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Arrest of Ships:  
Impact of the Law on Maritime  
Claimants.

Master thesis  
30 credits (30 ECTS)

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Master's Programme in Maritime Law

2010-05-24

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# Summary

To the Maritime lawyer, international ship arrest provides both an interesting and challenging topic. This field of law is so dynamic because a particular vessel trades worldwide and spends much of its time in international waters. The importance of this area of law could be seen from the attention it has received from the international shipping community, this is also evident from the enormous efforts which have been made by the international community to standardise and unify the practice of ship arrest over the years. These efforts resulted in the two International Conventions on arrest of ships. However, the conflicting interests of two major groups of players in the maritime industry have created a problem which lies at the heart of the industry in respect of ship arrest. These groups are the maritime claimants and the shipowners. Each group believes that the law which regulates the practice of international ship arrest is detrimental and unfavourable to their interest and business.

However, in this work, attention is focused particularly on the effect of the provisions of the international law of ship arrest on the maritime claimant. The Conventions through some of its provisions had made the exercise of ship arrest a difficult and sometimes impossible task. It is worthy of note that the potential maritime claimant includes persons (natural or artificial) whose input in the maritime industry aids in no less measure to the sustainability and growth of the industry. Therefore, the existence of a situation where the international laws of ship arrest, which has as one of its objects, the protection of the interest of the maritime claimant, now aids by its provisions, unscrupulous shipowners in their efforts to evade arrest and deprive the claimants of the recovery of their legitimate claims against the shipowners; threatens not only the business of the claimants, but also by extension the existence, growth and development of maritime commerce and world trade.

In this work this issues will be addressed and attempts to provide solutions to the problems raised will be made.

# Acknowledgments

I wish to express my gratitude to Almighty God who has been my strength all this while and without whom this feat would not have been achieved.

I am also deeply indebted to my supervisor, Professor P.K. Mukherjee of the World Maritime University, for all his considerable and invaluable guidance and support throughout the production of this work.

Thanks is also due to the librarians both at the Lund university law faculty library and the World maritime University library for all their wonderful co-operation and assistance during the production of this dissertation.

I will not forget all the members of my family, especially my mother, who has been a pillar of support for me, also my brothers and sister for their encouragement and support.

Also to all my classmates and friends, i thank you all.

# Abbreviations

AJA	Admiralty Jurisdiction Act, 1991 (Nigeria)
AJRA	Admiralty Jurisdiction Regulation Act, 1983 (South Africa)
A.C.	Appeal Cases (United Kingdom)
A.M.C.	American Maritime Cases
A & NZ	Australia and New Zealand Maritime Law Journal
C.A.	Court of Appeal Cases (U.K)
CMI	<i>Comite Maritime Internationale</i>
Fed. Cas.	Federal Cases (United States)
F.C.	Federal Court Reports (Canada)
F.2d	Federal Reporter (Second Series) United States
F. Supp.	Federal Supplement. (U.S. District Court Decisions)
H.L.	House of Lords
IMO	International Maritime Organisation
JMLC	Journal of Maritime Law and Commerce
JIML	Journal of International Maritime Law
LLP	Lloyd's of London Publishers
LMCLQ	Lloyd's Maritime and Commercial Law Quarterly
MLAANZ	Maritime Law Association of Australia and New Zealand Journal

# 1 Introduction.

The legal concept that a ship can be arrested and prevented from moving is unusual to say the least. After a car crash on land, the plaintiff is not allowed to ‘arrest’ the defendant’s car. Nor in such ordinary *in personam* actions against a defendant could the latter be arrested to force him to pay the claim. In such cases, it is only after a judgment on the merits of the claim that the defendant’s property may be seized to satisfy the claim.<sup>1</sup> It may therefore be apt to pose the following question: Why is it possible in an action *in rem* to arrest a vessel before the judgment on the merits?

The need to arrest comes from the fact that vessels are highly mobile and can travel with relative ease from country to country, and in and out of the jurisdiction of their courts. Perils of the sea may affect or diminish the value of the ship and ownership of the vessel may change easily without prior notice. In addition to these, flags of convenience mean that a ship can easily change identity between ports. All this indicates that trying to enforce a claim without having the opportunity to take the ship into custody, for all practical purposes, is impossible. The arrest of ships is a legal mechanism that prohibits any one from moving the vessel in order that it can serve as security for a claim. Arrest of ships is a pre-trial remedy unique to maritime law and has become a vitally important remedy for the maritime claimant.<sup>2</sup>

When a claim involving a vessel is brought in one court, the ability of a successful litigant to obtain their reward often depends on whether there is a valuable asset (usually the ship) within legal reach of the court that can be sold to pay the claimant. That is why collecting money from a debtor operating in the maritime trade has been characterised as the creditor’s nightmare.<sup>3</sup>

Pre-judgment security is of the highest importance to the maritime creditor, who always faces the threat of being unable to recover his debt from an

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<sup>1</sup> Chorley & Giles’ *Shipping Law*, 8<sup>th</sup> Edition, Pitman Publishing, 1987 at 7.

<sup>2</sup> *Ibid.*

<sup>3</sup> Hare, J., *Shipping Law and Admiralty Jurisdiction in South Africa*, Juta & Co., Cape Town 1999 at 77.

impecunious or unscrupulous debtor, if the debtor's ship –the main asset on which so many maritime creditors depend in extending credit should sail away without the debt being paid.<sup>4</sup> In many cases, after judgment on the merits is obtained, the execution will prove impossible by reason that the *res* (the vessel) against which the judgment is given could not be located or have sailed away to an unknown jurisdiction. A solution to this is to obtain some sort of security from the debtor before or during the legal proceedings and arrest of the ship is the most usual way to obtain such security. Arrest of ships can therefore be described as a powerful measure of interim relief.<sup>5</sup> Arrest constitutes the ship as security in the hands of the court for the claim and this security cannot be defeated by the subsequent insolvency of the owner of the arrested vessel.<sup>6</sup> This pre-trial remedy has been traditionally justified by the assumption that most admiralty cases involve international commerce and that most assets in maritime commerce (especially ships) are exceptionally mobile.<sup>7</sup>

Over the years, various jurisdictions have developed different systems and rules governing the right to arrest a ship. In those common law countries whose maritime law is primarily derived from the admiralty law of England (e.g. Nigeria and Canada), the arrest of ships in an action *in rem* is the basic procedure on which maritime creditors rely for the security of their claim.<sup>8</sup> In these common law countries, a vessel could only be arrested in the limited number of cases where claimants are entitled to enforce their claims in a proceeding *in rem* and in addition, only the ship against which the claim is asserted can be arrested.<sup>9</sup>

In civil law countries, the action *in rem* does not exist. In such countries, an *impersonam* action can be combined with the *saisie conservatoire* (conservatory attachment) to effect arrest. This permits any property of the

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<sup>4</sup> Tetly, W., "Arrest, Attachment and Related Maritime Law Procedures" (1999) 73 *Tulane Law Review*, 1895 –1985 at 1898.

<sup>5</sup> Jackson, D. C., *Enforcement of Maritime Claims*, 4<sup>th</sup> edition, LLP, London 2005 at 257.

<sup>6</sup> Messon, N., *Admiralty Jurisdiction and Practice*, LLP, London 1993 at 118

<sup>7</sup> Rutherglen, C., "The Contemporary Justification for Maritime Arrest and Attachment", 30 *WM. & Mary Law Review* (1998-1999) 541 at 542

<sup>8</sup> Tetly, note 3 at 1898.

<sup>9</sup> Berlingieri on *Arrest of Ships: A commentary on the 1952 and 1999 Arrest Conventions*, 4<sup>th</sup> Ed., Informa, London 2006 at p.4



defendant (including ships) to be seized and detained under judicial authority pending judgment. The subsequent judgment if favourable to the plaintiff may be enforced against the attached property or security replacing it.<sup>10</sup>

There are also some jurisdictions that seem to have taken the best features of both the common law and civil law traditions. Such is the case in the United States. United States maritime law allows a claimant both the right to arrest a ship in an action *in rem* and the right to a maritime attachment.<sup>11</sup>

Arrest of ships has long been the subject of international debate. Although the prospect of creating a uniform body of rules and laws that simplify the international ship arrest calculation is daunting, that has been the principal objective of maritime law during the past decades.<sup>12</sup> International bodies, such as the United Nations Conference on Trade and Development (UNCTAD), the International maritime Organization (IMO) and the *Comite Maritime Internationale* (CMI) have spent so much time and effort trying to simplify and standardize the procedures for ship arrest. Such attempts at uniformity have produced two conventions on arrest of ships, namely, the 1952 Arrest Convention<sup>13</sup> and the 1999 Arrest Convention.<sup>14</sup>

However, whether or not a claimant has the right to arrest a ship is not quite as straightforward as may it appear. There are often considerable factors at stake and the asset moves from jurisdiction to jurisdiction. In addition, the parties to a maritime dispute will often reside in different jurisdictions. On top of this, ownership of maritime property changes rapidly and sales are usually done in international market.<sup>15</sup> Unfortunately, one of the biggest problem encountered by claimants in the maritime industry is how to accurately calculate the level of recourse when securing a maritime asset, usually the ship, upon which the claimant may enforce his claim.<sup>16</sup> There

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<sup>10</sup> Tetly, note 3 at 1898

<sup>11</sup> Lynn, R., "A Comment on the New International Convention on Arrest of Ships, 1999" 55 *U. Miami Law Review* 453 (2000-2001) at 456: See also Tetly, note 3 at 1899.

<sup>12</sup> *ibid*

<sup>13</sup> International Convention For the Unification of Certain Rules Relating to the Arrest of Seagoing Ships, 1952.

<sup>14</sup> International Convention on Arrest of Ships, 1999.

<sup>15</sup> Hare, note 2 at 77

<sup>16</sup> Lynn, note 11 at 433

are numerous factors that go into this recourse equation. For example, factors such as the law of the flag state, the nature of the claim, existence of rival claims, jurisdiction of arrest and so forth. In addition to these factors, a history of heavily fragmented admiralty courts around the world makes full recovery of a claimant's debt nearly impossible.<sup>17</sup>

Reconciling the conflicting interests of the maritime claimants and shipowners has been a controversial issue in the domain of admiralty law.<sup>18</sup>

On the one side, from the claimant's perspective, the right to arrest a ship is the single most valuable tool in enforcing his maritime claims and recovering debts against shipowners and operators. On the other hand, from the view point of shipowners, it is equally essential that a wrongful arrest, attachment, or injunction against a ship does not interrupt the legitimate trading of that ship. This struggle between these opposing forces has risen over the centuries to create a dichotomy that still exists today: both factions believe that the law is not in their favour and that the other side has the greater advantage under existing law.<sup>19</sup>

Both the 1952 and 1999 Arrest Conventions aim at striking a balance between the diametrically opposite interests of maritime claimants and ship owners, bearing in mind the different approaches adopted by various legal systems. The important question therefore is: To what extent has the provisions of both the 1952 and 1999 Arrest Conventions achieved the objective of ensuring a fair balance and enabled maritime claimants to obtain security from shipowners and have their claims settled in full?

The purpose of this work is to attempt an examination of the international law on ship arrest from a common law perspective, paying particular attention to how the law impacts negatively on the claimant in the quest to enforce his claim through the instrumentality of ship arrest in an action *in rem*. Put differently, this work, from a common law perspective, will attempt to make an inquiry by an examination and consideration of some relevant provisions of the law on international ship arrest as to whether and

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<sup>17</sup> *ibid*

<sup>18</sup> Islam, R., "The Arrest of Ship Conventions 1952 and 1999: Disappointment for Maritime Claimants", *JMLC* Vol. 38, No.1, 2007 at 75.

<sup>19</sup> Lynn, note 11 at 454-455

to what extent the claimant's right to arrest a ship as security for his claim and ultimately the satisfaction of his claim is inhibited or rendered impracticable by the provisions of the law itself. The issues will be raised and dealt with in the light of some relevant provisions of the 1952 and 1999 Arrest Conventions and some developments and pro-active innovations in the domestic law of some maritime nations. In the course this examination and consideration, attempt will be made to answer this important question posed above and in doing so seek to proffer solutions to it.

### **1.1 Scope**

This work will examine the international law on ship arrest which is provided for and regulated by the two international conventions on arrest of ships, in doing so, particular attention will be paid on the adverse effects of the provision of these laws on the maritime claimant. This study will be done from the common law perspective.

This work is divided into six chapters. In this first chapter the subject is introduced. In the second chapter, the historical development of the English admiralty jurisdiction and action *in rem* is traced and examined. This is necessitated by the fact that the admiralty jurisdictions of the common law countries and by extension the arrest *in rem* have their basis in the ancient admiralty jurisdiction of England. In chapter three, a study of the law of ship arrest is made. It starts with the history, development and nature of arrest *in rem* at common law. Then it goes further to make an examination of some relevant provisions of the 1952 and 1999 Arrest Conventions which provides and regulates the international practice of ship arrest. Chapter four deals with the consideration of the laws of maritime claims, liens and mortgages. Issues such as recognition and ranking of maritime claims determines the success or failure of a ship arrest and recovery of claims, these are not regulated in the laws of ship arrest, they are instead provided for in the various laws and Conventions on maritime claims, liens and mortgages. In chapter five, some of the provisions in the arrest conventions and its negative impact on the maritime claimant is examined and analysed, in the process some proactive laws of some countries which seeks to remedy

the problems created by the provisions of the Conventions is also analysed. Chapter six is the conclusion of the work. Here attempt is made to seek a solution in respect of the protection of the interest of the maritime claimant.

### **1.2 Central Question.**

The importance of the right of ship arrest to the claimant as a valuable means of enforcing his maritime claims against shipowners and operators cannot be overemphasised. Through the mechanism of arrest, the claimant obtains security for his claims against the shipowner and recovers his claim through the sale of the ship in case of the shipowners insolvency or his inability to pay. However, the issue in this paper is, whether and to what extent the international Conventions on arrest of ships have created impediments to the maritime claimant in this regard, i.e. the arrest of ships as security for their claims and the recovery of their claims.

### **1.3 Research Methodology.**

The research method in this work is predominantly library based. Most of the study was done through the review of relevant literature in respect of the subject. This involves the examination the relevant jurisprudence and various commentaries and texts. Standard texts, Court decisions from law reports especially from common law jurisdictions, journals and articles were extensively utilised in the process of this research.

## 2. Historical Development of the English Admiralty Jurisdiction and Action in Rem.

Dr. F.L. Wiswall in his book, “*The Development of Admiralty Jurisdiction and Practice Since 1800*”, wrote that:

“The jurisdiction of the High Court of Admiralty, resting as it now does, upon a basis firmly established by our (English) statute law, and independent of that authority which it has derived from ancient custom, renders any inquiry respecting its origin a subject more fit for the research of the antiquarian than for that of a lawyer”<sup>20</sup>

However, it must be noted that in a work such as this, which centres on “arrest of ships at common law”, such an inquiry is inevitable. This is based on two reasons. First, a right of ship arrest at common law is a right that flows from an action *in rem*. In other words, the action *in rem* creates the foundation for the right to arrest a ship.<sup>21</sup> In addition, the action *in rem* itself, once considered to be the life boat of admiralty jurisdiction, as it were, has evolved through the long and tortuous history of admiralty law to become the core of admiralty jurisdiction.<sup>22</sup> Secondly, it is important to note also, that England, through its ancient admiralty law, has provided the basis for the arrest *in rem* in other common law countries, particularly common wealth countries such as Canada, Australia, Nigeria and so forth.<sup>23</sup> From the foregoing, it becomes highly compelling and even inevitable (for a better treatment and understanding of the subject of this paper) to trace the historical evolution and development of the Admiralty jurisdiction and action *in rem* in England. To do other wise will tantamount to building a house without a foundation; this is obviously not the intention in this work. On the contrary, the immutable words of Lord Denning MR are apposite,

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<sup>20</sup> Wiswall, F. L., *The Development of Admiralty Jurisdiction and Practice Since 1800* (Cambridge University Press, 1970) at pp. 1-2.

<sup>21</sup> Jackson, note 4 at 257.

<sup>22</sup> Glover, P., “Sister Ship Arrest and the Application of the Doctrine of Attachment in Australia: A Jurisdictional Comparative Analysis in the Wake of the 1952 Arrest Convention”, (2008) A. & N. Z.Mar.L.J. at 99.

<sup>23</sup> Tetly, note 4 at pp. 1916-1917.

according to his Lordship: “you cannot put something on nothing and expect it to stand...”<sup>24</sup>

## **2. 1 History of Admiralty Jurisdiction in England.**

The office of the Admiral is ancient.<sup>25</sup> Although the Admiralty Court is today located in a modern courtroom alongside other courts, and is simply part of the Queen’s Bench Division of the High Court, it has a distinctive and unique historical origin.<sup>26</sup> The first recorded use of the term ‘Admiral’ in England was in 1300.<sup>27</sup> For time out of mind and sometime prior to the reign of Edward 1, or since the time of Richard 11, the law of England has know the admiral, through whom the king ensured the collection of the droits, profits and emoluments of the sea. In addition to these, the Admiral exercised disciplinary powers over the fleet and acted as a court in piracy and maritime matters.<sup>28</sup> This extensive jurisdiction, which drew heavily from civilian sources and with civilian practitioners, quickly conflicted with the jurisdictions exercised by the courts in local seaports and the common law courts.<sup>29</sup>

Towards the end of the fourteenth century, the latter carried their grievances to parliament claiming unwarranted arrogation of power by the Admiral. This ultimately led to the enactment of two statutes that limited the jurisdiction of the Admiralty court. Formal restrictions on Admiralty jurisdiction to matters arising at sea and in tidal waters were imposed by the *Admiralty Jurisdiction Acts, 1389, 13 Rich. 2, ch.5 (Eng.); 1391, 15 Rich. 2 ch.3 (Eng) and 1400, 2 Hen. 4, ch. 11(Eng).*<sup>30</sup>

The effect of these statutes on the admiralty jurisdiction was explained by Dr. Lushington in the following words:

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<sup>24</sup> *U.A.C. Ltd. V. Macfoy* (1961) 3 W.L.R. 405 at p. 407

<sup>25</sup> Neill, H., “Origin, Development and Future of Maritime Liens and Action *in Rem*”, 28 *Tulane Maritime Law Journal* (2003-2004) at 85.

<sup>26</sup> Messon, note 6 at 118.

<sup>27</sup> Cumming, C., “The English High Court of Admiralty” (1993) 17 *Tulane Maritime Law Journal*, 209 at 219.

<sup>28</sup> Ryan, E.F., “Admiralty Jurisdiction and the Maritime Lien: An Historical Perspective” 7 *West Ontario Law Review*, (1968) 173-200 at 173.

<sup>29</sup> Edgar Gold, *et al.*, *Essentials of Canadian Law: Maritime Law* (Irwin Law, Canada 2003) at 105

<sup>30</sup> See generally, Wiswall, *supra* note 21 at 4-5; Tetly, *Maritime Liens and Claims* at 32-33

“Ever since the 13 Rich. 2, ch.5, the judges of the Admiralty Court were restrained from ‘meddling of anything done within the realm’ and were confined to things done upon the high seas,...it had no jurisdiction whatever where services were rendered or damage done within the body of the country”<sup>31</sup>

The passing of these three statutes gave the Admiralty Court jurisdiction over matters on the seas. However, this jurisdiction was statutory, as opposed to inherent, thus giving the common law courts the position from which they were able to limit and define the Admiralty court’s jurisdiction.<sup>32</sup> It is worthy of note that the expansion of trade and shipping in England during the Elizabethan age resulted in explosive growth in the Admiralty Court. The common law practitioners became resentful of the increased stature, business and income of their civilian counterparts.<sup>33</sup>

Apart from any articulate values which they may have held about the common law being excellently adapted to the genius of the English nation, it must be remembered that the judges at that time, though salaried, drew the greater part of their incomes from fees and therefore had a distinct financial interest in maintaining and extending the jurisdiction of the Westminster Hall courts.<sup>34</sup>

In the ensuing onslaught on the jurisdictional competence of the Admiralty Courts, the common law courts possessed two powerful weapons, the power of statutory interpretation and the power to issue writs of prohibition. The interpretation of statutes was a function of the common law courts. Of the writ of prohibition, Blackstone wrote that:

“A prohibition is a writ...directed to the judge or parties of a suit in any inferior court, commanding them to cease from the prosecution thereof upon a suggestion that either the cause originally, or some collateral matter arising therein, does not belong to

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<sup>31</sup> See The WATAGA, Swabey, 167.

<sup>32</sup> Gold, *et al.*, note 29 at 105

<sup>33</sup> Cumming, note 27 at 234.

