companies'.[162] An ordinary market participant would not be able to separate a state-owned company from a private one without looking in the Register of Artificial Entities and charter documents.

However, since there is no special status for such companies, the state participating in the according companies acquires only those rights which are provided by its share in the entity. Therefore, for instance, if the state has only 30 % of the shares in the enterprise, its decision may be outnumbered by other shareholders or stockholders.

(iii) The state control not through shareholding

Even though the state does not generally enjoy preferences in comparison to the other shareholders in a company, there are some situations where the state may acquire such special treatment. One such mechanism is the 'golden share' rule. This rule is introduced to Russian law by Federal Law No. 178-FZ dated 21 December 2001 'On Privatisation of State and Municipal Property'.[163] Art. 38 of the said law stipulates that in the situation where the government or municipal property has been privatised, the

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[159] Federal Law No. 51-FZ dated 30 November 1994 Civil Code of the Russian Federation as amended by Federal Law No. 23-P dated 16 May 2023.

[160] URL: https://www.tadviser.ru/index.php/%D0%A1%D1%82%D0%B0%D1%82%D1%8C%D1%8F:%D0%93%D0%BE%D1%81%D0%BA%D0%BE%D1%80%D0%BF%D0%BE%D1%80%D0%B0%D1%86%D0%B8%D0%B8_%D0%A0%D0%BE%D1%81%D1%81%D0%B8%D0%B8, accessed on 20 September 2023.

[161] URL: https://casebook.ru/card/company/review/1027739028712, accessed on 20 September 2023.

[162] Federal Law No. 208-FZ dated 26 December 1995 'On Joint Stock Companies', as amended by Federal Law No. 519-FZ dated 19 December 2022.

[163] Federal Law No. 178-FZ dated 21 December 2001 'On Privatisation of State and Municipal Property', as amended by Federal Law No. 370-FZ dated 24 July 2023.

state has a right to claim the 'golden share' in relation to the stocks in the amount of up to 25 % of joint stock companies. If this right has been realised the state acquires the right to participate in the most important decisions regarding the fate of the company, and the state's position in these issues becomes decisive.

This creates a situation where the company may be formally controlled by the state even if the state does not control the majority of the voting rights in the relevant company.

(d) Cuba

Before the communist revolution in the 1950s, Cuba was a capitalist state with stable relations with American businesses.[164] Cuban law had no restrictions on foreign investments and the rules of company incorporation were highly liberal.[165] Also, there are no indications that Cuban law was based on state ownership or state-owned enterprises. Principles of the free market dominated in those times.

After the revolution and accepting the communist ideology, Cuba transformed drastically. One of the most important transformations of the Cuban economy was the nationalisation of property. Until 2010, the Cuban government was almost alone employer in Cuba, and all the created companies were state-owned.[166] There were some independent workers, i.e., the ones who were not employed by the state, in the sphere of services, however, their number was not high.[167]

The changes were announced in 2005 by Fidel Castro and began to be realised by his brother Raul Castro in 2007. In 2010, experimental reform has been started. First of all, the economic requirements aimed at independent workers were loosened and the role of cooperative entrepreneurship and cooperative property was increased. Secondly, private ownership has been recognised even though under very strict restrictions.[168] The Constitutions of Cuba of 2019 in Art. 22 stipulates:

> 'The following are recognized as forms of property: … Private ownership: that which is exercised over specific means of production by natural or legal persons, Cubans or foreigners; with a complementary role in the economy.'

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[164] Crawford H.P. 'Corporation Law of Cuba' (1936) 10 *Tulane Law Review* 568 571.
[165] *Ibid.*
[166] Harnecker C.P. 'Cuba's New Socialism: Different Visions Shaping Current Changes' (2013) 40 *Latin American Prospectives* 107.
[167] *Ibid.*
[168] During the discussion over the further development and modernisation of Cuba, private property was called 'necessary evil' for building socialism. Harnecker. *Op. cit.* 114.

However, the general situation has not been changed yet, and the Cuban economy remains a state-based one. This consistent ideological foundation of Cuban society makes Cuba one of the most straightforward economies in the sense of its general principles and background.

IV Similarities and differences

The general specifics of the three states were described. The most important similarity between them is that in all of these countries, the number of state-owned companies is high. However, the economic bases thereof are different.

The Cuban economy is based on full state control of the economy. The communist ideology still dominates in this country even though it is in the process of transformation into a socialist market economy with a greater part of private mechanisms. However, such transformation has not finished yet, and the state control of the market participants and restrictions imposed upon private property is still widespread.

