



**UNIVERSITY OF
KWAZULU-NATAL** TM

**INYUVESI
YAKWAZULU-NATALI**

**MARITIME CLAIMS: GANGWAY TO SHIP
ARREST-A CASE STUDY OF SOUTH AFRICA
AND NIGERIA**

AYO-OJO BAYODE SUNDAY
218046906

This mini dissertation is submitted in partial fulfilment of the requirements for the degree of Master of Laws in Maritime Law.

College of Law and Management Studies

School of Law

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Supervisor: Mrs. Dusty Lee Donnelly

DECLARATION

I, Ayo-Ojo Bayode Sunday, declare that:

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- (ii) This dissertation has not been submitted for any degree or examination at any other university.
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ABSTRACT

The arrest of a ship cannot be granted in any court exercising its admiralty jurisdiction if the claimant/plaintiff cannot ascertain that he/she has a maritime claim. Arresting a ship is a unique concept. A maritime claimant who has a maritime claim against a ship could only arrest in an action in *rem* in a circumstance where the plaintiff can show that he/she has a maritime lien or can show that the owner of the vessel would be liable in *personam* (i.e. a statutory lien).

However, there is more complication to what maritime claims entail in different countries of the world. Most shipping jurisdictions have adopted the International Convention on the Arrest of Sea-going Vessels 1952 definition and outline of maritime claims. However, some maritime claims under the 1952 Arrest convention differ in interpretation when used in the national court. On this note, the curial question is what type of maritime claims constitute maritime liens because the recognized maritime liens differ from jurisdiction to jurisdiction. Thus, Nigeria and South Africa as former colonies of Britain have adopted relevant principles from the English admiralty law. Africa's seaports are seen as the gateways for Africa growing a thriving international trade business. However, there is a lack of literature comparing two African jurisdictions to each other. On this note, due to the underutilized and understudied legal systems in Africa, it is paramount to compare and understand what constitute maritime claims in both countries and how they are being interpreted.

LIST OF ABBREVIATIONS

AJA- Admiralty Jurisdiction Act, 1991, Chapter A5 of the Laws of the Federation of Nigeria, 2004

AJRA- Admiralty Jurisdiction Regulation Act, 105 of 1983

Art – Article

CCAA- Colonial Courts of Admiralty Act of 1890

FHC- Federal High Court

S- Section

SC- Supreme Court

SCA - Supreme Court of Appeal

SHC - State High Court

1999 Arrest Convention- International Convention on Arrest of Ships 12 March 1999, Geneva. UNTS 2797

Arrest Convention - International Convention Relating to the Arrest of Sea-Going Ships 10 May 1952, Brussels. UNTS 439

'The choice is between following slavishly and passively the English courts or having our own vibrant and evolving admiralty jurisdiction'¹

¹ Malcolm John David Wallis. *The Associated Ship and South African Admiralty Jurisdiction* (2010) at 436

CHAPTER ONE

Introduction

1.0 Background

The importance of ships in the maritime industry cannot be overlooked. Ships are either domestic or international carriers on the sea; in discharging their primary duties, they may ‘offend’² companies, or natural persons, leading to a maritime claim against the ship, possibly resulting in an arrest.³ For example, ships can arrive in a port to discharge and load cargo, and in turn, damage cargo or get service without paying for it, then exit the port.⁴ In other words, the ship can incur liabilities as it travels the world, and this can make it very difficult for claimants to enforce payment without the existence of a ship arrest mechanism. Thus, according to Anele, it is difficult for a claimant to collect money owed by a debtor due to the mobility of the ship.⁵ Arresting a ship is a legal mechanism that restricts the movement of the vessel in a particular jurisdiction so that it can serve as a security for claims against the vessel.⁶ In other words, the arrest mechanism offers an avenue for a maritime claimant to secure its claims against the ship.⁷ Hence, due to the above explanation, a claimant can rely on the action in *rem* procedure for a ‘prejudgement security and post judgment enforcement’⁸, or an action in *personam*⁹ where the property in question could be attached to confirm or found jurisdiction.¹⁰ Nevertheless, the arrest of the property as opposed to attachment could only be

² *Bulkship Union SA v Qannas Shipping Co Ltd & Another* [2009] 4 All SA 189 (SCA) at 14 states that ‘when one realises that the owner or controller of the offending ship has to be personally liable on the claim, it becomes clear that it is really inappropriate to speak of the offending ship; it is really the offending owner or controller who should be looked at.’ The word ‘offend’ is used not as a criminal term as both the Admiralty Jurisdiction Regulation Act 105 of 1983 (hereinafter referred to as AJRA) and the Admiralty Jurisdiction Act 1991 Chapter A5, Laws of the Federation of Nigeria 2004 (hereinafter referred to as AJA) are concerned with civil claims. However, the ship is a defendant in name in an action in *rem* although the ship is not a legal persona.

³ Gbadebo Anthony Olagunju & Bose Lawal. ‘A Comparative Analysis of Maritime and Statutory Liens under Canadian and Nigeria Admiralty Law – Suggestions for Improving the Nigeria Regime’ at 157. Available at <http://asperchairwp.bryan-schwartz.com/wp-content/uploads/2017/04/13AsperRevIntlBusTradeL15-2-33.pdf>, accessed on 15/04/2019

⁴ Douglas Schmitt & Alexander Holburn Beaudin. ‘The Action in Rem and Arrest’ (2014) at 1 available at http://cmla.org/papers/Action_in_Rem_and_Arrest_-_Schmitt.pdf, accessed on 15/04/2019

⁵ Kalu Kingsley Anele. ‘Rethinking the Arrest of Ship Regime in Nigeria’ (2019) *Commonwealth Law Bulletin* at 1

⁶ Stanley Onyebuchi Okoli. *Arrest of Ships: Impact of the Law On Maritime Claims*. Unpublished Master’s thesis: Lund University (2010) at 4

⁷ Anele, *op cit* note 5 at 2

⁸ *Ibid*

⁹ Section 3(1) & 3(2) of AJRA and s 5(1) of AJA

¹⁰ *Ibid*

through an action in *rem*,¹¹ which will be the focus of this dissertation. This ship arrest is an ancient legal procedure and is available in both South Africa and Nigeria; and as former British colonies, the ship arrest laws in both countries bear similarities to the admiralty laws of England.

Both cargo owners and ship owners guard against unjustified ship arrests that would impede their trade; however, it is in the interest of the claimant to be able to secure security for claims.¹² This would suggest that the arrest of a ship could only be done if the claimant has maritime claims against the vessel, which in turn affords the admiralty court jurisdiction.¹³ Thus, the maritime claim is the ‘gangway’ to ship arrest; however, the nature of claims a vessel can be arrested for is restricted, preventing unjustified arrest, but at the same time permitting maritime claimants a means of enforcing a maritime claim. Claims that arise from maritime activities, involving seamen, ships, ship owners, shipbuilding, charter parties, salvage, and proprietary rights over the ship are, for example, mostly considered as maritime claims.¹⁴ Moreover, many other important features make both jurisdictions arrest friendly. In light of that, the associated ship arrest (in South Africa), sister ship arrest (in Nigeria), acceptance of P & I letter of guarantee as adequate security for the release of a ship, wrongful arrest, counter-security, arrest based on charter (bareboat, time, and voyage charterers) and security arrest, are important considerations for maritime claimants. However, the examination and comparison of these features is outside the scope of this thesis.

Nigeria and South Africa can trace the origin of their admiralty law jurisdiction to English law; however, both countries have developed their own jurisprudence on the types of maritime claims, and how those are interpreted.

According to Hofmeyr, prior to the Admiralty Jurisdiction Regulation Act¹⁵(‘AJRA’) a maritime lien could be enforced in the Colonial Court of Admiralty through an action in *rem*

¹¹ Section 3(4) & (5) of AJRA and s 5(2) of AJA

¹² Jelena Nikčević Grdinić & Gordana Nikčević. ‘Arrest of Ships-The international Conventions on Arrest of Ships’. (2012) *Transactions on Maritime Science* at 103.

¹³ Section 2 of AJRA provides: ‘(1) Subject to the provisions of the Act each provincial and local division, including a circuit local division, of the Supreme Court of South Africa shall have Jurisdiction (hereinafter referred to as admiralty jurisdiction) to hear and determine any maritime claim (including, in the case of salvage, claims in respect of ships, cargo or goods found on land), irrespective of the place where it arose, of the place of registration of the ship concerned or of the residence, domicile or nationality of its owner’

¹⁴ Vadym Shestakov. *Securing of Maritime claims. Arrest of ships in Norway and Ukraine and Rule B Attachment*. Unpublished Master’s thesis: University of Oslo (2010) at 6

¹⁵ 105 of 1983 (hereinafter referred to as AJRA)

and those claims not falling under the maritime lien could also be enforced under a statutory right of proceeding in *rem* (the so-called statutory lien).

Furthermore, the Admiralty Court Act of 1840 and 1861 permitted the enforcement of claims that were not maritime liens either through proceedings in *rem* or in *personam*. Those claims which enjoyed maritime lien status under the Colonial Courts of Admiralty Act, 1890 (CCAA) continue to enjoy maritime lien status under the AJRA. On this note, this shows the influence of the CCAA as the law inherited by South Africa from the English.¹⁶ From the foregoing, Nigeria maintains the same position in which the CCAA applied until it was repealed by the Admiralty Jurisdiction Decree of 1962.¹⁷

In both South Africa¹⁸ and Nigeria, a ship cannot be arrested without a maritime claim.¹⁹ Nigeria is a party²⁰ to the International Convention Relating to the Arrest of Sea-Going Ships²¹ (1952 Arrest Convention) while South Africa is not. Neither nation is a party to the International Convention on Arrest of Ships, 1999²² (1999 Arrest Convention). The international conventions, as well the national law of Nigeria and South Africa shy away from giving a single definition of a maritime claim.²³ Instead, several maritime claims are listed. There are many similarities, and this may be because of their common origin in English admiralty law. However, the South African AJRA has a catch-all provision in s1(1)(ee)²⁴ which

¹⁶ Gys Hofmeyr *Admiralty Jurisdiction Law and Practice in South Africa* (2012) at 96-97

¹⁷ Abiola Falase-Aluko. 'New Developments in the Admiralty Jurisdiction of the Federal High Court in Nigeria'. (1995) *Journal of African Law* at 67 The 1962 Decree was later repealed by the Admiralty Jurisdiction Act of 1991 (hereinafter referred to as AJA)

¹⁸ Section 2(1) of AJRA

¹⁹ Lawrence Fubara Anga. 'Ship Arrest in Nigeria' in Faint, R et al. (eds) *Ship Arrests in Practice* at 298. A person seeking to arrest a ship in Nigeria's territorial waters must satisfy the court that his claims qualify as a 'maritime claims' as defined in s2 of the AJA. This generally means that it must be a proprietary maritime claim or a general maritime claim. Available at <https://www.raeder.no/globalassets/var-kompetanse/fagomrade/shipping-marine-og-tranport/final-ship-arrests-in-practice-11th-edition.pdf> at 298 accessed on 14/4/2019

²⁰ Gbadebo Anthony Olagunju. 'Maritime and Statutory Liens under the Nigeria Admiralty law' in Rickey Mustapha Tarfa, Olanrewaju Fagbohun, and Gbolahan Gbadamosi, (eds) *Rethinking the Administration of Justice: Essays in Honour of Hon. Justice Abdullahi Mustapha, OFR. FCI Arb (Rtd)* (2011) at 328

²¹ International Convention Relating to the Arrest of Sea-Going Ships, 10 May 1952, Brussels. UNTS 439 (hereinafter 1952 Arrest Convention)

²² International Convention on Arrest of Ships, 12 March 1999, Geneva. UNTS 2797 (hereinafter 1999 Arrest Convention)

²³ There is no single definition of the term 'maritime' or 'marine' claim. Rather the definition is divided into sub-sections, each setting out a different claim, and all of which are categorised as maritime claims. A list of the claims that constitute maritime claims is given in art 1(a)-(q) of the International Convention of Arrest of Sea-Going Ships of 1952. The AJRA of South Africa in s1(1) from paragraph (a) to (ff) and the AJA of Nigeria in s2(2) and (3) list the type of maritime claims.