<sup>34</sup> Ryan, note 28 at 173.

that jurisdiction ...This writ may issue to the Court of Admiralty where it concerns it self with any matter not within its jurisdiction”<sup>35</sup>

The earliest Admiralty records now extant show the first prohibition to have issued in the year 1528 in the case of *Kyrkby c. Barfoote*.<sup>36</sup> The grossly literal construction placed upon the statutes and together with the flow of prohibitions, which have begun to take on the aspects of a judicial tradition, was reported to have brought about a confrontation between the opposing sides in 1575. This was because the Admiralty Court’s civil jurisdiction was practically confined to contracts made and to be performed on the high seas, torts committed on the high seas and suits for mariner’s wages.<sup>37</sup>

An attempt to reach an agreement and eliminate the confrontational problems was repudiated when Coke was appointed to the Bench in 1606. Sir Edward Coke is well known as a great champion of the common law. The admiralty, based as it was on the civil law and prerogative was his natural target. He had taken the lead in the attack on the Admiralty. After his elevation to the bench, his offensive became determined and unscrupulous and there can be no doubt that he would have abolished the Admiralty Court altogether had he possessed the final say in the matter. He unleashed a torrent of prohibitions leaving little for the authority of the admiral to operate upon.<sup>38</sup> From the situation at the time, it became clear that if the Admiralty were to survive the oppression of this turbulent era, it would henceforth have to depend upon its ingenuity, traditions, and if possible, to secure its existence through the operation of its own peculiar laws.

Justice Coke has made the point that the Court of Admiralty proceeding by the civil law is not a court of record, and therefore cannot take any such ‘recognizance’ as a court of record may do. Unless some way out of this dilemma thus posed could be found, the Admiralty Court would lose its

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<sup>35</sup> Blackstone, Commentaries, 17, cited by Ryan, note 28 at 176.

<sup>36</sup> *Ibid.*, at 177

<sup>37</sup> Gold, *et al.*, note 29 at 106

<sup>38</sup> Ryan, note 28 at 182.



power to take bail for an arrested ship, which would leave it practically defined out of existence.<sup>39</sup>

Here the Admiralty lawyers ‘slipped through the meshes of the net’ by looking to their civil law heritage. They argued that the money so taken was not a ‘recognizance’, but rather a ‘stipulation’, which was a solemn civil law promise or undertaking, without consideration but nonetheless binding, often made with *fide jussores*, or sureties. There is no *a priori* requirement that the stipulator be a court of record or a court at all.<sup>40</sup> Had this argument by the civilians not been accepted by the common law, Coke’s efforts would have been crowned with success.

In pressing the distinction between a stipulation and a recognizance, which at the time provided identical results, the Admiralty bar had beaten the common law at its own game, emphasising form rather than substance. In so doing, the Admiralty Court had been given the means by which it was to develop the foundation of the modern Admiralty law – the proceeding on a maritime lien by way of an action *in rem*.<sup>41</sup> The action *in rem* was the only weapon in the armoury of the Admiralty Courts that was immune from the touch of the common law writ of prohibition. This area of immunity was grasped by the practitioners in Admiralty not only as a shield to repeal any further encroachments by the common law courts, but also as a platform on which to develop the future jurisprudence of the High Court of Admiralty.<sup>42</sup> After a long period of decline, interest once again began to revive in the court, and following the passage of the *Frauds by Boatman Act* of 1813,<sup>43</sup> a statutory process began that was to see much of the courts former jurisdiction restored and much new jurisdiction added. The principal reform instruments were the *Admiralty Courts Act*, 1840 (U.K.) and the *Admiralty Courts Act*, 1861 (U.K.). The Admiralty Court Act of 1840 introduced a statutory right of arrest in circumstances that were not confined to high seas and thus expanded the admiralty jurisdiction of the high court as follows:

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<sup>39</sup> *Ibid.*, at 183.

<sup>40</sup> *ibid* at 185

<sup>41</sup> *Ibid.*

<sup>42</sup> Thomas, D.R., *Maritime Liens*, British Shipping Laws: Vol.14, Stevens & Sons, London 1980 at p.8.

<sup>43</sup> 53 Geo 111, c. 87

“the High Court of Admiralty shall have jurisdiction to decide all claims and demands whatsoever in the nature of salvage for services rendered to, or damage received by any ship or seagoing vessel, or in the nature of towage, or for necessaries supplied to any foreign ship or seagoing vessel, and to enforce the payment thereof whether such ship or vessel may have been within the body of a country or upon the high seas at the time when the services were rendered or damage received or necessaries furnished in respect of which such claim is made”<sup>44</sup>

It was in this year (1840) that there began a movement for the revival of the ancient English Admiralty jurisdiction by the passage of this Act. This was followed by other Acts in 1846, 1854, 1861 and 1868. These all tended to give a broader and fuller jurisdiction to what was called by then the High Court of Admiralty. With the passage of the 1861 Act, the court was at last declared to be a court of record with all the powers of a superior court of common law with jurisdiction capable of being exercised either *in rem* or *in personam*.<sup>45</sup> The able administration of the Admiralty Court by Dr. Lushington and Sir J. Phillimore, combined with the development of steam shipping - leading not only to increased commerce but also to increased activity in cases of collision, salvage and damages – helped increase the significance and importance of the Admiralty Court.<sup>46</sup>

By the *Supreme Court of Judicature Acts*, 1873-75, the admiralty jurisdiction was further expanded and with the enactment of the Colonial Courts of Admiralty Act, 1890 (U.K.), the jurisdiction of the Admiralty Acts passed to courts of British Colonies abroad including Nigeria, Australia, Canada and so forth.<sup>47</sup>

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<sup>44</sup> 3 & 4 Vict. C. 65 s.6., see Falase-Aluko, A., “New Developments in the Admiralty Jurisdiction of the Federal High Court in Nigeria”, *Journal of African Law*, Vol. 39, No.1 (1995) pp. 64-78 at 68.

<sup>45</sup> Glover, note 22 at pp.100-101

<sup>46</sup> Gold, *et al.*, note 29 at 106.

<sup>47</sup> See generally, Glover, note 3 at 101; Falase-Aluko, note 44 at 64.

The Admiralty jurisdiction was consolidated by the *Supreme Court of Judicature (Consolidation) Act, 1925* and then by the *Administration of Justice Act* of 1956.<sup>48</sup> This Act was later replaced by the *Supreme Court Act* of 1981. Today, the admiralty jurisdiction in England is statutory and is governed by section 20-24 of the *Supreme Court Act, 1981*.<sup>49</sup>

## **2. 2 Development and Concept of the Action in rem.**

The origin of the action *in rem* could be traced back to the jurisdictional conflict between the common law courts and the High Court of Admiralty. As was earlier mentioned, the statutes of Richard 11 effectively confined the admiralty jurisdiction to matters arising on the seas and beyond the realm. They came to form the justification for a stream of prohibitions which flowed from the court of King's Bench, particularly in the time of Coke and which seriously restrained the scope of admiralty jurisdiction. By these writs, any attempt by the High Court Admiralty to assume a jurisdiction *in personam* was effectively blocked. The common law courts seized upon the idea that Admiralty jurisdiction was limited, not only to geographical areas within the 'ebb and flow of the tide,' but also causes of action involving the liability of the vessel, as opposed to the personal liability of the owner. The writ of prohibition did not however extend to the admiralty jurisdiction over a *res* or to bail entered in substitution.<sup>50</sup> This area beyond the reach of the common law courts became the escape route for the admiralty and also became the foundation for the modern admiralty jurisdiction.

English Admiralty *in rem* actions are derived, in the opinion of at least some legal historians today, from a process of arrest of property to compel appearance of the defendant, a procedure developed in medieval Europe and firmly established in England by the fifteenth century.<sup>51</sup> In other words, the writ *in rem* was the procedure by which the Admiralty court survived during the oppression by the courts of common law. The admiralty practitioners and judges used the concept that the ship (*res*) is a defendant in an action *in*

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<sup>48</sup> Falase-Aluko, note 42 at 68.

<sup>49</sup> Messon, note 6 at 2.

<sup>50</sup> Thomas, note 42 at 9.

<sup>51</sup> Tetly, note 3 at pp.1900-1901

*rem* as a means of defending and extending the jurisdiction of the High Court of Admiralty.<sup>52</sup> It could well be said that this unique form of action (action *in rem*) is a product of the jurisdictional chaos in which the Admiralty found itself at the beginning of the seventeenth century, it grew out of the application of its own peculiar laws to the situation.<sup>53</sup>

In *The Dictator*,<sup>54</sup> Jeune J. noted that the eighteenth century courts of common law, in considering limitations on Admiralty jurisdiction through writs of prohibition on proceedings, distinguished between actions based on jurisdiction over a *res* and jurisdiction over individuals. So jurisdiction over a *res* would not fall within the scope of such a writ. Roscoe had also argued that the prohibitions issued by the common law courts in respect of actions against individuals encouraged the development of proceedings *in rem* with which the common law courts had nothing to do.<sup>55</sup>

The action *in rem* is a form of legal process peculiar to the jurisprudence of the admiralty court and not known to the contemporary courts of common law. Though not the sole mode of admiralty proceedings, for all claims and questions within admiralty jurisdiction may be enforced either *in personam* or *in rem*. However, the action is the dominant feature of admiralty practice and represents the form of proceedings most frequently resorted to by maritime claimants.<sup>56</sup> However, its characteristics are complex, reflecting the current state of an unfinished development in which legislation has played a leading but not exclusive part.<sup>57</sup>

### **2.2.1 Nature of Action in Rem:**

The fundamental legal nature of an action *in rem* is that it is a proceedings against the *res*. Thus, when a ship represents such a *res*, as is frequently the case, the action *in rem* is an action against the ship itself. In *The City of Mecca*,<sup>58</sup> Jessel M.R. described the process *in rem* as follows:

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<sup>52</sup> *The Indian Grace* (No.2) (1998) 1 Lloyd's Rep. 1 (H.L.) *per* Lord Steyn at p. 6.

<sup>53</sup> Ryan, note 28 at 185.

<sup>54</sup> *The Dictator* (1892) p. 64

<sup>55</sup> Jackson, note 5 at 528.

<sup>56</sup> Thomas, note 42 at 37

<sup>57</sup> Jackson, note 5 at 13.

<sup>58</sup> (1881) 5 P.D. 106

"You may in England and in most countries proceed against the ship. The writ may be issued against the owner, and the owner may never appear and you get your judgment against the ship without a single person being named from the beginning to end. This is an action *in rem*, and it is perfectly well understood that the judgment is against the ship."<sup>59</sup>

The essence of the *in rem* procedure is that the *res* itself becomes the defendant, and ultimately the *res* (i.e. the ship) may be arrested by legal process and be sold by the court to meet the plaintiff's claim, always provided, of course, the validity of the claim is eventually proved to the satisfaction of the court. The primary object, therefore, of the action *in rem* is to satisfy the claimant out of the *res*. It should be understood that the vessel is not the only *res* against which action may be taken. Under certain circumstances it may also be the cargo, freight or even the proceeds of sale.<sup>60</sup>

The exact definition of what an action *in rem* encompasses depends to a large extent on the theoretical approach adopted towards the concept. Two theories, the personification and procedural theories will be examined briefly.

The personification theory looks on the action *in rem* as an action against the *res* (usually the ship) as the defendant. It followed that the action is independent of any action against the owner and that it is based on a substantive claim against the *res*.<sup>61</sup> This approach is popular in the United States and it recognises that the vessel is the offending thing and can be liable even though the owner has no *impersonam* liability.<sup>62</sup> Apparently justifying the personification theory, Oliver Wendel Holmes remarked:

“A ship is the most living of inanimate things...it is only by supposing the ship to have been treated as if endowed with personality, that the arbitrary seeming

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<sup>59</sup> *Ibid.*, at p.112

<sup>60</sup> Hill, C., *Maritime Law*, 6th Edition (LLP, London 2003) at p.88

<sup>61</sup> Jackson, *supra* note 4 at 257.

<sup>62</sup> Schoenbaum, T.J., *Admiralty and Maritime Law*, 4<sup>th</sup> Edition, Vol. 2 (West Publishing Co. 2004) at p. 401.

peculiarities of maritime law can be made intelligible, and on that supposition they at once become consistent and logical”<sup>63</sup>

Justice Brown in *Tucker V. Alexandroff*, painted a poetic picture of the personality theory in the following words:

“A ship is born when she is launched, and lives so long as her identity is preserved...In the baptism of launching she receives her name, and from the moment her keel touches the water she is transformed, and becomes a subject of Admiralty jurisdiction. She acquires a personality of her own; becomes competent to contract, and is individually liable for her obligations, upon which she may sue in the name of her owner, and be sued in her own name”<sup>64</sup>

The doctrine of personification of the ship is fundamental to the United States admiralty practice. However, the United States is virtually alone in its retention of the personification doctrine. The courts in the United States embraced this theory throughout the nineteenth and twentieth centuries despite its shortcomings. Other nations have repudiated it.<sup>65</sup>

According to Procedural approach, the action *in rem* was procedural in origin. Its purpose was to persuade a deft to appear and one powerful weapon was the seizure of his assets.<sup>66</sup> In the United Kingdom, the action *in rem* is the characteristic admiralty proceeding to enforce all maritime claims. It tends to be regarded primarily as a procedural device to secure the defendant’s personal appearance in the suit, rather than as an action against the wrongdoing ship.<sup>67</sup> This view is exemplified by the judgment of Scrutton L.J., in *The Tervaete*, where his Lordship noted that it was:

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<sup>63</sup> Oliver Wendel Holmes, *The Common Law*, 25, cited by Heyden & Leyland, “The Uniqueness of Admiralty and Maritime Law: The Unique Nature of Maritime Law”, 79 *Tulane Law Review*, 1222 (2004-2005) 1229.

<sup>64</sup> 183 U.S. 424 (1912) at p. 438.

<sup>65</sup> Schoenbaum, note 62 at 401

<sup>66</sup> Jackson, note 4 at p. 258

<sup>67</sup> Tetly, W., *Maritime Liens and Claims*, 2nd Edition, International Shipping Publications, Montreal,

“...established that the procedure *in rem* is not based upon the wrongdoing of the ship personified as an offender, but is a means of bringing the owner of the ship to meet his personal liability by seizing his property”<sup>68</sup>

The procedural theory has been widely accepted by the English judiciary and has exercised a significant influence on the development of Admiralty law. The personality theory held sway in England for over 40 years until Sir Francis Jeune first advanced the procedural theory in 1892 in *The Dictator*.<sup>69</sup> Jeune J. in reviewing the various decisions of Dr. Lushington, identified a special rule of admiralty procedure which makes a person by virtue of his appearance, liable *in personam* as if a writ *in personam* had been issued against him and served upon him within the jurisdiction notwithstanding that the original action did not make any *in personam* claim against him.<sup>70</sup>

Traditionally it was the appearance of the defendant in the action *in rem* which caused the action to proceed as a joint action *in rem* and *in personam*. If the defendant did not appear, the action proceeds *in rem*, but the eventual judgment was enforceable only against the arrested *res* or the substituted security.<sup>71</sup>

However, in 1997 in *The Indian Grace* (No.2),<sup>72</sup> the House of Lords rejected the personality theory and held that a shipowner is the true defendant in an action *in rem* from the time the Admiralty court is seized with jurisdiction (specifically, from the time the writ *in rem* is served or is deemed to be served as a result of the shipowner’s acknowledgement of issue of the writ before service). According to the House of Lords the procedural theory stripped away the form and revealed that in substance the owners were parties to the action *in rem*. The House of Lords noted that

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1998 at p. 977.

<sup>68</sup> (1922) P.259 (Eng. C.A.) at p. 270.

<sup>69</sup> *Ibid.*, note 54 at p.309-309.

<sup>70</sup> *Ibid.*, at 319-220

<sup>71</sup> Tetly, note 4 at p. 1908.

<sup>72</sup> (1998) 1 Lloyd’s Rep. 1. ; see also, Teare, N., “The Admiralty Action *in Rem* and the House of Lords”, (1998) LMCLQ 33.

personification theory in which the ship is personified and taken as the defendant is a legal fiction and that the time has come for that fiction to be discarded. In the words of Lord Steyn:

“The role of fiction in the development of the law has been likened to the use of scaffolding in the construction of a building. The scaffolding is necessary but after the building has been erected, scaffolding serves only to obscure the building. Fortunately, the scaffolding can usually be removed. The idea that a ship can be a defendant in legal proceedings was always a fiction. But before the Judicature Acts this fiction helped to defend and enlarge admiralty jurisdiction in the form of an action *in rem*. With the passing of the Judicature Acts that purpose was effectively spent.”<sup>73</sup>

### **2.2.2 Distinction between Action in Rem and Action in Personam:**

The distinction between an action *in rem* and an action *in personam* is a matter of substance and not mere form.<sup>74</sup> An action *in personam* is an action *inter partes* founded on personal service which leads to a judgment against the person of the defendant.<sup>75</sup> Such action is like an action in tort or contract and is necessary to look at the person who was liable *in personam* at the time when the cause of action arose. An action *in personam* is the method of enforcement of a claim by which it is sought to compel the defendant to act or cease from acting.<sup>76</sup>

All actions which are aimed at the person requiring him to take or not take an action or course of conduct are actions *in personam*, whilst all actions in which the subject matter is itself sought to be affected are actions *in rem*.<sup>77</sup>

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<sup>73</sup> *ibid* at p. 10.

<sup>74</sup> Thomas, note 42 at 39

<sup>75</sup> Falase-Aluko, note 44 at 69.

<sup>76</sup> Jackson, note 5 at 225.

<sup>77</sup> *Rhein Mass Und See GmbH. V. Rivway Lines Limited* (1988) 5 NWLR (Pt. 549) 265 at 277. (Supreme Court of Nigeria)



The action *in rem* is in essence a proceeding against the *res* which once instituted may be made effective by the arrest and detention of the *res* proceeded against, and followed, if necessary, by the judicial sale of the property and with the claim satisfied out of the proceeds of sale. The two forms of action are totally different in character. They cannot be interchanged because the parties involved are quite different. For example, where ship X is sued in an action *in rem*, its owners A and B Ltd. may decide not to appear as parties to the action at all. If A and B Ltd. is sued *in personam*, restrictions placed upon its person are not construed as proceedings against the ship. Furthermore, a release entered in favour of A and B Ltd. will not necessarily extend to releasing the ship from proceedings *in rem*. In *The Rena*, Brandon J. stated the position of the law in the following words:

"An action *in rem* may be filed alongside an action *in personam*. For so long and to the extent that a judgment *in personam* remains unsatisfied, it is open to the claimant to bring an alternative action *in rem*, and the reason for this is because an action *in rem* is of a different character altogether from a cause of action *in personam*."<sup>78</sup>

However, the essential characteristics of a claim *in rem* are obscured by the fact that the owner of the *res* (or someone else with interest in it) will almost invariably defend the claim. Once he has acknowledged the service of the writ or he defends on the merits, he is considered in English law to have submitted to the jurisdiction *in personam* of the court.<sup>79</sup> The result is that the court can give a judgment *in personam* against him. That judgment is not then limited to the value of the *res* and can be enforced against him in the normal way. Moreover, if the *res* has been arrested, the person defending the action will usually obtain its release by putting up security. However, the claimant will normally accept security only if the defendant submits to the jurisdiction *in personam* of the court, in which case the

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<sup>78</sup> (1979) Q. B. 377 at p.405.

<sup>79</sup> Chorley & Giles', note 1 at pp. 6-7.

defendant's liability is not limited either to the amount of security or the value of the res.<sup>80</sup> For this reasons, the characteristics features of a claim *in rem* are apparent only if it was not defended, a rare occurrence. This, however, does not alter its essential nature.

### **2. 2. 3 Advantages of Action in Rem:**

Given the nature of the action in rem, the question then arises as to why the action *in rem* is very popular with maritime claimants around the world?

According to Christopher Hill, “It is of immense convenience and brings advantages which are lacking in an action *in personam*”.<sup>81</sup> It represents a form of proceeding which avoids the many difficulties and disadvantages inherent in an action *in personam*.

First, the action *in personam* is dependent entirely upon the plaintiff being able properly to and effectively to serve a claim form on the defendant. This is unlikely to cause problems when the plaintiff and defendant are both in the same jurisdiction, but may create difficulties when they are in different jurisdictions. Ships, however, which are perhaps their owner’s most valuable asset, sail between nations and move from jurisdiction to jurisdiction.<sup>82</sup> Thus the maritime shipping industry contains within its sphere the concept of legal action being available to an injured party through the mechanism of admiralty jurisdiction which allows, under certain clearly defined circumstances, the vessel to be sued *in rem*.<sup>83</sup> The modern *in rem* claim form has become a piece of legal machinery directed against the ship alleged to have been the instrument of wrong doing in cases where it is sought to enforce a maritime lien or in a possessory action against a ship whose possession is claimed.<sup>84</sup>

Secondly, it represents a mode of founding jurisdiction independently of the availability of the *res* owner.<sup>85</sup> And thirdly, it provides a claimant with pre-

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<sup>80</sup> *The Dictator*, note 54 at 304

<sup>81</sup> Hill, note 60 at p. 100

<sup>82</sup> *Ibid.*, at 88.