The Chinese economy, in turn, constantly transforms and 'develops' from the late 1980s until the present day. Even though the Communist Party of China is the only political force in the country and socialist ideology is the state one, the existence of a 'social market economy' inevitably leads the market to its freer state. From the mid-1990s, the number of private-owned companies grew and their influence in the state market became higher as well. However, this situation does not change the fact that the Chinese economy remains highly state-owned, and the number of state-owned companies is still significant.

The main difference between Russia and the two other states under consideration is that the Russian economy is constitutionally based on free market principles. The state does not enjoy any preferences in the economic sphere, at least, legally. Even though the state may be a shareholder in the company, it exercises only those rights which are guaranteed for an ordinary shareholder. However, due to the Soviet Union's legacy and state transformation which has not been finished and has even been reversed in the 2000s, the number of state-owned companies in Russia is still very high. To illustrate this problem, it may be seen that despite the constitutional and ideological differences between Russia and China, the number of assets which are state-owned in these two states is almost equal. Also, Russian law stipulates mechanisms to provide the state control of the company even without acquiring the majority of the voting rights, for instance, one such way is the 'golden share rule' for the companies being privatised.

V Conclusion

Five possible structures of state control were identified. First is the structure where the state-owned companies are established by another state-owned company and aimed at making a profit for it. This structure is named ‘state-owned companies related to each other’.

Another possible situation is the one where the state-owned companies are created by the state and acting in the different areas of the economy. This position is named ‘state-owned companies not related to each other’.

The third is the one where the state-owned companies are created by the state and acting in the same area of economics. This structure is the means of distributing the state assets between different state-owned companies for management and other reasons. One such reason may be to avoid liability. The third structure may be realised in the form of either the first or the second one.

The fourth structure is rather unusual and may exist only in the countries with the complex system of taxation and budget. According to it, the companies are created by different levels of the state, for instance, the federal government and provincial or municipal government, or by the different provincial or municipal governments.

The fifth one is the reflection of the political or other informal influence of the state upon the companies. In this structure, there are no formal relations of control between the companies and the state, but the state imposes its will on a company by other means such as tax preferences, conclusion of the governmental contracts, etc. The distinctive feature of this situation is that the state does not control the company by legal means but uses its influence to determine the company’s fate.

After that, three different countries and their economy were discussed, China, Russia, and Cuba. The common feature between them is that their economy is predominantly based on the activity of state-owned companies. The implication of the South African provisions on the arrest of ships associated by common control influences mostly these countries and the countries with similar structures of economy.

CHAPTER 4. ARREST OF SHIPS OF STATE-OWNED COMPANIES

I Introduction

As it was determined in Chapter 2 the issue of control exists at two levels. The first level is the matter of fact which usually is established under the law of incorporation of the relevant companies on the basis of the balance of probabilities. This level in relation to the state-owned companies has been considered above. Now, it is important to understand how South African law deals with these structures in relation to the true associated ships provisions implication and the problems which may arise with regard to it. This chapter also consists of the possible solutions to the problems to be indicated. After that, a general solution is proposed.

II State using the mechanisms of single-ship companies

(a) Introduction

The South African courts already dealt with the structure where the state uses the mechanisms of single-ship companies in their activities. This structure of ownership was considered in the case of the *MV Baconao*.[169]

(b) MV Baconao: Transportes del Mar SA v Jade Bay Shipping Co Ltd

The case of *MV Baconao* has been already discussed in Chapter 2 in relation to the issue of comparing the requirements to arrest a ship associated by common control and to disregard the corporate veil under the company law provisions.

Now, this case should be discussed as one illustrating the specific type of state control of the companies in the shipping sphere, namely, when the state distributes its assets between different companies in order to avoid its recognition as the ones belonging to the state.

The proceedings were started by the application to arrest the vessel *MV Baconao* which was submitted by Jade Bay Shipping Co Ltd against the charterer of the vessel *Jade Bay*, Cuflet. *MV Baconao* was arrested as associated with *Jade Bay*.[170] As it was established by the court, *MV Baconao* was owned by a single-ship company Transporter Del Mar SA.[171] This company, in turn, was controlled by Mambisa which also was the manager of the according vessel and a lot of other vessels which were indirectly controlled by the Cuban government. Mambisa had been the company which

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[169] *MV Baconao: Transportes del Mar SA v Jade Bay Shipping Co Ltd*, A119/95 (DCLD), Shipping Cases of South Africa C42.
[170] *MV Baconao supra* C43E–G.
[171] *MV Baconao supra* C43E–G.

owned the Cuban fleet before the dispute arose. However, the vessels under Mambisa control consequently had been distributed between a number of single-ship companies.[172] It was established by the court that Mambisa was a state-owned enterprise even though it was disputed by the representatives of the defendant.[173]

The association between *Jade Bay* and *MV Baconao* was justified by the court due to the fact that both Cuflet, charterer or deemed owner of *Jade Bay*, and Mambisa controlling Transporter Del Mar SA, the owner of *MV Baconao*, were controlled by the Cuban government.

