Neutral Citation Number: [2018] EWHC 1733 (Comm)

Case No: CL-2016-000417

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/07/2018

Before :

MR ANDREW HENSHAW QC
(sitting as a Judge of the High Court)

- -

Between :

HSBC BANK PLC	**Claimant**
- and -	
(1) ANTAEUS SHIPPING CO S.A.	**Defendants**
(2) APELLIS SHIPPING CO S.A.	
(3) PYRSOS SHIPPING COMPANY LTD	
(4) AIKATERINI XYLA	

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Adam Turner (instructed by **Watson Farley & Williams**) for the **Claimant**
The Defendants did not appear and were not represented

Hearing dates: 8 and 9 May 2018

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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Mr Andrew Henshaw QC:

(A) INTRODUCTION

1. This judgment follows the trial on 8 and 9 May 2018 of the Claimant's claims for sums alleged to be due to it under:

   i) a ship finance loan agreement dated 8 December 2009 ("***the Antaeus Loan Agreement***") between the Claimant and the First Defendant Antaeus Shipping Co SA ("***Antaeus Shipping***") and relating to the motor-vessel "*Antaeus*";

   ii) a ship finance loan agreement dated 8 October 2010 ("***the Apellis Loan Agreement***") between the Claimant and the Second Defendant Apellis Shipping Co SA ("***Apellis Shipping***") and relating to the motor-vessel "*Apellis*";

   iii) corporate guarantees and indemnities ("***the Corporate Guarantees***") dated 8 December 2009 and 8 October 2010 provided to the Claimant by the Third Defendant, Pyrsos Shipping Company Ltd ("***Pyrsos***") in respect of each of the Antaeus Loan Agreement and Apellis Loan Agreement respectively; and

iv) personal guarantees and indemnities ("***the Personal Guarantees***") dated 8 December 2009 and 8 October 2010 provided to the Claimant by the Fourth Defendant, Aikaterini Xyla ("***Katerina Xyla***") in respect of each of the Antaeus Loan Agreement and Apellis Loan Agreement respectively.

2. The Antaeus Loan Agreement and the Apellis Loan Agreement (together, the "***Loan Agreements***") and the Corporate Guarantees are governed by English law. The Personal Guarantees are governed by Greek law.

3. Pyrsos was the management company for Antaeus Shipping and Apellis Shipping (together, the "***Borrowers***").

4. Ms Katerina Xyla was the 50% beneficial owner of Pyrsos and the Borrowers, according to Beneficial Ownership Declarations dated 8 November 2010. The other 50% beneficial owner was Katerina Xyla's sister, Theodora Xyla (to whom I shall refer, adopting the parties' usage in correspondence, as "**Doris Xyla**"). Doris Xyla did not give a personal guarantee or indemnity in connection with the Loan Agreements and is not a party to these proceedings.

5. The Claimant claims that the Borrowers failed to perform the Loan Agreements in accordance with their terms. It says there were a series of Events of Default, duly notified to the Defendants, followed by notices of acceleration of the loans in July 2016, and judicial sales of the vessels. The liability of Pyrsos and Katerina Xyla under their respective guarantees and indemnities is said to follow from the same matters.

6. None of the Defendants was present or represented at the trial. I therefore considered whether or not to proceed, taking account by analogy of the factors identified by the Court of Appeal in *R v Hayward, Jones and Purvis* [2001] EWCA Crim 168, [2001] 2 Cr. App. R. 11 at § 22.5. Counsel for the Claimant explained to me the steps which had been taken to ensure that the Defendants had advance notice of the trial, and I required the Claimant to provide a witness statement from its solicitor confirming these matters. That was provided in the form of the fourth witness statement of Mr Prentki, a senior associate of the Claimant's solicitors Watson Farley & Williams ("***WFW***") dated 9 May 2018.

7. The witness statement confirmed that, following the events outlined in section B below summarising the procedural history of this case, subsequent events were as follows.

8. WFW on 28 November 2017 wrote to the Defendants – at the email addresses for service on the Defendants specified in the Order of Popplewell J dated 6 October 2017 and the Order of Leggatt J dated 14 November 2017 – enquiring as to their availability to attend the Commercial Court listing office in order to fix a date for the trial. In the absence of a response, WFW wrote to the Defendants again on 30 November 2017 notifying them of the date, 4 December 2017, on which the Claimant's counsel's clerk would attend the listing office to fix the trial date. Later the same day, 30 November 2017, Katerina Xyla emailed WFW about another aspect of the case, using the same email address to which WFW had sent its email to Katerina Xyla regarding the listing appointment. No response was received regarding the listing appointment itself, which accordingly proceeded on 4 December 2017 and resulted in the trial being fixed for 8 - 11 May 2018.

9. WFW thereafter sent the following communications to the Defendants which made specific reference to the trial date:

   i) an email dated 19 March 2018 referring to *"the trial in this matter that commences on 8 May 2018"*;

   ii) a letter dated 17 April 2018 asking the Defendants to confirm as a matter of urgency whether they *"intend to participate in the trial of this matter that commences on 8 May 2018"*;

   iii) a further letter dated 17 April 2018 stating that the Claimant *"propose to call both our factual witnesses and our expert witnesses on 8 May 2018"* and proposing to *"allow the morning of 9 May for any possible overrun of the Claimant's witness testimony"*;

   iv) a copy of the Claimant's skeleton argument for the trial, sent to the Defendants on 30 April 2018, which stated in its first paragraph that *"[t]he trial is currently listed for 4 days commencing on 8th May 2018 …"*; and

   v) a letter sent on 3 May 2018 to the Court, copied to the Defendants, which began *"We write in relation to the proposed timetable for the trial of this matter next week …"*

10. In these circumstances, I was and remain satisfied that:

   i) the Defendants had been given sufficient notice of the trial and had ample opportunity to attend and/or be represented at the trial;

   ii) there was no reason to believe that an adjournment would be likely to result in the Defendants attending the hearing at a later date;

   iii) there was no reason to believe that any of the Defendants wished to be represented at the hearing;

   iv) the Defendants had voluntarily waived their right to appear or to be represented at the trial, and were voluntarily absent; and

   v) although the claims are for reasonably significant sums of money, there was a public interest in the matter proceeding without further delay.

11. I therefore indicated that I would proceed, and would assume that had they been present then the Defendants would have taken all available points. I am satisfied that the Claimant's representatives have done everything possible to assist me in identifying and considering the potential arguments available to the Defendants.

(B) PROCEDURAL HISTORY

12. The claim was commenced on 7 July 2016 and Particulars of Claim were served on 7 December 2016.

13. The original Defence, settled by Ince & Co (Greece), was served on 31 January 2017. It did not set out a positive defence to the claims, and many of the Claimant's allegations were simply noted or non-admitted.

14. The Claimant in May 2017 issued an application for summary judgment against all four Defendants supported by a witness statement.

15. The Defendants responded with a witness statement from a Mr Lagadianos of Ince & Co (Greece), exhibiting documents which included a written advice from two Ince & Co (Greece) lawyers ("***the Ince & Co Advice***") who had acted for Katerina Xyla in Greece in relation to an application by the Claimant for protective measures. The Ince & Co Advice addressed *"the Greek law position"* in relation to the Claimant's claims under the Personal Guarantees, setting out a number of unpleaded Greek law defences to the claims under the Personal Guarantees.