²⁴ Any other matter which by virtue of its nature or subject matter is a marine or maritime matter, the meaning of the expression marine or maritime matter not being limited by reason of the matters set forth in the preceding paragraphs;

Nigeria does not have in the AJA²⁵ The question arises how far this broadens the admiralty jurisdiction of South Africa. Conversely, in Nigeria, claims arising under a letter of credit²⁶ are subject to admiralty jurisdiction, but this is not the case in South Africa. The claim is listed in s1(1) of AJA but is not a ‘maritime claim’ as defined in s2, and therefore cannot be enforced by an action *in rem*. There is no similar claim enforceable in admiralty proceedings in South Africa unless arguably it falls under s1(1)(ee). These are examples only illustrating some of the similarities and differences between the two jurisdictions. The purpose of making such a comparison will be set out in section 1.1 below.

1.1 Statement of Purpose

The purpose of this dissertation is a comparative study of the nature and role of maritime claims in the arrest *in rem* jurisdiction under the AJRA of South Africa and the Nigerian AJA in order to offer recommendations for what Nigeria could learn or adopt from the South African approach. It will be shown in various parts of this dissertation, that South Africa has in some cases adopted unique statutory provisions in the definition of some of its maritime claims differently from the English law. However, Nigeria still greatly follows English law principles.²⁷ This will also be illustrated by case law.

It is trite that in English law, South African law, and Nigerian law an arrest *in rem* cannot be made if the claimant fails to establish a maritime claim over the *res*. A maritime lien, which is a leading factor on how a ship can be arrested in common law jurisdictions, is discussed in depth in which the enforceability of a maritime lien against a ship through an action *in rem* in both jurisdictions will be examined. In both jurisdictions, the statutory right *in rem* expands the availability of the action *in rem* procedure from the six maritime liens to any maritime claim arising in respect of the vessel for which the owner is personally liable. Although the named

²⁵ Falase-Aluko *op cit* note 17 at 69 : who notes the defects in the 1956 Arrest Convention were addressed by its repeal in the 1981 Supreme Court Act in England and by the enactment of the Admiralty Jurisdiction Decree in Nigeria in 1991.

²⁶ AJA s 1(h) : ‘any banking or letter of credit transaction involving the importation or exportation of goods to and from Nigeria is a ship or an aircraft, whether the importation is carried out or not and notwithstanding that the transaction is between a bank and its customer’

²⁷ Chudi Nelson Ojukwu. ‘Arrest and Detention of Ships and Other Property In Nigeria’ at 251 states: ‘In principle there is no difference between the Brussels Convention and the Admiralty Jurisdiction Decree in Nigeria, thus the Act may be seen as a local application of the Brussels Convention. This statement is true to the extent that the Admiralty Jurisdiction Decree in Nigeria is based on the Administration of Justice Act in England’. Also see, Falase-Aluko, *op cit* note 17 at 69, he explains the defects in the Administration of Justice Act of 1956 were addressed by its repeal in the Supreme Court Act of 1981 in England and the enactment of the AJA in 1991 in Nigeria. .

defendant is the ship, it is essential for the enforcement of these types of maritime claims to identify if it lies against the shipowner²⁸ or beneficial owner.²⁹ Although AJRA does not recognise the concept of a beneficial owner,³⁰ the concept has been widely used in s 4 of AJA.³¹ The claim can also lie against the demise charterer.³² For this reason, the meaning of these terms is discussed in the comparative analysis of the statutory lien in South Africa and Nigeria.

To achieve its objective, this dissertation will thus seek to explain and provide insight, on how selected maritime claims are interpreted in both jurisdictions; namely a claim of suppliers of necessaries (which is denied status as a maritime lien), a claim relating to containers and a claim for goods damaged under multi-modal transport (which are both essential parts of modern shipping) and the catch-it all provision in AJRA section 1(1)(ee).

1.2 The Rationale of the Study

African law according to Chris Okeke³³ is one of the ‘underutilized and understudied legal systems in the world’ compared to others like South Asia, Europe, and northern America. Moreover, due to the influence of different colonial masters, the legal system in Africa became a ‘patchwork’³⁴ which leads to the complexity of law as a result of the combination of western common law, religion, civil law, and customary law.³⁵

²⁸ This could also be against those that have shares in the ship.

²⁹ Wallis *op cit* note 1 at 273 explains that the beneficial owner is referred to as the true holder of the benefits of the shares. He is more than a mere nominee holder or a registered holder who also acts as an agent of the beneficial owner or acts on its directives.

³⁰ Wallis, *op cit* 1 at 219 notes that beneficial ownership is not recognized in South Africa; however, it has been mentioned in several associated ship cases. See e.g. *MV Heavy Metal: Belfry Marine v Palm Base Maritime SDN BHD* 1999 (3) SA 1083 (SCA).

³¹ This provides: ‘(4) In any other claim under section 2 of this Decree, where the claim arises in connection with a ship and the person who would be liable on the claim in an action *in personam* (in this Decree referred to as "the relevant person") was, when the cause of action arose, the owner or charterer of or in possession or in control of the ship, an action *in rem* may (whether or not the claim gives rise to a maritime lien on that ship) be brought against

(a) that ship, if at the time the action is brought the relevant person is either the beneficial owner of that ship as respects all the shares in it or the charterer of the ship under a charter by demise ; or

(b) any other ship of which, at the time when the action is brought, the relevant person is the beneficial owner as respects all the shares in the ship.’

³² Section 1(3) of AJRA states: ‘For the purposes of an action in rem, a charterer by demise shall be deemed to be, or to have been, the owner of the ship for the period of the charter by demise’ and s 4(a) of AJA states that one can arrest: ‘[a] ship, if at the time the action is brought the relevant person is either the beneficial owner of that ship as respects all the shares in it or the charterer of the ship under a charter by demise ...’

³³ Chris Nwachukwu Okeke. ‘African Law in Comparative Law: Does Comparative Have Worth?’ (2011) *Roger Williams University law Review* at 1

³⁴ *Ibid*

³⁵ *Ibid*

This complexity of Africa's history, especially in relation to our colonial roots, requires frameworks that will manage and integrate our diverse legal systems in a complementary manner that is adaptable in a highly globalized world.³⁶ Thus, Chris Okeke asserted that for one to understand a legal system in an African country, one must analyse and understand the genesis, background, and nature of its laws.³⁷

According to Okeke³⁸ the first role and aim of comparative law is a scientific goal which is to aid us in understanding our own legal system and others. He asserted comparative law to have a second practical goal that is to aid our interaction either internationally or regionally.³⁹ This is practically useful in admiralty law based on the mobility of ship. It will be good to understand the legal system of other ship arrest jurisdictions on the continent. More so, in an increasingly globalised world, the use of comparative law is important for continued education and interactions of diverse legal systems.⁴⁰

Although AJRA and AJA have been modified to suit the needs of contemporary citizens, however, the origin still maintains a great influence as seen in s 6 (1)(a) of AJRA⁴¹ and s 1 (1)(b) of AJA.⁴² The colonial root of admiralty law is widely discussed further in relation to South Africa by Shaw,⁴³ Hofmeyr,⁴⁴ Wallis⁴⁵ and Hare⁴⁶ and in relation to Nigeria by Hare⁴⁷, Falase-Alujo⁴⁸ and Ojukwe.⁴⁹ Although Shaw⁵⁰ and Hare⁵¹ describe how AJRA was enacted

³⁶ Okeke, *op cit* note 33 at 4

³⁷ Okeke, *op cit* note 33 at 2

³⁸ Okeke *op cit* note 33 at 3

³⁹ *Ibid*

⁴⁰ *Ibid*

⁴¹ This provides: 'with regard to any matter in respect of which a court of admiralty of the Republic referred to in the Colonial Courts of Admiralty Act, 1890, of the United Kingdom, had jurisdiction immediately before the commencement of this Act, apply the law which the High Court of Justice of the United Kingdom in the exercise of its admiralty jurisdiction would have applied with regard to such a matter at such commencement, in so far as that law can be applied'

⁴² This provides that admiralty jurisdiction includes 'any other admiralty jurisdiction being exercised by any other court in Nigeria immediately before the commencement of this Decree'

⁴³ Douglas John Shaw *Admiralty Jurisdiction and Practice in South Africa* (1987) at 1-7

⁴⁴ Hofmeyr, *op cit* note 16 at 83 – 94

⁴⁵ Wallis, *op cit* note 1 at 25- 40

⁴⁶ John Hare. *Shipping Law and Admiralty Jurisdiction in South Africa* (2009) at 19-30

⁴⁷ John Hare. 'Limitation of Liability- A Nigerian Perspective,' (2004) at 13 available at <http://www.nimasaelibrary.com/PDFs/133213650269709.pdf> accessed on 03/07/2020

⁴⁸ Falase-Aluko, *op cit* note 17 at 64 -69

⁴⁹ Ojukwu, *op cit* note 27 at 251

⁵⁰ Shaw, *op cit* note 43 at 72-75

⁵¹ Hare, *op cit* note 46 at 16- 29. Hare, at page 16 under the title 'Modern South African Admiralty: Towards the Admiralty Jurisdiction Regulation Act 105 of 1983', refers to AJRA as a 'jurisdictional metamorphosis' in that 'the Act sought to extend the jurisdiction of the (then) Supreme Court in admiralty to all maritime disputes'. See also, *Euromarine International of Mauren v The Ship Berg* 1986 (2) SA 700 (AD) at [19]-[20] approves remarks by Leon J (dissenting) in *Euromarine International of Mauren v The Ship Berg and Otrs* 1984 (4) SA 647 (N) at 666G: 'with reference to the Act, said that it was the intention of the legislature to introduce a

as a fundamental break from the past, however, to some extent, English admiralty law has continued to influence the interpretation of maritime claims.⁵²

However, as asserted by Wallis now the ‘choice is between following slavishly and passively the English courts or having our own vibrant and evolving admiralty jurisdiction.’⁵³ First, although the admiralty jurisdiction has been influenced by the English law, it can be denoted that due to an evolving society, the law must keep changing to fit a contemporary society which is what AJRA contemplates. A comparison is necessary to make recommendations for what Nigeria could learn from the South African approach. Secondly, in practice maritime lawyers may seek to arrest *in rem* a target ship that is scheduled to call at both a South African and Nigerian port, and this study provides a reference of the similarities and differences in the maritime claims that can be enforced which may influence which jurisdiction is chosen to enforce an action *in rem*.