It is important to note that both Cuflet and Mambisa were state-owned companies acting in the same sphere of economy. Cuflet, as it was accepted by the court, was the 'charterer arm' of the Cuban government,[174] and Mambisa was the major shipowner of the Cuban government.[175]

(c) The problem and the possible solution

The idea of the arrest of ships associated by common control occurred as a reaction to the widespread use of single-ship companies as the mechanism to avoid liability.[176] The situation where the state establishes companies just to distribute its assets between them in order to avoid liability or other convenience purposes does not really differ from the one where an ordinary private company does so.

As it was mentioned above, the state does not enjoy immunity in relation to its commercial activities.[177] This solution is reasoned by the fact that the state should not have a preference in commercial relations in comparison to the other market participants.[178] Therefore, it would be contradictory to allow the state to take some actions as a market player which are prohibited for private persons. In this case, it seems reasonable that if it is possible to arrest a ship as an associated one if it belongs to a company established by private persons then the same should be applicable to the state.

However, the main problem is to determine the purpose under which the state establishes separate companies. As was noted above, the state is not an ordinary

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[172] *MV Baconao supra* C55I.
[173] *MV Baconao supra* C51A-B.
[174] *MV Baconao supra* C43H-I.
[175] *MV Baconao supra* C51A-B.
[176] South African Law Commission, *Report on the Review of the Law of Admiralty*, Project 32 (1982) para 7.3.
[177] Foreign State Immunity Act 87 of 1981, ss 4(1)(a).
[178] Abbas A. *International Law. Text, Cases, and Materials.* 2nd ed. Chapter 8. 9. See also *Trendtex Trading Corp. v. Central Bank of Nigeria* [1977] 2 WLR 356 370.

investor even if the legislation considers it the one. In some cases, state-owned companies may not relate to each other and may be created in different economic spheres. It seems impossible in most cases to distinguish these situations from the one which occurred in the *MV Baconao* case. Even the Cuban economy does not seem to be as straightforward now as it was when the *MV Baconao* case was considered. The new Constitution of Cuba does not restrict the existence of private enterprises and does not stipulate that all assets belong to and are controlled by the state. Even though it was suspiciously that the Cuban government distributed its assets between several companies in the same economic area before, now it would not be the case.

In this context, the situations where the state uses the mechanism of single-ship companies for convenience purposes and where state-owned companies act in different spheres of economics and are not related to each other but controlled by the state as the market supervisor may hardly be differentiated. The problem of the state-owned companies not related to each other is discussed below.

III State-owned companies not related to each other

The second situation arises where two state-owned companies controlling ships do not relate to each other. In other words, the association between two companies may be established only at the level of the state and their characteristic as state-owned ones.

Dealing with the problem of state-owned companies in relation to the arrest of ships associated by common control, Wallis states that the AJRA 1983 stipulates that the control of the company may be established on the basis of the possibility of intervening in the decision-making process of the company on a daily basis.[179] Also, Wallis stipulates that if the control is described in terms of the socialist or communist ideology of the state, then such control is too remote to be considered as the one which was stipulated under the relevant provisions of the AJRA 1983.[180]

Wallis reaches such a conclusion after discussing the *MV Baconao* case. However, with respect, it does not seem to be correct that the state could not intervene in the decision-making process of the companies by legal means in this case. Moreover, it does not follow from the proposed factual background that the Cuban government did not use this opportunity. Therefore, it does not seem that this problem may be solved by the mere interpretation of the term control under the relevant provisions of the AJRA 1983.

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[179] Wallis. *Op. cit.* 315-6.
[180] *Ibid.* 316.

State control of the state-owned company which may be realised on a daily basis also gives rise to the power to decide on the fate of the company. In this case, the state, from the legal point of view, cannot be considered as the subject which does not exercise the power to control the company at least in the sense of the AJRA 1983 in the interpretation given by the majority judgment in the *MV Heavy Metal* case.[181]

As mentioned above, the situation when the legislation would allow arresting ships associated by merely common control of the state may have a far-reaching outcome. For such countries as Russia, China and Cuba, it may result in a situation where a lot of vessels may be arrested for the debt of one of them only because these vessels are owned by state-owned companies.

For instance, in Russia, state owned companies include the biggest shipowner in Russia, Sovcomflot; the gas production company Gazprom; and the oil production company Rosneft. Each of these companies has a huge commercial fleet. If a vessel owned by Sovcomflot were to collide with another vessel, then ships of Gazprom or Rosneft are at risk of being arrested. These companies do not relate to each other. They perform their own functions, and their management is separate. Moreover, the state control of these companies is exercised by different state departments. At the same time, formally, these enterprises are controlled by the same entity, the state. Even though it is the only common feature among them, under ss 3(7)(b)(ii) of the AJRA 1983 the vessels controlled by these companies may be considered associated.