<sup>83</sup> *Ibid.*, at 89.

<sup>84</sup> *Ibid.*

<sup>85</sup> *The Atlantic Star* (1974) A.C. 436, *per* Lord Reid at pp. 454-455.

judgment security. These attendant advantages explain why no prudent claimant will hesitate to proceed *in rem*.

#### 2. 2. 4 Judgment in rem.

The action *in rem* is a proceeding against the *res*, whereas a judgment *in rem* in the words of Evershed L.J. in *Larzarus-Barlow V. Regent Estates Co. Ltd*,<sup>86</sup> is :

"...a judgment of a court of competent jurisdiction determining the status of a person or thing... (as distinct from the particular interest in it of a party to the litigation)...and such judgment is conclusive evidence for and against all persons whether parties, privies or strangers of the matter actually decided"<sup>87</sup>

If the judgment is solely *in rem*, it may be enforced only against the *res*, consequently, it does not affect any one who does not have an interest in the *res* and, if he does have such an interest, affects him only to the extent of that interest. It is also binding, to the extent of his interest in the *res*, on anyone who has such an interest, even if he was not served with process or otherwise informed of the proceedings and even if he took no part in the proceedings. That is also why it is said that an action *in rem* is against the *res* and not against an individual.<sup>88</sup>

In respect of the *res*, the effect of the judgment *in rem* is to settle the status of the *res* and in so doing is valid, not merely *inter se* the parties, but against the world at large.<sup>89</sup>

The Availability of the action *in rem* to enforce maritime liens, statutory rights *in rem* and other maritime claims in England is governed by the *Supreme Court Act of 1981* at section 21 (2), (3) and (4), providing for the exercise *in rem* of the admiralty jurisdiction of the Queen's Bench Division of the High Court of Justice against a ship or other property concerned in the claim. The action *in rem* against maritime property in England is similar

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<sup>86</sup> (1949) 2 K.B. 465

<sup>87</sup> *Ibid.*, at 475

<sup>88</sup> Dicey, Morris and Collins, *The Conflict of Laws*, 14th Edition, Vol. 1, Sweet & Maxwell, London 2006 at p.550.

<sup>89</sup> Thomas, note 42 at p.44.

to those in the United States, Canada, Nigeria and other common law jurisdictions.<sup>90</sup>

The bringing on an action *in rem* may either enforce a lien (a maritime lien) or create one (statutory lien) and create the foundation for arrest of the property. The lien reflects the interest to be enforced, the action *in rem* is the method of enforcement and arrest a powerful measure of interim relief. The action *in rem* provides pre-judgment security for the claim founds jurisdiction of the court and usually secures the appearance of the ship owners. It is typically enforced by the arrest of the *res*.<sup>91</sup>

Having laid a solid foundation, the law of ship arrest will now be examined.

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<sup>90</sup> Tetly, note 67 at 978.

<sup>91</sup> *Ibid.*

### 3. THE LAW OF SHIP ARREST.

#### 3.1. Historical Development of ship arrest.

As earlier stated, according to opinion of some legal historians, the action *in rem* in the English admiralty law was derived from a process of arrest of property to compel the appearance of the defendant, a procedure developed in medieval Europe and firmly established in England by the fifteenth century.<sup>92</sup> This *processus contra contumacem* was in use in the continent by the fourteenth century and in England the procedure was well established in the Admiralty court by the sixteenth century. The primary purpose of the process was to counteract the defendant's contumacious refusal to appear before the court and contest the suit brought against him.<sup>93</sup>

In England, the person and/or the property of the defendant in the jurisdiction of the Admiral could be arrested by the Admiral Marshal or other officer at the same time as the defendant (or any one else having an interest in the property) was cited to appear. According to Marsden:

“The ordinary mode of commencing suit was by arrest either of the person or of his goods. Arrest of goods was quite as frequent as arrest of ship; it seems to have been immaterial what the goods were, so long as they were the goods of the defendant and were within the Admiral's jurisdiction at the time of arrest...the fact that the goods and ships that had no cause of action, except as belonging to the defendant, were subject to arrest, points to the conclusion that arrest was procedure, and that its only object was to obtain security that the judgment should be satisfied...”<sup>94</sup>

The civilian judges of the High Court of Admiralty in the 1500s and 1600s did not distinguish clearly between actions *in personam* and *in rem*, however, there being for them but a single procedure, although one that had

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<sup>92</sup> Tetly, note 4 at pp.1900-1901

<sup>93</sup> *Ibid.*

<sup>94</sup> Marsden, *Select Pleas in the Court Admiralty* (Selden Society, 1892) pp. xxi-xxii, see Ryan, note 28 at 188.

two variants: arrest of the person and arrest of his property. The procedure was valid as long as the ship or goods belonged to the defendant and were within the court's jurisdiction.<sup>95</sup> Infact, arrest appears to have extended to goods of the defendant in possession of a third party, as well as to goods of a party indebted to the defendant and even incorporeal rights. This aspect of procedure has been seen in retrospect as the origin of the Admiralty attachment.<sup>96</sup> In respect of the *Admiralty Court Act of 1840* which granted the statutory power of arrest to the court of Admiralty, Fry L.J. in *The Henrich Bjorn*,<sup>97</sup> posed the following question:

“...how and in what manner was the new jurisdiction thus given to the Admiralty Court by the statute of 1840 to be exercised? The answer is, that it must be exercised in the manner familiar to the court of Admiralty and to all courts regulated by the civil law, either by an arrest of the person of the defendant if within the realm, or by the arrest of any personal property of the defendant within the realm, whether the ship in question or any other chattel, or by proceedings against the real property of the defendant within the realm.”<sup>98</sup>

The late seventeenth and eighteenth centuries consequently saw the beginning of a sharp distinction between the action *in rem* and the action *in personam* as we know it then. Up to the beginning of the nineteenth century, the Admiralty Court was possessed of three distinct proceedings, first, the writ *in rem* whereby the ship or cargo was arrested and the action directed against the *res* or thing itself, secondly, the writ *in personam*, where the action was directed against an individual who was arrested, and thirdly, a decree of attachment of the goods and chattels of the defendant could be added to the writ *in personam* if the defendant was not to be found in the

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<sup>95</sup> *ibid* at xlvi

<sup>96</sup> Tetly, *supra* note 3 at 1902.

<sup>97</sup> (1885) 10 P.D. 44.

<sup>98</sup> *Ibid.*, at 53-54.

jurisdiction.<sup>99</sup> Most probably, as the actual arrest of the person declined and disappeared, the attachment of his goods came to the fore.

This raises the question why the court of admiralty introduced the requirement of a link between the ship and the claim and allowed arrest for certain claims.

What is known about the development and features of the action *in rem* makes it possible to explain why it altered the arrest procedure. It should be noted during the jurisdictional conflict between the common law courts and the Admiralty court in which the former utilised the writs of prohibition to limit the jurisdiction of the latter to issues relating to ships, the court of admiralty found ways of getting round these writs. But the common law courts will keep the ‘snow ball rolling’ by issuing new writs or lobby in statutory amendments.<sup>100</sup> Nevertheless, the closer the connection the claim had with the ship, the less the chance that a writ of prohibition would succeed in the admiralty court, as the mandate of the court is to deal with issues relating to ships. The English concept of maritime lien most likely evolved concurrently with the action *in rem* as a result of the call for a close connection between the claim and the ship.<sup>101</sup> The concept of ship arrest requiring a link between the ship and the claim and based on certain types of claims necessarily developed in the prolongation of the action *in rem* and maritime liens. When relying upon the fiction that the ship was liable, the only object to pursue was the ship herself. From the foregoing, it seems that arresting the ship gradually turned into a mandatory requirement to obtain the jurisdiction of the court of Admiralty. This opinion was expressed by Lord Merriman in *The Beldis*, as follows:

“The original object of arrest, as Mr. Roscoe suggested... was to found jurisdiction at a time when any attempt to assume jurisdiction *in personam* was prohibited by the common law courts.”<sup>102</sup>

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<sup>99</sup> Tetly, Maritime Liens and Claims, *supra* note 69 at pp.973-974

<sup>100</sup> Ryan, *supra* note 28 at 176.

<sup>101</sup> *Ibid.*, at 185.

<sup>102</sup> (1936) P.51 at 73-74

But due to the increased use of the writ of prohibitions by the common law courts against the Admiralty court to forestall any attempt by the latter to assume any *impersonam* jurisdiction, the *impersonam* practice of the Admiralty court declined significantly. The withering away of the Admiralty action *in personam* necessarily caused a slow decline, and eventually the virtual disappearance in England of the Admiralty attachment.<sup>103</sup> In *The Beldis*,<sup>104</sup> Sir Boyd Merriman formulated the issue before the court thus:

“There remains the question...whether the action *in rem* can be directed against the property of the deft owner other than that in respect of which the cause action arose.”<sup>105</sup>

*The Beldis* stated the rule that in an action *in rem*, there can be no arrest of property unrelated to the cause of action. It is taken as having ended the attachment once and for all. In England and most common law countries, admiralty attachment is no longer practiced today. However, Admiralty attachment survived in the United States where the American Revolution (1775-1783) predated the alleged demise of the attachment in England and where it continues to flourish.<sup>106</sup>

The Admiralty Court Acts in the nineteenth century (1840-1861) introduced into English law the statutory right to arrest, originally conferring it upon claimants in respect of necessary materials supplied or services such as towage rendered to foreign vessels.<sup>107</sup> The *Administration of Justice Act of 1956* was the United Kingdom’s attempt to give recognition to the 1952 International Convention on Arrest of Ships. The Act was replaced by the *Supreme Court Act of 1981* which today provides for the law of ship arrest in the United Kingdom.<sup>108</sup>

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<sup>103</sup> Tetly, note 4 at 1905.

<sup>104</sup> *The Beldis*, *ibid* note 102.

<sup>105</sup> *Ibid.*, at 63.

<sup>106</sup> Tetly, note 4 at 1905.

<sup>107</sup> Hill, note 60 at 88.

<sup>108</sup> *Ibid.*



In Nigeria, the Law of ship arrest is regulated by the provisions of the Admiralty Jurisdiction Act of 1991 and the Admiralty Jurisdiction Procedure Rules of 1993. On the international scene, arrest as an interim remedy and arrest as a jurisdictional base are matters which are the primary objects of the laws on ship arrest. The law of ship arrest is provided for and regulated internationally by the International convention for the *Unification of Certain Rules Relating to the Arrest of Sea Going Vessels, 1952* (hereafter ‘the 1952 Arrest Convention’) which is in force and has over eighty ratifications and the *International Convention For the Arrest of Ships, 1999* (hereafter ‘the 1999 Arrest Convention’) which is yet to come into force.<sup>109</sup>

### **3.2 The Concept of Ship Arrest.**

Arrest of ships is a very special feature of the English (common law) admiralty law.<sup>110</sup> As was stated earlier, England, through its ancient admiralty law, has provided the basis for the arrest *in rem* in other common law countries, particularly common wealth countries such as Canada, Australia, Nigeria and so forth.<sup>111</sup> In *The Anna H*,<sup>112</sup> Hobhouse L.J, has this to say on arrest *in rem* under English law:

“In English law, the arrest of a ship or other maritime property in an admiralty action *in rem* involves the detention of the ship by the Admiralty Marshal subject to the directions of the Admiralty Court in judicial proceedings to secure a maritime claim.”<sup>113</sup>

In most common law countries, an arrest is practically undertaken by serving upon the vessel a ‘warrant of arrest’, a very similar concept to criminal proceedings *albeit* this form of arrest is a civil law admiralty procedure and for different reasons. Once the plaintiff has obtained a writ in an action *in rem* he can apply for a warrant to arrest the ship.<sup>114</sup> As the

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<sup>109</sup> Jackson, note 5 at 394.

<sup>110</sup> Chorley & Giles’, note 1 at 6-7.

<sup>111</sup> Tetly, note 4 at 1916-1917.

<sup>112</sup> (1995) 1 Lloyd’s Rep.11

<sup>113</sup> *Ibid.*, at 21.

<sup>114</sup> Chorley & Giles’ *supra* at p.7.

name implies, the vessel in question can be legally prevented from moving or trading pending the resolution of a court action (action *in rem*) in which more often than not the vessel to be arrested (the *res*) is the subject of the claim, the arrest being undertaken in conjunction with a claim rather than an arrest for its own sake. Securing the arrest of a vessel does not depend on showing an arguable claim or satisfying the court that any judgment to be awarded to the claimant eventually may not be met. Its availability is consequent only on the property being arrestable and the claim being enforceable by an action *in rem*. There is no cross undertaking in damages and its effect on third parties is irrelevant. At common law, arrest is restricted to maritime claims, requires the prior institution of an action *in rem*, and may be exercised only against ship, cargo and freight – and in many cases only against a ship.<sup>115</sup>

### **3.2.1 Purpose of arrest.**

First, the primary purpose of arresting a vessel is to obtain security before judgment for the claim. While the ship is under arrest, it cannot be moved. This means that the owner will not be able to fulfil the contracts which enable him to make profits, but at the same time he will continue to incur expenses. To break out of this vicious circle the owner can put up bail for the ship. In practice, it is more usual for ship owners to arrange that security in the form of a guarantee or undertaking, to be provided by their banks or Protection and Indemnity (P & I) clubs.<sup>116</sup> However, the mere threat of an arrest will often provoke the owners of the vessel threatened with arrest into providing voluntary security.<sup>117</sup>

Secondly, the most direct interim remedy or relief available so as to ensure a fund against which judgment may be enforced is through arrest of property. In this way the property arrested moves to the control of the court and unless other adequate security is given, out of the defendant's power.<sup>118</sup>

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<sup>115</sup> Jackson, note 5 at 376.

<sup>116</sup> Chorley & Giles, *supra* note 2 at p.7.

<sup>117</sup> Messon, *supra* note 5 at p. 133.

<sup>118</sup> Jackson, note 5 at 376.

Thirdly, arrest can also be seen as the primary mode of ensuring the availability of judicial sale, itself the means of implementing the interest conferred or enforced through the action *in rem*.<sup>119</sup>

### 3.2.2 Consequences of Ship Arrest.

Where a ship is arrested under an action *in rem*, a number of important consequences arise.

- (a) The ship comes under the custody of the Admiralty court. It cannot be moved without the court's permission and may also be immobilised or prevented from sailing.
- (b) The arrest constitutes the ship or other property as security in the hands of the court for the claim and this security cannot be defeated by the subsequent insolvency of the owner of the arrested property.<sup>120</sup> In *The Cella*,<sup>121</sup> Fry L.J. stated thus: "The arrest enables the court to keep the property as security to answer the judgment, and unaffected by chance events which may happen between the arrest and the judgment".<sup>122</sup> In the same vein, Lopes L.J. observed: "...that from the moment of the arrest, the ship is held by the court to abide the result in the action, and the rights of the parties must be determined by the state of things at the time of the institution of the action, and cannot be altered by anything which takes place subsequently",<sup>123</sup>
- (c) The arrest of ship establishes the jurisdiction on the merits.<sup>124</sup> This arises from the practical need to be able to satisfy a claimant at the jurisdiction where he obtained the security. Otherwise the situation may arise where the security obtained would not be transferable between the court that has jurisdiction on the merits and the court of

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<sup>119</sup> D.C. Jackson, *supra* note 6 at p.393

<sup>120</sup> Messon, note 5 at 118.

<sup>121</sup> (1888) 13 P.D. 82

<sup>122</sup> *Ibid.*, at p. 88

<sup>123</sup> *Ibid.*, at p. 89.

<sup>124</sup> See *The Anna H* (1995) 1 Lloyd's Rep 11 (C.A.)

the other jurisdiction, thus rendering the security obtained ineffective.<sup>125</sup>

(d) Under arrest, the ship becomes financial security for the claimant *in rem*. This means that unless the shipowner puts up security in order to have the ship released from arrest, the ship will be sold and the claimants will be paid out of the proceeds of sale.<sup>126</sup>

(e) The arrest of ships breaks the time bar for maritime liens.<sup>127</sup>

### 3.3 The 1952 Arrest Convention.

The aim of the International Convention relating to the Arrest of Seagoing Ships of 1952 was to harmonise, by the introduction of uniform rules the arrest procedures which prevailed among the common and civil law countries. States within the civilian tradition tended to adopt a broad and liberal approach with a claimant entitled to arrest any property of the defendant within the municipal jurisdiction. In contrast, the admiralty jurisprudence developed within the common law tradition was significantly more restrictive and with the right *in rem* confined to the ship in respect of which the claim arose.<sup>128</sup>

Before the coming into force of the 1952 Arrest Convention, a vessel could be arrested in the civil law countries for any claim, whether or not of a maritime nature, but in common law countries, a vessel could only be arrested in the limited cases where claimants are entitled to enforce their claim in a proceeding *in rem*.<sup>129</sup>

The purpose of the convention is to strike a compromise between the common and civil law systems in respect the law of ship arrest.<sup>130</sup> The compromise character of the convention could be seen from the situations provided in the convention where a defendant's ship could only be arrested

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<sup>125</sup> Southampton on Shipping Law, Institute of Maritime Law, Informa, London, 2008 at p. 357.

<sup>126</sup> *Ibid.*

<sup>127</sup> See Convention on Liens and Mortgages, 1993. Art. 9 (1).

<sup>128</sup> Thomas, note 42 at 45

<sup>129</sup> Berlingieri, note 9 at 4.

<sup>130</sup> *Ibid.*

for a fixed and limited list of maritime claims. This was an approach familiar to common law practitioners (and similar to the jurisdiction of the English Admiralty court). On the other hand, a completely new concept to the common law practitioners was introduced allowing arrest of what were later described as ‘sister ship’ in the same ownership as the particular ship in respect of which the original claim arose. The result here was a recognisably civilian approach.<sup>131</sup>

The compromise character is further reflected in the ability of the action *in rem* to enable the arresting court to assume jurisdiction on the merits of the claim through the mechanism of arrest. This idea was (and still is) anathema to many civilian lawyers, who considered that arrest could not give jurisdiction.<sup>132</sup>

### **3.3.1 Definitions.**

‘Arrest’ means the detention of a ship by judicial process to secure a maritime claim, but does not include the seizure of a ship in execution or satisfaction of a judgment.<sup>133</sup>

The substantial difference between arrest covered by the convention and seizure excluded from its scope is that the former is a security measure which is requested before the claim is heard on the merits. Its purpose is to preserve the *res* or security *in lieu* of the *res* until judgment on the merits is obtained. The seizure on the other hand is a manner of enforcing a judgment and satisfying the claimant out of the proceeds of sale.<sup>134</sup> The purpose of the definition is to exclude from the scope of the convention all enforcement proceedings, irrespective as to whether the seizure of a ship is effected on the basis of a judgment or any other order issued by the court.<sup>135</sup>

The arrest of a ship ordered by a criminal court in connection with any type of crime (e.g. smuggling) is excluded from the scope of the convention.<sup>136</sup>

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<sup>131</sup> N. Gaskell & R. Shaw, “The Arrest Convention 1999”, LMCLQ (1999) 470-490 at 472.

<sup>132</sup> *Ibid.*

<sup>133</sup> Article 1(2)

<sup>134</sup> Berlingieri, note 9 at 88.

<sup>135</sup> *Ibid.*

<sup>136</sup> *Ibid.*, at 89.

“Claimant” means a person who alleges that a maritime claim exists in his favour.<sup>137</sup> In this context, ‘claim’ is not used in the sense of an established right to obtain certain sum of money or title to or possession of a ship. It follows that when considering an application for the arrest of a ship, the court should not determine the merits of the claim or establish whether or not the claim exists, but should merely make a preliminary investigation in order to find out whether the contention that certain claim exists is reasonable.<sup>138</sup>

In Art. 1(1), a list of maritime claims for which the right of arrest may be granted is enumerated. It starts with the phrase “Maritime claim” means a claim arising out of one or more of the following: and it goes further to list the categories of maritime claims in sub-paragraphs (a) – (q). This list of claims in effect represents a closed list of maritime claims.<sup>139</sup>

### 3.3.2 Scope of Application

“A ship flying the flag of one of the contracting states may be arrested in the jurisdiction of any contracting state in respect of any maritime claim, but in respect of no other claim...”<sup>140</sup>

This provision was necessary in order to stress the change in the law of arrest in civil countries. Whilst previously, a ship could be arrested as a security for any claim, whether maritime or not, under the convention, the arrest of a ship for non-maritime claim has become impossible. This provision is restricted to ships flying the flag of state parties.<sup>141</sup>

However, Paragraph (2) of Article 8 extends the right of arrest in respect of maritime claims to ships flying the flag of non-contracting states, but does not extend to those ships the benefit granted by article 2 (i.e., the limitation to maritime claims). Ships flying the flag of a non-contracting state may be arrested also in respect of any non-maritime claims for which the *lex fori* permits arrest. That means that in civil jurisdictions, where arrest is a ‘conserving measure’ which may be executed against any asset of a debtor

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<sup>137</sup> Article 1(4)

<sup>138</sup> Berlingieri, note 9 at 95.