There are few scholarly works that compare maritime laws related to shipping arrest of one African country to the maritime law of non-African states.⁵⁴ Most authors restrict their writing to only the law of a specific country.⁵⁵ By contrast, there are many scholarly works in Europe, North America, and Asia comparing ship arrest laws between various western and Asian countries.⁵⁶ The importance of the present study is that given the lack of studies comparing maritime laws in Africa it attempts to contribute to scholarship a comparative study on the concept of the role and nature of maritime claims in the arrest *in rem* jurisdiction of two African maritime states. On this note, the significance of the study is that maritime claims are essential to invoke the admiralty jurisdiction in both countries. However, the maritime claims interpretation differs. Thus, this dissertation will provide how Nigeria and South Africa’s

remedial measure designed to provide what is nowadays referred to as 'a new dispensation' in respect of maritime claims and their enforcement in South Africa’.

⁵² Hare, *op cit* note 46 at 18 states: ‘South Africa still clings to the skirts of its English mother in relation to what law applies once the court has decided that it has jurisdiction in Admiralty’.

⁵³ Wallis, *op cit* note 1 at 436

⁵⁴ Olagunju, *op cit* note 3 at 157. See, Schlichting Mathias Peter. *The Arrest of Ships in German and South Africa*. Unpublished Master’s thesis: University of Cape Town (1991), Mayerhofer Vincent Michael. *Arrest of Ships in Germany and South Africa-A Comparison*. Unpublished Master’s thesis: University of Cape Town (2014) and Peters, JF. *Arrest of Ships: A Comparative Analysis between Belgian and South Africa*. Unpublished Master’s thesis: University of Cape Town (1997)

⁵⁵ For example, Hofmeyr, *op cit* note 16 and Wallis, *op cit* note 1 both wrote on South Africa.

⁵⁶ See e.g. Haifeng Lin. *A Comparative Study on the Legal System of Arrest of Ships in China*. Unpublished Master’s thesis: World Maritime University (2006) and Shestakov, *op cit* note 14

courts have interpreted some maritime claims and comparative analysis illustrated by case law in order to meet the goals of comparative study outlined by Okeke.

1.3 The Research Questions

The research will seek to examine the following questions:

1. Is a maritime claim the gateway to arrest in *rem* in Nigeria and South Africa?
 - a. Can an arrest in *rem* be instituted without a maritime claim in Nigeria and South Africa?
 - i. What are the relevant statutory provisions in Nigeria?
 - ii. What are the relevant statutory provisions in South Africa?
 - b. Are the maritime claims available in South Africa and Nigeria comparable?
 - c. What is the significance of any similarities and differences?
2. Is there a difference in maritime liens between the two nations?
 - a. What is the definition of maritime lien in both jurisdictions?
 - i. What are the characteristics of a maritime lien in Nigeria?
 - ii. What are the characteristics of a maritime lien in South Africa?
 - iii. What are the claims to which a maritime lien may attach in Nigeria?
 - iv. What are the claims to which a maritime lien may attach in South Africa?
 - v. Does the International Convention on Maritime Liens and Mortgages apply to both jurisdictions?
 - b. What is the position of a foreign maritime lien in both jurisdictions?
 - i. Does Nigeria recognise foreign maritime liens?
 - ii. Does South Africa recognise foreign maritime liens?
3. Is there a difference in statutory rights in *rem* between the two jurisdictions?
 - a. What is the additional requirement to arrest a vessel on a statutory right *in rem* in Nigeria?
 - b. What is the additional requirement to arrest a vessel on a statutory right *in rem* in South Africa?
 - c. Who is regarded as the owner or beneficial owner in both jurisdictions?
 - i. Demise Charter

1.4 Methodology

The main purpose of a research methodology is to specify how the researcher attains his or her set objectives.⁵⁷ The study is desktop-based research, referring to conventions, legislation, case law, and academic commentary.

The dissertation adopts a theoretical framework of legal positivism, providing a legal analysis of the enactments and their application in case law. The analysis of the jurisprudence of the case law in each country under maritime law will be examined

The dissertation presents a comparative analysis of the law of South Africa and Nigeria. As maritime law is international in nature and as ship arrest is governed by international conventions that have been widely adopted,⁵⁸ a comparative analysis provides insights into similarities and differences in national approaches. Nigeria and South Africa were selected because the researcher had access to primary sources in both jurisdictions, being legislation and case law reports, as well as to secondary sources.⁵⁹ Secondly, Nigeria and South Africa are important maritime nations in Africa⁶⁰ and the two countries seaports serve as significant gateways⁶¹ for African trade.⁶² The study may therefore be of practical interest to maritime lawyers as explained in the rationale.

⁵⁷ Oke-Samuel Olebengu. *A comparative Study of South African and Nigerian Legislation Relation to Control of Gas Emission* Unpublished LLD thesis: University of Zululand (2013)

⁵⁸ Bob Deering & Jonathan Reese. 'An Overview of the 1952 and 1999 Arrest Conventions' available at <https://www.incedlaw.com/en/knowledge-bank/overview-of-the-1952-and-1999-arrest-conventions>, accessed on 22/04/2019

⁵⁹ I have made use of all available resources in South Africa : Juta, Jstor, Lexis Nexis , Heinonline, Lloyds Law Reports, , Worldcat, and Saffii, to access Case law, Legislation, and Dissertations and in Nigeria: LawPavillion, ALLFWLR, to access Case law , Dissertations, and Legislation.

⁶⁰ Maxwell Hall. 'Africa's Prosperity Tied to Powerhouse Pair South Africa and Nigeria' available at <https://www.weforum.org/press/2017/05/africa-s-prosperity-tied-to-powerhouse-pair-south-africa-and-nigeria/> Accessed on 23/4/2019. Both countries serve as a trade corridor into Africa through the shifting of shipments on to other modes of transportation to another country that only operates as a dry port. Out of the 54 African countries, 16 are landlocked, making it important for land-sea transport connections. South Africa's seaports serve as the gateway to countries like Zimbabwe, Zambia, Malawi, and the kingdoms of Swaziland and Lesotho. While Niger Republic, Chad, Mali, and Burkina Faso rely on the Nigerian seaport. These ports are linked with major facilities such as Rotterdam and Antwerp for Europe, New York, and Los Angeles for North America and Singapore and Shanghai for Asia, constituting the major entrance for Africa trades.

⁶¹ PWC 'An analysis of port development in sub-Saharan Africa, Strengthening Africa's gateways to trade' 32 available <https://www.pwc.co.za/en/assets/pdf/strengthening-africas-gateways-to-trade.pdf> accessed on 5/5/2019

⁶² There is a lot of direct trade between Nigeria and South Africa. The statistics from the South Africa Revenue Services show that South Africa exports R 5 750 336 980 worth of goods to Nigeria while the country imports R 22 854 932 099. This includes goods like vegetables, live animals, prepared foodstuffs, mineral products, chemicals, plastics and rubber, raw hides and leather, wood products, wood pulp and paper, textiles, footwear, stone and glass, precious metals, iron and steel products, machinery, vehicles, toys, works of art and equipment components. In 2018 the trade interaction increased by South African exports to R5 938 478 640 and imports to R 50 844 931 326. From January to February 2019, South Africa exported goods worth R1 056 266 203 and imported R 6 824 267 701. Available at <https://www.sars.gov.za/ClientSegments/Customs-Excise/ImpExpTrans/Pages/Exports.aspx>

According to Black's Law Dictionary⁶³, as cited in Chris Okeke's work, comparative law means 'the scholarly study of the similarities and differences between the legal systems of different jurisdictions'.⁶⁴ In other words, comparative legal studies 'involve drawing explicit comparisons of aspects of two or more legal systems.'⁶⁵ Similarly, Gordley asserted that 'law cannot be studied in isolation' and contended that 'to understand law, even as it is with that country one must look beyond its borders.'⁶⁶

1.5 Chapter Breakdown

This dissertation is divided into five chapters. Chapter One is the introductory chapter, dealing with the background, purpose, research methodology, and the structure of the dissertation. It also provides a general summary of the dissertation.

Chapter Two looks at the historical background of admiralty law in Nigeria and South Africa, tracing it from English Law. The maritime claims available in the two jurisdictions are compared. Thus, this chapter does not focus on the historical background only, but explains the link between the historical background and maritime claims. First, the chapter considers the law to be applied to maritime claims and explains how s 6 of AJRA is applied. Second, the chapter sets out the differences between the maritime claims in the two jurisdictions. The chapter examines similarities and differences in the maritime claims. A significant similarity is the requirement in each jurisdiction that although the claim may relate in some way to a ship it must have a 'maritime' connection. Differences are noted, and a significant difference that is analysed is the provision relating to claims for containers. Lastly, the chapter examines the 1952 Arrest Convention.⁶⁷

Chapter Three looks at the definition and characteristics of maritime liens. Moreover, the chapter also provides the list of claims for which a maritime lien may be found an arrest in *rem* in both jurisdictions and their interpretation. The chapter considers the foreign maritime lien and a significant similarity is that both jurisdictions do not recognise necessities as a maritime lien. This is also examined further by discussing the case of the *Andrico Unity*.⁶⁸

⁶³ Bryan Garner & Henry Campbell Black. *Black's Law Dictionary* (2004)

⁶⁴ Okeke, *op cit* note 33 at 4

⁶⁵ Okebengu, *op cit* note 57 at 12

⁶⁶ James Gordley. 'Comparative legal Research: its function in the Development of Harmonised law' (1995) *The American Journal of Comparative law* at 560

⁶⁷ *Supra* note 21

⁶⁸ *Transol Bunker BV v MV Andrico Unity and others* 1987 (3) SA 794 (CPD) (hereinafter *Andrico Unity*)

Chapter Four examines statutory rights in *rem* and the law determining the ambit of maritime claims in both jurisdictions. The chapter does not focus only on the definition of statutory lien but examines the maritime claim for damage or loss occurring to goods and the phrase 'arising out of or relating to'.⁶⁹ The chapter sets out the difference between the two maritime claims in both jurisdictions. Moreover, a significant distinction is what Nigeria could learn since the claim for damage or loss occurring to goods connotes a different interpretation in South Africa. Chapter Five provides the conclusion and recommendations on what Nigeria could adopt or learn from South Africa.

⁶⁹ Section 1(1) of AJRA

CHAPTER TWO

The Applicable National Law and the 1952 Arrest Convention

2.0 Introduction

The ancient procedure of ship arrest is available in both South Africa and Nigeria, and as former colonies of Britain, the ship arrest laws in these countries bear similarities to the admiralty law of England. Consequently, it is necessary to outline the historical background of the action *in rem* in the three jurisdictions and its conjunction with maritime claims.