Also, it should be borne in mind that when a company's ship may be at risk of being arrested due to the debts of such a huge number of vessels, it is almost impossible to control this risk and mitigate it. The only way to avoid the applicability of these provisions is just not to call at the port of the countries, such as South Africa, where these provisions are enacted. If more countries adopt these rules, then even this solution would be barely realisable. It is not desirable to create by legal means a risk which is hardly controllable by market participants.

One of the possible solutions to the problem described above is to amend the wording of the relevant section of the AJRA 1983. It may be stipulated that control cannot be established at the state level, i.e., to establish common control by state-owned companies there should be at least one common person except for the state that controls both of them either directly or indirectly.

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[181] *MV Heavy Metal: Belfry Maritime Ltd v Palm Base Maritime SDN BHD* 1999 (3) SA 1083 (SCA) [8] by Smalberger JA.

Such a decision may provide the opportunity to avoid the situation described above where all the ships belonging to the state-owned companies may be arrested for the debts of each other.

If this solution had been realised when the *MV Baconao* case was considered, then the relevant ships could not be arrested as associated ones in this case. However, the Cuban situation where private entrepreneurship is severely restricted is not usual in the modern global market. Also, it is not a widespread position that the government tries to avoid liability by creating different companies directly controlled by the state. It seems that Cuba is one of the few countries participating in global shipping where the communist state of affairs still remains, and even Cuba is being transformed and moving towards free market principles. Therefore, excluding arrest of ships under circumstances similar to the *MV Baconao* case seems a necessary measure to avoid much greater risks to global commercial activity.

Another possible solution is to exclude state-owned companies from the provisions of ss 3(7)(b)(ii) of the AJRA 1983. However, all the concerns, which were taken into account when the arrest of ships associated by common control was introduced,[182] are fully applicable to the state-owned companies. As a result of such amendments, they would be able to abuse their exceptional position by distributing their fleet among single-ship companies. This situation may be corrected only by disregarding corporate veil provisions but as it was established the mere creation of single-ship companies to avoid liability does not amount to the improper conduct necessary to pierce the corporate veil at common law in South Africa.[183]

IV State-owned companies created on the different levels of the state

(a) Introduction

Another possible situation which was considered by the South African courts was the structure where the state-owned companies were controlled by different levels of the state. From the international point of view, the different levels of state government are a part of the state.[184] It seems to be reasonable that there is no difference if such

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[182] South African Law Commission, *Report on the Review of the Law of Admiralty*, Project 32 (1982) para 7.3.

[183] *MV Baconao: Transportes del Mar SA v Jade Bay Shipping Co Ltd*, A119/95 (DCLD), Shipping Cases of South Africa C42. C56E, *The Shipping Corporation of India Ltd v Evdomon Corporation* 1994 (1) 2 All SA 11 (A) 15.

[184] The position of the European Court of Human Rights in this regard consists in the *Case of Sergunin and Others v. Russia*, application No. 54322/14 and 2 others. 40-41. However, it should be noted that the positions of the ECHR do not have a direct effect on South Africa since South Africa is not a member of the Council of Europe, but this judgment had its influence on the understanding of the state role in Russia (before the exclusion from the Council of Europe) and other European countries and this

companies were created at a central or municipal level, they both should be considered as ones controlled by the state. If it would be not the case, human rights may have been violated by one level of the government and damages could not be compensated by the other. In some cases, this may result in unfairness where, for instance, the municipal government does not have enough property to compensate for the violation and the person cannot claim against the central government which has such resources. Also, it would be an inappropriate result of legal interpretation if the state will not be liable for the acts of their bodies even if these bodies are formally independent from each other.

(b) International Marine Transport SA v MV 'Le Cong'

The case *International Marine Transport SA v MV "Le Cong"*[185] was dealt with the issue considered above. The dispute arose in relation to the charter hire which was not paid by the company Shantou Sez in favour of International Marine Transport SA for the charter of the vessel *Gaz Progress*.[186] International Marine Transport SA applied to arrest the *MV Le Cong* as associated with *Gaz Progress*. *MV Le Cong* was owned by Guangzhou. The arrest was sought and granted on the basis that both Shantou Sez and Guangzhou were state-owned companies.[187]

The appellant with references to the Constitution of the People's Republic of China and the budget law of China argued that Shantou Sez and Guangzhou were created on different levels of the state and were maintained from the different budgets. Shantou Sez was controlled by the Shantou City Municipal Government and Guangzhou by the central government.[188]

The respondent's position was that the establishment of the companies on the different levels of the state does not prove their independence.[189] The court did not state expressly its position regarding this issue but emphasised that '*the People's Republic of China not only has a legal system different from ours but its constitutional and social structures are vastly different*'. As a result, the court stated that:

> 'It will be apparent that none of the provisions quoted above affords a decisive answer to the issue in question, namely whether the power to control Shantou Sez in the sense referred to in paragraph [7] above rests with the Shantou Municipal

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understanding should be found by South African courts when dealing with state-owned companies belonging to European states.