16. As a result, the Claimant did not pursue its application for summary judgment. Instead it asked the Defendants to plead the Greek law defences that had been raised. At the CMC on 6 October 2017 Popplewell J ordered the Defendants to provide full particulars of any defence or principles of foreign law on which they relied and which were not pleaded in their existing Defence dated 31 January 2017.

17. Shortly after the CMC, Ince & Co came off the record for the Defendants. Katerina Xyla told the Claimant in an email dated 27 October 2017 that she was now acting on behalf of all four Defendants, and she signed notices of change of legal representation on behalf of the other three Defendants dated 29 October 2017 (as Managing Director of Pyrsos and, as regards Antaeus Shipping and Apellis Shipping, pursuant to Management Agreements between those companies and Pyrsos). Katerina Xyla is a director of all three of the other defendants to this action, and the correspondence indicates that in practice she has operated as their sole director.

18. The Defendants then served on 17 November 2017 an "*Amended Defence*" which is not supported by a statement of truth and which, whilst it makes a number of complaints about the Claimant's conduct of the banking relationship, does not contain any clear statement of the defences on which the Defendants sought to rely (despite the Order of Popplewell J at the CMC). The Defendants have not engaged substantively with the proceedings since then.

19. As a result, in order to understand the defences that the Defendants would be likely to have advanced, it is necessary to have regard to the Ince & Co Advice alongside such information as can be obtained from the Amended Defence.

(C) WITNESSES

20. I heard evidence from the following witnesses, called by the Claimant, all of whom gave evidence via video link pursuant to the Order of Cockerill J dated 22 March 2018:

    i) Mr Gerasimos (Makis) Mendoros, currently head of Shipping Client Management in the Shipping Department of the Athens branch of HSBC France, who was closely involved in the handling of the Defendants' account in 2015 and 2016;

ii) Mr Antonis Lamnides, Senior Relationship Manager in the same department, who until August 2015 was the customer relationship manager for the Defendants' account; and

iii) Professor George Georgiades, whom the Claimant called as an expert witness in relation to Greek law.

21. Having heard and considered their evidence, I am satisfied that each of Mr Mendoros and Mr Lamnides was truthfully stating his genuine recollections, and that Professor Georgiades was suitably qualified to give expert evidence as to Greek law in this case and stated his true and complete professional opinion, in each case in accordance with the witness's duties to the court.

(D) FACTS

(1) The Antaeus Loan Agreement

22. The Claimant advanced US$15,000,000 to Antaeus Shipping in December 2009 upon delivery of the "Antaeus" as a newly built vessel. The loan was repayable over a 10-year loan period in six-monthly instalments and secured by a mortgage over the "*Antaeus*" and by the relevant Corporate Guarantee from Pyrsos and Personal Guarantee from Katerina Xyla.

23. Clause 5.1 (Repayment of Loan) provided: *"The Borrower agrees to repay the Loan to the Lender by twenty (20) consecutive half-yearly instalments [in the amounts set out] the first instalment falling due on the date which is three (3) calendar months after the Drawdown Date and subsequent instalments falling due at consecutive intervals of six (6) calendar months thereafter…"*

24. Clause 7.7 (Accrual and payment of interest) provided: *"Interest shall accrue from day to day, shall be calculated on the basis of a 360 day year and the actual number of days elapsed…and shall be paid by the Borrower to the Lender on the last day of each Interest Period..."*

25. Clause 12.2.17, a liquidity covenant, provided that: *"The Borrower shall at all times during the Facility Period maintain minimum liquidity deposited with the Lender, free of Encumbrances in an amount equal to the next Repayment Instalment due."*

26. Clause 12.2.21 contained an Asset Cover Ratio ("***ACR***") covenant, requiring the maintenance of a 130% ratio of asset value to loan outstanding.

27. Clause 13.1 (Events of Default) defined "*Event of Default*" to include the following:

i) "13.1.1 **Non-payment** The Borrower does not pay on the due date any amount payable by it under a Finance Document at the place at and in the currency in which it is expressed to be payable"; and

ii) "13.1.2 **Other obligation** A Security Party … does not comply with any provision of any of the Relevant Documents to which that Security Party … is a party (other than as referred to in Clause 13.1.1 (*Non-payment*)).

> No Event of Default under this Clause 13.1.2 will occur if the failure to comply is capable of remedy and is remedied within ten (10) Business Days of the Lender giving notice to the Borrower or the Borrower becoming aware of the failure to comply."

The definitions of "*Finance Document*" and "*Relevant Documents*" included the Loan Agreement itself; and the definition of "*Security Party*" included the borrower itself.

28. Clause 13.2 (Acceleration) stated: *"If an Event of Default is continuing the Lender may by notice to the Borrower [13.2.1] declare that the Loan, together with accrued interest, and all other amounts accrued or outstanding under the Finance Documents are immediately due and payable, whereupon they shall become immediately due and payable; and/or [13.2.2] declare that the Loan is payable on demand, whereupon it shall immediately become payable on demand by the Lender."*

29. Clause 21.1 provided that the Antaeus Loan Agreement was governed by English law.

30. From 31 May 2014, Antaeus Shipping began to breach the minimum liquidity covenant in the Antaeus Loan Agreement, leading the Claimant to discuss the provision of additional security with Katerina and Doris Xyla, although none was ultimately provided.

31. By mid 2015 the shipping markets had fallen considerably, and the Claimant on 3 June 2015 agreed a waiver of the minimum liquidity covenant until 8 December 2015 and a reduction from 130% to 115% in the ACR until the same date, in return for Antaeus Shipping pre-paying on 8 June 2015 the repayment instalment due on 8 December 2015.

32. The covenants reverted to normal in December 2015, at which point Antaeus Shipping was immediately in breach of both. Antaeus Shipping thereafter failed to pay interest falling due and missed a US$525,000 repayment of principal on 8 June 2016.

33. The particular Events of Default relied upon by the Claimant were notified by the Claimant to Antaeus Shipping (copied to Pyrsos and Katerina Xyla) in the Claimant's letters dated:

    i) 18 March 2016, notifying (a) Antaeus Shipping's non-payment of interest, (b) its failure to remedy the ACR breach, and (c) its failure to remedy the minimum liquidity breach.

    ii) 9 June 2016, notifying Antaeus Shipping's recent non-payment of (i) principal and (ii) interest, (iii) its ongoing ACR breach, (iv) its ongoing minimum liquidity breach, and (v) its ongoing failure in respect of earlier interest.

    iii) 16 June 2016, re-notifying all of Antaeus Shipping's prior Events of Default, and threatening to accelerate the loan and enforce against the "*Antaeus*" if these were not rectified within three days.

34. The failures to pay principal and interest are apparent from the Claimant's Control Accounts, which by virtue of clause 16.6 of the Antaeus Loan Agreement are contractually binding in the absence of manifest error.