2.1 Historical Background of Action *in Rem* in England

A claimant who wishes to address the court must be able to ascertain that he/ she has a maritime claim. It must be denoted that the claimant can proceed either by action in *personam* or action in *rem*. The action in *personam* is instituted against a person while the action in *rem* is against the vessel or property as the defendant.⁷⁰ Thus, the action in *rem* is the only arrest mechanism that guarantees the creditor who has a *maritime* claim a ‘prejudgement security and post judgement enforcement.’⁷¹ The actual origins of the action *in rem* are not certain,⁷² however, the admiralty court’s origin can be traced to the time of conflict between the common law practitioners and the admiralty court in or about 1389 when King Richard II enacted a law bearing the title ‘An Act Concerning What Things the Admiral and His Deputy Shall Meddle’.⁷³ The admiralty court then faced vehement opposition from the common lawyers who issued so-called writs of prohibition, which restricted the admiralty court from hearing actions that could otherwise be heard under the common law.⁷⁴ They would have succeeded but for the arcane restrictions which restricted the courts of common law from hearing maritime matters.⁷⁵ The consequent uncertainty laid the ground for the action *in rem*.⁷⁶ At first, its function was unclear, but in the early 19th century it was officially reported that an action involving the arrest of a ship and its equipment constituted a unique form of action.⁷⁷ Arrests of persons and goods,

⁷⁰ Anele, *op cit* note 5 at 9

⁷¹ Anele, *op cit* note 5 at 2

⁷² Wallis, *op cit* note 1 at 32.

⁷³ *Ibid.*

⁷⁴ *Ibid.*

⁷⁵ Wallis, *op cit* note 1 at 33

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*

including vessels, were executed by the admiralty court from an early stage. ‘Marsden’ is recorded as having written:⁷⁸

‘The ordinary mode of commencing the suit [in the 16th century] was by arrest, either of the person of the defendant or of his goods. The arrest of goods was quite as frequent as the arrest of the ship; and it seems to have been immaterial what the goods were, so long as they were the goods of the defendant and were within the Admiralty’s jurisdiction at the time of arrest.’⁷⁹

Although the action *in rem* procedure was subject to admiralty court jurisdiction, it is not clear whether the characteristics of the action *in rem* at the time were the same as the present action *in rem*.⁸⁰ Ordinances passed in 1648 during the tenure of Oliver Cromwell offer some clues:

‘That the Court of Admiralty shall have cognisance and jurisdiction against the ship or vessel with the tackle, apparel and furniture thereof, in all causes which concern [their] pairing, victualling and furnishing provisions for the setting of such ships or vessels to sea, and in all cases of bottomry . . .’⁸¹

However, many of the cases reported deal with the ouster of the admiralty court by the common law court, resulting in few reports of cases on actions *in rem* in the admiralty court,⁸² the first only being reported in the 18th century.⁸³ What is clear is that all maritime claims were initiated by an action *in personam* under the civil law, meaning the action *in rem* did not *per se* exist.⁸⁴ Before 1852 the action *in personam* prevailed⁸⁵ in terms of which the vessel was seen as the property of the owner and the owner had to appear to defend the case.⁸⁶ In 1860, a significant development was the dissolution of the Doctors Commons (a society of lawyers practising civil law) which ended the ‘appointment of common law judges to the admiralty court.’⁸⁷ The common law had provided that once a ship was arrested the owner had to appear in person, giving rise in consequence to the need for an action *in rem*.⁸⁸

⁷⁸ Ibid and see Select Pleas in the court of Admiralty (1892) (edited by Reginald G. Marsden for the Selden Society), pages lxxi.lxxii

⁷⁹ Ibid

⁸⁰ Wallis, *op cit* note 1 at 34

⁸¹ Wallis, *op cit* note 1 at 34-35

⁸² Ibid

⁸³ Ibid

⁸⁴ Carlo Corcione. ‘Bring the Vessel to Court: The Unique feature of the action in rem in the admiralty law proceedings’, (2013) *International Review of Law* at 2

⁸⁵ Ibid

⁸⁶ Corcione, *op cit* note 84 at 2

⁸⁷ Wallis, *op cit* note 1 at 32

⁸⁸ Hare, *op cit* note 46 at 98

2.2 Historical Background of Action in *Rem* in conjunction with Maritime Claims in South Africa

The principle and procedure of an action *in rem* surfaced in South Africa when the British occupied the Cape of Good Hope from 1795 to 1903.⁸⁹ Governor McCartney established the Vice-Admiralty Court in 1799,⁹⁰ but the court was abolished after the departure of the British, although it was re-established on the return of the British during the Napoleon Wars.⁹¹ Under the leadership of Chief Justice Sir John Wylde, the Charters of Justice of 1828 and 1832 established the Vice-Admiralty Court.⁹² In 1842, the first decision involving an action *in rem* in the Vice-Admiralty Court was recorded.⁹³ In 1856, a royal charter created Natal as a crown colony⁹⁴, and in 1863; Natal and the Cape Colony were granted courts with admiralty jurisdiction⁹⁵ under and in terms of the Vice-Admiralty Court Act. During this period, many maritime claims were pursued in ordinary courts based on the ground of attachment to found jurisdiction.⁹⁶ Whilst the Vice-Admiralty Courts Act⁹⁷ was repealed in 1890 no pre-union court was named as the colonial court of admiralty. In 1910, only the Supreme and the superior courts of the four colonies under British control enjoyed admiralty jurisdiction under the Colonial Courts of Admiralty Act (CCAA).⁹⁸ Whilst the creation of the Union of South Africa was intended to change the way in which the CCAA operated, some specified divisions of the Supreme Court still exercised the admiralty jurisdiction.⁹⁹ By 1961, the court had only recorded four reported cases of actions *in rem*,¹⁰⁰ including the case *Re SS Mangoro*¹⁰¹ and *Crooks & Co v Agricultural Co-operative Union Limited*¹⁰² which dealt with the distribution of the proceeds of a sale of a vessel in terms of a court order exercising its admiralty jurisdiction.¹⁰³ The second and third cases dealt respectively with the private international law issue of

⁸⁹ Van Niekerk, JP. 'Judge John Holland and the Vice-Admiralty Court of the Cape of Good Hope, 1797-1803: Some Introductory and Biographical Notes' (Part 1) (2018) *Fundamina* at 1

⁹⁰ *Ibid*

⁹¹ Wallis, *op cit* note 1 at 55

⁹² *Ibid*

⁹³ *Ibid*

⁹⁴ *Ibid*

⁹⁵ Wallis, *op cit* note 1 at 56

⁹⁶ *Ibid*

⁹⁷ Vice Admiralty Courts Act 1863

⁹⁸ Colonial Courts of Admiralty Act, 1890 (hereinafter referred to as CCAA)

⁹⁹ Wallis, *op cit* note 1 at 57

¹⁰⁰ Wallis, *op cit* note 1 at 59

¹⁰¹ (1913) 34 NLR 67

¹⁰² (1921) 42 NLR 216

¹⁰³ Wallis, *op cit* note 1 at 59

sovereign immunity¹⁰⁴ and damages arising from a collision,¹⁰⁵ whilst the fourth case dealt with an action *in rem*, but did not reveal admiralty jurisdiction in the record.¹⁰⁶ When South Africa became a Republic in 1961, there was no immediately meaningful development in admiralty law. By 1967, and partly due to the closure of the Suez Canal, the number of ships passing and docking in the Republic increased, driving admiralty practice and providing lawyers with foreign clients. This resulted in the need to access the admiralty jurisdiction and actions *in rem* in order to pursue claims.¹⁰⁷ The increase in maritime litigation also necessitated reform in the form of the Admiralty Jurisdiction Regulation Act (AJRA)¹⁰⁸ which, according to Hare, introduced South Africa to the procedural principles of the action *in rem*,¹⁰⁹ by which the owner of the *res* could be brought before a court, in contrast to the personification theory under which the *res* was the basis of jurisdiction without the interference of the owner.¹¹⁰ It was not surprising that South Africa sought to follow the decision of the *Dictator*¹¹¹, as reflected in s 6(1) of AJRA.¹¹² Thus, how has this historical background reflected on maritime claim interpretation? It could be noted that South Africa's history aligned with some maritime claims that were in place before the promulgation of AJRA. Section 6(1), which is one of the most important sections, deals with the law that may apply to different maritime claims listed in AJRA. On this note, s 6(1) distinguishes between two heads of jurisdiction.¹¹³ Section 6(1)(a) provides that the jurisdiction of the Supreme court before the commencement of the AJRA would be applied which is the claims falling under the jurisdiction of Colonial Courts of

¹⁰⁴ *De Howorth v SS India: Mann George & CO. (Delagoa) Limited v The SS India* 1921 CPD 451

¹⁰⁵ *South African Railways and Harbours v Lyle Shipping Company Limited* 1958 (3) SA 419 (A). According to Wallis 'the judgment does not deal with any substantive issue of maritime law but with the effect of an exemption clause in a towage contract' (Wallis, *op cit* note 1 at 40)

¹⁰⁶ *Ibid*

¹⁰⁷ *Ibid* at 64

¹⁰⁸ 105 of 1983.

¹⁰⁹ Hare, *op cit* note 46 at 100. Both jurisdictions differ in procedure on how an arrest is made. For further discussion on Nigeria's arrest procedure see Anele *op cit* note 5. For further discussion on South Africa's arrest procedure see Hofmeyr *op cit* note 16

¹¹⁰ *Ibid*

¹¹¹ *The Dictator* 1892 P 304. See further *Harmer v Bell (the Bold Buccleugh)* 7 Moo PC 267; 13 ER 884 (1851) and *Indian Grace* (No 2.) (1998) 1 Lloyd's Rep 1 (HL) and the commentary of Hare, J. *op cit* note 46 and Corcione, *op cit* note 84. A discussion of the development of the action *in rem* in England, and the personification theory versus the procedural theory is outside the scope of this dissertation.