<sup>139</sup> *Ibid.*, at 51

<sup>140</sup> Article 2.

<sup>141</sup> Berlingieri, note 9 at 105

as security for any claim, ships flying the flag of a non-contracting state may, subject to the conditions set forth by the *lex fori*, be arrested in respect of any claim against the owner.<sup>142</sup>

“Nothing in this Convention shall modify or affect the rules of law in force in the respective contracting states relating to the arrest of any ship within the jurisdiction of the state of her flag by a person who has his habitual residence or principal place of business in that state.”<sup>143</sup>

The purpose of this provision is to exclude from the convention situations where there is no foreign element.<sup>144</sup>

### **3.3.3 Right of Arrest.**

“A claimant may arrest either the particular ship in respect of which the maritime claim arose, or any other ship which is owned by the person who was, at the time when the maritime claim arose, the owner of the particular ship...”<sup>145</sup>

The implication of the provision in the first limb of this article is that the claim must relate to a particular ship. Claims against a ship owner, for example, that relates to the maintenance or operation of his ships, but are not related to a particular ship, cannot be secured by means of arrest of one of the ships owned by him.<sup>146</sup> This requirement was stated by Lord Diplock in *The Eschersheim*, as follows:

“it is clear that to be liable to arrest a ship must not only be the property of the defendant to the action but must also be identifiable as the ship in connection with which the claim made in the action arose...”<sup>147</sup>

In the second limb of this provision, the right of arrest is extended to other ships in the same ownership. This is the so-called ‘sister ship’ provision.

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<sup>142</sup> Berlingieri, “The Scope of Application of the 1952 Brussels Convention on the Arrest of Ships”, *JMLC*, Vol. 22, No. 3 (1991) 405 at pp. 407-408.

<sup>143</sup> Article 8 (4).

<sup>144</sup> Berlingieri, note 9 at 412

<sup>145</sup> Article 3 (1).

<sup>146</sup> Berlingieri, note 9 at 127

<sup>147</sup> (1976) 2 *Lloyd’s Rep.* 1 at p.7.

The provision is a compromise position taken between the civil and common law countries. The compromise consisted of reducing the unlimited right of arrest of ships only to specified claims and at the same time of extending the right of arrest to other ships in the same ownership.<sup>148</sup> In *The Eschersheim*, Lord Diplock noted that the sister-ship arrest provision in the 1952 Convention:

“...represented a compromise between the wide powers of arrest in some civil law countries...and the limited powers of arrest in England and other common law countries...”<sup>149</sup>

The right to arrest a sister ship is granted as an alternative. This was emphasised by Lord Denning MR in *The Monte Ulia (owners) V. The Banco & Other Vessels (owners), The Banco*,<sup>150</sup> as follows:

“...the important word in that subsection is the word “or”. It is used to express an alternative as the phrase “one or the other”. It means that the Admiralty jurisdiction *in rem* may be invoked against the offending ship or against any other ship in the same ownership but not against both.”

“Ships shall be deemed to be in the same ownership when all the shares therein are owned by the same person or persons”<sup>151</sup>

The implication of this provision is that the sister ship rule does not apply where the other ship is not fully owned by the same person or persons owning the ship in respect of which the maritime claim arose. Thus, whenever the shares in the ownership of one vessel are not, all of them, in the same hands as owned the other vessel, the sister ship cannot be arrested. It is however, sufficient that the ship is fully owned by one or more, *albeit*, not all of the persons owning the ship in respect of which the maritime claim arose.<sup>152</sup>

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<sup>148</sup> Berlingieri, note 9 at 157.

<sup>149</sup> (1976) 1 W.L.R. 430 at p. 436.

<sup>150</sup> (1971) 1 Lloyd’s Rep. 49.

<sup>151</sup> Article 3 (2).

<sup>152</sup> Berlingieri, note 9 at 159.



Pursuant to Article 3 (1), the sister ship rule does not apply in respect of maritime claims enumerated in Article 1 (1) o, p, and q, namely, disputes as to title to ownership of any ship, disputes between co-owners of any ship as to the ownership, possession and employment of that ship and, the mortgage and hypothecation of any ship. The reason being that these maritime claims have a relationship with the ship to some extent different from that of all other maritime claims. They are claims of proprietary interests in a ship or a claim for possession of the ship.

In the case of a charter by demise of a ship the charterer and not the registered owner is liable in respect of the maritime claim relating to that ship, the claimant may arrest such ship or any other ship in the ownership of the charterer by demise. The provision of this paragraph shall apply to any case in which a person other than the registered owner of a ship is liable in respect of a maritime claim relating to the ship.’<sup>153</sup>

The first limb of this provision extends the sister ship rule to a demise charterer of the particular ship in respect of which the maritime claim arose. The rather unfortunate provision in the second limb of the article due to its vagueness and lack of clarity has given rise to conflicting interpretations in courts of contracting states.<sup>154</sup> Several persons may be liable in respect of claims relating to a ship, such as: (i) the time charterer, for claims arising out of voyage charters, contracts of carriage, services rendered and supplies made to the ship; and (ii) the voyage charterer, for claims arising out of loss, or damage to other ships or harbour installations. Conflicting views have been expressed particularly in respect of claims against the time charterer. However, it is thought that the same principles that should govern the right of arrest in respect of claims against the demise charterer should apply also in respect of all other persons. It is unlikely, however, that a uniform interpretation of Art. 3 (4) will be reached.<sup>155</sup>

Art. 9 provides that, “Nothing in this Convention shall be construed as creating a right of action, which apart from the provisions of this

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<sup>153</sup>Article 3 (4).

<sup>154</sup> Berlingieri, note 9 at 144.

<sup>155</sup> Berlingieri, f., ”The 1952 Arrest Convention Revisited” (2005) LMCLQ 237 -416 at 332..

convention, would not arise under the law applied by the court which had seisin of the case, nor as creating any maritime liens which do not exist under such law or under the Convention on Maritime Liens and Mortgages, if the latter is applicable.” In consequence, where the ship is sold after the maritime arises but before the arrest is applied for, authorisation to arrest will be refused unless the claim is secured by a maritime lien under the *1926 Liens & Mortgages Convention* or the arrest is permitted by the national law.<sup>156</sup>

It is clear from the foregoing that a claimant wishing to effect an arrest on a ship under the convention must pass two tests very similar to those provided in S. 20 of the Supreme Court Act, 1981 of the United Kingdom: first, the claimant has to satisfy the court that its claims falls within one or more of the categories listed set out in Article 1 (1) a – q, and secondly, the claimant must satisfy the court that the ship to be arrested has a sufficient connection with the claim. The point of departure of the 1952 Arrest Convention from the Supreme Court Act is that under the convention, a claimant can arrest a ship even, if, at the time of arrest, it was not owned by the person who would be liable for the claim, even in cases not involving a maritime lien. Also a sister ship can also be arrested.<sup>157</sup> An example of such a situation is where a time charterer was supplied with bunkers (fuel oil) but failed to pay for it, which were then consumed by the vessel, the ship owner might find his vessel arrested by the bunker supplier long after the time charter had ended and the time charterer disappeared. This will be even though the ship owner had no contract with the bunker supplier and did not benefit from the use of the bunkers.<sup>158</sup>

### **3.3.4 Release of ships**

A ship arrested shall be released upon sufficient bail or other security being furnished.<sup>159</sup> The convention does not limit the amount of security to be put up in order to release the ship from arrest. The court determines the nature

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<sup>156</sup> Tetly, note 67 at 960.

<sup>157</sup> M.D. Lax, "International Convention on Arrest of Shps", *Lloyd's List*, 18 August 1999.

<sup>158</sup> *Ibid.*

<sup>159</sup> Art. 5.

and amount of bail or security if the parties cannot agree. Bail is money paid into court; security other than bail ordinarily takes the form of a bank guarantee or a letter of undertaking from the shipowner's Protection and Indemnity (P & I) Club.<sup>160</sup>

In Art. 6, all questions relating to liability for wrongful arrest shall be determined by the law of the contracting state in whose jurisdiction the arrest was made or applied for. The convention by this article adopted the simple compromise of leaving the matter (liability for wrongful arrest) to the rules of procedure prevailing in the *lex fori*, and by doing so a sharp distinction has been drawn between countries which require security for wrongful arrest and countries which do not, thus creating a real chart for forum shopping.<sup>161</sup>

Also in the second paragraph of Art. 6, all matters of procedure generally concerning the arrest of ships shall be governed by the law of the contracting state in which the arrest is made or applied for. The effect of the provision in Art. 6 is that national law shall govern such issues as the burden of proof the claimant must discharge to obtain arrest, the giving of counter security, constitutional safeguards surrounding arrest and sanctions for wrongful arrest. As a result, there are significant differences in the arrest procedures of states party to the convention.<sup>162</sup>

### **3.3.5 Jurisdiction on the Merits**

The convention confers jurisdiction on the merits on the court of the jurisdiction where the arrest is made if the domestic law of the country gives jurisdiction to such courts or in any of the following circumstances, namely, (a) if the claimant have his habitual residence or principal place of business in that country, (b) if the claim arose in that country, (c) if the claim concerns the voyage of the ship during which the arrest was made, (d) if the claim arose out of a collision or in circumstances covered by the 1910

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<sup>160</sup> Tetly, note 67 at pp. 960-961.

<sup>161</sup> Alcantara, J., "Some Reflections Over the Brussels Convention Relating to Arrest of Sea Going Vessels and its Amending Process", *Georgia Journal of International Comparative Law*, Vol. 26 (1997) No. 3, 551 at p.554.

<sup>162</sup> Tetly, note 67 at 962.

Collision Convention, (e) if the claim is for salvage, and (f) if the claim is upon a mortgage or hypothecation of the ship arrested.<sup>163</sup>

### **3.4. International Convention on Arrest of Ships, 1999.**

The purpose of the Convention was to bring the practice of arrest of ships up to date and in line with the changes that have taken place in maritime operations since the 1952 Arrest Convention. It is worthy of note that the Convention is not yet in force. According to the preamble, the convention was borne out of the:

“...necessity for a legal instrument establishing international uniformity in the field of arrest of ships which takes account of recent developments in related fields.”<sup>164</sup>

The 1999 Convention is drafted in a much more precise way. The main change is that the concept of personal liability of the shipowner whose vessel is arrested is introduced, leaving only a very limited category of claims (including maritime liens), where an arrest is possible, even if the shipowner is not personally liable. In particular, the uncertainty of substantive rights in an arrested ship in the 1952 Arrest Convention is removed and the power to arrest dependent more closely on the person liable on the claim. Jurisdiction on the merits became a convention concept with qualification for national law.<sup>165</sup>

#### **3.4.1 Definitions.**

In Art. 1, the definition of maritime claims was enlarged from the seventeen in the 1952 convention to twenty-two. The purpose of this article is to define a maritime claim and to list the claims recognised as giving a claimant a right to arrest. It is a closed and exhaustive list of claims which allows a claimant who has suffered a loss, been injured, or is unpaid to arrest a ship.<sup>166</sup> The new claims were for: damage or threat of damage to

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<sup>163</sup> Art. 7 (1).

<sup>164</sup> Preamble to the 1999 Arrest Convention.

<sup>165</sup> Jackson, note 5 at 396.

<sup>166</sup> Lynn, note 11 at 463.

the environment; port, dock, harbour dues and charges; insurance premiums (including mutual insurance calls) in respect of the ship; any commissions, brokerages or agency fees in respect of the ship; costs and charges of wreck removal.

Arrest is defined more widely in Art. 1 (2) than in the 1952 Convention to cover any “restriction on removal” of a ship. This phrase “restriction on removal of a ship” would seem to include Mareva Injunctions issued in respect of vessels. It would, like the 1952 Arrest Convention also include *seize conservatoire*, the United States Maritime attachment, as well as arrest in action *in rem*.<sup>167</sup>

### **3.4.2 Right of Arrest.**

In the 1999 Arrest Convention, personal liability is the main criterion to indicate whether a ship can be arrested or not. The 1952 Arrest Convention’s concept of “particular ship” has been modified. The 1999 convention provides that arrest is permissible of any ship in respect of which a maritime claim is asserted if the person who owned the ship at the time when the maritime claim arose is liable for the claim and is owner of the ship when the arrest is effected.<sup>168</sup>

Arrest is also permitted of any ship in respect of which a maritime claim is asserted if the claim is against the owner, demise charterer, manager or operator of the ship and is secured by a maritime lien that is granted or arises under the law of the state where the arrest is applied for.<sup>169</sup> Arrest is also permitted when the claim is based upon a mortgage or charge of the same nature and where a claim relates to the ownership or possession of the ship.<sup>170</sup>

The 1999 Arrest convention like its predecessor provides for the “sister ship” arrest, but in doing so, cured the controversy generated by the rather ambiguous provision of the last sentence of Art. 3 (4) of the 1952 Arrest Convention. The phrase “a person other than the registered owner of a ship”

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<sup>167</sup> Tetly, note 4 at 1963.

<sup>168</sup> Art. 3 (1) (a); see also Berlingieri, note 9 at 138.

<sup>169</sup> Art. 3 (1) (e)

<sup>170</sup> Art. 3 (1) (c) & (d)

in the 1952 Convention generated a lot of controversy in interpretation but was remedied by the 1999 Convention by identifying the persons as the demise charterer, time charterer or voyage charterer.<sup>171</sup> It went further to provide that the sister ship rule does not apply to claims in respect of ownership or possession of the ship.<sup>172</sup>

Unlike the 1952 Arrest Convention, the 1999 Convention limits the amount of security to be required for the release of a ship from to the value of the arrested ship.<sup>173</sup> The same limitation has also been provided with respect to the right of re-arrest and multiple arrests.<sup>174</sup>

### **3.4.3 Damages for Unjustified Arrest.**

The convention authorises the arresting court to impose on the claimant the obligation to provide counter security for losses that may be incurred by the defendant as a result of the arrest and for which the claimant may be found liable.<sup>175</sup> The court is also empowered to award damages for “wrongful” or “unjustified” arrest, or for “excessive security” having been demanded and provided.<sup>176</sup> Whether there is in fact any liability for loss resulting from arrest is, under Art. 6 (3) to be determined by the law of the place of arrest, and under Art. 6 (2), the court of arrest has the jurisdiction to determine the liability in any. It follows that there will be complete uniformity of the law of arrest in this respect.<sup>177</sup>

Under the English and Common law, the rule is that for a claimant to be found liable in damages for wrongful arrest, the defendant will have to prove malice (*mala fides*) and gross negligence (*crassa negligentia*) on the part of the claimant in respect of the arrest.<sup>178</sup> But this rule has been dispensed with and is no longer applicable in Nigeria since 1991. The provision in Art. 6 of the 1999 Arrest convention has similar effect with the

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<sup>171</sup> Art. 3 (2) (b)

<sup>172</sup> *Ibid.*

<sup>173</sup> Art. 4 (2).

<sup>174</sup> Art. 5 (1) (a)

<sup>175</sup> Art. 6 (1)

<sup>176</sup> Art. 6 (2) (a) & (b).

<sup>177</sup> Gaskel, N., & Shaw, R., note 131 at 473.

<sup>178</sup> *The Evangelismos* (1885) 12 Moo. P.C. 352.

combined provisions of s.13 of the *Admiralty Jurisdiction Act 1991* (Nigeria) and Order XI of the *Admiralty Jurisdiction Procedure Rules 1993* (Nigeria). Under the combined effect of this provisions, for the claimant to be found liable in damages for wrongful arrest, the defendant is merely required to show that the arrest was either unreasonable or without good cause, that the arrest was made on insufficient grounds, or that the suit was instituted without probable grounds.<sup>179</sup>

#### **3.4 4 Right of Rearrest and Multiple Arrest.**

The 1999 convention follows the principle of the 1952 convention on rearrest, i.e. when a ship has been arrested and released or security has been given to secure a maritime claim, that ship will not be rearrested or arrested in respect of the same maritime claim. However, there are some changes in the provisions of the 1952 convention in relation to situations where there is a subsequent arrest. Instead of setting out what has to be done in case of rearrest, the 1999 Convention provides situations where rearrest or multiple arrests can be made, for example, where the nature or amount of security provided is inadequate, where the person who provided the security is not, or is unlikely to be able to fulfil the obligation, and so forth.<sup>180</sup>

#### **3.4.5 Jurisdiction on Merits.**

The 1999 Convention makes it clear that the court where an arrest has been effected or security provided to obtain release has jurisdiction to determine the case on its merits unless there is a valid jurisdiction or arbitration agreement.<sup>181</sup> However, that court may refuse to exercise jurisdiction if such refusal is permitted by the law of that state, and a court of another state accepts jurisdiction.<sup>182</sup> It also provided that where the court of the state where an arrest has been effected does not have jurisdiction or has refused to exercise jurisdiction, the court may order a period of time within which the claimant has to bring proceedings before a competent court or arbitration

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<sup>179</sup> Ojukwu, C. N., "Arrest and Detention of Ships and Other Property in Nigeria", 28 *Tulane Maritime Law Journal*, 247 (2003-2004) at p. 251.

<sup>180</sup> Art. 5 (1).

<sup>181</sup> Art. 7 (1).

<sup>182</sup> Art. 7 (2).

tribunal, or the ship arrested or security provided will be released.<sup>183</sup> Art. 7 (5) and (6) deals with the issue of recognition of foreign judgment. Paragraph (1) of this article establishes the rule whereby the local court can act as a jurisdiction for the arrest procedure and then as bailiff in holding the security while the merits of the case are heard elsewhere. It allows the substantive aspects of a claim to be heard in a jurisdiction other than where the arrest has been effected, while recognising the judgment of the jurisdiction where the merits were heard.<sup>184</sup>

### **3.4.6 Scope of Application.**

The Convention applies to any ship whether sea going or not, within the jurisdiction of any state party, whether or not that ship is flying the flag of a state party.<sup>185</sup> From the wording of this provision, it appears that the 1999 Convention will govern the arrest of all ships in the jurisdiction of states party to the convention regardless of their flags. The effect of this seems to be that the “maritime claim” enumerated in Art. 1 (1) becomes the sole basis on which states parties to the convention may arrest ships of any flag or registry.<sup>186</sup>

The Convention provides that the procedure relating to the arrest of a ship or its release shall be governed by the law of the state in which the arrest was effected or applied for.<sup>187</sup> In effect the *lex fori* determines all the procedural issues concerning arrest of ships.

However, although the procedural law may allow for the arrest of the vessel, the claimant may still lose the underlying claim because the substantial law does not recognise the claim as valid. Likewise, even though the substantive law may recognise the validity of the claim, the order of priorities may place the claim below many others. In that case, once the ship is sold to satisfy the judgment, there may be no money left in the fund derived from the sale once the higher priority claims are paid out. This latter case leaves the claimant successful on the merits, but with no real

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<sup>183</sup> Art. 7 (4).

<sup>184</sup> Lynn, note 11 at 484.

<sup>185</sup> Art. 8 (1)

<sup>186</sup> Tetly, note 4 at 1971.

<sup>187</sup> Art. 2 (4).



recovery of monies and his claim extinguished. It is evident from the foregoing, that the importance of the issue of recognition and priorities or ranking of maritime claims to the success and failure of ship arrest and recovery of claims against ship owners cannot be over emphasised. These issues are provided for by the laws of maritime claims, liens and mortgages.

## **4. MARITIME CLAIMS, LIENS AND MORTGAGES.**

The phrase “maritime claims” is used in the 1952 and 1999 Arrest Conventions as a general label describing all the claims in relation to which a ship may be arrested under the convention.<sup>188</sup> The 1952 & 1999 Arrest Convention begins with a list of “maritime claims”,<sup>189</sup> it is important of course not to confuse “maritime claims” with “maritime liens”. Maritime liens constitute one category of maritime claims; claims arising from ship mortgage are also maritime claims that may be brought against a ship. So also are other claims that are enumerated in Art. 1 of both Conventions. Some maritime claims are maritime liens while some are not. Whether specific types of maritime claims constitute maritime liens which follow the ship and rank before ship mortgages or merely statutory rights *in rem* which do not follow the ship and rank after the mortgage, depends on other international conventions (governing maritime liens and Mortgages) and on national law.<sup>190</sup> The various types or classes of maritime claims will now be considered.

### **4.1 Types or Classes of Maritime Claims.**

#### **4.1.1 Cost of arrest cost of judicial sale and *custodia legis*.**

These are the expenses necessary to keep the ship in custody after its arrest and before its sale, for the benefit of all the creditors.

#### **4.1.2 Maritime Liens.**

In England and most common law countries (e.g. Canada, and Nigeria), the term “maritime liens” applies only to a select group of maritime claims, being seamen’s wages, master’s wages, master’s disbursements, salvage and damage (collision and other maritime torts and delicts). They are known as “traditional maritime liens”.<sup>191</sup> A maritime lien has been defined as a privileged claim or charge upon maritime property for services rendered to

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<sup>188</sup> Jackson, *supra* note 6 at p. 23.