35. None of the Defendants has disputed that the Events of Default referred to above occurred. The Events of Default are confirmed by the evidence of Mr Mendoros of the Claimant, which I accept. Further, a letter written by Katerina Xyla on behalf of Pyrsos on 7 June 2016 with reference to both loans stated: *"The Loans are until June 8, 2016 both current in relation to original repayment schedule. However, one interest payment on both Loans has been delayed, and, considering the present condition of the dry bulk shipping market, original covenants are not presently complied with."*

36. Mr Mendoros of the Claimant states in evidence that by this time the earnings of the "*Antaeus*" and "*Apellis*" no longer covered the vessels' operating expenses, but no further equity was forthcoming from the Xyla sisters, and no progress had been made in negotiations whose aim was to split the vessels between the two sisters and so facilitate further investment. As a result, suppliers, port agents and crew were left unpaid. Katerina Xyla stated in an email of 30 May 2016 to Mr Mendoros that: *"…Due to the lack of liquidity, Owners are unable to cover the vessels' monthly operational expenses in a timely fashion and this has resulted in serious problems with the crew and loss of credibility towards third party suppliers who are already becoming hostile and aggressive…"*.

37. Katerina Xyla emailed the Claimant on 22 June 2016 advising that the "*Antaeus*" was lying off Vizag (India), unfixed, with crew owed an estimated US$60,000 unpaid wages and local port agents owed about US$13,000.

38. In the circumstances, the Events of Default not having been rectified, on 4 July 2016, the Claimant served a notice of acceleration, accelerating the Antaeus Loan Agreement pursuant to clause 13.2. The notice indicated that Antaeus Shipping was liable to pay US$8,700,000 principal and US$135,563.66 interest, a total of US$8,835,563.66. The Claimant proceeded to enforce its mortgage security, installing its own manager and crew and directing the "*Antaeus*" to Walvis Bay, Namibia for arrest and judicial sale as described further below.

(2) The Apellis Loan Agreement

39. The US$16,500,000 Apellis loan was advanced in October 2010 on delivery of the "*Apellis*" as a newly built vessel. The loan was repayable over a 10-year loan period in six-monthly instalments and secured by a mortgage over the "*Apellis*" and by the relevant Corporate Guarantee from Pyrsos and Personal Guarantee from Katerina Xyla.

40. Clauses 5.1 (save for the different amounts of repayment instalments), 7.7, 13.1 and 13.2 of the Apellis Loan Agreement were in the same terms as the corresponding clauses of Antaeus Loan Agreement. The liquidity and ACR covenants in clauses 12.2.16 and 12.2.20 of Apellis Loan Agreement were in the same terms as clauses 12.2.17 and 12.20.21 of Antaeus Loan Agreement.

41. On 3 June 2015 the Claimant agreed a waiver of the minimum liquidity covenant until 26 April 2016 and a reduction from 130% to 115% in the ACR until the same date, in return for Apellis Shipping pre-paying the upcoming instalments falling due on 26 October 2015 and 26 April 2016.

42. The "*Apellis*" was arrested in Malaysia in October 2015 at the request of time charterers seeking compensation for the vessel's detention in Australia the previous month apparently due to non-payment of crew.

43. In December 2015 the "*Apellis*" was arrested in China on account of a liability arising from collision with a fishing vessel. The arrest was lifted against the provision of a US$295,000 letter of undertaking by the Claimant, which resulted in contractual variations to the Apellis Loan Agreement made by a Supplemental Side Letter dated 16 December 2015. These included a requirement to provide cash collateral of US$295,000 for the letter of undertaking by 16 May 2016 (additional clause 10.11 of the Apellis Loan Agreement, added by the Supplemental Side Letter dated 16 December 2015). Failure to perform this requirement constituted a non-payment Event of Default under clause 13.1.1 of the Apellis Loan Agreement.

44. The evidence indicates that by early 2016 the "*Apellis*" had fallen in value to such a degree that even the reduced 115% ACR covenant was breached; and that further Events of Default followed in that Apellis Shipping failed to pay interest falling due, and failed to provide the cash collateral for the letter of undertaking by the stipulated deadline.

45. The particular Events of Default relied upon by the Claimant were notified by the Claimant to Apellis Shipping (copied to Pyrsos and Katerina Xyla) in the Claimant's letters dated:

    i) 18 March 2016, notifying (i) Apellis Shipping's non-payment of US$145,000 interest, and (ii) its failure to remedy the ACR breach.

    ii) 16 June 2016, re-notifying Apellis Shipping's prior Events of Default, notifying its failure to provide US$295,000 cash collateral for the Claimant's letter of undertaking by the 16 May 2016 deadline specified in the 16 December 2015 side letter, and threatening to accelerate the loan and enforce against the "*Apellis*" if the breaches were not rectified within three days.

46. The failure to pay interest falling due is apparent from the Claimant's Control Accounts, which by virtue of clause 16.6 of the Apellis Loan Agreement are contractually binding in the absence of manifest error. None of the Defendants has disputed that the Events of Default referred to above occurred. The Events of Default in relation to Apellis Loan Agreement are confirmed by the evidence of Mr Mendoros of the Claimant, which I accept. Further, as noted earlier, a letter written by Katerina Xyla on behalf of Pyrsos on 7 June 2016 with reference to both vessels admitted the breaches in relation to interest and covenants.

47. In June 2016 the "*Apellis*" was arrested in Fangcheng, China, at the behest of Zhoushan Changhong International Shipyard which was seeking security in respect of a claim against the vessel for an unsettled US$166,400 dry-docking invoice.

48. I have already referred at § 36 above to Mr Mendoros's evidence about the vessels' earnings no longer covering their operating expenses and the lack of further equity.

49. Katerina Xyla emailed the Claimant on 23 June 2016 advising that the crew of the "*Apellis*" were owed some US$141,567 unpaid wages to the end of May, and would be owed US$194,142.33 to the end of June. Consequently, the crew was refusing to discharge the laden cargo of sulphur and threatening to arrest the vessel for unpaid wages. At Katerina Xyla's invitation, the Claimant entered into correspondence directly with the Master of the "*Apellis*", and arranged to settle the unpaid wages.

50. On 4 July 2016, Apellis Shipping having failed to remedy the extant Events of Default, the Claimant sent a notice of acceleration, accelerating the Apellis Loan Agreement pursuant to its clause 13.2. The acceleration notice indicated that Apellis Shipping was liable to pay US$10,175,000 principal and US$145,678.87 interest, a total of US$10,320,678.87.

51. Following acceleration, the Claimant proceeded to enforce its mortgage security, installing its own manager and crew and directing the "*Apellis*" to Hong Kong for arrest and judicial sale as described further below.

(3) The Corporate Guarantees

52. Pyrsos provided the Corporate Guarantee dated 8 December 2009 in respect of Antaeus Shipping's liabilities under the Antaeus Loan Agreement, and the Corporate Guarantee dated 8 October 2010 in respect of Apellis Shipping's liabilities under the Apellis Loan Agreement. Each Corporate Guarantee is governed by English law (clause 15.1).