¹¹² The full discussion of the nature of the action *in rem* in South Africa, and the personification or procedural theory is outside the scope of this dissertation. See Rule 8(3) of the Rules regulating the conduct of the admiralty proceedings of the several provincial and local divisions of the supreme court of South Africa, GN R571, GG 17926, 18 April 1997, *SA Boatyards CC v The Lady Rose* 1991 (3) SA 711 (C) at 715F-H, *Transnet Ltd v The Owner of the Alina II* [2011] 4 All SA 350 (SCA) at 35, *Northern Endeavour Shipping Pte Ltd v Owners of MV NYK Isabel* [2016] 3 All SA 418 (SCA) at 38, *Mv Seaspan Grouse: Seaspan Holdco I Ltd v Ms Mare Traveller Schiffahrts GmbH & Co, KG and another* 2019 (4) SA 483 (SCA) at 15, *MV Silver Star: Owners of Mv Silver Star v Hilane Ltd* 2015 (2) SA 331 (SCA) at 31

¹¹³ Hare, *op cit* note 46 at 26-29

Admiralty that exercise the same jurisdiction as that of the High Court in England and Wales.¹¹⁴ In a nutshell, any maritime claims that fell under the Colonial Court of Admiralty would be entertained by a High Court exercising admiralty jurisdiction under AJRA (the old head of jurisdiction),¹¹⁵ while there are some maritime claims that fall under the new head of jurisdiction.¹¹⁶ It could be denoted, for example, from s 1(1)(d) of AJRA which provides ‘*to bottomry and mortgages to all charges on the ship*’ that this is a maritime claim that existed before the commencement of AJRA. In 1890 admiralty jurisdiction could be said to have been in existence in England in respect of ‘*ship mortgages*’.¹¹⁷ In the case of *The Guzin s (No.1)*¹¹⁸ which is about a loan agreement by mortgage used for security of a ship, the issue that arose was whether the claim was a maritime claim or not. It was held that ‘a mortgage is an accessory to an obligation and unless such an obligation exists, there can be no mortgage’.¹¹⁹ It was further held, that the claim was one relating to a mortgage; thus it constituted a maritime claim. However, the main issue was under what head of jurisdiction could this be categorised? It was held that the jurisdiction existed before the commencement of AJRA, thus, the English law would apply in accordance with s 6(1)(a) of AJRA.¹²⁰

Contrarily, there are some maritime claims that fall under the new head of jurisdiction and are decided under the Roman Dutch law in terms of s 6(1)(b). For example, s 1(1)(n)¹²¹ provides:

‘the rendering, by means of any aircraft, ship or other means, of services in connection with the carriage of persons or goods to or from a ship, or the provision of medical or other services to or in respect of the persons on being taken to or from a ship’¹²²

According to Hofmeyr,¹²³ it was introduced by the 1992 amendment¹²⁴ and with no counterpart in the English law although, if one could relate the provision to a claim ‘arising out of or relating’ to necessities then the court could have jurisdiction based on the old head of jurisdiction and thus, the English law would apply.¹²⁵ More so, s 1(1)(q) contains a similar

¹¹⁴ Section 2 and 3 of the CCAA

¹¹⁵ Section 6(1)(a) of AJRA

¹¹⁶ Section 6(1)(b) of AJRA

¹¹⁷ Section 3 of Admiralty Court Act 1840

¹¹⁸ 2002 (6) SA 113 (D)

¹¹⁹ Ibid

¹²⁰ Ibid

¹²¹ AJRA

¹²² 2002 (6) SA 113 (D)

¹²³ Hofmeyr, *op cit* note `16 at 42

¹²⁴ Section 1(d) Admiralty Jurisdiction Regulation Amendment Act, 1992: Act 87 of 1992

¹²⁵ Ibid

provision to that of s 1(1)(n) which could result in using English law if it is found to fall under the old head of jurisdiction for maritime claims. This section provides that *‘the design, construction, repair or equipment of any ship’* is a maritime claim. One thing that could be noted from this section is that ‘building, equipment, and repairing of a ship’ existed as a maritime claim in South Africa before the commencement of AJRA and thus this old head of the jurisdiction could apply to claims for *‘construction, repair, and equipment’*. However, the *‘design’* provision as a maritime claim will only be the subject of the new head of jurisdiction and the Roman-Dutch law must be applied.¹²⁶

It can be denoted that it is important to note the history of the maritime claim that one is presenting at the court so that one could know the law that would apply.

2.3 Historical Background in of Action in *Rem* in Conjunction with Maritime Claims in Nigeria

The invasion of Nigeria by the English in 1862, which led to the colonisation of Lagos, marked the introduction of the English legal system in Nigeria.¹²⁷ Section 2 of the CCAA established the Admiralty Court on 25 July 1890, providing that the jurisdiction of the court was the same as England’s High Court of Admiralty,¹²⁸ established under s 12 of the CCAA which afforded the power to the Queen in council to make directions regarding the CCAA in any colony established.¹²⁹ Accordingly, the Nigeria Protectorate Admiralty Jurisdiction Order was passed in 1882 giving the Supreme Court in the Colony of Lagos admiralty jurisdiction. In 1933, the powers of the Lagos Supreme Court in Lagos Colony were extended to the whole of the protectorate of Nigeria.¹³⁰ Although another supreme court was established for Lagos Colony and the Protectorate of Nigeria in 1943,¹³¹ the 1928 Order-in-Council was retained in terms of section 24 of the 1943 Supreme Court Act.¹³²

When Nigeria became a federal state in 1954, only the Federal Supreme Court was vested with admiralty jurisdiction.¹³³ The Admiralty Jurisdiction Act of 1962 then repealed the Supreme Court Act which resulted in the three regional (state) high courts and the Lagos High

¹²⁶ Hofmeyr, *op cit* note 16 at 46

¹²⁷ Hare, *op cit* note 46 at 13

¹²⁸ Falase- Aluko, *op cit* note 17 at 64

¹²⁹ *Ibid*

¹³⁰ *Ibid*

¹³¹ *Ibid*

¹³² *ibid*

¹³³ Falase- Aluko, *op cit* note 17 at 65

Court being conferred with admiralty jurisdiction.¹³⁴ The process was disrupted when a Federal Revenue Court was established in 1973 with admiralty jurisdiction, ousting the admiralty jurisdiction of the state high courts. This resulted in conflict over which court had jurisdiction in admiralty matters. In *Bronik Motors Ltd. v Wema Bank Ltd*¹³⁵ the court held that s 230(1)(b) of the 1979 Constitution of Nigeria vested the Federal High Court with the relevant jurisdiction¹³⁶ and that article 236(1) of the Constitution¹³⁷ gave unlimited jurisdiction to the state high courts

‘ . . . to hear and determine civil proceedings in which the existence of a legal rights or a power or duty, liability, privilege, interest, obligation or claim is in issue or to hear and determine any criminal proceedings involving or relating to any penalty, forfeiture, punishment or other liability in respect of an offence committed by any person.’

It was held that the jurisdiction of the state high courts included the power to hear and determine admiralty matters as well as the Federal High Court on a reading of s 7(1)(d) of the Federal High Court Act of 1973.¹³⁸ In 1991, the AJA repealed the Admiralty Jurisdiction Decree of 1962 and s (1)(1) of AJA set out the admiralty jurisdiction. Thus the Federal High Court was granted unlimited power to hear admiralty matters concerning both local and foreign parties regarding conduct in Nigerian territorial waters.

It is important to note that AJA retains the admiralty jurisdiction that existed by any other court before the commencement of AJA in section 1(1)(b). However, there is no further interpretation or scholarly work written about this section although, it could be denoted that almost all listed maritime claims in s 1(1)(a) -(s) of the Administration of Justice Act 1956 are incorporated into AJA. Thus, does it mean that these listed maritime claims have the same interpretation under the AJA as they have in England? This is a very difficult question to answer. In the United Kingdom, according to Jackson, the Administration of Justice Act was repealed by the Supreme Court Act of 1981 in order to incorporate the 1952 Arrest Convention provisions.¹³⁹ Moreover, in principle, there is no difference between the 1952 Arrest Convention and the

¹³⁴ Ibid

¹³⁵ (1983) 6 SC 158

¹³⁶ Ibid

¹³⁷ 1979 Constitution of the Federal Republic of Nigeria

¹³⁸ Chapter 134 Laws of the Federal Republic of Nigeria

¹³⁹ David Jackson. *Enforcement of Maritime Claims*. 4 ed (2015) at 6

AJA.¹⁴⁰ On this note, according to Ojukwu, AJA is seen as the local application of the 1952 Arrest Convention¹⁴¹, and AJA is based on the Administration of Justice Act in England.¹⁴²

2.4 Relevant Statutory Provisions in South Africa

The AJRA repealed the CCAA,¹⁴³ and s 2(1) conferred on the provincial and local divisions of the High Court¹⁴⁴ jurisdiction to hear admiralty matters.¹⁴⁵ Sections 3(4) and 3(5) of the AJRA conferred *in rem* jurisdiction on the High Courts,¹⁴⁶ and s 1(1)¹⁴⁷ provided a detailed list of what constituted maritime claims (s 1(1a) to 1(ff) – see the list in paragraph 2.6 of this chapter). On account of the fact that South Africa and Nigeria share the same admiralty law origins, most maritime claims in the two countries follow a similar course. However, Nigeria does not provide for the ‘catch it all’ provision set forth in s1(1)(ee) of the AJRA, explained by Hofmeyr¹⁴⁸ as a ‘tool designed to bring under the jurisdiction of the court any matter or claim that is not covered in paragraphs (a)-(ff)’.¹⁴⁹ The provision confusingly refers to ‘marine matters’ which ‘is distinct from those which are ordinarily considered to constitute maritime matters and which properly fall to be cognisable in admiralty’.¹⁵⁰ Marine matters and maritime matters have different meanings¹⁵¹ and may lead to matters wrongly being included in admiralty jurisdiction.¹⁵² Moreover, AJRA offers no factual or legal differentiation between marine and maritime matters nor was this discussed in the judgment in the case in point of the *Galaecia*.¹⁵³ This is the case in which a fishing vessel *Galaecia* was arrested *in rem* in Durban by *Viarsa Export Co Ltd (Viarsa)* on the premise that it was a vessel associated to *MFV Carran*

¹⁴⁰ Ojukwu, *op cit* note 27 at 251

¹⁴¹ The 1952 Arrest Convention was applied in Nigeria by virtue of the importation of English Administration of Justice Act. This was done by the courts applying section 9 of the Federal High Court Act, which empowers the court to resort to the Lagos State High Court Law in cases where there is a lacuna in the law. See, Ojukwu, *op cit* note 27 at 251, *Supra* note 21

¹⁴² Ojukwu, *op cit* note 27 at 251 However, Ojukwu did not detail a comparison of the law in England nor did he analyse any case law

¹⁴³ Hare, *op cit* note 46 at 22 See the long title of AJRA where it was recorded : ‘To provide for the vesting of the powers of the admiralty courts of the Republic in the provincial and local divisions of the Supreme Court of South Africa, and for the extension of those powers; for the law to be applied by, and the procedure applicable in, those divisions; for the repeal of the Colonial Courts of Admiralty Act, 1890, of the United Kingdom, in so far as it applies in relation to the Republic; and for incidental matters.’