<sup>189</sup> See Art. 1 of the 1952 & 1999 Arrest Conventions.

<sup>190</sup> Tetly, note 4 at 1965.

<sup>191</sup> Tetly, *International Conflicts of Law: Common, Civil & Maritime*, International Shipping Publications, Montreal, 1994 at p.539; see also s.67, *Merchant Shipping Act 2007* (Nigeria); s.5 (3) *Admiralty Jurisdiction Act, 1991*(Nigeria).

it or damage done by it, accruing from the moment the event out of which the cause of action arises occurs, travelling with the property secretly and unconditionally and enforced by an action *in rem*. Maritime liens arise at the time of the contract or tort (e.g. tort liens as in ship collision). They do not require registration or notice and do not expire when the ship is transferred or sold conventionally. They terminate by judicial sale.<sup>192</sup>

In consequence, one may say that a traditional maritime lien is a secured right in the “*res*”, i.e., in the property of another (ordinarily the ship, but sometimes the cargo, freight and/ or bunkers as well), deriving from the *lex maritima* and the civil law; which arises with the claim, without registration or other formalities; which travels with the vessel surviving its conventional sale (although not its judicial sale); which remains inchoate until it is enforced by an action *in rem*; and which, when enforced, gives the lienor’s claim priority in ranking over most other claims, notably the ship mortgage.<sup>193</sup>

#### **4.1.3 Mortgage.**

A ship mortgage is a form of security for a loan created by deed that confers interest in a ship and is discharged upon repayment of the loan. Unlike a traditional mortgage, it does not involve a transfer or conveyance of the ship to the mortgagee but simply a security created by or under a contract (deed) that confers an interest in the property subject to it, it is annulled upon the performance of some agreed obligation, usually the payment of the debt with or without interest.<sup>194</sup> The typical mortgagee is the bank and other financial institutions. Over the years a form of legal charge has been developed that allows a bank to obtain valid security for its loans but at the same time allowing the borrower to retain ownership. This is known as a statutory mortgage which to be valid must be in the prescribed form. An alternative is an equitable mortgage where the paperwork does not comply with the statutory provisions but the intention is the same, however, this will

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<sup>192</sup> Tetly, *ibid.*

<sup>193</sup> Tetly, “Maritime Liens in the Conflict of Laws”, Essays in Honour of Arthur T. von Mehren, Transnational Publishers Inc., Ardsley, N.Y. 2002 at pp. 439-457.

<sup>194</sup> Tyler, Fisher & Lightwood’s *Law of Mortgages*, 10<sup>th</sup> ed., Butterworths, London 1998 at p.4.

only bind people who have notice of it so there is no security and would rank behind any registered mortgage even if the mortgage pre-dated the registered charges.

Upon default, the mortgagee at common law can take possession by arresting the ship in a mortgagee action.<sup>195</sup> The Arrest Conventions do not cover the mortgagee taking possession of a vessel under the terms of a mortgage deed *per se*, although such claims will fall within the scope of the conventions where the ship is arrested and detained by a court to enable a mortgagee action to proceed.

Most cases involving mortgages are concerned with the ranking of rival claimants to the fund created by the sale of the arrested ship. The mortgage ranks after claimants with maritime liens.<sup>196</sup>

#### **4.1.4 Other maritime Claims.**

General maritime claims such as ship repairs, supplies and bunkers, etc, usually known under the generic term of “necessaries” provided to the vessel as well as for claims for cargo damage and for breaches of charter party do not give rise to traditional maritime liens in the United Kingdom and other common law countries, but only to “statutory rights *in rem*”. The latter are simply rights which are granted by statute to arrest a ship in an action *in rem* for a maritime claim.<sup>197</sup>

Unlike the traditional maritime liens, statutory rights *in rem* do not arise with the claim, they do not travel with the ship (i.e. they are expunged if the vessel is sold in a conventional sale before the action *in rem* is commenced on the claim concerned), and they rank after, rather than before, the ship mortgage in the distribution of the proceeds from the vessel’s judicial sale.<sup>198</sup>

However, in the United States, claims for necessaries are granted full status as maritime liens by the relevant national legislation. Necessaries are

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<sup>195</sup> *Halsbury’s Laws of England*, 4th Edition, Reissue, Vol.43 (1) 1997 at para. 261.

<sup>196</sup> Tetly, note 67 at 487; see also *The Feron*, (1868) L.R. 2 A & E, 65.

<sup>197</sup> Tetly, “Liens, Mortgages and Conflict of Laws”, 6 *U.S.F. Maritime Law Journal* 4 (1993-1994) at p.5.; see also Tetly, note 191 at 539.

<sup>198</sup> Tetly, note 4 at 1910-1911.

secured by a maritime lien in the United States by virtue of the *Commercial Instruments and Maritime Liens Act*.<sup>199</sup>

#### **4.2 Priorities or Ranking at Common Law.**

It will frequently be the case that the fund in the custody of the court after a judicial sale will be the subject of several liens and claims. When the fund is sufficient to satisfy all, the plurality of their existence will offer no difficulty. However, when the fund is insufficient, so that the various liens and claims stand in rivalry, then the relative priority between the various liens and claims will assume a crucial importance since the success or failure of a particular claim will depend on its degree of elevation or postponement.<sup>200</sup>

The question of priorities in maritime law is usually taken to mean priority between holders of maritime security interests in relation to a fund in court representing the *res* against which an action *in rem* has been brought.<sup>201</sup>

Ranking is the process whereby proceeds of sale of a ship sold by the Admiralty Court is distributed to the various claimants in an admiralty queue with those at the top usually scooping up most of the proceeds of sale and those at the end of the queue hoping that some crumbs might still be left. A low ranking in most cases will mean that the maritime claimant walks away empty handed and his claim extinguished.<sup>202</sup>

Lying at the heart of many substantial priorities contest is the relative ranking position of the mortgage. Mortgage by its very nature is substantial in amount and certainly large by reference to the proceeds of sale. Generally speaking, mortgage will take up, if not the whole of the proceeds of sale, at least a lion's share of the proceeds. Who therefore ranks before or after the mortgage or even *pari passu* with the mortgage makes all the difference to the recovery of a claim.<sup>203</sup>

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<sup>199</sup> 46 U.S.C. 31301

<sup>200</sup> Thomas, note 42 at 229.

<sup>201</sup> Jackson, note 5 at 561.

<sup>202</sup> Honourable Justice Waung, "Maritime Law of Priorities: Equity, Justice and Certainty", (2005) 19 MLAANZ Journal 9 at 10.

<sup>203</sup> *Ibid.*, at 21.

Maritime law of priorities in most common law jurisdictions is largely judge made law. South Africa and the United States have their own elaborate statutes providing for their Admiralty law of priorities. The priorities system in these two countries and that of continental Europe (.g. France) are very different from the common law system of priorities.<sup>204</sup> Cases of maritime priorities in common law jurisdictions are decided by reference to various factors such as equity, public policy and commercial considerations. In *The Ruta*,<sup>205</sup> David Steel J. while deciding on the approach to question of priorities of maritime claims approved a passage from Prof. Thomas' book, "Maritime Liens" as follows:

"The Admiralty and appellate courts have adopted a broad discretionary approach with rival claims ranked by reference to consideration of equity, public policy and commercial expediency, with the ultimate aim of doing that which is just in the circumstances of each case."<sup>206</sup>

The usual and established ranking in the common law system of priorities (ignoring special rights provided by specific statute such as harbour authorities or wreck removal and the infrequent occurrence of bottomry and possessory lien) is as follows:

- (i) Court costs, cost of arrest and cost of sale of vessel
- (ii) Maritime liens: damage for collision, salvage, seamen's and master's wages, master's disbursement.
- (iii) Registered Mortgages (earlier date mortgage with priority)
- (iv) Statutory liens such as claims in respect of cargo, charter party, necessaries, repairmen's liens, towage liens, pilotage, general average (ranks *pari passu*).<sup>207</sup>

The top priority given to costs of arrest and costs of realising the *res* by court sale and cost of the marshal or bailiff is universally accepted in all

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<sup>204</sup> *Ibid.*

<sup>205</sup> (2000) 1 Lloyd's Rep. 359.

<sup>206</sup> See also Thomas, note 42 at 418.

<sup>207</sup> Tetly, note 67 at 884-890.

jurisdictions. Court sale is the means of converting the arrested *res* into proceeds of sale.<sup>208</sup>

Given that most common law jurisdictions have no statutory provision regulating the order of priorities of maritime claims, the question now is whether it can then be said that the order of priorities or ranking of maritime claims in the common law system is uncertain. Thomas by referring to the “broad discretion” of the court could be said to cast doubt on the stability of the established ranking rules being always applied. However, Toh, in his *Admiralty Law and Practice*, believed that Thomas went a little too far. He says:

“It is probably going too far to say, as the commentator Thomas does, that ‘in the realm of priorities, there appears to be no immutable rules of law, but only a number of guiding principles...’ Giving the regularity with which the courts apply the *prima facie* order of priority, it may fairly be said of the order that whilst not immutable, it is in fact very stable and far more established than is suggested by the expression, ‘guiding principles’”.<sup>209</sup>

However, it may be correct to say that ranking of maritime liens and claims is a balancing of the legitimate rights of the claimant, against the legitimate claims of other creditors of the debtor. It is an equitable process, wherein the court is bound by certain rules of statute or general maritime law, but is permitted, in its discretion, to temper justice with equity.<sup>210</sup>

#### **4.3 Priority of Sister-Ship Claim.**

The sister-ship arrest does not mean that the maritime lien against an offending ship becomes enforceable against a sister-ship. For example, a claimant who may have a maritime lien for collision damage against the offending ship, does not obtain an equal maritime lien against a sister ship. Only the offending ship is subject to the maritime lien. The claimant who

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<sup>208</sup> Waung, note 202 at p 12.

<sup>209</sup> Toh Kian Sing, *Admiralty Law and Practice*, Butterworths Asia, Singapore, 1998 at 300.

<sup>210</sup> Tetly, note 67 at 912.

enforces his security against the sister ship ranks after all the maritime liens against the sister ship, as is only proper, because the rights of the lien holder against the sister ship must be protected. The claimant against the offending ship really has only a statutory right *in rem* on the sister ship.<sup>211</sup>

What is the priority of a statutory lien which is a sister ship claim? How does the sister ship claim compete with a straight forward statutory lien against the offending ship? In *The Leoborg* (No.2),<sup>212</sup> one of the claims was against the sister ship in respect of wages earned on the offending ship. The claim would, of course, be a maritime lien against the offending ship but it was only a statutory lien against a sister ship. The question posed above was raised in this case, unfortunately, that point was not decided upon.

The question is whether a statutory lien against an offending ship and a competing statutory lien against a sister ship should be treated in the same way or whether a statutory lien on a sister ship should be accorded a lower ranking. Using the necessities claim as an example will explain this problem. Bunker is supplied by Oil Company A to the Ship Africana 1 and diesel is supplied by Oil Company B to the Ship Africana 11. Both ships are owned by the same company and therefore are sister ships. Oil Company A arrests Africana 11 in a sister ship arrest. Oil Company B also makes a claim *in rem* against Africana 11. Should both claims be treated equally on priorities, so that they rank *pari passu* or should Oil Company A's claim (being a sister ship claim) rank behind Oil Company B's claim?

It seems that no case has directly decided this question of priority of claims against a sister ship.<sup>213</sup> However, considered from the point of view of service towards the vessel Africana 11, Oil Company B could be said to have conferred a more substantial benefit on Africana 11 while Oil Company A conferred no benefit on Africana 11 (only on Africana 1, the offending ship) and that therefore Oil Company B is more deserving than Oil Company A of a higher priority.

South Africa is unique amongst maritime nations of the world in having enacted an elaborate statute law governing priorities, which was described

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<sup>211</sup> Tetly, note 67 at 1032.

<sup>212</sup> (1964) 1 Lloyd's Rep. 380

<sup>213</sup> Waung, note 202 at 19.



by Professor Hare as “a maverick approach which differs from the current practice of most maritime states”.<sup>214</sup> Section 311 (5) of the Admiralty Jurisdiction Regulation Act, 1983 provides for a priority ranking of maritime claims. The South African law on priority therefore expressly provide for a sister ship claim to have a lower priority. Under the 1967 and 1993 Liens and Mortgages Conventions’ provisions on priorities, nothing is said about the equality or otherwise of the priority of sister ship liens with the offending ship.<sup>215</sup>

#### **4.4 International Recognition and Ranking of Maritime Claims.**

There is no conformity among maritime nations of the world as to the recognition and ranking of maritime claims. As between the various national maritime jurisdictions the differences may be very pronounced. As a general rule, claims which are secured by a maritime lien frequently take precedence over payments due to the holder of a mortgage or hypothec, but whether a claim is secured by maritime lien frequently depends on the jurisdiction where recovery is sought.<sup>216</sup> When a ship has been the subject of a forced sale by an admiralty court, the proceeds of sale are paid out by that court in accordance with the priorities recognised by that court. Viewed globally therefore the ranking of any particular lien or claim is a phenomenon capable of material fluctuation depending upon the jurisdiction in which the lien or claim is pursued. To this extent the choice of jurisdiction, where such a choice is open to the claimant, is an election of material importance and one which ought to be fully considered.<sup>217</sup>

This problem of lack of uniformity in the international recognition and ranking of maritime claims is clearly illustrated by posing the following questions;

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<sup>214</sup> Hare, note 2 at 107.

<sup>215</sup> Waung, note 202 at 19.

<sup>216</sup> Kriz, J.M., “Ship Mortgages, Maritime Liens and their Enforcement: The Brussels Conventions of 1926 and 1952”, *Duke Law Journal*, Vol. 1963, No. 4 (1963) pp.671-695 at p.673.

<sup>217</sup> Thomas, note 42 at 229-230.

- (i) If an American creditor holds a ship mortgage on a foreign vessel, will the mortgage be enforced in the United States or in the various foreign countries?
- (ii) If a supplyman or repairman in New York furnishes supplies or repairs (necessaries) to a British vessel, this ordinarily gives rise to a maritime lien under the United States law and the supplyman may bring an action *in rem* and arrest the vessel and have it sold by order of the court in the event of non-payment or the shipowner's insolvency. If however, the vessel never returned to the United States, but is know to be lying in foreign port (e.g. in Lagos, Nigeria), can the supplyman enforce his lien there and arrest the ship?
- (iii) And if the British vessel in the example (ii) above is subject to a ship mortgage and the funds obtainable from judicial sale of the vessel is insufficient to pay all creditors, who will be entitled to prority – mortgagee or supplyman?

Unfortunately, the answers to this and many other questions affecting the rights of maritime claimants are far from being clear when a claim against a ship owner is initiated in a country other than the country of the ship's registration and the claimant eventually arrests the ship in a third country, then it is necessary to determine which country's law applies.<sup>218</sup> Related issues may further include whether the claimants rights is secured by a maritime lien and its ranking over other claims. As the recognition and ranking of maritime liens and claims differs from country to country, such problems involving conflict of laws became major issues to consider when "jurisdiction shopping".<sup>219</sup>

#### **4.5 Maritime Claims and Conflict of Laws**

Conflict of laws is that branch of municipal law which determines which system of laws is to be applied by a domestic forum when a claim or question before a forum possesses a foreign element. The need for such a

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<sup>218</sup> Kriz, note 216 at 674.

<sup>219</sup> Grant Gilmore & Charles Black, *The Law of Admiralty*, 2<sup>nd</sup> Edition, Foundation Press Inc., New York 1975 at 589.

body of jurisprudence derives from the disparity which exists in the laws of different countries.<sup>220</sup> Conflict of laws situations are prevalent in ship arrest cases, the reason for this is not farfetched. As mentioned earlier, the recognition and ranking of maritime liens and claims differ from jurisdiction to jurisdiction, this makes the question whether a particular type of claim is maritime lien which is ranked above the mortgage and other claims and also the system of ranking to be applied dependent on where the enforcement of the claim is sought or where the ship is arrested.

In England and common law countries, the concept of a maritime lien has been cautiously regarded and confined to a small cluster of maritime claims. In sharp contrast, under the United States maritime law, the concept of maritime lien is more widely received and under that system of law, it is generally the case that whenever an action *in rem* is available, a maritime lien exists.<sup>221</sup> The relative liberality with which maritime lien status is bestowed upon the broad range of supplies and services considered necessities under the United States law is generally not followed by the laws of other maritime nations. Under the United States law, any person providing “necessaries” to a vessel has an enforceable maritime lien against the vessel. But under English law or other common law jurisdictions, claims for necessities only give rise to a statutory right *in rem* rather than a maritime lien.<sup>222</sup> The United States Court for example, have held that a statutory right *in rem* under English law is not equivalent to an American maritime lien and therefore not enforceable by an action *in rem*.<sup>223</sup> The implication of this is that a claimant with English statutory right *in rem* cannot effect an arrest in the United States because an arrest *in rem* under American law is dependant on the existence of a maritime lien. It follows therefore that choice of English law (or vice versa) will significantly affect the right of the claimant.<sup>224</sup> In *Forsythe International U.K. Ltd. V. M/V*

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<sup>220</sup> Thomas, note 42 at 307.

<sup>221</sup> *Ibid.*, at 308.

<sup>222</sup> Dougherty, W.F., “Multi-Contact Analysis for a Multinational Industry: The United States’ Approach to Choice of Law Analysis in the Enforcement of Maritime Liens”, 13 *U.S.F. Mar. L. J.* (2000-2001) 75 at 80.

<sup>223</sup> K.A.S. Camilla, 966 F. 2d at p. 617.

<sup>224</sup> Dougherty, note 222 at 80.

*Ruth Venture*,<sup>225</sup> a United States' court applying English law dismissed a claimant's *in rem* action for unpaid bunkers supplied to a vessel because English law does not provide a maritime lien for such a claim.

The concept of maritime lien is one which is widely recognised in the principal maritime jurisdictions of the world.<sup>226</sup> However, there is lack of consensus on the conflict of laws principles governing the creation and operation of maritime liens, with the consequences that a lien may be attached and may be lost as a ship sails from one country to another.<sup>227</sup> The range of claims which assume the character of maritime liens may nevertheless vary enormously as between different legal systems. Significant differences may also exist in the manner in which maritime liens are ranked between themselves and in relation to other competing claims. This has been the principal cause of conflict of laws in this field.<sup>228</sup>

As a general rule, claims which have the status of maritime claims almost invariably rank ahead of all other categories of claims. To that extent, national laws on the subject would appear to be largely uniform.<sup>229</sup> There are three major problems with respect to conflict of laws and maritime claims. Firstly, does the forum court have jurisdiction to permit the arrest of a ship for a foreign maritime claim? Secondly, should the foreign law with respect to the maritime claim be recognised by the forum court? And finally, what law applies to determine the ranking of the claim?<sup>230</sup>

On the first issue, the Privy Council (U.K.) in *The Halcyon Isle*,<sup>231</sup> in accepting jurisdiction held that with respect to a foreign lien, the right to proceed *in rem* against a vessel falls to be determined by the *lex fori*. In the United States, the courts have declared that it has jurisdiction to hear foreign liens, mortgages and claims. Thus the courts have permitted ship arrest (or attachment) even when the right claimed is unlike an American right.<sup>232</sup>

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<sup>225</sup> 633 F.Supp. 74 1986 AMC 621.

<sup>226</sup> Thomas, note 42 at 331

<sup>227</sup> Jackson, note 5 at 509.

<sup>228</sup> *Ibid.*

<sup>229</sup> Mukherjee, P.K., "The Law of Maritime Liens and Conflict of Laws", JIML 9 (2003) 6 at p. 648.

<sup>230</sup> Tetly, note 191 at 538-539.

<sup>231</sup> (1980) 2 Lloyd's Rep. 352.

<sup>232</sup> See *The Maggie Hammond*, 76 U.S. (9 Wall.) 453 (1869).

Also in Nigeria, S.3 of the Admiralty Jurisdiction Act 1991 provides that the:

“Admiralty jurisdiction of the court shall apply to (a) all ships, irrespective of the place of domicile or residence of the owners; and (b) to all maritime claims wherever arising” (emphasis mine)

The second issue relates to the recognition of the claim. Liens *ex delicto* (tort) and salvage liens do not pose any significant problem because the status of these claims as maritime liens is universally acknowledged.<sup>233</sup> With respect to liens arising from claims *ex contractu* (contract), the determination of the status of such a claim, as to whether or not it is a maritime lien and flowing from it the question of the proper law to be applied is quite problematic.<sup>234</sup> It should be noted that according to the English rules of conflict of laws, traditionally the principle of *lex causae* (law of the cause) is invoked with regard to substantive matters, and in matters of procedure the *lex fori* (law of the forum) is applied.<sup>235</sup>

This issue of recognition of foreign maritime claims came up for consideration in *The Halcyon Isle*<sup>236</sup> before the Privy Council, the issue was whether maritime liens recognised under foreign law are to be recognised as such in English proceedings thus taking priority over other claims. For example, where, as in the present case, repairs were effected in a foreign country (United States) and under that law, a maritime lien supports the claim of the ship repairers. The question was asked whether the claim continued to be supported by a maritime lien even where the arrest was effected in a forum (England) in which the ship repairers’ claim was not supported by a maritime claim. The Privy Council answered in the negative, holding that a maritime lien being a remedy is procedural in character and therefore a matter for the *lex fori*. In other words, foreign

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<sup>233</sup> Mukherjee, note 229 at 550.