53. Each of the Corporate Guarantees imposed pursuant to clause 3 both the liability of a guarantor and the liability of a principal debtor by way of indemnity in respect of all *"Indebtedness"* under the relevant Loan Agreement and its associated Finance Documents. In each of the Corporate Guarantees, *"Indebtedness"* is defined as: *"the aggregate from time to time of: the amount of the Loan outstanding; all accrued and unpaid interest on the Loan; and all other sums of any nature (together with all accrued and unpaid interest on any of those sums) payable by the Borrower to the Lender under all or any of the Finance Documents."*

54. The Corporate Guarantees provide for the expenses of enforcement and for default interest as follows: *"6.1 The guarantor shall pay to the Lender on demand on a full indemnity basis all costs and expenses incurred by the Lender in or about or incidental to the exercise by it of its rights under any of the Security Documents, together with interest at the Default Rate on the amount demanded from the date of demand until the date of payment, both before and after judgment, which interest shall be compounded with the amount demanded at the end of such periods as the Lender may reasonably select."*

55. When the notices of acceleration were served, they were copied to Pyrsos expressly by way of demand under the Corporate Guarantees. The last paragraph of the notice to Antaeus Shipping stated *"We are copying this notice to each of Pyrsos Shipping Company Ltd. and Ms Aikaterini Xyla by way of demand under their respective guarantees of the Loan each dated 8 December 2009".* The last paragraph of the

notice to Apellis Shipping was in the same terms save that the date of the guarantees was given (correctly) as 8 December 2010.

(4) The Personal Guarantees

56. Katerina Xyla provided the Personal Guarantee dated 8 December 2009 in respect of Antaeus's liabilities under the Antaeus Loan Agreement, and the Personal Guarantee dated 8 October 2010 in respect of Apellis's liabilities under the Apellis Loan Agreement. Each of the Personal Guarantee is governed by Greek law (clause 16.1).

57. The Personal Guarantee in respect of Apellis Shipping refers in its recitals to *"Antaeus Shipping"*. That was an obvious typographical error, given the correct reference in the same recital to the date of the Apellis Loan Agreement, and the fact that that was also the date of the relevant Personal Guarantee itself. The original Defence, settled by Ince & Co, admitted in § 15 that the debts of Apellis Shipping had been guaranteed. Shortly before the CMC on 6 October 2017, Katerina Xyla wrote to the court indicating that she might reverse her position on this point, and § 2c of the Order of Popplewell J made at the CMC required the Defendants to plead any such point if it were to be taken. The Amended Defence served on 17 November 2017 did not take any such point. In my judgment it is clear that this Personal Guarantee guarantees the obligations of Apellis Shipping under the Apellis Shipping Loan Agreement.

58. Each of the Personal Guarantees expressly imposes, pursuant to clause 3, both the liability of a guarantor and the liability of a principal debtor by way of indemnity in respect of all *"Indebtedness"* under the relevant Loan Agreement and its associated Finance Documents. In each of the Personal Guarantees, *"Indebtedness"* is defined as: *"the aggregate from time to time of: the amount of the Loan outstanding; all accrued and unpaid interest on the Loan; and all other sums of any nature (together with all accrued and unpaid interest on any of those sums) payable by the Borrower to the Lender under all or any of the Finance Documents."*

59. The Personal Guarantees provide for the expenses of enforcement and for default interest, as follows: *"6.1 The guarantor shall pay to the Lender on demand on a full indemnity basis all costs and expenses incurred by the Lender in or about or incidental to the exercise by it of its rights under this Guarantee and Indemnity, together with interest at the Default Rate on the amount demanded from the date of demand until the date of payment, both before and after judgment, which interest shall be compounded with the amount demanded at the end of such periods as the Lender may reasonably select."*

60. When the notices of acceleration were served, they were copied to Katerina Xyla by way of demand under the Personal Guarantees: see § 55 above.

61. Various Greek-law defences have been pleaded, and developed in the Ince & Co Advice, on behalf of Katerina Xyla. I consider these in section (E) below.

(5) The sale of the "Antaeus"

62. The contemporary documents and the evidence of Mr Mendoros of the Claimant indicate that following the notice of acceleration of the Antaeus Loan Agreement given on 4 July 2016, the following events occurred.

63. On 31 July 2016, the Claimant's appointed manager, Interunity Management (Deutschland) GmbH, replaced the crew of the "*Antaeus*" whilst she was unemployed at Vizag, India, and arranged for the usual Class audit. The vessel was then sailed to Trincomalee, Sri Lanka, for urgent repairs, delivery of spares and hull bottom cleaning.

64. On 23 August 2016, the "*Antaeus*" was arrested in Trincomalee by a supplier, Barwil General Marine Contractors, and the Claimant paid US$32,138.15 in order to release the vessel.

65. The Claimant then directed the "*Antaeus*" to Walvis Bay, Namibia, for arrest and judicial sale. This was considered a favourable enforcement jurisdiction given (i) its legal system, which permits sale *pendente lite* and without the need for an auction where the applicant has found a buyer prepared to pay full market price (as the Claimant had); (ii) the favourable repositioning of the vessel that would be achieved, given available cargoes. The Claimant also considered Singapore, but this was relatively expensive by comparison.

66. The "*Antaeus*" was arrested in Walvis Bay, Namibia on 20 September 2016 and sold by provisional and final orders of the High Court of Namibia dated 7 October 2016 and 8 November 2016 to Boheme Marine Company, for US$8,910,000 + US$130,000 (bunkers) = US$9,040,000. The Namibian court dispensed with a formal auction and approved the sale in reliance upon two formal valuations of US$8,100,000 (Hartland Shipping Services) and US$8,000,000 – US$8,250,000 (Ship Valuation Consultancy) with which the actual sale price compared favourably. The Claimant obtained payment out of court in the sum of US$9,040,000.

67. The expenses incurred in realising that sum are confirmed in the evidence of Mr Mendoros, which I accept, as having been US$548,988.42 + €105,334.83. The Claimant is entitled to recover these sums pursuant to clauses 8.7 (Events of Default) and 8.8 (Enforcement costs) of Antaeus Loan Agreement, read with the definitions of "*Finance Documents*" and "*Security Documents*".

68. The part of the realisation expenses incurred in Euros, €105,334.83, has been converted into US dollar sum of US$113,505.97 and netted off against the vessel sale proceeds under clause 10.9 of the Antaeus Loan Agreement.

69. The Claimant also claims accrued interest up to the date of the sale of the vessel and interest that has accrued subsequently. The former interest amounts to US$232,489.46, made up of the amounts of US$131,158.30, US$4,405.36, US$94,912.18, and US$2,013.62 are shown at lines 9, 10, 17 and 18 of the Loan Statement for the Antaeus Shipping Control Account.

70. The Claimant gives credit for 100% of the sums contained in the Antaeus Earnings Account and 50% of the sums held with the Claimant in the name of Pyrsos (the other 50% having been credited to the Apellis Loan Agreement).

71. As a result, the sums due to the Claimant in respect of the Antaeus, excluding interest accruing due since the sale of the vessel, are as set out below:

Item	**Debit**	**Credit**
Unpaid loan principal	US$8,700,000	
Interest to date of judicial sale	US$232,489.46	
Enforcement expenses	US$548,988.42 + ~~€105,334.83~~	
€ enforcement expenses converted into US$ for offsetting	US$113,505.97	~~€105,334.83~~
Proceeds of judicial sale		US$9,040,000
Funds in Antaeus Earnings Account		US$4,514.11
50% of funds in Pyrsos account		US$5,000
Total	US$545,469.74	

72. These balances are confirmed by the evidence of Mr Mendoros, which I accept, and by entries in the Control Account and the supporting documentation provided to the Court.