¹⁴⁴ Hofmeyr, *op cit* note 16 at 58 in which he deals with the AJRA

¹⁴⁵ *Ibid*

¹⁴⁶ *Ibid*

¹⁴⁷ *Ibid*

¹⁴⁸ *Ibid*

¹⁴⁹ *Ibid*

¹⁵⁰ *Ibid*

¹⁵¹ *Ibid*

¹⁵² *Ibid*

¹⁵³ 2006 SCOSA D252 (D)

against which Viarsa had affirmed a maritime claim. The owner of the *Galaecia* then applied to have the arrest set aside and the court held that the contract was one of purchase and sale of frozen fish, and the fact that the fish were harvested by a fishing vessel did not make it a maritime claim. The judge duly set aside the arrest and the vessel was released.¹⁵⁴ Thus, even though the subject matter is similar to that of a maritime claim this does consistent- not imply that the claim is a maritime matter. It was argued by the plaintiff that the case had no connection with the land and is a marine or maritime matter based on the reason that *MFV Carran* was a ship, fish are products of the sea and everything occurred on the sea. Combrinck J made it clear that although the subject matter of the case dealt with a fishing vessel that caught fish it was not a maritime matter because of the purchase and sale of frozen fish will fall under the sale of goods and contract law.¹⁵⁵

The opening statement of s 1(1) of the AJRA includes the phrase 'arising out of or relating to'¹⁵⁶ in respect of maritime claims, and these words were critically examined in the case of *Peros v Rose*.¹⁵⁷ The plaintiff entered into a contract with a company, of which the defendant was the sole proprietor, to construct a yacht for the plaintiff. The plaintiff also entered into a separate contract (guarantee) with the defendant specifying a penalty provision in the event of non-performance of the aggregate of everything due to the plaintiff. When the defendant defaulted, the plaintiff claimed on the guarantee. In the resultant action, the issue was whether the claim was a maritime claim under s 1(1)(ii)(m) of the AJRA. Peros (plaintiff) sued Rose (defendant) in the Natal Provincial Division of the Supreme Court. The defendant raised a plea in *limine* saying the plaintiff's claim was a maritime claim based on the definition of AJRA s 1(1)(ii)(m) and thus, the claim can only be heard in a High Court exercising its admiralty jurisdiction as specified in s 2 of AJRA. One of the terms of the construction agreement between plaintiff and Rosa Marine CC that is relevant to this discussion is a term entered for delivery which reads:

¹⁵⁴ 2006 SCOSA D252 (D) at 248

¹⁵⁵ Ibid 248. Also see, Hofmeyr, *op cit* note 16 at 58

¹⁵⁶ Prior to the Admiralty Jurisdiction Regulation Amendment Act of 1992, the words were not contained in the opening statement but variations of the same terms were used in each subsection. Thus, the Admiralty Jurisdiction Regulation Amendment Act of 1992 substituted the definition of maritime claim by the opening statement of 'maritime claim means any claim for, arising out of or relating to'

¹⁵⁷ 1990 (1)SA 420 (N) at 424H-425H. At the time, s1(1)(ii)(m) read: 'any claim in respect of the design, construction, repair or equipment of any ship or any dock or harbour dues or any similar dues' Note that this section was renumbered in terms of the 1992 amendments to 1(1)(q) read. 'the design, construction, repair or equipment of any ship;'

‘from the date of the signing of the contract, the estimated time to complete the yacht is 9-12 months. The BUILDER will not be responsible for any reasonable extension of this time period and no penalties will apply’¹⁵⁸

More so, another agreement was concluded by the plaintiff with Rose in his personal capacity which read as ‘Contractual Guarantee’:

‘I, the undersigned, Donald Rose, in my personal capacity together with my heirs assigns and successors in title undertake that in the event of the BUILDER not completing the construction of the yacht up to stage 7.1.3 “installation of engine, completion of plating” within a period of six months from “laying of the keel” I shall if called upon to do so by the OWNER, repay to the OWNER an amount equal to the aggregate of such sums as shall have been paid by the OWNER to the builder as at that date against cession by the OWNER of all his rights, title, and interest in, and to, the yacht, all of the OWNER’S rights, titles and interest in and to, to the yacht and arising under this agreement. Notwithstanding the provisions of this guarantee, the OWNER shall in his sole and absolute discretion decide whether he wishes to exercise his rights in term of his guarantee’¹⁵⁹

The plaintiff chose to enforce his right against the defendant and informed him of his decision to collect the money under the guarantee and offered the defendant the right of cession against the payment.¹⁶⁰ The main issue was if the claim was a maritime claim and turned on the scope of the words ‘in respect of’ in s(1)(1)(ii)(m), and the similar words in s1(1)(q). The defendant alleged that the plaintiff’s claim was a maritime claim as defined in s 1(1)(ii)(m) of AJRA which provides that a maritime claim means

‘any claim in respect of the design, construction, repair or equipment of any ship or any dock or harbour dues or any similar dues’

However, the plaintiff rebutted that the case was about a contractual guarantee and undertaking that the defendant had failed to pay. On this note, the learned Judge in adjudicating on the matter looked at the historical background:

‘...[in a] matter arising out of English Admiralty claims as recognized under the English Admiralty law 1983, the intention of the legislature in using the expressions such as “relating to”, “for” “arising out of” “in the nature of” and “with regard to” in the listed

¹⁵⁸ Ibid at 422H

¹⁵⁹ Ibid

¹⁶⁰ Ibid

maritime claims “was to convey a relationship between the claim and the maritime topic to which it is related, sufficiently intimate to impart to the claim a maritime character which would render it appropriate for the claim to be adjudicated in accordance with maritime law”¹⁶¹

Thence, it was held that the claim did not¹⁶² fall within the jurisdiction of the court exercising its admiralty jurisdiction and the connection was not sufficient to render a claim for specific performance of a guarantee to a claim of construction of a yacht.¹⁶³

The case *Peros v Rose* has since been cited and approved in a number of recent decisions,¹⁶⁴ including the case *Twende Africa Group (Pty) Ltd t/a TAG Marine v Qavak; Fisherman Fresh CC v Twende Africa Group (Pty) Ltd t.a TAG Marine*¹⁶⁵ This is a case that presents two different types of claims namely the contractual claims for commission arising from a brokerage contract for the sale of the ship by the defendant¹⁶⁶ to the plaintiff¹⁶⁷ For the purpose of this dissertation only what is related to the interpretation of a ‘maritime claim’ will be considered, which is the alternative claim.¹⁶⁸ This was a delictual claim for damages caused by the applicant’s alleged wrongful and unlawful breach of a legal duty owed to the plaintiff.¹⁶⁹ The question that was asked was if the claim was a maritime claim that is arising out of or relating to an agreement for the sale of a ship as envisaged in s 1(1)(c) or the remuneration of a person appointed to act as a broker in respect of a sale agreement relating to a ship in s 1(1)(p) of AJRA.

The claim was said to be a maritime claim based on the interpretation of the phrase 'arising out of and relating to' in the case of *Kuehne and Nagel (Pty) Ltd v Moncada Energy Group Srl*¹⁷⁰ where the judge held that there has to be a legally relevant connection between the claim

¹⁶¹ Arthur James & Marko Kershoff 'South Africa: Maritime Claims in South Africa (2016) available at <https://www.mondaq.com/southafrica/Transport/472174/Maritime-Claims-In-South-Africa> . accessed on 27/06/2020. See also, *Peros v Rose* 1990 (1)SA 420 (N) at 424H-425H

¹⁶² Supra note 157 at 421H

¹⁶³ Supra note 157 at 424I - 425D

¹⁶⁴ See Chapter three, section 4.3 *Kuehne & Nagel (Pty) Ltd v Moncada Energy Group SRL*. [2016] JOL 35897 (GJ) and *MFV El Shaddai, Oxacelay and Another v MFV El Shaddai and Others* 2015 (3) SA 55(KZD)

¹⁶⁵ 2018 JDR 0238 (ECP)

¹⁶⁶ The MFV Qavak was a commercial fishing vessel, which until recently was owned by M C Donahue Fishing Ltd

¹⁶⁷ The vessel is owned by Fisherman Fresh CC, the applicant in the application.

¹⁶⁸ The claim was relied upon for the first time in the application to set aside the arrest, and was not included in the summons at the time of arrest, but based on longstanding authority it is acceptable for a plaintiff in admiralty jurisdiction to introduce any justification for the arrest at the stage of the application to set aside the arrest.

¹⁶⁹ The plaintiff is a broker with its registered office in Cape Town. It carried on the business of a ship broker facilitating, inter alia, the sale and purchase of shipping vessels.

¹⁷⁰ [2016] JOL 35897 (GJ)

and the object to which the claim is required to relate for the purpose of the definition of a maritime claim. Thus, the object for the purpose of this case to which the claims are required to relate is an agreement regulating the remuneration of the plaintiff as a broker in the sale of a vessel. It was held by the court that the plaintiff's 'alternative delictual claims are sufficiently closely connected to maritime matters'.¹⁷¹ In other words, there is a 'legally relevant connection' between the claim and the object to which it relates which is the remuneration of a broker as provided in the sale of a ship agreement. More so, the court made reference to the case of *Peros v Rose* which is relevant to this dissertation and the interpretation of the words 'arising out of or relating to' in that:

'...It seems to me that expressions of the kind referred to above are not readily capable of precise definitions and have meanings which by their very nature are less than definite. When it becomes necessary, therefore, to determine the limits of the relationships which they may be employed to describe, particularly in what may be considered as borderline cases, it is inevitable, I think, that particular regard will have to be had to the context in which they are used in the statutory provision in question as well as any other indications, whether in the statutes or otherwise, which may present themselves.'¹⁷²

On appeal it was held that the contractual claim of a broker commission was a maritime claim in terms of s 1(1)(p) of AJRA and this is a claim that is 'arising out of or relating to' to the remuneration of any person appointed to act or who acted as a broker in respect of sale relating to a ship.¹⁷³ The court further held that the alternative claim which deals with a breach of an alleged broker agreement was also a maritime claim.¹⁷⁴ However, the case was dismissed based on the failure to prove a *prima facie* case that an agreement was concluded with Donohue Fishing to act as a broker for the purchase of the vessel Qavak.¹⁷⁵

¹⁷¹ *Twende Africa Group (Pty) Ltd v MFV Qavak* 2018 JDR 0238 (ECP) at 66-67

¹⁷² *Twende Africa Group (Pty) Ltd v MFV Qavak* 2018 JDR 0238 (ECP) at 63 see also *Twende Africa Group (Pty) Ltd v MFV Qavak* 2019 JDR 0518 (SCA)

¹⁷³ *Twende Africa Group (Pty) Ltd v MFV Qavak* 2019 JDR 0518 (SCA) at 4 para 7

¹⁷⁴ *Ibid*

¹⁷⁵ *Ibid* at 19 para 39

2.5 Relevant Statutory Provisions in Nigeria

The Admiralty Jurisdiction Act of 1991 (AJA)¹⁷⁶ as referred to in s 1¹⁷⁷ and 251(g) of the 1999 Constitution¹⁷⁸ gave admiralty jurisdiction to the Federal High Court to the exclusion of any other courts.¹⁷⁹ The AJA classifies maritime claims in two sections, the first being ‘proprietary claims [being] rights which the owner of the vessel has by virtue of his ownership, and the second being general maritime claim is seen as based on statutory liens.’¹⁸⁰ The Admiralty Jurisdiction Procedure Rules¹⁸¹ (AJPR) in Order 7, rule 1(1) set out that a maritime claimant can proceed in *rem* if it is certain that the vessel is within the country’s jurisdiction, or that the vessel is expected to come into the country within three days. Therefore, s 2(2) of the AJA provides the list of claims that falls under proprietary claim,¹⁸² while s 2(3)¹⁸³ describes general maritime claims.¹⁸⁴ However, there is no provision for the phrase ‘for, arising out of or relating to’¹⁸⁵ in AJA. Thus the distinction is illustrated by the case of *Med Queen & Ors.v J.B Erinfolami*⁹⁵ in which the Court of Appeal interpreted s 2(3)(k) of AJA as arising from a claim lodged in the Federal High Court (FHC). The respondent sued the appellant for N822,000 for special and general damages purportedly arising from non-use and negligent damage by the appellants as hirers of the respondent’s forklift. The Federal High Court overruled a preliminary objection on the competence of the claim, and on appeal, the Court of Appeal (CA) had to decide whether the negligent damage done in respect of the forklifts could be construed as a maritime claim as envisaged in s 2(3)(k) of the AJA. It was held that the Federal High Court erred in interpreting s 2(3)(k)¹⁸⁶ as meaning that the respondent’s case did not fall within the meaning of general maritime claims or s 2(3)(k).¹⁸⁷ However, as the case concerned the contract of hire of forklifts, such claims did not fall within the meaning of s 1(1) of the AJA. Thus, the Federal High Court, exercising its admiralty jurisdiction, did not have jurisdiction to