[185] *International Marine Transport SA v MV "Le Cong"* [2005] JOL 16130 (SCA).

[186] *MV "Le Cong" supra* [1], [2].

[187] *MV "Le Cong" supra* [2].

[188] *MV "Le Cong" supra* [9].

[189] *MV "Le Cong" supra* [10].

> City Government or whether, as in the case of Guangzhou, the power rests with the central government. Given the obvious difficulties facing a South African court when attempting to interpret provisions of such a nature or those of the Chinese Constitution generally, it has not been shown, in my view, that they are inconsistent with or do not support the statement of the law as set out in the affidavits of Guangzhou's experts. Indeed, there is much to be said for their exposition of the law, especially when regard is had to the budget law…'[190]

Therefore, it was decided that the respondent failed to prove the association between *Gaz Progress* and *Le Cong*.[191]

(c) The problem and the possible solution

Discussing the case of *MV Le Cong*, Wallis stated that the issue of 'political control' of the company by the state arose therein.[192] With respect, it does not seem that this has been the case at least it does not follow from the judgment reported. The control of Shantou Sez and Guangzhou by the state which was under dispute was not of political nature but it was a formal legal power to decide on the fate of the according companies.[193] This situation is covered by the interpretation of the term control given in the case of *MV Heavy Metal*.[194]

In this regard, the problem of this case does not much differ from the one discussed in relation to the state-owned companies not related to each other. The solution to this problem should be the same as well. The control which was found at a state level should be not enough to establish the association between two vessels.

V State-owned companies related to each other

One situation where the arrest of ships associated by common control of state-owned companies may be justified is where such association is established not at the state level but below. In this situation, the problem of state ownership does not even arise. The association between two ships in this case may be established by common control of one company. Whether such a company is state-owned or not is not the question relevant to establishing the association. For instance, if the Russian state-owned company Sovcomflot establishes two companies which own ships, such ships should

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[190] *MV "Le Cong" supra* [17].
[191] *MV "Le Cong" supra* [18].
[192] Wallis. *Op. cit.* 313.
[193] *International Marine Transport SA v MV "Le Cong"* [2005] JOL 16130 (SCA) [7], [8].
[194] *MV Heavy Metal: Belfry Maritime Ltd v Palm Base Maritime SDN BHD* 1999 (3) SA 1083 (SCA) [8] by Smalberger JA.

be considered associated since they are both controlled by the same company, Sovcomflot, and not because they are controlled by the Russian government.

However, this position may be criticised from the point of view that even though a state-owned company is the owner of several ships formally, the actual owner of these ships is the state. This, for instance, was the position of Mr Justice Clarkke in the English case *The 'Nazim Khikmet'*[195] which was supported in the judgment of Sir Thomas Bingham, M.R.[196] The case arose in relation to the arrest of the ship *Zorinsk* as sistership to the vessel *Nazim Khikmet* on board of which the cargo was damaged. The judge concluded that *Zorinsk* cannot be considered owned by BLASCO, the owner of *Nazim Khikmet*, since

> 'The state has retained its ownership of the income-earning assets of enterprises such as BLASCO and has retained the right and power of ultimate decision over the use and exploitation of those assets.'[197]

Even though this case did not deal with the arrest of ships associated by common control, it may be seen how the judges treat BLASCO as not a separate entity but a means to control the government assets.[198]

If this position is supported, it results in a conclusion that there are no differences between state-owned companies related to each other and not related to each other since all of them are controlled by the state at the end and the company level is just the means of management of the state's assets. Even though this position sounds reasonable for some cases, it forces the legislators or courts to decide whether to completely exclude the state-owned companies from the application of the true associated ships provisions or not. This position gives no criteria by which it would be possible to distinguish different situations which may arise.

As it was stated above, neither of these extreme approaches are desirable for the country allowing the arrest of ships associated by common control. If state-owned companies are completely excluded from the application of the relevant provisions, then it is possible for them just to create single-ship companies to avoid liability. If the exclusion for the state is not introduced at all, then all the ships controlled by the state are at risk, and the only way to control such a risk is by not calling the ports of the relevant country. This is not legally and economically reasonable or sensible since it

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[195] *The 'Nazim Khikmet'* [1996] 2 Lloyd's Rep. 362 369.
[196] *The 'Nazim Khikmet' supra* 374.
[197] *The 'Nazim Khikmet' supra* 374.
[198] *The 'Nazim Khikmet' supra* 369.

both creates an essentially uncontrollable risk for the shipowners and reduces the number of ships potentially calling the port of the relevant country.