<sup>234</sup> *Ibid*; See also Thomas, note 42 at 320.

<sup>235</sup> Mukherjee, note 229 at 547.

<sup>236</sup> *Ibid.*, note 231.

maritime liens would not be recognised as such unless they also have the same character under English law.<sup>237</sup>

This judgment has been severally criticised. According to Prof. Tetly:

“To propose that all claims, worldwide, be classified as procedural, subject to the laws of the forum amounts to the adoption of the *lex fori* as the solution in every conflicts case and to the denial of international law”<sup>238</sup>

Also according to the authors of *Cheshire and North*:

“It is for the law, (United States’ law), as the governing law, to consider both whether the claim by the repairers was valid and whether it would lead to the creation, under the United States law of a maritime lien.”<sup>239</sup>

The conflict of laws rule of *The Halcyon Isle* decision promotes forum shopping, because a lien will not depend on the law of the place of the contract as its proper law, but on the law of the place chosen for the arrest, i.e., the law of one of the hundred or so maritime nations of the world.<sup>240</sup>

A more modern and logical approach is to apply the law of the jurisdiction which maintains the most significant relationship or contact with the subject matter of the dispute.<sup>241</sup> This is often referred to as the jurisdiction that has the “closest and most real connection” with the subject matter of the dispute.<sup>242</sup> In 1940, Morris and Cheshire published an essay titled “*The Proper Law of a Contract in the Conflict of Laws*,”<sup>243</sup> and the term was taken up by Lord Denning M.R. (whom Professor Tetly described as “the great innovator”<sup>244</sup>) in *Bosissevain V. Weil*<sup>245</sup> where he said:

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<sup>237</sup> *Ibid.*

<sup>238</sup> Tetly, note 197 at 34.

<sup>239</sup> Cheshire & North’s *Private International Law*, 12th Ed., Butterworths, London, 1992 at p. 90.

<sup>240</sup> Tetly, note 191 at 572.

<sup>241</sup> Mukherjee, note 229 at 547.

<sup>242</sup> Tetly, note 191 at 10.

<sup>243</sup> (1940) 56 L.Q.Rev. 320 (C.A.)

<sup>244</sup> Tetly, note 191 at 11.

<sup>245</sup> (1949) 1 K.B. 482

“The proper law of the contract...depends not so much on the place where it is made, nor even on the intention of the parties, or on the place where it is to be performed, but on the place with which it has the most substantial connection.”<sup>246</sup>

According to Prof. Tetly:

“The concept of ‘the most significant connection’ or ‘the closest and most real connection’, principally the work of Morris in Contract and Tort is, in my view, the greatest single contribution ever to the theory and practice of conflict of law.”<sup>247</sup>

This path is frequently treaded by the United States’ and Canadian courts. Where in the United States’ court, a foreign jurisdiction is found to be the proper law, according to the conflicts rule of the forum, either because it is expressly so declared in the contract, or because of the “contacts” (connecting factors) linking the case to the other jurisdiction, foreign maritime claims are recognised, even when the rights they confer differ in character from those which would arise from the equivalent maritime claim under American law. A typical example of this attitude by the American courts can be seen in *Forsythe International U.K. Ltd. V. M/V Ruth Venture*,<sup>248</sup> where a court in the United States having found the English law to be the proper law dismissed a claimant’s *in rem* action for unpaid bunkers supplied to a vessel because English law does not provide a maritime lien for such a claim.

Finally on the third issue, the question of priorities as between competing claims together with such other matters appertaining to the enforcement of a claim, as period of limitation, are considered purely procedural and governed by the *lex fori*.<sup>249</sup> Many common law courts have rendered

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<sup>246</sup> *Ibid.*, at 490-491.

<sup>247</sup> Tetly, note 191 at 11.

<sup>248</sup> 633 F.Supp. 74 1986 AMC 621; see also *The Ioannis Daskalelis* (1974) S.C.R. 1248, 1254; (1974) 1 Lloyd's Rep. 174, 177, where the Supreme Court of Canada held that a foreign maritime lien for necessities could be recognised by a Canadian court, even though no such lien existed in Canada.

<sup>249</sup> Thomas, note 42 at 329.

judgments that the *lex fori* fixes the ranking of rival maritime claimants.<sup>250</sup> As mentioned earlier, there is no uniformity among maritime nations as to the ranking of rival maritime claims; the relative ranking of a particular claim depends on the law of the forum where the claim is asserted. A typically example of this problem of non-uniformity in ranking of maritime claims is well illustrated by reference to the necessities claim. In the United States, necessities claims has the status of a maritime lien and therefore ranks ahead of, for example, a registered mortgage. In the United Kingdom and Canada, a necessities claim is treated as a mere statutory right *in rem* and ranks lower than a maritime lien as well as a registered mortgage.<sup>251</sup> This effect of this was shown in the decision of the Privy Council in *The Halcyon Isle*.<sup>252</sup> Here it was held that a maritime lien is a remedy and therefore subject to the law of the forum and thus English law. In consequence the lien holder was granted only a statutory right *in rem*. As such, it would rank after the mortgage in virtue of the English ranking which was also declared to be the law of the forum.<sup>253</sup>

#### **4.6 International Developments.**

If ship owners are always ready, willing and able to meet their obligation promptly as they fell due, there would probably be no need for securities such as maritime liens and mortgages. It is because ship owners due to certain reasons become insolvent that it is necessary to consider the priority which should exist between their creditors. If the assets of an insolvent ship owner are insufficient to pay all his creditors in full, it is necessary to consider whether the debts due to each creditor should be reduced proportionately or whether some creditors should be paid in full even if it means that others will receive nothing. These are the sort of considerations which have led to the creation of securities in ships such as maritime liens and mortgages. Ever since the emergence of the maritime mortgage in the

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<sup>250</sup> Tetly, note 197 at 15.

<sup>251</sup> Mukherjee, note 229 at 551.

<sup>252</sup> (1981) A.C. 221.

<sup>253</sup> Tetly, note 191 at 571.



19<sup>th</sup> century, friction has existed between maritime liens and ship mortgage.<sup>254</sup>

The priorities accorded to various types of claim considerably differ from jurisdiction to jurisdiction. The creditors who will be paid in full before other creditors get anything are the preferred creditors. Unfortunately, the answer to the question, who should be a preferred creditor is considerably different depending on where the question is asked. As a general rule, claims which are secured by a maritime lien take precedence over payments due to the holder of a mortgage, but whether a claim is secured by a maritime lien frequently depends on the jurisdiction within which recovery is sought. The world wide community has attempted to solve this priority problem (an issue that lies at the very heart of the shipping industry) by adopting international rules in the form of Conventions.<sup>255</sup> This attempt resulted in three international conventions. They are the *International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages, 1926* (hereafter “the 1926 Convention”), the *International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages, 1967* (hereafter “the 1967 Convention”) and the *International Convention on Maritime Liens and Mortgages, 1993* (hereafter “the 1993 Convention”). The 1923 Convention although a success, became obsolete. The 1967 Convention did not gain international acceptance and therefore failed to replace its predecessor.<sup>256</sup> The 1993 Convention on liens and Mortgages is the third attempt to, after the earlier conventions to unify this particular area of law.<sup>257</sup> The 1993 Convention is now in force.

#### **4. 6. 1 The 1926 Convention of Maritime Liens and Mortgages.**

One of the principal purposes of the 1926 Convention was to assure recognition in the courts of one country of ship mortgages validly executed

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<sup>254</sup> Alcantara, J.M., “A Short Primer on the International Convention on Maritime Liens and Mortgages, 1993”, JMLC, Vol. 27, No. 2, 1996 at p.219.

<sup>255</sup> *Ibid.*, at 220.

<sup>256</sup> *Ibid.*

<sup>257</sup> Berlingieri, F., “The 1993 Convention on Maritime Liens and Mortgages”, LMCLQ, 1995, 57-76 at p. 57.

according to the laws of another country. A second objective was to fix by international agreement the types of maritime claims entitled to recognition as liens and to preference over mortgages in the event of a shipowner's insolvency.<sup>258</sup> The 1926 Convention adopted mostly rules based on civil law systems and recognised an excessive number of maritime liens, for this reason it was ratified almost entirely by the civil law countries.<sup>259</sup>

#### **4.6.2 The 1993 Convention of Maritime Liens and Mortgages.**

The Convention like the 1926 and 1967 Conventions provides for the uniform recognition in the courts of any contracting state of ship mortgages and hypothecations created under the laws of another contracting party.<sup>260</sup> It provides for the recognition and enforcement of mortgages and hypothecations in state parties provided that they have been effected and registered in accordance with the law of the state in which the vessel is registered.

This provision has the effect of a uniform choice of law rule under which the validity of a mortgage on a vessel is to be determined by the law of the flag, rather than by the law of the place of contracting or the law of the forum.<sup>261</sup> Thus, in courts of contracting states, mortgages on vessels of contracting states will by virtue of the convention be governed by the law of the flag, mortgages on vessels of non-contracting states, e.g. a United States vessel will most likely, in courts of contracting states, be governed by the law of the flag under general conflicts of law principles rather than under the convention.<sup>262</sup>

The ranking of mortgages, hypothecs and charges among themselves and their effect on third parties shall be determined by the law of the state of registration. All matters relating to procedure of enforcement shall be regulated by the *lex fori*.<sup>263</sup> Substantially, the ranking of registered mortgages as between themselves and their effect on third parties will be

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<sup>258</sup> Kriz, note 216 at 676.

<sup>259</sup> Berlingieri, note 257 at 57.

<sup>260</sup> Art. 1 (a) 1993 convention.

<sup>261</sup> Kriz, note 216 at 676.

<sup>262</sup> *Ibid.*, at p. 677.

<sup>263</sup> Art. 2.

determined by the law of the state of registration (the law of the flag). Procedurally, however, enforcement of the same will be governed by the law of the forum.<sup>264</sup>

The Convention in Art. 4, sets out a number of claims secured by a maritime lien. These are the traditional maritime liens:

- (a) claims for wages of master, officers, and crew, cost of reparation and social insurance premiums;
- (b) claims for loss of life and personal injury;
- (c) Claims for reward for salvage of the vessel;
- (d) Claims for port, canal, and pilotage dues;
- (e) Claims for loss or damage caused by operation of the vessel.<sup>265</sup>

The maritime liens listed in Art. 4 ranks ahead of mortgages,<sup>266</sup> and as between themselves, the liens rank in the order in which they are listed, except for salvage liens which take priority over all prior liens.<sup>267</sup> The maritime liens set out in paragraph (a) (b) (d) and (e) shall rank *pari passu* as between themselves,<sup>268</sup> except that salvage liens rank *inter se* in inverse order of the time when the claims they secure arose.<sup>269</sup>

The second category of liens recognised by the convention is that existing under the domestic law of a contracting state but not recognised as a lien in the first category above.<sup>270</sup> They shall rank after maritime liens set out in Art. 4 and also registered mortgages, hypothecs and charges which comply with the provisions of Art. 1.<sup>271</sup> A lienor in the first category set out in Art. 4, enjoys two advantages over other creditors, first, a right to follow the vessel and assert the lien against it even into the hands of a bona fide purchaser.<sup>272</sup> Secondly, a right of preference over mortgages and other creditors.<sup>273</sup>

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<sup>264</sup> Tetly, note 67 at 911.

<sup>265</sup> Art. 4 (1) (a) – (e).

<sup>266</sup> Art. 5 (1).

<sup>267</sup> Art. 5 (2).

<sup>268</sup> Art. 5 (3).

<sup>269</sup> Art. 5 (4).

<sup>270</sup> Art. 6.

<sup>271</sup> At. 6 (c).

<sup>272</sup> Art. 8.

<sup>273</sup> Kriz, note 216 at 681.

The convention in Art. 5 (1) established that mortgages and hypothecs rank below maritime liens set out in Art. 4. As a result of this, a vessel subject to a ship mortgage would pick up higher ranking liens as it travelled from port to port, prejudicing the security of the mortgages. The difficult problem of priority arises when a vessel of a non-contracting state is arrested and sold in a contracting state, or a vessel of a contracting state is arrested in a non-contracting state, such as the United Kingdom or United States. Although the validity of a foreign mortgage is usually governed by the law of the flag, the relative priority of the mortgage and other competing claims (e.g. maritime liens) is usually subject to the law of the forum.<sup>274</sup>

In the event of a forced sale, all liens, mortgages and charges cease to attach to the vessel.<sup>275</sup> In respect of proceeds of sale, the first priority is granted by the convention to the costs and expenses arising out of the arrest or seizure and subsequent sale, including costs of upkeep, crew wages and sums and costs referred to in Art. 4 (1) (a) from the time of arrest (*custodia legis* expenses).<sup>276</sup>

Maritime liens under Art. 4 are extinguished after one year, unless the vessel has been arrested or seized, such arrest or seizure leading to a forced or judicial sale.<sup>277</sup> National maritime liens are extinguished after six months (unless within this period the ship is arrested or seized, leading to its judicial sale) or sixty days after the vessel's sale to a bona fide purchaser, whichever happens first.<sup>278</sup>

This provision of lapse of any lien by arrest within a specified and short period emphasises the prime method of enforcement of maritime liens. The relationship of arrest and lien from the provision of the conventions needs more clarification, because from the provisions of the 1967 and 1999 conventions as it stands, it appears that a claimant must arrest the ship to ensure enforcement of the lien – the acceptance of bail or guarantee *in lieu* would therefore mean that on the expiry of the period set out in the conventions for the extinguishment of the lien, the lien would lapse.

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<sup>274</sup> *Ibid.*, at p. 687.

<sup>275</sup> Art. 12 (1).

<sup>276</sup> Art. 12 (2).

<sup>277</sup> Art. 9 (1).

<sup>278</sup> Art. 6 (b).

Conversely, there are no provisions as to the extinguishment through consent, waiver or acceptance of other security.<sup>279</sup>

Having examined the circumstances under which the right of arrest is exercisable by the maritime claimant under the Laws of ship arrest in chapter three; and the issue of recognition and ranking of maritime claims governed by the laws of maritime liens and claims (which are the only actions that can give rise to the right of arrest), it is now expedient in the context of this work, to examine those provisions of the Conventions which impedes or inhibits the maritime claimant in this regard.

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<sup>279</sup> Jackson, note 5 at 510.

## **5. THE ARREST CONVENTIONS AND THE MARITIME CLAIMANT.**

Reconciling the conflicting interest of the maritime claimants and shipowners has always been a controversial issue in the domain of Admiralty law. As have been previously mentioned, in respect of the claimant, arrest of ships is the most valuable tool in enforcing his maritime claims and recovering debts against shipowners and operators. The 1952 and 1999 arrest conventions aims to strike a balance between these two opposing interest for the purpose of securing the free movement of ships and the right of claimants to obtain security for their claims.<sup>280</sup> To determine the extent to which the provisions of both Conventions have achieved the objective of ensuring a fair balance and enabled maritime claimants to obtain security from shipowners and have their claims settled in full requires an analysis of some relevant provisions of the Conventions. Although from the examination of the substantive provisions of the Conventions in chapter three, it is clear that some of the provisions have the potential of inhibiting or constituting impediments to the maritime claimant in his attempt to obtain security from shipowners and recover his debt, however, it is necessary to take a closer look at those provisions and their effects on the maritime claimant. In doing so, consideration of some relevant national laws will also be made.

### **5.1 Closed List of Maritime Claims.**

The 1952 and 1999 Conventions adopted a ‘closed’ list of maritime claims.<sup>281</sup> These provisions of contains a closed list of claims which allow a claimant who has suffered a loss, been injured, or is unpaid to arrest a ship. The effect being that any claim that is not specifically listed in the provision cannot give rise to the right to arrest a ship.

The working group established to draft the articles of the 1999 Convention was divided as to whether the list of “maritime claims” in article 1 should be

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<sup>280</sup> Speech by the Deputy Secretary-General of UNCTAD, Preparation and Adoption of a Convention on Arrest on Arrest of Ships, see Berlingieri, note 9 at 434.

<sup>281</sup> See Art. 1 (1) (a)-(q) of 1952 Convention; Art. 1 (a)-(v) of 1999 Convention.

closed and exhaustive as under the 1952 Convention, or “open-ended”, to take account of new types of maritime claims that may emerge with the passage of time.<sup>282</sup> The group in favour of a closed list (shipowners’ interest groups) argued that it would ensure consistency in interpretation in different jurisdictions and promote international uniformity.<sup>283</sup> The other group in favour of the open list (claimants’ public interest groups) made a strong argument for a non-exhaustive open list. Their position was based primarily on a concern for the future of maritime law and the need to create a document that would be dynamic. An open list will leave flexibility in the wording of the article so that the Convention could continually evolve to suit any future legal changes occurring in the maritime field. They pointed out that a closed list, no matter how carefully prepared, may never be or remain a complete list of claims.<sup>284</sup>

At the end, the diplomatic conference opted for a “closed list” of maritime claims as found in the Arrest Convention of 1952. Article 1 (1) like its counterpart in the 1952 convention begins with the words: “‘Maritime claim’ means a claim arising from one or more of the following”: then it follows with the long list of maritime claims that permit arrest of ships. The implication of this is that since the right to arrest a ship under the Conventions can only avail a claimant if his claim falls with the category specifically listed in the provision, a claimant who has suffered a loss, been injured, or is unpaid cannot therefore arrest a ship if his claim, though of a maritime nature, is not specifically listed as a “maritime claim” in article 1 of either the 1952 or 1999 Arrest Convention. As a consequence, the right of arrest have been denied to many maritime claimants by article 1, the reason being that even though their claims are of a maritime nature, they are not specifically listed in article 1. In this regard, Prof. Tetly noted as follows:

“In my view, it is regrettable that an ‘open-ended’ list was rejected, because it would have provided greater

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<sup>282</sup> Tetly, note 4 at 1965.

<sup>283</sup> Berlingieri, note 9 at 56.

<sup>284</sup> Berlingieri, note 9 at 51.

flexibility to courts applying the Arrest Convention in future years”,<sup>285</sup>

However, contrary to the closed list approach adopted by the international Conventions, under the Canadian Maritime law, the *Federal Court Act of 1985* seems to have adopted an open list approach. Section 22 (1) of the Federal Court Act extends the Admiralty jurisdiction to all claims “relating to any matter coming within the class of subject of navigation and shipping...” Section 22 (2) then sets out nineteen categories of claims for which the admiralty jurisdiction is to apply. Section 22 (2) begins with the words, “without limiting the generality of subsection (1)...” It would therefore appear that the list of maritime claims in section 22 (2) is not a “closed list” but rather an “open list”, the claims enumerated there being merely examples of categories of claims subject to the Trial Division’s original general jurisdiction under section 22 (1) over claims arising under the Canadian maritime law.<sup>286</sup> The Canadian court in *Balodis V. The Ship Prince George*,<sup>287</sup> held that:

“...as specifically stated in the opening words of s.22 (2), the enumeration of illustrative jurisdictional claims does not exclude, or inhibit, the general jurisdiction given by sub-section (1) and the definition in sub-section (2).”<sup>288</sup>

Also in South Africa, the current rules of arrest are found in the *Admiralty Jurisdiction Regulation Act, 1983* (hereafter “the AJRA”). The AJRA is based on the English tradition for arrest of ships. In 1992, the *Admiralty Jurisdiction Regulation (Amendment) Act No. 87 of 1992* was passed; a “catch all” section was introduced in section 1 (d), which invokes the admiralty jurisdiction for:

“Any other matter which by virtue of its nature or subject is a marine or maritime matter, the meaning of the expression ‘marine or maritime matter’ not

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<sup>285</sup> Tetly, note 4 at 1966.

<sup>286</sup> *Ibid.*, at 1919.

<sup>287</sup> (1985) 1 F.C. 890.

