

Shipping & Transport - South Africa

Market woes continue as ships go under the hammer

Contributed by **Bowman Gilfillan Africa Group**

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The South African courts witnessed a flurry of judicial ship sales in the first half of 2015.

It began with the auction in Durban of the Turkish flagged and owned bulk carrier Tarik 3 in early February 2015, followed by the Iskandar (bulk carrier), Altai (crude oil carrier), Mar Sik Ryong (forest product carrier) and Glory Morning (bulk carrier). In July 2015 the Durban High Court ordered the judicial sale of the Aetos (bulk carrier), which should take place within six weeks.

In the case of the Aetos, the owners attempted to resist the sale at first, citing the closure of Greek banks as a main factor preventing the flow of funds earmarked to pay for victuals, fresh water and crew claims, and to settle claims of various other arresting creditors.

Given this state of affairs, it is useful to highlight the key features of the South African admiralty jurisdiction in the context of ship sales:

- The jurisdiction is undoubtedly arrest friendly, in that it recognises a broad category of maritime claims and allows creditors to pursue claims against the ship concerned and against "associated ships" (ie, ships beneficially owned or controlled by the same person or entity, thus allowing creditors to pierce of the corporate veil).
- Creditors are free to apply for the sale of the vessel at any time after the arrest and, in certain situations, a sale *pendent lite* will be permitted by the court.
- The law does not restrict judicial sales to public auctions and the courts are prepared, for example, to grant orders for private treaty and sealed tender sales. The courts enjoy a wide discretion as regards the method of sale.
- A judicial ship sale gives the buyer clean title. The Admiralty Act states that a sale shall not be subject to any mortgage, lien, hypothecation or any other charge of any nature whatsoever.
- After a sale, the claims submitted by the various maritime creditors are received and assessed by a referee nominated by the party applying to court for the sale, who is normally an advocate (barrister) with experience in the field of maritime law. If need be, referees can deal with claims in a more robust and pragmatic manner than would ordinarily be the case with court proceedings.
- The referee compiles a report of claims in terms of their validity, amount and ranking, which forms the basis of a final application to court to have the report confirmed or varied in order to make way for the distribution of the fund to creditors.
- The priority of claims is determined by a statutory ranking, which for the most part is clear and uncontroversial, except that it favours a certain class of necessities and repairers ahead of mortgage claims. In order to enjoy priority, the supply or repair claim must have arisen within a year of the arrest of the vessel or the submission of the claim to the referee.

While South Africa is not necessarily a favoured jurisdiction for mortgage enforcement in terms of the priority afforded to a mortgagee, the ease with which vessels can be arrested in a bad market for a wide variety of claims often paralyse owners and forces the hand of banks to foreclose. However, once the enforcement process is underway, it functions on a sound legal foundation and in a transparent and effective manner.

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