(6) The sale of the "Apellis"

73. The contemporary documents and the evidence of Mr Mendoros of the Claimant indicate that following the notice of acceleration of the Apellis Loan Agreement given on 4 July 2016, the following events occurred.

74. On 7 July 2016, while the "*Apellis*" was still at Fangcheng, China under the arrest requested by Zhoushan Changhong shipyard, she was arrested again, now at the behest of a supplier of spare parts based in Shanghai. The Claimant considered arresting the vessel and enforcing its own rights in nearby Beihei, but expected this to be a lengthy process. The Claimant decided instead to sail the vessel to Hong Kong, for the sake of its quicker and more efficient judicial sale process, which it considered would more than mitigate the expenses of relocation.

75. The Claimant paid the crew's wage arrears, insured the "*Apellis*" against the usual marine risks, and paid off a number of other trade creditors, in order to lift the arrest in Fangcheng. The Claimant's appointed manager then replaced the vessel's crew and the new crew sailed her to Hong Kong on 2 August 2016.

76. On 5 August 2016, the "*Apellis*" was arrested in Hong Kong at the behest of the Claimant. The Hong Kong court made an order for appraisement and sale *pendente lite* on 30 August 2016. The "*Apellis*" was appraised and advertised for sale in Lloyd's List on 19 September 2016. The successful bidder, Corsaro Shipping S.A., completed its purchase of the "*Apellis*" on 12 October 2016 for a price of US$9,350,000 + US$78,030 (bunkers) = US$9,428,030. The Claimant subsequently obtained payment out of court in the sum of US$9,358,979.08.

77. The expenses incurred in realising that sum are confirmed in the evidence of Mr Mendoros, which I accept, as having been US$865,227.84 + €116,865.38. The Claimant is entitled to recover these sums pursuant to clauses 8.7 (Events of Default) and 8.8 (Enforcement costs) of Apellis Loan Agreement, read with the definitions of "*Finance Documents*" and "*Security Documents*".

78. The part of the realisation expenses incurred in Euros, €116,865.38, has been converted into US dollar sum of US$138,343.26 and netted off against the vessel sale proceeds under clause 10.9 of the Apellis Loan Agreement.

79. The Claimant also claims accrued interest up to the date of the sale of the vessel and interest that has accrued subsequently. The former interest amounts to US$258,808.45, made up of the amounts of US$145,678.87 and US$113,239.58 are shown at lines 9 and 17 of the Loan Statement for the Apellis Shipping Control Account.

80. The Claimant gives credit for 100% of the sums contained in the Apellis Earnings Account and 50% of the sums held with the Claimant in the name of Pyrsos.

81. As a result, the sums due to the Claimant in respect of the Apellis, excluding interest accruing due since the sale of the vessel, are as set out below:

Item	**Debit**	**Credit**
Unpaid loan principal	US$10,175,000	
Interest to date of judicial sale	US$258,808.45	
Enforcement expenses	US$865,227.84 + ~~€116,865.38~~	
€ enforcement expenses converted into US$ for offsetting	US$138,343.26	~~€116,865.38~~
Proceeds of judicial sale		US$9,358,979.08
Funds in Apellis Earnings Account		US$3.38
50% of funds in Pyrsos account		US$5,000
Total	US$2,073,397.09	

82. These balances are confirmed by the evidence of Mr Mendoros, which I accept, and by entries in the Control Account and the supporting documentation provided to the Court.

(E) POTENTIAL DEFENCES

83. As noted earlier, in order to understand the defences that the Defendants would be likely to have advanced, it is necessary to have regard to the Ince & Co Advice alongside such information as can be obtained from the Amended Defence. The Defendants have not otherwise put forward any evidence of or information about the relevant Greek law.

84. The Claimant has served expert evidence addressing the relevant principles of Greek law from Professor George Georgiades, who provided a report and gave oral evidence at trial. Professor Georgiades is an Assistant Professor teaching civil and commercial law at the University of Athens, who has also been a partner since 2004 in an established Greek law firm handling commercial litigation and arbitration. He holds

postgraduate qualifications: LLMs from Harvard and Munich, and a doctorate in law from the University of Athens. I am satisfied that he is appropriately qualified to give expert evidence in this case, and that he is independent.

85. On the basis of the Ince & Co Advice and the Amended Defence, the defences which I consider the Defendants would have been likely to have advanced, had they appeared or been represented at the trial before me, are:

i) that Pyrsos and/or Katerina Xyla were or are exonerated from their obligations under the Corporate Guarantees and the Personal Guarantees under Article 862 of the Greek Civil Code (*"Extinction of guarantee"*) by reason of fault by the Claimant that made its satisfaction by Antaeus and/or Apellis impossible;

ii) that the exercise of rights by the Claimant was prohibited under Article 281 of the Greek Civil Code (*"Abuse of right"*) because such exercise obviously exceeded the limits imposed by good faith or morality or by the social or economic purpose of the right; and/or

iii) that the Claimant acted in breach of the requirements of good faith, contrary to Article 288 of the Greek Civil Code.

(1) The relevant principles of Greek law

(a) Article 862

86. Article 862 of the Greek Civil Code, in the translation set out in the Ince & Co Advice, provides:

> "A guarantor shall be exonerated [from his obligations] where by reason of a fault of the creditor, his [the creditor's] satisfaction from the debtor became impossible."

Professor Georgiades' preferred translation of the same Article is in substance identical.

87. The Ince & Co Advice accepted that this defence requires *"a causal connection between the creditor's fault and the impossibility for the creditor to be satisfied"*. That is also Professor Georgiades' evidence. He adds that:

i) the inability of the lender to be satisfied by the borrower usually occurs because the borrower has been declared bankrupt *"or has been led to a factual or legal situation which excludes the fulfilment of its debt or has in general become insolvent because of the voluntary or compulsory enforcement of his assets"* (citing *Karagkoundis* in A. Georgiades, Short Interpretation of Civil Code (SEAK),Vol. 1, article 862, no 5-12);

ii) the concept of fault under Article 862 covers all forms of liability under Greek law, namely wilful misconduct, gross negligence and minor negligence, excluding only random incidents or force majeure events (citing *Karagkoundis, supra*, no 6); and whether the lender's behaviour could be attributed to such conduct is subject to an ad hoc examination by the court following assessment of the total factual situation; and

iii) the borrower's inability to satisfy its claims should have a causal link with the lender's behaviour, meaning that it should be an effect of that behaviour; that causal link is construed in Greek law under the prevailing theory of adequate cause (*causa adequata*) under which a cause is regarded as adequate *"when it has not simply brought about the damage, or in general the result examined, in terms of a logical causation (as under the theory of conditio sine qua non), but when it has the tendency and the capability of leading to this result, in accordance with the normal course of events"*, that being a matter to be assessed based on the perception of the average prudent person and (according to the prevailing theory) based on the information that existed at the time the relevant behaviour took place (citing Michael Stathopoulos/Antonio Karampatzos, *Contract Law in Greece*, 3rd edn. (2014) § 311; A. Georgiades, Contract Law, General Section (1999) § 10, no 31; and M. Stathopoulos, General Contract Law (2004) § 8, no 128).