Therefore, the middle solution is preferable. It is to differentiate the levels of control and make an exclusion only for the ships in relation to which the association is established at the state level and not at the lower company level.

VI Formal or legal and informal or political control

Another important consideration in this regard is that the state may not only exercise legal control but also exert political influence on the decision-making process of the company. The question is whether such influence amounts to control under ss 3(7)(b)(ii) of the AJRA 1983.

The majority judgment in the *MV Heavy Metal* case states that the AJRA 1983 stipulates two types of power to control the company, direct or *de jure* which is exercised by the actual shareholders even nominee ones or indirect or *de facto* – by the beneficiaries of the company.[199] Both direct and indirect control should be exercised through legal means. The indirect power to control, in this interpretation, refers to the beneficial owners of the company and not people who have some influence on the decision-making process.[200] Otherwise, a sibling of a shareholder of the company may be considered a person having power to control the company if a shareholder listens to their advice. As rightly noted by Wallis, the political influence is too remote, and it is hard to imagine that this meaning of control was implemented by the relevant provisions of the AJRA 1983.[201] Therefore, it may be concluded that informal or political control is not covered by the true associated ships provisions.

It should be borne in mind that the legal means of control may be different depending on the jurisdiction. In some cases, such a control may be statutory, for example, the state control of the company under the golden share rule in Russia which has been discussed above.

Another example of a structure of control may be found in the case of *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs, Government of Pakistan*.[202] This case does not relate to the issue of the arrest of vessels but to the enforceability of the arbitration award against the government of Pakistan allegedly

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[199] *MV Heavy Metal: Belfry Maritime Ltd v Palm Base Maritime SDN BHD* 1999 (3) SA 1083 (SCA) [8] by Smalberger JA.
[200] *MV Heavy Metal supra* [10] by Smalberger JA.
[201] Wallis. *Op. cit.* 316.
[202] *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46.

controlling the trust that had breached an agreement with the Dallah. However, it is a good illustration of the possible structure of control by the state. Under the circumstances of this case, the government of Pakistan established a trust to realise the project aimed at providing housing for pilgrims.[203] This trust was financed from 'contributions and savings by pilgrims (Hujjaj) and philanthropists, as well as by any income from investments or property' and was controlled by the Pakistan government.[204] This situation constitutes the legal means of control since the state could decide on the fate of the trust and this right was given to the state by legally recognised documents.[205] Despite the fact that the Supreme Court of the United Kingdom decided that the government was not bound by the arbitration agreement between the trust and Dallah, the fact of control of the trust by the state was not overturned.[206]

VII General Solution

It was determined that control under ss 3(7)(b)(ii) of the AJRA 1983 means the legal control of the company and does not consist of control by other means such as political or other informal influence on the decision-making process within this company. The legal control may be realised through direct control over voting rights in the company or indirect control through such mechanisms as nominee agreements and others. In this regard, merely political influence on the company is not enough to establish control even under the current South African legislation in the interpretation of case law primarily the *MV Heavy Metal* case.[207] The legal means, in turn, may be various, for instance, the statute provisions which expressly stipulate the power of the state to determine the fate of the company as in the case of *The 'Nazim Khikmet'*,[208] the terms of the trust as in the case of *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs, Government of Pakistan*,[209] and others. The main criterion in this regard is the existence of relations of control which are recognised by law.

Taking into account the above, the main problem which should be resolved is the applicability of the true associated ships provisions to the state-owned companies

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[203] *Dallah Real Estate and Tourism Holding Co supra* 4.
[204] *Dallah Real Estate and Tourism Holding Co supra* 5.
[205] *Dallah Real Estate and Tourism Holding Co supra* 41, 141.
[206] *Dallah Real Estate and Tourism Holding Co supra* 42, 142.
[207] *MV Heavy Metal: Belfry Maritime Ltd v Palm Base Maritime SDN BHD* 1999 (3) SA 1083 (SCA) [10] by Smalberger JA.
[208] *The 'Nazim Khikmet'* [1996] 2 Lloyd's Rep. 362 372.
[209] *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46 5.

which are controlled by the state through legal means. In this regard, all the described structures may be divided into two groups. The first group consists of the structures where a true association between vessels could be established at the company level, i.e., two vessels are controlled by the same state-owned company. The second group is the one where true association between ships could be established only at the state level, i.e., where there is not a common intermediary company controlling them.