¹⁷⁶ AJA

¹⁷⁷ Ibid

¹⁷⁸ 1999 Constitution of the Federal Republic of Nigeria

¹⁷⁹ Ojukwu *op cit* note 27 at 249- 250

¹⁸⁰ Section 2. of AJA

¹⁸¹ Admiralty Jurisdiction Procedure Rules 2011

¹⁸² The table drawn in 2.6 shows the type of claims that falls under both proprietary and general maritime claim

¹⁸³ Ibid

¹⁸⁴ The drawn table in 2.6 shows the type of claims that falls under both proprietary and general maritime claim

¹⁸⁵ The phrase has been used in AJA separately in a number of subsections, for example, see s 2 and all the subsections. The phrase has not been used at the beginning of s 2. This is the same with AJRA before the 1992 Amendments Act. The phrase was used separately in number of subsections and not conjoined like it is now.

¹⁸⁶ AJA

¹⁸⁷ Ibid

entertain the case. The same reasoning was applied in the case of *Francis Obi Oroegbu v Calabar Carrier & Ors.*,¹⁸⁸ which was also an appeal from the Federal High Court (FHC) to the Court of Appeal (CA). The main issue, in this case, was whether the memorandum of understanding between the appellant and the 5th respondent (owner) amounted to an agreement for the ‘use or hire’ of the 1st to 4th respondent within the meaning of s 2(3)(f) of the AJA upon which an action in *rem* could be founded.

The appellant (applicant in the FHC) had invoked the admiralty jurisdiction of the FHC in Lagos in an action in *rem* subject to an *ex parte* order which caused the 1st to 4th respondents to be arrested and detained pending the respondents providing a first-class bank guarantee from any of the reputable banks in the country. However, the 1st to the 4th respondents failed to provide this guarantee and thus, remained detained. Nevertheless, the respondents rebutted the applicant’s case, arguing that it was not a maritime claim. They filed a motion on notice which made the trial court rule unconditionally for the release of the 1st to 4th respondents.

An aggrieved applicant moved to the CA on four grounds, the one relevant to this dissertation being:

‘whether the agreement between the appellant and the 5th respondent(owner) on a proper interpretation relates to the ‘use or hire’ of the 1st to 4th respondent in Nigeria or can otherwise be found a maritime claim and whether the learned trial judge was right in ordering the unconditional release of the 1st – 4th respondents.’¹⁸⁹

On this note, the respondent argued that the relationship between the appellant and the 5th respondent was about a partnership that was captured in the memorandum of understanding that any service rendered by the appellant would be made from the proceeds of the 1st to the 4th respondents. Thus, in order to clear the meaning and subject of the claims, the counsel in oral submissions asked some questions which were:., whether the nature of the service showed fell under the classes of service rendered on the high seas, or related to the perils of the seas;. whether the appellant employed the service of the vessels, and whether the 5th respondent, the owner of the vessels, employed the services of the appellant. All answers were ‘no’.

¹⁸⁸ (2003-2008) Nigeria Shipping Cases, Vol. 10, 507

¹⁸⁹ Ibid

In addition, the counsel described the memorandum of understanding as an agreement for the running of the Alpha Marine Company that did not fall under s 2(3)(f) AJA. It had not been shown that the Alpha Marine Company was a vessel nor had it been shown that Alpha Marine entered into an agreement with the appellant relating to ‘hire’ ‘use; or ‘carriage of goods or persons by ship’.

The CA had to decide whether the FHC correctly decided that the memorandum of understanding between the appellant and the five respondents¹⁹⁰ for the use and hire of a ship sustained a maritime claim within the meaning of s 2(3)(f) of the AJA. It was held that breach of contract did not fall under the purview of the admiralty jurisdiction of the FHC and that claims flowing from s 2(3)(f) of the AJA must have arisen out of an agreement for carriage of goods or hiring of the ship by a charter party. The court concluded that s 2(3)(f) of the AJA meant that the appellant had to make clear the ‘nature and usage he put the vessels to; equally, the injury caused to him by the vessel must be clearly spelt out’. Failing this, the FHC lacked jurisdiction in the exercise of its admiralty jurisdiction. Therefore not every transaction that involves a ship will be a maritime claim falling under the admiralty jurisdiction in AJA. Thus, the appeal was dismissed and the decision of the FHC was affirmed.¹⁹¹

2.6 Comparison of Maritime Claims in South Africa and Nigeria

There is a significant similarity in both jurisdictions. A contract dealing with a ship does not automatically amount to a maritime claim. This can be seen in the *Galaecia*;¹⁹² the court held that with a contract to purchase and sale of frozen fish did not fall under admiralty law. A similar decision was held in the case of *Peros v Rose*¹⁹³ where the court held that the connection was not sufficient to render a claim for specific performance of a guarantee a maritime claim for construction of a yacht. Moreover, in the Nigerian case of *Francis Obi Oroegbu v Calabar Carrier & Ors*¹⁹⁴ which deals with the ‘use or hire’ of a ship and whether a memorandum of understanding could sustain a maritime claim within the meaning of s 2(3)(f) of AJA it was held that a breach of contract did not fall under the admiralty court jurisdiction. The court shares a similar approach to that taken by the court in South Africa, but there is no express provision in the Nigerian case law of requiring a ‘sufficient connection’. AJA requires in s

¹⁹⁰ The respondents were: Mv Calabar Carrier Mv Bonny Carrier, Mv Lolita Chouest, Mv Miss Reece, and Chief Edison Chouest jr

¹⁹¹ (2003-2008) Nigeria Shipping Cases, Vol. 10, 507

¹⁹² Supra note 153

¹⁹³ Supra note 157

¹⁹⁴ Supra note 188

2(3)(f) that the claim in the trial must have risen out of an agreement either in 'respect of carriage of goods or persons by the ship or use or hire of the ship whether by charter party or otherwise' and in order to be to be successful, the appellant must state clearly the nature and 'usage' he put the vessels to and the injury caused must be clearly spelt out.' The appellant's claim is for damages that are based on a breach of contract between parties and by the provision of s 251(1)(p) of the 1999 Constitution of the Federal Republic of Nigeria, an action for a breach of contract does not fall under the Admiralty Jurisdiction of the FHC. The court examined the terms of the contract closely and observed:

'...The MOU has not stated the nature of the services to be rendered to Alpha Marine Services nor is the use for which the 1st to 4th respondents were employed. It is thus difficult for one to say that the necessary pre-conditions under section 2(3) (f) of the Admiral Jurisdiction Act have been satisfied by the terms of the MOU to justify the invocation of the admiralty jurisdiction of the Federal High Court'.

However, there are also significant differences between the two jurisdictions. The next paragraph will show some of the differences by tabulation.

There is some overlap in what constitutes a maritime claim in both jurisdictions. Thus in order to get a good understanding, the table below shows by way of comparison the overlap of the different types of maritime claims.

Table 1: Comparison of maritime claims in South Africa and Nigeria
Column 1 and 2 drawn from section 1 of AJRA¹⁹⁵ while Column 3 and 4 drawn from section 2 of AJA¹⁹⁶

South Africa		Nigeria	
Section:1 paragraph:	Provisions:	Section: 2	Provision:
A	ownership of a ship or share in a ship	2(2)a	proprietary maritime claim: a claim relating to - (i) the possession of a ship, or (ii) a title to or ownership of a ship or of a share in a ship, or of share in a ship, or (iii) a mortgage of a ship or of a share in a ship, (iv) a mortgage of a ship's freight

¹⁹⁵ Admiralty Jurisdiction Regulation Act.105 of 1983

¹⁹⁶ Admiralty Jurisdiction Act, Chapter A5, Laws of the Federation of Nigeria

B	the possession, delivery, employment or earnings of a ship;	2(2)(a)I 2(2) (b)	a claim relating to - (i) the possession of a ship, a claim between co-owners of a ship relating to the possession, ownership, operation or earning of a ship
C	any agreement for the sale of a ship or a share in a ship, or any agreement with regard to the ownership, possession, delivery, employment or earnings of a ship;	2(2)(b)	no equivalent a claim between co-owners of a ship relating to the possession, ownership, operation or earning of a ship
D	any mortgage, hypothecation, right of retention, pledge or other charge on or of a ship, and any bottomry or respondentia bond;	2(2)(a)(iii) 2(3)(o)	a mortgage of a ship or of a share in a ship, a claim arising out of bottomry
E	damage caused by or to a ship, whether by collision or otherwise;	2(3)(a)	general maritime claim: a claim for damage done by a ship whether by collision or otherwise;
F	loss of life or personal injury caused by a ship or any defect in a ship or occurring in connection with the employment of a ship;	2(3)(c)	make claim for loss of life or for personal injury sustained in consequence of a defect in a ship or in the apparel or equipment of a ship;
G	loss of or damage to goods (including the baggage and the personal belongings of the master, officers or seamen of a ship) carried or which ought to have been carried in a ship, whether such claim arises out of any agreement or otherwise;	2(3)(e)	a claim for loss of or damage to goods carried by ship;