88. Professor Georgiades provides a series of examples from Greek case law of the application of Article 862 to lending transactions. These include a case particularly relied on in the Ince & Co Advice: namely the Greek Supreme Court's Judgment No 419/2013, which concerned the inaction of a lender who failed to proceed with compulsory enforcement and auction of the mortgaged property for a period of almost four years.

89. Professor Georgiades states that by reason of Article 862 *"the lender should be diligent and take immediate action after the termination of the loan agreement, if of course he has the contractual right to proceed to the specific actions, in order to minimise any risks, especially through selling of the pledged or mortgaged assets of the borrower, aiming to achieve reduction or full extinction of the debt".* Further, Professor Georgiades states:

> "… it is not expected from the lender nor is he obliged under 822 GCC or any other law provision to make an accurate assessment and prediction of the future development on the market and to act accordingly, in respect of the selling of the assets of the borrower. Nor is he expected or obliged to wait until the conditions of the market change radically, as such event, as well as its exact timing, remains in any case uncertain. To this end, any early and immediate measure by the lender, instead of waiting and examining the prospects of a more efficient enforcement in the future, cannot be attributed to him as fault under article 862 GCC. On the contrary, fault under article 822 would exist if the lender was significantly delaying until the market value of the assets would be practically eliminated due to radical circumstances (i.e. recession in the market), and was deliberately choosing this timing to sell the pledged assets."

Professor Georgiades explains that in Judgment 419/2013 referred to above, the Supreme Court held that the lender's inaction was wilful or at least grossly negligent, because it was aimed at inflating the debt by accruing compound interest, and meant the vessels remained for about four years immobilised in port, subject to external wear and tear, significantly reducing their initial commercial value.

90. The Claimant initially argued that Article 862 did not apply to the present case unless there had been wilful misconduct or gross negligence, because Katerina Xyla had expressly waived or excluded Article 862 by clause 4.5 of the Personal Guarantees:

> " **The Guarantor hereby irrevocably waives** any rights which the Guarantor may have to require the Lender to proceed against or enforce any guarantee or security of, or claim payment from the Borrower or any other guarantor of the Borrower's obligations to the Lender before claiming from the Guarantor under this Guarantee and Indemnity as well as **all other rights, remedies, defences or exceptions (if any) which are or may be given to a guarantor by any applicable law including without limitation Articles**…855…[and] **862**…**of the Greek Civil Code** (or any statutory re-enactment or modification thereof)." (emphasis added)

91. Article 332 provides that any prior agreement excluding or limiting responsibility arising from fraud or gross negligence is null (void), and that a prior agreement excluding responsibility even for simple negligence is null if the waiver is included in a term of an agreement that was not subject to individual negotiation.

92. I raised with the Claimant's counsel the precise basis on which it was contended that clause 4.5 of the Personal Guarantees were subject to individual negotiation, and the matter was explored in questioning by counsel and the Court of Mr Lamnides of the Claimant (as to the facts) and Professor Georgiades (as to Greek law) as part of their oral evidence given at trial.

93. Mr Lamnides stated that he believed that the Personal Guarantees were based on a standard form used by the Claimant and drafted by external lawyers. However, he noted that unlike the other standard form documents, the Personal Guarantees provided that they were governed by Greek law. He believed that the customer must have asked for this provision.

94. Professor Georgiades said in his oral evidence that in order for a waiver of Article 862 to be effective in relation to simple negligence, it was necessary under Article 332 for the waiver clause itself (here, clause 4.5 of the Personal Guarantees) to have been individually negotiated: it was not sufficient for the guarantee as a whole to have been negotiated.

95. Professor Georgiades was asked what the position would be if a lender put forward a standard form of guarantee which included an express choice of English law; the proposed guarantor asked for the choice of law to be changed to Greek law; the lender then put forward a revised draft with an express choice of Greek law but also a clause waiving Article 862; and the revised draft was then agreed. Professor Georgiades stated that if there was no discussion of the waiver clause in particular, then it would not be regarded as having been individually negotiated. Article 332 required the parties to have discussed and negotiated the specific issue of the waiver.

96. In the light of this evidence, the Claimant decided not to pursue the argument that the waiver of Article 862 had been individually negotiated, on the basis that it could not discharge the burden of proof. As a result, simple negligence would be sufficient in

the present case to amount to fault for Article 862 purposes. The requirements of impossibility and causation, referred to in §§ 87-89 also still of course apply.

97. The burden of proof under Article 862 lies on the guarantor: Georgiades report §34 citing *Karagkoundis* in A. Georgiades, Short Interpretation of Civil Code (SEAK),Vol. 1, article 862, no 15 and, indicatively, Supreme Court Judgment no 1296/2017 and Court of First Instance of Athens Judgment no 802/2013.

(b) Article 281

98. Article 281 of the Greek Civil Code (*"Abuse of right"*) provides, in the translation set out in the Ince & Co Advice:

> "The exercise of a right shall be prohibited if such exercise obviously exceeds the limits imposed by good faith or morality or by the social or economic purpose of the right."

Professor Georgiades' preferred translation is the same.

99. Professor Georgiades explains that Article 281 includes the following criteria, and that behaviour inconsistent with any of them can constitute an abuse of right within Article 281:

i) good faith, i.e. the candour and fairness required in transactions, according to the prevailing objective theory, which requires each party to a transaction in the exercise of its rights to take into consideration the justified interests and expectations of the counterparty: case law gives special emphasis to this criterion;

ii) the *boni mores*, i.e. the prevailing and generally accepted morality of society, namely the ideas of a right and prudently thinking member of society as to what behaviour corresponds to social morality; and

iii) the social and economic purpose of the right, meaning the purpose that corresponds to the social function of the right and the financial interests pursued by it as recognised by the legal order.

(citing Michael Stathopoulos/Antonio Karampatzos, *Contract Law in Greece*, 3rd edn. (2014) §§ 51-52, 57 and 145; A. Georgiades, Short Interpretation of Civil Code (SEAK), Vol. 1, article 281, nos 24, 25, 26 and 29-30; A. Georgiades, General Principles of Civil Law (2002) § 23 nos 28 and 29, § 36 no 1-3)

100. Professor Georgiades indicates that long-term inaction by the beneficiary of a right can be in breach of Article 281 though only if additional circumstances are present, in particular the beneficiary having given the other party the justified belief and expectation that he will not exercise the right, resulting in onerous effects for the other party. By contrast, Professor Georgiades quotes, indicatively, the Court of First Instance of Piraeus Judgment no 95/1991 where borrowers alleged that a lending bank had ignored their objections to the sale of mortgaged vessels, those objections having been based on the expected future recovery of the shipping market. The court said:

> "it would be far too excessive to claim that the principle of the boni mores or the general duty of non-causing of damage to third parties imposes to the mortgage creditor, so as to avert the financial collapse of the debtor, to wait, in order to satisfy its claims, for the alleged recovery of the shipping market, as said element is completely uncertain and therefore unreliable."