For the first group, it is not necessary to create any exclusion from the relevant provisions of the AJRA 1983. There are several reasons for that. First, the state-owned companies in most cases act as ordinary companies in economic activities, i.e., the difference between state-owned companies and private companies is within their internal management and not in the external relations with their counterparties. Therefore, state-owned companies are ordinary companies in commercial relations and the legal rules should be applicable to them as to any other company. This reasoning applies also to the provisions on the arrest of ships. Second, all the reasons why the true association provisions were introduced to the AJRA 1983 are fully applicable to state-owned companies as well.[210] If these companies are completely excluded from the relevant provisions, then it would be possible for them just to use single-ship companies to avoid liability. It is not a desirable outcome.

The situation which is truly different from the ordinary companies is the one where an association between ships is established by common control of the state itself. As it was mentioned, the state acts in the market not only as an ordinary investor or shareholder but also as a supervisor of the overall economy. In this situation, the activities of state-owned companies may not aim at making a profit for their investor (the state) but are reasoned by other things such as support of the particular sphere of the country's economy. These companies do not necessarily act for the same purpose, have the same management, or relate to each other in any other way than state control. Also, the state control itself may be realised by different state bodies.

The purpose of the true associated ships provisions is to allocate the debts to the person who ought to be the debtor. In the case of the state, where the state-owned companies may not be related to each other and the state may not realise the real control of a particular company but rather the supervision of the economy in general, it may hardly be said that the purpose behind the relevant provisions is reached.

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[210] These reasons were discussed above and may be found in South African Law Commission, *Report on the Review of the Law of Admiralty*, Project 32 (1982) para 7.3.

In some countries such as Cuba, China, and Russia, the state participation in the economy is predominant and therefore the huge commercial fleet is owned by state-owned companies there. If it is allowed to arrest the ships associated by common control established at the level of the state all the ships in this fleet may be arrested for the debts of each other. The only means to control this risk is to avoid calling the ports of the state where such arrest is allowed. This is unreasonable from the economic point of view to create such a risk since it reduces the number of ships calling the ports of the according country or at least makes the carriage and other contracts in connection with the vessels' activity more expensive.

The term control stipulated in the AJRA 1983 in the interpretation of the majority judgment in the *MV Heavy Metal* case[211] does not imply any exclusions for the state to be the common controller of the ships to be considered associated. Also, it does not seem that under the current South African legislation it is possible to reason this exclusion by way of interpretation. Therefore, the solution in this regard may be to exclude the possibility of arresting ships associated by common control of the state expressly.

This solution is also not perfect. It opens the way for the states to establish separate companies and distribute their assets between them when controlling them without any additional straw companies. However, this risk seems to be insignificant since it is hard to imagine that the state which owns huge assets will use this scheme just to avoid the arrest of one ship. For the most egregious cases where such activity of the state will constitute fraud or other improper conduct, the mechanism of disregarding the corporate veil under the company law provisions is available.

VIII Conclusion

Under current South African law, the state control of ship-owning companies and consequently the vessels should be enough to establish the association between them. This situation leads to the problems that have been indicated.

The main risk is that a huge commercial fleet is at risk since every ship controlled by state-owned companies may be arrested as associated with another ship controlled by another state-owned company.

The issue of state control of the companies arises only in situations where common control by other means cannot be established. In this regard, this problem is

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[211] *MV Heavy Metal: Belfry Maritime Ltd v Palm Base Maritime SDN BHD* 1999 (3) SA 1083 (SCA) [8] by Smalberger JA.

relevant only if there is no common controller of the shipowners below the state level. Therefore, the two situations should be clearly distinguished. The first one is where the state-owned company acts as a common controller. In this context, the problem of the arrest of ships controlled by such a state-owned company does not arise. The second position is that the common controller of two shipowners is the state itself. Only the second situation raises the problem under consideration.

A possible solution is to restrict the applicability of ss 3(7)(b)(ii) only to the cases where the association between the vessels may be found without regard to the common state control over the companies. If the companies cannot be considered associated without using the argument of common state control over them, then the ships should not be associated, and it should be impossible to arrest them as such. This solution may result in a situation where the state creates separate companies and distributes its assets among them without using any straw companies and therefore avoids liability. However, this risk seems to be the necessary concession when weighed against the possible economic results of not having the proposed exclusion.

CHAPTER 5. CONCLUSION

South Africa is the only country which permits the arrest of ships not owned by the person liable for the claim being enforced expressly and independently of company law rules. The true associated ships arrest provisions deal with one of the most important problems for creditors with claims in respect of ships and their operations in the modern shipping industry, namely single-ship companies established in convenience jurisdictions.