<sup>288</sup> *Ibid.*, at 896.



being limited by reason of the matters set forth in the preceding paragraphs”

The explanation for the introduction of this provision might be that the ‘closed list’ have proved to be a vehicle of injustice by shutting out claims which though of a maritime character was not listed in the earlier list of maritime claims. An example of this situation is clearly illustrated by the case of *Peros V. Rose*,<sup>289</sup> the case concerned the construction of a yacht. The contract explicitly exempted the company building the yacht from liability for late or non-performance. Instead, a third person (the sole member of the sole corporation) undertook full responsibility for any late or non-performance relating to the building of the yacht. The Admiralty Court considered the matter to be outside the jurisdiction conferred on it. This case shows that the closed list makes it possible to contract away from the matter being governed in admiralty, and thereby avoiding i.e. the right to arrest *in rem*. This avoided by including the “catch all” provision providing the court with discretion to decide whether the matter is of maritime nature or not.

Indeed even the closed list approach taken in the 1952 Convention has already been amended by the addition of five new claims. This need for the additional recognised claims in the 1999 Convention illustrates that a closed list approach is impracticable for such dynamic industry.<sup>290</sup>

## **5. 2 Exercise of the Right of Arrest.**

The most significant barrier to the satisfaction of the maritime claimants’ claim is the provisions laid down in article 3 of both Conventions.<sup>291</sup> These will be examined in turn.

Article 3 (1) (a) and (b) of the 1999 Convention, appears to cover arrest for claims secured by statutory rights *in rem* as understood in the maritime law of England and other British Commonwealth countries.<sup>292</sup> These provisions permit arrest of any ship of which a maritime is asserted if:

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<sup>289</sup> (1990) 1 S.A. 420.

<sup>290</sup> Lynn, note 11 at 465.

<sup>291</sup> Islam, note 18 at 78.

<sup>292</sup> Tetly, note 4 at 1968.

- (a) the person who owned the ship at the time when the maritime claim arose is liable for the claim and is the owner of the ship when the arrest is effected; or
- (b) the demise charterer of the ship at the when the maritime claim arose is liable for the claim and is demise charterer or owner of the ship when the arrest is effected;<sup>293</sup>

From the claimant's point of view this provision constitutes an impediment or hindrance to his efforts to obtain security for his claims because under article 3 (1) of the 1952 Convention, the claimant is permitted to arrest the particular ship in respect of which the maritime claim arose and this additional burden of establishing the personal liability of and ownership link introduced by the 1999 Convention is not required.<sup>294</sup> This personal liability requirement also has impact on the sister-ship arrest.<sup>295</sup> This provision introduced the concept of personal liability of the shipowner as a requirement for the arrest of a ship, leaving only a very limited category of claims where an arrest is permissible even if the shipowner is not personally liable. The only circumstances in which ship arrest is permitted irrespective of the liability of the shipowner are contained in article 3(1) (b) – (e) of the 1999 Convention. These include claims against a demise charterer (who for all intents and purposes is the owner via contract), claims based on mortgages of the ship; and claims secured by maritime liens.<sup>296</sup>

The 1999 Arrest Convention permits arrest of any ship in respect of which a maritime claim is asserted if:

“The claim is against the owner, demise charterer, manager or operator of the ship and is secured by a maritime lien that is granted or arises under the law of the state where the arrest is applied for.”(emphasis mine)

This could presumably include maritime liens claims contemplated by article 4 of the Liens and Mortgages Convention, 1993 (if the state where

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<sup>293</sup> Art. 3 (1) (a)-(b) 1999 Convention.

<sup>294</sup> Islam, note 18 at 78.

<sup>295</sup> See Art. 3 (2) (a)-(b) 1999 Convention.

<sup>296</sup> Lynn, note 11 at 478.

the arrest is applied for is a party to the Convention) as well as any other maritime liens granted by or arising under that country's national law.<sup>297</sup>

The Draft Articles, 1997 (of the 1999 Arrest Convention) had a bracketed provision, article 3 (1) (b), which would have permitted arrest for maritime liens, other than those under article 4 of the Liens and Mortgages Convention 1993, which are recognised under the law of the state where the arrest was requested. By using the word "recognised", the bracketed provision would have permitted the arrest of a ship for foreign maritime liens recognised by a state according to its conflict of laws rules, even where equivalent maritime liens did not exist under its own national law.<sup>298</sup>

The replacement of the word "recognised" by the words "granted or arises" in article 3 (1) (e) of the 1999 Arrest Convention in effect means that the arrest of ships is permitted only for foreign maritime lien claims that correspond to maritime liens existing under the law of the arresting state (the United Kingdom position) and not (as in the United States and Canada) for maritime liens existing under the properly applicable foreign law even if the equivalent claim is not secured by a maritime lien in the arresting state.<sup>299</sup> A provision such as this constitutes a serious impediment to the maritime claimant because it will severely limit his ability to effect an arrest in many jurisdictions if a state were to adopt both the 1993 Liens and Mortgage Convention and the 1999 Arrest Convention. As a result a claimant will be barred from any legitimate right to recover his claims, and may find himself at risk under the terms of article 6 of the 1999 Convention which awards a ship owner "unjustified arrest" damages as well.<sup>300</sup> The International Ship Suppliers Association expressed this exact dissatisfaction with article 3 when it stated:

"This provision will be particularly unfair to the small claimant who, even though he may not be entitled to a maritime lien under the terms of the 1993 Liens and Mortgages Convention, arrests a vessel

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<sup>297</sup> Tetly, note 4 at 1967.

<sup>298</sup> *Ibid.*, at 1968.

<sup>299</sup> *Ibid.*

<sup>300</sup> Lynn, note 11 at 477.

only to find out that the name of the owner's company has been changed (which is common practice with owners who are trying to avoid payment).”<sup>301</sup>

### **5.3 Limitation of Sister-Ship Arrest.**

Under the 1952 and 1999 Arrest Conventions, for a lawful arrest to be effected on a vessel, it has to be within the jurisdictional competence of the arresting state and ships being transient objects, a ship may commit an offence in country A and before the process of arrest is perfected, the ship might be in country B. In such situation, the arresting state which is country A cannot effect arrest because the ship has left its jurisdiction. This is where the sister-ship arrest comes in. The 1952 Convention provides that:

“...a claimant may arrest either the particular ship in respect of which the maritime claim arose, or any other ship which is owned by the person who was, at the time when the maritime claim arose, the owner of the particular ship”<sup>302</sup>

The 1999 Arrest convention also has similar provision, it provides that arrest is permissible of any other ship or ships which, when the arrest is effected, is or are owned by the person who is liable for the maritime claim and who was, when the maritime claim arose, the owner, demise, time or voyage charterer.<sup>303</sup>

This is the so-called sister-ship arrest provision. Sister-ship arrest relates to a situation where legal action is taken against any vessel in a fleet of vessels belonging to the same owner as the vessel that actually caused the loss or damage. This is so because the responsible vessel is out of reach of legal action and the claimant may take action against the sister-ship.

“Ships shall be deemed to be in the same ownership when all the shares therein are owned by the same person”<sup>304</sup> The sister-ship arrest rule

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<sup>301</sup> *Ibid.*

<sup>302</sup> Art. 3 (1) 1952 Convention.

<sup>303</sup> Art. 3 (2) (a)-(b) 1999 Convention.

<sup>304</sup> Art. 3 (2) 1952 Convention.

provision dealt a lethal blow to the satisfaction of maritime claims as it restricts the sister-ship arrest only to ships in the same legal ownership as the offending ship rather than extending the right of arrest to all sister-ships legally or beneficially owned at the time of the arrest by the owner of the offending ship who is personally liable on the maritime claim concerned.<sup>305</sup>

As a result of the fact that sister-ship arrest forestalls ship owners or offending ships from escaping from the long arms of the law, ship owners devised a new tactics to circumvent the sister-ship concept. Soon after the coming into force of the 1952 Arrest Convention, the sister-ship rule was counter-effected by an international trick consisting of the formation of owning companies in respect of each and every single vessel within the same fleet, later called “single-ship companies.” This was the response of the ship owning community to this particular provision relating to the arrest of sister-ships.<sup>306</sup> The rush to one ship companies was fuelled firstly, by fact that the extension of the right to arrest in the common law jurisdictions by the sister-ship rule made ship owners more aware of the economic risk they exposed themselves to by operating under one ownership and secondly, by the realisation of the potentially vast oil pollution liabilities which the loss of the *MT Torrey Canyon* on 18 March 1967 off Southern England generated.<sup>307</sup>

Today, many fleets of ships operate within large ship owning groups, owned and controlled by the same parent corporation or holding company, but with each vessel in the fleet or group legally owned by (in other words, registered in the name of) a separate single ship company. None of these companies is the registered owner of any of the other vessels in the fleet, but all of them have the same “beneficial” owner being the parent corporation or the holding company.<sup>308</sup> This strategy makes it impossible for a claimant to arrest any of these ships under the sister-ship arrest provision because they are owned by different corporate entity. The fact that the sister-ship arrest provision of the Conventions permit arrest only of

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<sup>305</sup> Islam, note 18 at 79.

<sup>306</sup> Alcantara, note 161 at 554.

<sup>307</sup> Hare, note 2 at 37.

<sup>308</sup> Tetly, note 4 at 1971.

ships in the same legal ownership and not ships in the same beneficial ownership, fails to take account of the reality of ship owning in today's maritime commerce and is a substantial impediment to the realisation of the claimant's claim.<sup>309</sup>

As a result of this innovation by ship owners, the claimant is now restricted to proceeding only against the particular ship based on the fact the other ship belongs to a different corporate entity and therefore does not fall within the meaning of sister-ship under the conventions. This strategy effectively defeats the sister-ship provision of both the 1952 and 1999 Arrest Conventions.

Under the prevalent state of affairs, a maritime claimant may face the predicament of initiating proceedings against a foreign ship owner who in many instances (due to corporate restructuring following the recognition of the sister-ship provision) is little more than a "brass plate" office courtesy of Panamanian or Liberian lawyers.<sup>310</sup> Alternatively described as 'a two dollar Company' with elusive principals and no asset other than the ship itself.<sup>311</sup>

In order to remedy this mischief brought about by the sister-ship provision of the 1952 Arrest Convention, South Africa came forth with the associated ship arrest. The *Admiralty Jurisdiction Regulation Act No. 105 of 1983* (hereafter "the AJRA) in section 3 provided for the associated ship arrest. The AJRA was designed to combat the proliferation of single ship companies.<sup>312</sup> The reason for the enactment of this provision could be seen from the remarks of the draftsmen of the AJRA as follows:

"The international Convention with regard to arrest of sea-going ships, to which reference has been made above, makes provision for the arrest to found an action *in rem* of a sister ship, that is to say, a ship in the same ownership as the guilty ship. The provisions of this bill are an extension of this notion based on the fact that since the conclusion of the

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<sup>309</sup> *Ibid.*, at 1969-1970.

<sup>310</sup> Glover, note 22 at 107.

<sup>311</sup> Hare, note 2 at 77.

<sup>312</sup> Staniland, at 410.

Convention, its provisions have been defeated by the proliferation of “one ship companies”, that is to say, companies owning only one ship and therefore avoiding the Convention. This extension is, it is thought, a logical extension of the Convention, but the broad notions upon which the Convention is founded have been preserved.<sup>313</sup>

Section 3 (6) of the AJRA provides as follows:

“...an action *in rem* in respect of a maritime claim may be brought by the arrest of an associated ship instead of the ship in respect of which the maritime claim arose”.

Section 3 (7) (a) provides that for the purposes of subsection (6) an associated ship means a ship, other than a ship in respect of which the maritime claim arose :

- (i) owned, at the time when the action is commenced, by the person who was the owner of the ship concerned at the time when the maritime claim arose; or
- (ii) owned, at the time when the action is commenced, by a person who controlled the company who owned the ship concerned when the maritime claim arose; or
- (iii) 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.

A person shall be deemed to control a company if he has power, directly or indirectly, to control the company.<sup>314</sup>

Section 3 (7) (b) (i) has the effect of preserving the true ‘sister ship’ arrest in that the associated ship must now be owned by the same person who then owned the guilty ship when the cause of action arose.<sup>315</sup>

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<sup>313</sup> South African Law Reform Commission, Report on the Review of the Law of Admiralty, Project No. 32 (1982) page 14, cited by Glover, note 22 at 110.

<sup>314</sup> Section 3 (7) (b) (ii) AJRA.

<sup>315</sup> See Glover, note 22 at 111.

Section 3 (7) (a) (ii) introduces the ‘novel’ sections of the South African Admiralty law which differentiates its “associated ship” arrest provision from the arrest practice of all other maritime nations. Pursuant to s. 3 (7) (a) (ii), the associated ship must, at the time of the arrest be owned by a person who controlled the company who owned the guilty ship when the maritime claim arose. Person in s. 3 (7) (a) (ii) means a natural person.<sup>316</sup>

Section 3 (7) (a) (iii) extends s. 3 (7) (a) (ii) by addressing the situation where both ships are company owned. In other words, the associated ship must at the time of the arrest be owned by a company which is now controlled by a person who then owned the guilty ship, or controlled by the company which owned the guilty ship at the time the maritime claim arose.<sup>317</sup>

It is these provisions that establish an association through common control that have no parallel in any other maritime jurisdiction and which distinguish South African ‘associated ship’ arrest provision from ‘sister-ship’ arrest provisions else where and contribute most to South Africa’s reputation as an arrest friendly jurisdiction.<sup>318</sup>

The criterion of ‘common control’ represents an expansion of the sister-ship arrest and is the basis of the associated ship arrest. The definition of ‘control’ in section 3 (7) (b) (ii) has been considered by the Supreme Court of Appeal of South Africa in *Belfry Marine Limited V. Palm Base Maritime SDN BHD*,<sup>319</sup> Smalberger J.A. stated in respect of the subsection:

“Control is expressed in terms of power...The subsection clearly distinguishes between “direct” and “indirect” power. That distinction must be given a meaning. Indirect power can only refer to the person who *de facto* wields power through and hence over, someone else. The latter can only be someone who

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<sup>316</sup> *Ibid.*

<sup>317</sup> *Ibid.*

<sup>318</sup> Bradfield, G., “Guilt By Association in South African Admiralty Law”, (2005) LMCLQ 234 at 236.

<sup>319</sup> (1999) 3 SA 1083 (SCA).



wields direct power *vis-à-vis* the company and the outside world and who therefore, in the eyes of the law (i.e. *de jure*) controls the shareholding and thus determines the fate of the company...In my view, therefore, direct power refers to *de jure* authority over the company by the person who, according to the register of the company is entitled to control its destiny; and indirect power to the *de facto* position of the person who commands or exerts authority over the person who is recognised to possess *de jure* power (i.e. the beneficial “owner”, as opposed to the legal “owner”). This extension of *de jure* power to *de facto* power is in line with the objective of the section: to prevent the true “owner”, by presenting a false picture to the outside world, from concealing his assets from attachment and execution by his creditors:”<sup>320</sup>

The rule does not leave any discretion to the courts. As long as the criterion of common control is fulfilled, the court is obliged to authorise an associated ship arrest even though the companies owning the ships are set up for perfectly legitimate reasons. The associated ship provisions are not content merely to lift the corporate veil in special circumstances; instead, they shred the veil in all cases.<sup>321</sup> This is in contrast to, for example, English and other common law jurisdictions, where the courts are content to lift the corporate veil only if a company is formed as a device, stratagem or sham in order to mask the effective carrying on of business. In *The Maritime Trader*,<sup>322</sup> Sheen J. noted as follows:

“...I would not hesitate to lift the veil (corporate veil) if the evidence suggested that it obscured from view a

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<sup>320</sup> *Ibid.*, at 1086.

<sup>321</sup> Staniland, H., “The Arrest of Associated Ships in South Africa: Lifting the Corporate Veil Too High?” 9 *U.S.F. Mar. L. J.* 405 (1996-1997) at 423.

<sup>322</sup> (1981) 2 *Lloyd’s Rep.* 153.

mask of fraud rather than the true face of the corporation”.<sup>323</sup>

Under the South African associated ship arrest provision of the AJRA, once the criterion of common control is established, this requirement under English law is presumed.

#### **5.4 Liability for Wrongful or Unjustified Arrest.**

The 1999 arrest convention in article 6 establishes the right of the court of the local jurisdiction to order a claimant seeking to arrest a ship to provide counter security to the court. The fund so created would be paid to a ship owner in the case of an arrest being “wrongful or unjustified”.<sup>324</sup> A similar provision is already codified in the national laws of some civil countries. For example, under German Law, a claimant is liable for damages if the arrest is without justification. The liability exists regardless of fault on the part of the claimant. It is sufficient if the warrant of arrest is unjustified from the start of the proceedings or if it would have been set aside. The damages can include loss of profits by the arrest and detention of the vessel.<sup>325</sup> Like the Germany’s standard, article 6 of the 1999 arrest Convention has raised the stakes for claimants contemplating a ship arrest by the use of the ‘unjustified arrest’ wording. In reality, the unjustified arrest language seems more of a counter-threat against a claimant or a punitive damage award for the ship owner against the claimant for losing the case on the merits.

By this provision, the claimants have been placed in a very precarious position where before proceeding with their *in rem* action, they are bound to pre-judge the merits of their own claims. This position seems to be unjustifiably onerous to a claimant who honestly pursues a claim but later discovers that his claim does not fall within the strict letters of the law. In such situations, he will be found liable in damages for unjustified arrest. In this respect, it may be true to say that the right of

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<sup>323</sup> *Ibid.*, at 157.

<sup>324</sup> Art. 6 (1) (a) 1999 Arrest Convention.

<sup>325</sup> Lynn, note 11 at 471.

arrest, which hitherto, is a weapon for the maritime claimant, has been converted into a double-edged sword by the 1999 Arrest Convention, which now has the potential capability of injuring the person wielding it.

### **5.5 Forum Shopping and the 1999 Arrest Convention.**

“Forum shopping” is a phrase much used in everyday language in the maritime world and it is inextricably linked with the principles of action *in rem* and the availability of maritime liens. The word “forum” in Latin means “market place”, every port is potentially a legal forum in admiralty. The system, so inconvenient though it may be to some, has overall lent itself to the preservation of justice.<sup>326</sup> Almost the same opinion was expressed by Lord Simon in *The Atlantic Star*,<sup>327</sup> in the following words:

“‘Forum shopping’ is, indeed, inescapably involved with the concept of maritime lien and the action *in rem*. Every port is automatically an admiralty emporium. This may be very inconvenient to some defendants; but the system has unquestionably proved itself on the whole as an instrument of justice”<sup>328</sup>

Because of the international nature of ocean shipping, “forum shopping” is an activity practiced by maritime claimants all over the world. The rationale behind forum shopping is not farfetched. Claimants will frequently attempt to have their action tried in a jurisdiction where they believe they will receive the most favourable judgment or verdict.<sup>329</sup> In the case of maritime claims, the judgment sought is that the claim, (i) is valid on the merits of the case, and (ii) that it ranks above and has priority over other rival claims that may be joined to the action from other parties. Although the rationale for forum shopping may be simple, the matrix that develops in deciding where the best forum lies is

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<sup>326</sup> Hill, note 60 at 89.

<sup>327</sup> (1973) 2 ALL ER 175 (H.L.)

<sup>328</sup> *Ibid.*, at 197

<sup>329</sup> See *The Atlantic Star* (1972) 2 Lloyd’s Rep. 446, 451 (Q.B.) C.A. ; see also Black’s Law Dictionary 655 (6<sup>th</sup> Ed. 1990)

extremely complex. Factors such as the law of the flag, the law of the forum, the nature of the claim etc are very relevant.<sup>330</sup>

In a typical forum-shopping scenario, the maritime claimant will literally chase the debtor's ship around the world until the ship calls at a port in a jurisdiction in which the claimant is confident of recovery. This process can take a significant amount of time since the ship can be at sea for a long period of time. Usually, when the finally arrives at the choice forum, the claimant will pounce on the vessel with little or no warning to the ship owner in what has been described as a "cat-and-mouse" game.<sup>331</sup> In *The Atlantic Star*,<sup>332</sup> the plaintiff commenced an action against the ship owners of the M/V Atlantic Star in the Antwerp Commercial Court, but for choice of law reasons, subsequently commenced an action in the English Admiralty Court. The owners of Atlantic Star moved for a stay of the English action because of the plaintiff's action in Belgium. In dismissing the owner's application for stay, Lord Denning M.R. in the Court of Appeal, made the following remarks about forum shopping:

"Inconvenience falling short of injustice, is not sufficient to stay the action...If a plaintiff considers that the procedure of our courts, or the substantive law of England, may hold advantages for him superior to that of any other country, he is entitled to bring his action here – provided always that he can serve the defendant, or arrest his ship within the jurisdiction of these courts – and provided also that his action is not vexatious or oppressive. This right to come here is not confined to English men. It extends to any friendly foreigner. He can seek the aid of our courts if he desires to do so. You may call this "forum shopping" if you please, but if the forum is

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<sup>330</sup> Gilmore & Black, note 219 at 589.

<sup>331</sup> Lynn, note 11 at 478.

<sup>332</sup> *Ibid.*, at 310.