101. More generally, Professor Georgiades states that it has been widely accepted in a series of judgments of Greek courts in cases involving banks' exercise of rights against borrowers or (frequently) guarantors, that:

> "the mere fact that exercise of the right in a specific case causes damage, even significant damage, to the debtor, cannot constitute abuse of right under article 281 GCC, unless it is combined with other circumstances, for example if the lender has no actual interest in the exercise of the right. However, as lack of interest cannot be considered the case when the lender decides to proceed to the collection of the debt against the debtor (or the guarantor respectively), when it has the contractual right to do so, because in such case the lender acts in order to satisfy its own legitimate interest, which is inextricably linked to the management of the lender's own affairs, and the lender is entitled to decide the means of such management at its own discretion, unless in the case examined there is obvious excess of the principles of good faith, of morality and of the financial and social purpose of the right."
>
> (citing, indicatively, Greek Supreme Court Judgment no 1352/2011; Greek Supreme Court Judgment no 1472/2004; Court of Appeal of Thessaloniki Judgment no 2788/2009; Court of Appeal of Thessaloniki Judgment no 218/2016; Court of First Instance of Athens Judgment no 576/2014; Court of First Instance of Athens Judgment no 199/2009)

102. The burden of proof under Article 281 lies on the party alleging abuse of right: Georgiades report § 67 citing, indicatively, Supreme Court Judgment no 394/2006.

(c) Article 288

103. Article 288 of the Greek Civil Code provides:

> "A debtor shall be bound to perform the undertaking in accordance with the requirements of good faith taking also into consideration business usage."

104. Since the Ince & Co Advice includes reference to Article 288, I asked Professor Georgiades to explain its relevance and its interrelationship in the present case with Article 281.

105. Professor Georgiades explained that whilst Article 288 makes specific reference to the conduct of debtors, it reflects the general concept of good faith which is a very

important principle of Greek civil law. In relation to lenders, though, its practical importance is diminished by the existence of Article 281 which gives the general principle more specific and concrete form in that context. In the context of the present case, for example, the application of Article 288 would not be expected, in Professor Georgiades' opinion, to add anything to Article 281.

(2) Application to the facts

106. The Ince & Co Advice alleges breaches of each of the provisions referred to above. The allegations are in some cases diffuse and difficult to follow. For example, in relation to Article 281 it is stated that "*the conduct of HSBC vis-à-vis the Security Parties, including A. Xyla manifestly exceeds the limits imposed by good faith or morality or the social or economic purpose of the right and thus it is abusive.*" However, the basis for this allegation is not spelt out with particularity. I address below what I consider to be the essential substance of the allegations made, or arguably available, of breach of relevant principles of the Greek law.

(a) Timing of sale of vessels

107. The Defendants have contended, in their Amended Defence and via the Ince & Co Advice, that the Claimant acted negligently by selling the vessels when they did rather than waiting for the shipping market to recover in order to achieve higher values. The Defendants say that during 2015-16 *"the Shipping industry was experiencing some of the worst conditions in more than 30 years"* (Amended Defence, §2.a.1). They say that sales in early 2017 would have realised better prices than were in fact realised.

108. The Claimant makes the point that in English law, which governs the Loan Agreements and the Corporate Guarantees, its duty as mortgagee was limited to taking reasonable steps to obtain the true market value of the mortgage property at the date of sale as chosen by the Claimant, and it was contractually entitled as lender and mortgagee to sell the vessels at a time of its choosing provided that the preconditions to enforcement of its mortgage security had been met (see *Cuckmere Brick Co v Mutual Finance* [1971] Ch 949, 965G, 968H; *The Tropical Reefer* [2004] 1 Lloyd's Rep 1 § 23). The Claimant adds that where a sale of mortgaged property at a specific price is pre-approved by a court it ought usually to be unimpeachable (see *Arab Bank Plc v Mercantile Holdings Ltd* [1994] Ch 71, 90). The Claimant says it would be wrong to hold it to have acted negligently by reason of conduct that is clearly licensed by the law governing the loans.

109. Though I see considerable force in that point, it is unnecessary to decide it for the purposes of this judgment. That is because I consider it clear that even if Greek law is applied, the Claimant did not contravene Article 862, Article 281 or Article 288 by the timing or any other aspect of the selling of the vessels.

110. First, I do not consider that any of those provisions requires a lender to delay enforcement in the speculative hope that the market will improve. On the contrary, a lender is likely to be at fault if it does delay enforcement in the hope of market recovery, especially when the mortgaged or pledged property is continuing to incur expenses and/or may deteriorate in value. I consider that view to be clearly consistent with the Greek case law on Articles 862 and 281 referred to by Professor Georgiades discussed in §§ 88-89 and 100-101 above.

111. Secondly, in the present case the Claimant in my judgment acted entirely correctly by enforcing its security promptly in circumstances where (as the documents show and as Mr Mendoros confirmed in his evidence) ongoing expenses were being incurred, there had been arrests and threats of arrest for non-payment of crew/suppliers, there was a risk of the condition of the vessels (which were largely idle) deteriorating, the Borrowers were clearly in default and there appeared to be no sufficient prospect of the situation being promptly resolved.

112. Thirdly, the argument that the Claimant should have delayed is based essentially on hindsight. The contemporaneous documents indicate that the Claimant was in fact concerned in the period leading up to the vessel sales about the potential deterioration in value of its security (see, in particular, the affidavit of Joelle Downes, a South African attorney acting for the Claimant, sworn on 27 September 2016 in the Namibian proceedings which in § 63 stated *"Due to the collapse of the Baltic Dry Index and the consequent flood of tonnage for sale on the market over the past 6 months it is likely that the Vessel's value will continue to decrease significantly".*)

(b) Relocation of earnings accounts

113. The Defendants complain that the Claimant was at fault for failing to transfer the vessels' earnings accounts to London, with the result that they were affected by the capital controls introduced by the Greek government in June 2015, causing knock-on difficulties with payment of the vessels' operational expenses. This is framed as an alleged breach of both Article 862 and Article 281, the Defendant stating in relation to the latter that the Claimant by failing to transfer the Vessel's earnings accounts to London *"did not offer [the security parties] the same protection it enjoyed itself."*

114. By way of background, in 2012 the Claimant re-booked the Control Accounts to London. The Defendants expressed interest in the vessels' earnings account also being relocated to London, and the Claimant on 13 June 2012 set out the documentation that would be required in order to satisfy the 'know your customer' requirements with which the bank was required to comply. However, a problem was then encountered in June 2012 about conflicting payment instructions received from Katerina Xyla and Doris Xyla without each other's authority (notwithstanding that both of them were required to sign such instructions) and the idea of relocating the earnings accounts was not pursued further at this stage.

115. In April 2015 Katerina Xyla revived the proposal that the Claimant relocate the vessels' earnings accounts to London, and the Claimant looked into the possibility of doing so. However, the documents and the evidence of Mr Mendoros show that the Defendants were unable to satisfy the Claimant's 'know your customer' requirements for the purposes of opening new bank accounts in London. Mr Lamnides confirmed in his oral evidence, and I accept, that although the Defendants were pre-existing customers in Greece, in order to open account in London it would be necessary for them to comply with the 'know your customer' requirements applicable there. (The relocation in 2012 of the control accounts did not assist in this context: those were not bank accounts as such but merely bookkeeping accounts used to record the position on the loans.)