The main idea behind true associated ships arrest provisions is to treat the shareholders as liable for the company's debts and treat the assets of the company as being owned by its shareholders. The aim of this institution makes it very close to disregarding the corporate veil under the company law principles or statutory provisions in those jurisdictions that have such principles or provisions. In general, the arrest of ships associated by common control is a kind of institution of disregarding the corporate veil, however, with some specifics attributed to admiralty proceedings.

In order to establish the association between two vessels it is necessary to establish common control between them. The term 'control' is a part of the company law. The main difference between disregarding the corporate veil and the arrest of ships associated by common control is that to disregard the corporate veil it is needed to establish fraud or other improper conduct. This is not required in case of the arrest of ships associated by common control. This difference makes the requirements for the arrest of ships associated by common control more relaxed in comparison to disregarding the corporate veil.

The term 'control', in turn, is not defined in the admiralty legislation and the most authoritative definition of it is given by the majority judgment in the case of *MV Heavy Metal*. The main idea behind it is that control is the power to decide on the fate of the company, i.e., to decide on the most important matters of its activity. The AJRA 1983 stipulates that control of the company may be direct or indirect. Direct control is the power to decide on the fate of the company exercised by registered shareholders of the company even nominee ones. Indirect control is the same power but exercised by persons other than actual shareholders, for instance, beneficiaries. In any case, this power should be exercised by legal means and does not cover some kind of informal influence on the decision-making process.

In relation to state-owned companies, the true associated ships arrest provisions face serious problems. If these provisions would be applicable to state-owned

companies as they apply to private-owned ones, then all ships owned by the companies legally controlled by the state may be treated as associated ones.

In commercial activities, the state acts as an entity which may be a shareholder or counterparty to different corporate and other agreements. Therefore, it also may control the companies either directly or indirectly and this control is covered by ss 3(7)(b)(ii) of the AJRA 1983 in the interpretation given by the majority in the *MV Heavy Metal* case. It is important to note that state control should be understood as legal or formal control of the company. The political or informal control cannot be considered as covered by the relevant provisions of the AJRA 1983 since it is too remote.

The situation described above creates a position where, depending on the number of state-owned assets in the country, a huge commercial fleet may be at risk of being arrested. In order to illustrate this problem, the three different jurisdictions with different economic and political regimes were discussed, Cuba, China and Russia. The main similarity between them is that the number of state-owned companies in all these countries is significant.

Dealing with the problem under consideration, five types of state ownership of companies have been indicated. They, in turn, were divided into two groups by the criterion of the level where the association between two ships may be established. The first group of structures is the one where the association between two vessels may be established at the level lower than the state. This position occurs when a state-owned company controls several companies, and these companies are treated as associated since they are controlled by the same state-owned company and not the state itself. The second group reflects the situation when the association between two vessels may be established only at the level of the state, i.e., when there is no intermediary company controlling both shipowners. Another situation which was dealt with is the one where the company is controlled by the state not by legal means but due to the informal influence on the decision-making process by the state.

In the case of the companies association which was established at the level of the state-owned company and not the state the problem under consideration does not even arise. In this case, the association is established due to the common control of a company, and it does not matter if this company is owned by the state or not. Therefore, this situation does not lead to the position where all the vessels owned or controlled by state-owned companies may be considered associated, they are associated because of the control of the particular company which, in turn, is state-owned.

If the association between two ships is established at the state level, these ship under the current South African regulation may be considered associated. This is due to the fact that the state in this case exercises common control of two ships by legal means. In this context, there are no legal reasons why such ships should not be treated as associated. However, this situation results in the problem which has already been mentioned. In order to avoid these outcomes, it is reasonable to exclude the possibility of arresting ships associated by common control if the association between two ships may be established only at the state level.

This conclusion is also justified by the role of the state in economic transactions. The state is not an ordinary market participant it is also a supervisor of the national market in the particular country. The reasons to participate in commercial activity for the state may not only reasoned by creating profits but also by supporting the industry or controlling some sensitive spheres of economics. In this regard, the state may create companies in different spheres, and the management of such companies does not always relate to each other. Therefore, ships belonging to state-owned companies which formally associated due to the common control of the state may be unconnected with each other in any other way besides formal state control.

In these circumstances, it seems to be reasonable to just exclude the ships, the association between which may be found only at the state level from the application of the relevant provisions of the AJRA 1983. However, this solution is not perfect as well. The main problem in this regard is that if the state in order to avoid liability distributes its assets between different companies with no common straw companies, then the ships distributed in this way could not be arrested as associated. This situation seems to be a necessary evil in comparison to the global shipping industry problems which may occur if all the state-owned companies were treated as associated. Also, the institution of disregarding of corporate veil under the company law provisions is available with regard to the most improper situations.

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