England, it is a place to shop in, both for the quality of the goods and the speed of service.”<sup>333</sup>

Also in a dissenting judgment at the House of Lords, Lord Simon in *The Atlantic Star*,<sup>334</sup> while justifying the practice of forum shopping, made the following observations:

“Ships are elusive. The power to arrest in any port and found thereon an action *in rem* is increasingly required with the custom of ships being owned singly and sailing under flags of convenience. A large tanker may by negligent navigation cause extensive damage to beaches or to other shipping: she will take very good care to keep out of the ports of the ‘convenient’ forum ... if the aggrieved party manages to arrest her else where, it will be said forcibly (as the appellants say here): that the defendant has no sort of connection with the forum except that she was arrested within its jurisdiction. That, however, will frequently be the only way to secure justice.”<sup>335</sup>

In order to succeed in forum shopping, the claimant must know which jurisdiction offers the best potential for arrest, both procedurally and substantially. Ignoring either aspect will lead to failure since simply effecting an arrest of a ship does not guarantee recovery of the debt. While a claimant may be able procedurally to arrest a ship, if the ship owner is willing to post bond and fight the underlying claim on the merits of the case, a claimant may well find out that his facts about the substantive law of the jurisdiction was wrong. In this circumstance, the claimant will not only lose the claim, but also any possibility of enforcing his claims in the proper forum else where.<sup>336</sup>

Under the 1952 and 1999 Arrest Conventions, the closed and exhaustive list of maritime claims clearly limits and specifies the claims in respect

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<sup>333</sup> *Ibid* at 451.

<sup>334</sup> *Ibid.*, note 327

<sup>335</sup> *Ibid* at 197.

<sup>336</sup> Tetly, note 67at 1111-1113.

of which the right of arrest may be available to the claimants. A claimant may not be able to effect an arrest in the first place if his particular claim is not specifically listed in the closed list of the arrest Conventions. In this instance the claimant's right of arrest and trial on the merits will be barred.

The claimant will also be barred because his claim may not be executed under the 1999 Arrest Convention if the ownership of the vessel has changed before he can effect the arrest.<sup>337</sup> This allows the ship owners to play the "change of company name game" to escape liability. Likewise, if the claim is against a party other than the actual ship owner, such as a charterer, the claimant is automatically barred from effecting an arrest under the 1999 Arrest Convention general rule, unless the claim itself qualifies under the limited lien status of the of the Convention and 1993 Liens and Mortgages Convention.<sup>338</sup>

The implication of these is that once the 1999 Convention is in force, the claimant (forum shopper) will be left to target those states which are not parties to the Convention. Furthermore, the claimant must seek those non-Convention states that have a wide acceptance of enforceable claims. For example the sates that follow the *in rem* regime of the United States or South Africa would be favourable jurisdictions to effect an arrest when the claim is outside the closed list of claims of the 1952 or 1999 Arrest Conventions. Thus in view of the provisions of article 3 of the 1999 Convention, the claimant will simply avoid effecting an arrest when the targeted ship is calling at a port where the 1999 Convention is in force.

However, an unscrupulous ship owner bent on evading arrest may tactfully prevent his ships from calling at such ports where the conventions is in force or other arrest friendly jurisdictions. This situation have given rise to the situation where claimants have naturally begun to seek out the most beneficial forum for arrest, while ship owners continue to create sophisticated corporate structures to escape

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<sup>337</sup> See Art. 3 (1) (a)-(b) 1999 Convention.

<sup>338</sup> See Art. 3 (1) (e) 1999 Convention; see also Lynn, note 11 at 483.

liability through structuring of the vessel's ownership so that the ship is immune from the most "creditor-friendly" jurisdiction.<sup>339</sup> In this 'hide-and-seek' game, the maritime claimant appears to be worse off, this is because he is usually the party that has either suffered a loss, been injured or is unpaid. The provisions of the Arrest Conventions has made forum shopping in respect of the plaintiff a very difficult exercise. From the issue raised and considered in this chapter, it will not be an overstatement to say that these provisions of the Conventions which include, the closed list of maritime claims and the limitation of the sister-ship arrest rule of both Conventions, the concept of personal liability of the ship owner, the non-recognition of arrest of ships for foreign maritime liens differing from those existing under the *lex fori* and on top of it, the liability for damages for 'unjustified' arrest in the 1999 Convention are rules and provisions that constitutes serious impediments or hindrances to the maritime claimant.

One example of the unfortunate situation in which the maritime claimant may be exposed to by virtue of the provisions of the Conventions on ship arrest is vividly illustrated in the following scenario: A large tanker laden with crude oil or chemical through negligent navigation causes considerable damage to the coast in Lagos, Nigeria. In the incident, there was an explosion and oil spill which destroyed the entire marine life in the area and in the process, the vessel it self was completely destroyed. Fishing is the main source of livelihood of the local coastal community. The tanker is one in a fleet of ships owned by a parent corporation, in which each vessel in the fleet is legally owned by a single ship company. In a representative action, the local community ignorantly arrested another ship belonging to the same parent company in a sister-ship arrest. At the Federal High Court in Lagos, the ship was released because it is legally owned by another company, and therefore is not a sister-ship to the destroyed tanker with the meaning of the 1952 arrest Convention to which Nigeria is a party. It was also discovered that the only asset of the ship-owning company is

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<sup>339</sup> Lynn, note 11 at 461.

the destroyed ship. In an action for unjustified arrest, the plaintiffs were found liable for damages under section 13 (1) of the Admiralty Jurisdiction Act, 1991 which have similar provision to article 6 of the 1999 arrest Convention on damages for wrongful or unjustified arrest.

This depicts the level of deprivation or injustice that may be visited on a claimant by the provisions of the Arrest Conventions. In other words, it may be true to say here that the provisions of the Conventions has become, in respect of the claimant, a vehicle of injustice or has turned the right of arrest into a double-edged sword.

After reviewing the debates on the provisions of the draft articles of the 1999 Convention and its adoption at the Geneva Conference, a commentator was quick to assert that “the maritime claimants suffered more disappointments than ship owners at the conclusion of the conference”,<sup>340</sup>

How then will the maritime claimant, in view of these unfortunate provisions of the arrest Conventions, be protected?

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<sup>340</sup> Lynn, note 11 at 474.



## 6. CONCLUSION.

In his book, “*Admiralty and Maritime Law*”, T. J. Schoenbaum, painted, in respect of the maritime claimant, a somewhat omnipotent picture of arrest *in rem*, he wrote as follows:

“Maritime arrest is a powerful procedural tool in the hands of the plaintiff. The action *in rem* allows the arrest of the vessel even though the ship owner’s only contact with the jurisdiction is the presence of the vessel. The vessel may be seized, in most cases, without notice to the ship owner or third parties. The plaintiff has a considerable tactical advantage because the ship owner must post bond to release the vessel, or alternatively, obtain the plaintiff’s consent or stipulation for release. The plaintiff does not have to post bond to cover the cost of a wrongful or erroneous seizure...The ship owner may recover his expense only in a separate action for wrongful arrest, in which the standard for liability is bad faith.”<sup>341</sup>

Also in his book, “*Enforcement of Maritime Claims*”, Professor D.C. Jackson wrote that:

“Arrest is a powerful weapon. Its availability is consequent on the property being arrestable and the claim being enforceable by an action *in rem*”<sup>342</sup>

Having said this, the question now is whether, in the light of the provisions of the 1952 and 1999 Conventions which provides and regulates the international practice of ship arrest, arrest of ships can still be regarded, in respect of the claimant, as a ‘powerful procedural tool’ or a ‘powerful weapon’. In view of the analysis of the relevant provisions in the preceding chapter, the answer seems to be in the negative. Instead, the provisions of the Arrest Conventions have mounted road-blocks and created barriers for

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<sup>341</sup> Schoenbaum, note 62 at 402.

<sup>342</sup> Jackson, note 5 at 393.

the maritime claimant in the quest to obtain security for his claims and to the eventual recovery of the claim.

Given this unfortunate situation in which the maritime claimant is potentially exposed to, courtesy of the provisions of the 1952 and 1999 arrest Conventions, some of these provisions will be briefly highlighted in an attempt to proffer some useful solutions to these predicament of the claimant.

The closed list of maritime claims provided by both Conventions in effect implies that any claim not specifically listed in the provisions, whether of a maritime nature or not, will not be recognised as giving rise to the right to arrest a ship. In a dynamic industry such as shipping, a closed list of maritime claims will be counter productive; this is because so many claims of a maritime nature might arise which may not be specifically listed in the provisions. In such circumstances, the claimant cannot effect an arrest because his claim will not fall within the definition of maritime claim of the Conventions.

As a result of technological advances, the shipping industry has seen significant changes over the years. It is not so much the business of shipping that has changed, but the methods by which that business is conducted. Larger, faster and more specialised ships, computer and satellite communications and fierce competition for market share have revolutionised the industry. These changes require that the laws governing shipping evolve to keep pace.<sup>343</sup> It is submitted that an open list of maritime claims will make the wording of the provisions flexible so that it can adapt to any future changes that may occur in the maritime industry. In effect any claim of a maritime nature can easily be interpreted as falling with the meaning of maritime claims in either of the Conventions.

This could be achieved by inserting into the definition of maritime claims in article 1 of the Conventions, immediately before the list of claims, the words, “including but not restricted to”. The consequence of this words would be that any claim falling within the general definition will be deemed

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<sup>343</sup> Paul Gardiner, *The Linear Market 1997/98, New Alliances and the New Era* 3-4, Lloyd's Shipping Economist Management Reports, LLP Limited, 1997 at 3.

to be a maritime claim, whether included in the list or not. Alternatively, the words “such as” can be inserted immediately before the list of maritime claims. This will introduce the element of *ejusdem generis* (of the same kind), the effect will be that in any case of doubt as to whether a particular claim falls within the definition, the claims specifically listed will serve as a guidance. Such an approach was taken in respect of the claim for ‘environmental damage’ in article 1 (1) (d) of the 1999 Convention. The words “damage, costs, or loss of a similar nature” were used, the argument was that ‘damage to the environment’ was very difficult to define and there was likely to be a great degree of evolution.<sup>344</sup>

In an industry such as shipping, where commercial and technical developments might give rise to new claims of a maritime nature, an open and non-exhaustive list of maritime claims approach should be adopted. This is the only way the interest of the maritime claimant will be protected in this respect.

The introduction of the concept of personal liability of the ship owner by article 3 of the 1999 Arrest Convention and also the provision in article 3 (1) (e) of the same Convention that arrest is permissible in respect of claims secured by a maritime lien that is “granted or arises” under the law of the state where the arrest is made will severely limit the abilities of the claimant to effect an arrest.<sup>345</sup> It is suggested that the words “granted or arises” be replaced by the word “recognised”. By using the word “recognised”, the provision would have permitted the arrest of a ship for foreign maritime liens recognised by a state according to its conflict of laws rules, even though equivalent maritime liens did not exist under its own national law.<sup>346</sup> The limitation of the sister-ship arrest provisions of both the 1952<sup>347</sup> and 1999<sup>348</sup> Arrest Conventions to vessels in the same legal ownership may well prove to have a “fatal flaw”, however, in that it restricts sister-ship arrest to ships in the same legal ownership as the offending ship, rather than extending the right of arrest to all sister ships legally or beneficially owned

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<sup>344</sup> Gaskel & Shaw, note 13 at 3.

<sup>345</sup> Lynn, note 11 at 474.

<sup>346</sup> Tetly, note 4 at 1968.

<sup>347</sup> Art. 3 (1).

<sup>348</sup> Art. 3 (2)

at the time of the arrest by the owner of the offending ship who is personally liable on the maritime claim concerned.<sup>349</sup> The ship owners capitalised on this flaw created by the provisions to subvert and defeat the sister-ship rule through the instrumentality of single ship companies. A ship owner who has two or more ships could by arranging for his ships to be separately owned by individual companies, ensure that one ship would not be arrested in respect of a claim against another ship. Because of the separate legal personalities of such companies, the claimant could only proceed against the guilty ship. These types of ships are notoriously elusive and even when one is arrested, it is not unusual for the amount of the claim to exceed the value of the ship.<sup>350</sup> This sharp practice invented by ship owners to circumvent the sister-ship arrest rule and its effect on the maritime claimant was clearly illustrated in the United Kingdom's proposal to the amendment of the 1952 Arrest Convention as follows:

“Since 1952, the stratagem of the single ship companies has proliferated. As a result, few ships have “sisters” within the meaning of the 1952 Arrest Convention. The only option available to many claimants, therefore, is to arrest the particular ship. The balance that the 1952 Convention sought to strike has tilted in favour of the ship owner.”<sup>351</sup>

In a bid to counter this unholy practice, the South African legislature through the *Admiralty Jurisdiction Regulation Act No. 105 of 1985* introduced the associated ship arrest, the relevant provisions of which have been examined in the last chapter. The Act was designed to combat the proliferation of single ship companies and its adverse effect on the maritime claimants.<sup>352</sup> Furthermore, when the Act was being debated, the South African parliament expressed hope that the associated ship arrest would help to prevent elusive ships from escaping claims made upon them and

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<sup>349</sup> Tetly, note 4 at 1969-1970.

<sup>350</sup> Staniland, note 321 at 406.

<sup>351</sup> See Berlingieri, note 9 at 567.

<sup>352</sup> Staniland, note 321 at 410.

would be useful where a ship liable for oil pollution had been destroyed.<sup>353</sup> The Act uses the concept of ‘control’ as the criterion for establishing association.

The United Kingdom’s proposal to the redrafting of the 1952 Arrest Convention, (article 3 (2) of the United Kingdom draft) was largely modelled on the South African associated ship provisions. Like the South African AJRA, the United Kingdom draft article utilised the notion of ‘control’ to establish an association rather than ‘legal ownership’.<sup>354</sup> This involved the lifting or piercing of corporate veil to see who controls the company.

The United Kingdom’s proposal was rejected on the grounds, among others, that the question whether and in what circumstances, the corporate veil can be pierced, is a question that involves the general principles of corporate law and cannot be regulated in a particular maritime convention regulating a very specialised area.<sup>355</sup>

Granted that the question of the circumstances in which the corporate veil may be pierced is a matter in the domain of corporate law, however, maritime law is an area of the law that has always enjoyed a relevant degree of autonomy from the general law. This would not have been, and would not be in the future, the first time in which shipping law has been the forerunner of new legislative concepts, suffice it to mention general average and limitation of liability.<sup>356</sup> According to Professor Tetly:

“Maritime law is not a branch of law, like Company law or Matrimonial law or Tax law, but a slice of all branches of law. Maritime law in other words, cuts through the whole sphere of law.”<sup>357</sup>

If it is in the interest of maritime trade to adopt specialised rules, this should be done. But perhaps it is not entirely correct to state that this problem is a

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<sup>353</sup> *Ibid.*, at 411.

<sup>354</sup> Gaskel & Shaw, note 131 at 480.

<sup>355</sup> Berlingieri, note 155 at 335.

<sup>356</sup> Berlingieri, note 9 at 181.

<sup>357</sup> Tetly, note 191 at xvi.

problem that involves general principles of corporate law. The problem of single ship companies is a purely maritime problem.<sup>358</sup>

Another ground for rejecting the United Kingdom associated ship arrest proposal was that the growth of single ship companies is well justified and not at all due to the intention to circumvent the sister-ship arrest. It is submitted that even though there are cases in which single ship companies are created for justifiable reasons, it is a fact that quite often they are created in order to build up an additional and illegitimate shield to the owner's responsibility.<sup>359</sup>

In order to make arrest of ships effective as a means by which the maritime claimant can obtain security and recover his claims in an action *in rem*, the South African model of the associated ship arrest should be introduced into the international law of ship arrest. In effect, the limitation of the sister-ship arrest only to ships in the same legal ownership as the offending ship, as provided by the 1952 and 1999 arrest conventions, will be dispensed with and concept of 'control' will be introduced as the criterion for determining association under the associated ship arrest. Although this would involve the piercing of corporate veil in disregard of the principle that one could not look past the incorporated entity to pursue the shareholders and persons who control a company, as was set out by the House of Lords in *Salomon V. Salomon*,<sup>360</sup> nevertheless, this seems to be the only answer to this unacceptable practice of single ship companies devised by ship owners to evade arrest and defeat the sister ship provisions of the arrest Conventions.

It should not be forgotten, however, that one of the main reasons that necessitated the making of the 1999 arrest convention was the "desirability of facilitating the harmonious and orderly development of world seaborne trade".<sup>361</sup> In addition, the Deputy Secretary-General of UNCTAD, in respect of the adoption of the 1999 arrest convention noted that, "the establishment of up-to-date rules and regulations governing arrest of ships

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<sup>358</sup> Berlingieri, note 155 at 336.

<sup>359</sup> Berlingieri, note 9 at 182.

<sup>360</sup> (1879) A.C. 22 (H.L.)

<sup>361</sup> Preamble to the 1999 Arrest Convention.

would clearly play an important role in facilitating maritime transport and world trade”.<sup>362</sup>

Having said this, the question now is whether the provisions of the arrest conventions already mentioned and examined facilitate or act as catalysts in the achievement of these laudable goals in respect of maritime transport and world trade. On the contrary, will these provisions of the arrest conventions act as barriers and impediments to the realisation and actualisation of these goals?

Taking into cognisance the negative effects of these convention provisions on the claimant’s abilities to effect an arrest in an action *in rem*, and in the quest to obtain security for his legitimate claims against the ship owner and the full realisation of these claims; it seems correct to state that these provisions instead of acting as facilitators or catalysts to the achievement of progress in maritime transport and world trade will constitute barriers and impediments.

The International Ship Suppliers Association seemed to agree with this opinion when it expressed dissatisfaction with article 3 of the 1999 arrest convention which limited the protection of its members (claimants) as compared with the existing regime under the 1952 arrest convention. Its closing remarks on the article reflected the concern that more limited protection for its members would create significant changes in financing the shipping world. They stated as follows:

“Under the provisions of the 1999 arrest convention, ship owners and managers might find suppliers unwilling to supply vessels on open credit terms if any doubt existed as to payment being properly protected by international law. This could interfere significantly with the smooth operating of a vessel”<sup>363</sup>

On this point, the Ship Suppliers Association might not be too far from the truth. If financing for ship owners begins to decrease, the cost of ocean

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<sup>362</sup> Preparation and Adoption of a Convention on Arrest of Ships, see Berlingieri, note 9 at 434.

<sup>363</sup> *Ibid.*, at 436.

shipping would rise and this would affect even ship owners with good credit. Likewise, a rise in shipping costs could cause a ripple effect throughout the global economy if the increase in costs were passed on to consumers.

Finally, on the issue of single ship companies, the associated ship arrest modelled in the South African associated ship arrest which was proposed by the United Kingdom at the redrafting of the 1952 arrest convention would have solved the problem of proliferation of the single ship companies once and for all. Unfortunately the proposal was rejected on the grounds, *inter alia*, that it would lead to the lifting of corporate veil alleged to be within the province of corporate law. However, considering its seriousness and negative effects on the maritime claimant and by extension on the shipping industry and global trade, Berlingieri noted as follows, (in respect of the problem of single ship companies):

“This is not tolerable and although it has to be regretted that it has not proved possible to find an internationally agreed solution to this problem in the arrest convention, the problem should not be forgotten, and attempts ought to be made to solve it in the not too distant future.”<sup>364</sup>

It was widely recognised at the conference that a problem existed, but the majority of the delegates were not ready to adopt a radical solution to that problem.<sup>365</sup> Nevertheless, it is submitted that a serious problem such as this requires a radical solution. In order to protect the potential maritime claimant, which may include, persons injured by shipping operations, the banks and other financial institutions that help in the financing of ship building and purchase, companies that service, supply, and repair vessels and even seamen and businessmen who, with their assistance, assure the commercial operation and exploitation of the vessel, and by extension facilitate the harmonious and orderly development of maritime industry and world trade, radical solutions such as the introduction of the associated ship

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<sup>364</sup> Berlingieri, note 9 at 182.

<sup>365</sup> Gaskel & Shaw, note 131 at 481



arrest and the open list of maritime claims should be effected in the international law of ship arrest. Commenting on some of the radical, proactive and far-reaching provisions of the South African AJRA, which, among others, includes the associated ship arrest, Friedman J. noted as follows:

“The Act in my view, is an outstanding piece of legislation; it is bold, innovative and comprehensive...it is, what is more, a measure that has a realistic regard, first, to the need for the expeditious handling of maritime work and, secondly, to the ever shrinking world of international trade in shipping matters. I believe it is a measure which is likely to be held in high regard through out the shipping world, one which other countries may well seek to emulate.”<sup>366</sup>

To the international bodies and organisations saddled with the onerous task and responsibility of drafting and updating the international law of ship arrest, fishing may provide an apt analogy: If a line is cast into the shallow waters of a nearby pond, only little fish will be caught. For the big fish, it is necessary to venture into deep waters.

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<sup>366</sup> Friedman, “Maritime Law in Practice and in the Courts”, (1985) 102 *South African Law Journal* 45 at 54.

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