116. In particular, the Defendants needed to address the need to resolve (a) signing authority for the proposed new accounts and (b) the need for the bearer shares in

Antaeus Shipping and Apellis Shipping to be lodged with the Claimant, lodged with an approved custodian or converted to registered shares in order to provide certainty as to the identity of the companies' ultimate owners. The correspondence shows that the Claimant repeatedly made clear that these matters needed to be resolved in order for the accounts to be relocated, including by communications dated 9 July 2015, 7 October 2015, 13 October 2015 and 28 March 2016 and at meetings on 8 December 2015 and 3 February 2016.

117. However, it appears that Katerina Xyla and Doris Xyla were unable to reach the degree of consensus necessary. Relations between them appear to have deteriorated over the period leading up to and including the time at which relocation was being considered. By 2013, Doris Xyla had according to Mr Lamnides' evidence been barred from Pyrsos's offices. In August 2014 Katerina Xyla in a letter to the Claimant referred to "*differences of opinion*" between herself and Doris Xyla in which it was "*unhelpful for the Claimant to intervene*". By 2015, Katerina Xyla and Doris Xyla were litigating against each other in the Greek courts about an allegedly unauthorised withdrawal of US$5,000,000 from a treasury company used by Pyrsos.

118. The documents indicate that RBS (London) was encountering similar problems with the Defendants' group (specifically, a letter from RBS to Athene Financiera Corporation SA, another company beneficially owned by the Xyla sisters, notified the closure of all that company's accounts due to failure to provide up-to-date 'know your customer' information).

119. In the light of the Defendants' apparent inability to meet the 'know your customer' requirements, the Claimant was not in my judgment at fault in any way for the non-relocation of the vessels' earnings accounts to London.

120. In any event, the problems subsequently arising from the Greek government's imposition of capital controls were not caused by the Claimant having declined to relocate the vessels' earnings accounts to London, applying the causation test in Greek law referred to in § 87.iii) above. Those problems were not a foreseeable consequence of any action or inaction by the Claimant.

121. Moreover, as Mr Lamnides explained, the Claimant worked hard in the second half of 2015 to mitigate the effects of the capital controls on its clients. Any inconvenience those controls caused cannot be laid at the Claimant's door.

122. For these reasons, I do not consider that the Claimant was in breach of Articles 862, 281 or 288 by reason of the vessels' earnings accounts not having been relocated to London at any relevant time.

(c) Alleged agreement concerning enforcement

123. The Defendants have asserted that some form of agreement or understanding was made with the Claimant in 2016 pursuant to which it would refrain from enforcement against the vessels or Katerina Xyla.

124. However, as Mr Mendoros explains, whilst the Claimant took trouble to facilitate and encourage a rescue agreement between the Xyla sisters, which would have involved their agreeing to split ownership of the two vessels between them (taking one vessel

each) and the Claimant installing a professional third-party manager, the sisters were not able to reach a consensus. The contemporary documents provide no support whatever for the Defendant's allegations of an agreement or understanding whereby the Claimant would refrain from exercising its rights. To take one example, an email dated 31 May 2016 from Mr Mendoros to Katerina Xyla stated in § 6 that *"You will appreciate that the current situation is due to the prolonged inaction and inability of the shareholders to enter into an agreement. The bank has so far supported the company. However, this cannot continue without any sign from the shareholders of a final resolution on the issues between themselves"*. None of the subsequent communications from the Defendants' side to the Claimant (including Katerina Xyla's letter of 7 June 2016 to the Claimant, in which she admitted breaches in relation to interest and covenants under both loans) made any suggestion that the Claimant had agreed not to exercise its rights. The allegation of an agreement or understanding not to enforce was also clearly refuted by Mr Mendoros in his oral evidence, which I accept. I therefore reject the Defendants' allegation.

(d) Terms of acceleration notice

125. The Ince & Co Advice argues that *"abusive conduct"* occurred because the notice of acceleration sent to Apellis Shipping referred to a failure to pay a repayment instalment in the sum of US$525,000 on 8 June 2016. That was incorrect: it was true of Antaeus Shipping and it appears that the relevant text from the notice sent simultaneously to Antaeus Shipping was mistakenly copied over into the text of the notice sent to Apellis Shipping.

126. The evidence provides no reason to regard this as anything other than a mistake. It was not, in my judgment, abusive conduct, and it was immaterial given the other Events of Default referred to in the acceleration notice sent to Apellis Shipping each of which itself provided sufficient basis for the notice: specifically, the non-payment of interest on 8 March 2016 and the admitted breaches of covenants.

(e) Alleged failure to waive covenant breaches

127. The Ince & Co Advice also suggests that *"abusive conduct"* occurred because the Claimant failed to waive breaches of ACR covenants by the Borrowers. In the light of the principles discussed in § 99-101 above, I do not consider that a lender could properly be held to have committed *"abusive conduct"* by declining to waive its contractual rights to enforce such covenants. Moreover, in the present case the Claimant did permit a relaxation of the ACR covenants, from 130% to 115%, for a period of months starting from June 2015, in relation to each of the Borrowers.

128. Finally, the last paragraph of the Ince & Co Advice states:

> "The Claimant argued that the security ratio fell below 130% and this constituted an event of default under the Loan Agreements. However, we understand that, although this was the same for the vast majority of the shipping loan agreements in the industry during the period 2010-2015 in view of the depressed vessels' values, other banks did not seek to rely on this. In addition, during the course of the hearing of

> 29.05.2017 before the Piraeus First Instance Court it transpired that the Claimant financed 100% the purchase of the Vessels by Interunity interests (which is extremely unusual in shipping banking practice). The cover ratio of this finance was only the 100% of the "Interunity loans" and not 130%, which HSBC considered to be a breach in the terms of the Antaeus and Apellis loans (when the ratio fell below 130%)."

129. Mr Lamnides explained in evidence that Interunity Management (Deutschland) GmbH had been a well-regarded customer of the Claimant since, he believed, the 1980s. The Claimant regarded them as trustworthy and as being good vessel managers, and accordingly selected them in July 2016 to undertake the management of the vessels following the acceleration of the loans to Antaeus and Apellis.

130. It is not clear what legal conclusion the Ince & Co Advice sought to draw from the matters set out in the paragraph quoted above. However, even if it were the case that (a) other banks had taken a more lenient approach to breaches of covenant by other customers (the circumstances of whose accounts may have been entirely different from those of the Defendants) and/or (b) the Claimant had lent to Interunity on particularly favourable terms as regards cover ratio, those matters would not in my judgment have placed the Claimant in breach of Article 862, Article 281 or Article 288 vis a vis the Defendants.

131. In all these circumstances, I do not accept the Defendants' complaints under this heading.

(F) CONCLUSIONS

132. For the reasons set out above, I conclude that:

i) The Defendants were and are in default of their respective obligations under the Antaeus Loan Agreement, the Apellis Loan Agreement, the Corporate Guarantees and the Personal Guarantees;

ii) the Claimant was entitled to accelerate the loans to Antaeus Shipping and Apellis Shipping;

iii) the Claimant was entitled to enforce its security over the vessels in the manner and at the times at which it did; and

iv) the Claimant is entitled to judgment against each of the Defendants in the sums set out earlier in this judgment, together with subsequent interest from the date of acceleration of the loans to the date or dates of payment.

133. I am grateful to counsel and the solicitors for the Claimant for their clear and helpful submissions (accompanied by a very full and helpful chronology), and for assisting the Court in ensuring that the arguments for and against the Claimant have been fully and fairly identified and articulated.