H	the carriage of goods in a ship, or any agreement for or relating to such carriage;	2(3)(f)	a claim out of an agreement relating to the carriage of goods or persons by a ship or to the use or hire of a ship, whether by a charter party or otherwise
I	any container and any agreement relating to any container;		no equivalent
j.	any charter party or the use, hire, employment or operation of a ship, whether such claim arises out of any agreement or otherwise;	2(3)(f)	a claim out of an agreement relating to the carriage of goods or persons by a ship or to the use or hire of a ship, whether by a charter party or otherwise
K	salvage, including salvage relating to any aircraft and the sharing or apportionment of salvage and any right in respect of property saved or which would, but for the negligence or default of the salvor or a person who attempted to save it, have been saved, and any claim arising out of the wreck and salvage act, 1996;	2(3)(g)	a claim relating to salvage (including life salvage of cargo or wreck found on land)
L	towage or pilotage;	2(3)(i) 2(3)(j)	a claim in respect of pilotage of a ship a claim in respect of towage of a ship or an aircraft when it is water-borne;
M	the supplying of goods or the rendering of services for the employment, maintenance, protection or preservation of a ship;	2(3)(k)	a claim in respect of goods, materials or services (including stevedoring and lighterage service) supplied or to be supplied to a ship for its operation or maintenance
N	the rendering, by means of any aircraft, ship or other means, of services in connection with the carrying of	2(3)(k)	a claim in respect of goods, materials or services (including stevedoring and lighterage service)

	persons or goods to or from a ship, or the provision of medical or other services to or in respect of the persons on being taken to or from a ship;		supplied or to be supplied to a ship for its operation or maintenance
O	payments or disbursements by a master, shipper, charterer, agent or any other person for or on behalf of or on account of a ship or the owner or charterer of a ship; ¹⁹⁷	2(3)(p)	a claim by a master, shipper, charterer or agent in respect of disbursements on account of a ship;
P	the remuneration of, or payments or disbursements made by, or the acts or omissions of, any person appointed to act or who acted or failed to act- (i) as an agent, whether as a ship's, clearing, forwarding or other kind of agent, in respect of any ship or any goods carried or to be carried or which were or ought to have been carried in a ship; or (ii) as a broker in respect of any charter, sale or any other agreement relating to a ship or in connection with the carriage of goods in a ship or in connection with any insurance of a ship or any portion or part thereof or of other property referred to in section 3 (5); or (iii) as attorney or adviser in respect of any matter mentioned in subparagraphs (i) and (ii);		

¹⁹⁷ The old AJRA in s 1(1)(o) before it was repealed and replaced by paragraph (o) had the same provision with the Nigeria AJA in paragraph (P). The old AJRA provides; ‘any claim by a master, shipper, charterer or agent in respect of payments or disbursements made for or on behalf or on account of a ship or any ship-owner;’ [Original wording of AJRA available at https://www.gov.za/sites/default/files/gcis_document/201504/act-105-1983.pdf, accessed on 25/07/2019]

Q	the design, construction, repair or equipment of any ship;	2(3)(m) 2(3)(l)	a claim in respect of the alteration, repair or equipping of a ship or dock charges or dues a claim in respect of the construction of a ship(including such a claim relating to a vessel before it was launched)
R	dock, harbour or similar dues, and any charge, levy or penalty imposed under the south african maritime safety authority act, 1998, or the south african maritime safety authority levies act, 1998;	2(3)(n)	a claim in respect of a liability for port, harbour, canal or light tolls, charges or dues, or tolls, charges or dues of any kind, in relation to a ship
S	the employment of any master, officer or seaman of a ship in connection with or in relation to a ship, including the remuneration of any such person, and contributions in respect of any such person to any pension fund, provident fund, medical aid fund, benefit fund, similar fund, association or institution in relation to or for the benefit of any master, officer or seaman;	2(3)(r)	a claim by a master, or a member of the crew, of a ship for-(i)wages, or(ii)an amount that a person, as employer, is under an obligation to pay to a person as employee, whether the obligation arose out of the contract of employment or by operation of law, including by operation of the law of a foreign country
T	general average or any act claimed to be a general average act;	2(3)(h)	a claim in respect of general average.
U	marine insurance or any policy of marine insurance, including the protection and indemnity by any body	2((3)q)	a claim for an insurance premium, or for a mutual insurance call, in relation to a ship, or

	of persons of its members in respect of marine matters;		goods or cargoes carried by a ship
V	the forfeiture of any ship or any goods carried therein or the restoration of any ship or any such goods forfeited;	2(3)(s)	a claim for the forfeiture or condemnation of a ship or of goods which are being or have been carried, or have been attempted to be carried in a ship, or for the restoration of a ship or any such goods after seizure
W	the limitation of liability of the owner of a ship or of any other person entitled to any similar limitation of liability;	s 1(1)d	any action or application relating to any cause or matter by any ship owner involving limitation liability. ¹⁹⁸ part xxv of the merchant shipping act of 2007 ¹⁹⁹
x.	the distribution of a fund or any portion of a fund held or to be held by, or in accordance with the directions of, any court in the exercise of its admiralty jurisdiction, or any officer of any court exercising such jurisdiction;		no equivalent
Y	any maritime lien, whether or not falling under any of the preceding paragraphs;	s 5(3)	section 5(3) ²⁰⁰ provides for maritime lien.
Z	pollution of the sea or the sea-shore by oil or any other substance on or emanating from a ship;	s 1(1)(e)	section 1(1) (e) ²⁰¹ provide the federal high court the jurisdiction to hear and determine claims relating to oil pollution damage.

¹⁹⁸ any action or application relating to any cause or matter by any ship owner or aircraft operator or any other person under the Merchant Shipping Act or any other enactment relating to a ship or an aircraft for the limitation of the amount of his liability in connection with shipping or operation of aircraft or other property;

¹⁹⁹ Section 351 to 359 of the Merchant Shipping Act of 2007

²⁰⁰ In any case in which there is a maritime lien or other charge on any ship, aircraft or other property for the amount claimed, an action in may be brought in the court against that ship, aircraft or property, and for the purpose of this subsection, 'maritime lien' means a lien for –

(a)salvage or (b)damage done by a ship or (c)wages of the master or of a member of the crew of a ship

(d)master's disbursement

²⁰¹ Any claim for liability incurred for oil pollution damage

Aa	any judgment or arbitration award relating to a maritime claim, whether given or made in the republic or elsewhere;	2(3)(t)	a claim for the enforcement of or a claim arising out an arbitral award (including a foreign award within the meaning of the arbitration and conciliation act made in respect of a proprietary maritime claim or a claim referred to in any of the preceding paragraphs;
Bb	wrongful or malicious proceedings in respect of or involving any property referred to in section 3 (5), or the wrongful or malicious arrest, attachment or detention of any such property, wherever any such proceedings, arrest, attachment or detention took place, and whether in the republic or elsewhere, and any loss or damage contemplated in section 5 (4);		
Cc	piracy, sabotage or terrorism relating to property mentioned in section 3 (5), or to persons on any ship;		no equivalent
Dd	any matter not falling under any of the previous paragraphs in respect of which a court of admiralty of the republic referred to in the colonial courts of admiralty act, 1890 (53 and 54 vict c. 27), of the united kingdom, was empowered to exercise admiralty jurisdiction immediately before the commencement of this act, or any matter in respect of which a court	s 1(1)(b)	section 1(1)(b) ²⁰² . in respect of any admiralty jurisdiction exercised by any other court before the commencement of the act.

²⁰² Any other admiralty jurisdiction being exercised by any other court in Nigeria immediately before the commencement of this Decree

	of the republic is empowered to exercise admiralty jurisdiction;		
Ee	any other matter which by virtue of its nature or subject matter is a marine or maritime matter, the meaning of the expression marine or maritime matter not being limited by reason of the matters set forth in the preceding paragraphs;		no equivalent
Ff	any contribution, indemnity or damages with regard to or arising out of any claim in respect of any matter mentioned above or any matter ancillary thereto, including the attachment of property to found or confirm jurisdiction, the giving or release of any security, and the payment of interest;	2(3)(u)	a claim for interest in respect of a claim referred to in any of the paragraphs (a) to (t) of this subsection.

		C	a claim for the satisfaction or enforcement, of a judgement given by the court or any court (including a court of a foreign country) against a ship or other property in an admiralty proceeding in rem
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		D	subject to subsection (4) of this section, a claim, including a claim for loss of life or personal injury, arising out of an act or omission of-(i)the owner or charterer of a ship,(ii)a person in possession or control of a ship,(iii)a person for whose wrongful act or omission the owner, charterer or person in possession or control of the ship is liable;
		section 2(4)	a claim shall not be made under subsection (3) (d) of this section unless the act or omission in an act or commission relating to the management of the ship, including an act of commission or omission relating to the management of the ship, including an act or omission in connection with – (a) the loading of goods onto or the unloading of goods from a ship; (b) the embarkation of persons on to or the disembarkation of persons from a ship ; and (c) the carriage of goods or persons on a ship.

Although there is overlap, the above table illustrates that there are also important differences in the maritime claims. For example, s 1(1)(cc) of AJRA provides for ‘piracy, sabotage or terrorism relating to property mentioned in section 3(5)²⁰³ or to persons on any ship’. In a

²⁰³ Section 3(5) refers to the following property: ‘(a) The ship, with or without its equipment, furniture, stores or bunkers;

(b) the whole or any part of the equipment, furniture, stores or bunkers;

(c) the whole or any part of the cargo;

(d) the freight;

(e) any container, if the claim arises out of or relates to the use of that container in or on a ship or the carriage of goods by sea or by water otherwise in that container;

contemporary world where piracy has become an international concern, it is understood why AJRA incorporated the provision.²⁰⁴ Contrarily, AJA has no equivalent provision.

More so, containers are now an essential part of modern multi-modal shipping²⁰⁵. They are used to pack any type of goods either dangerous, refrigerated, food, and any type of consumer goods.²⁰⁶ In the modern shipping context the goods are not simply carried on a ship,²⁰⁷ but often stowed in a container. The container may be damaged or the goods inside the container may be damaged while it is on the ship, or while it is being transported to port or after discharge to the place of final destination. Section 1(1)(i) was inserted into AJRA in 1992²⁰⁸ and refers to ‘any container and any agreement relating to any container’. The further issue arises whether this includes any container outside the port or a container that causes injury on its way to the shipping port. Hofmeyr refers to the definition of ‘container’ in AJRA: ‘a container destined for the carriage of goods by sea, including a container that is not being used or empty.’²⁰⁹ Accordingly, the meaning must be construed in line with s 3(5) of the AJRA which provides that an arrest *in rem* can be against a container only if the use of the container relates to the carriage of goods by sea.²¹⁰ Thus not all container issues will be maritime claims or enforceable by an action *in rem*.

(f) a fund.’

²⁰⁴ There are many discussions on piracy: see Vishal Surbun. *Piracy Jure Gentium in Territorial Seas: A Perspective from the East African Seaboard* Unpublished PHD thesis: University of Kwazulu-Natal (2018). A comparative analysis of the treatment of piracy under South Africa and Nigerian law is beyond the scope of the dissertation.

²⁰⁵ World Shipping Council 'Containers' available <http://www.worldshipping.org/about-the-industry/containers> accessed on 26/06/2020

²⁰⁶ In chapter 4 further discussion will be made on damage to goods which occurs after discharge from a ship.

²⁰⁷ Section 1(1) (g) of AJRA provides: ‘loss of or damage to goods (including the baggage and the personal belongings of the master, officers or seamen of a ship) carried or which ought to have been carried in a ship, whether such claim arises out of any agreement or otherwise;’ s1(1)(h) provides: ‘the carriage of goods in a ship, or any agreement for or relating to such carriage;’ and s 2(3) (e) of AJA provides: ‘a claim for loss of or damage to goods carried by a ship’; s2(3)(f) of AJA provides: ‘a claim out of an agreement relating to the carriage of goods or persons by a ship or to the use or hire of a ship, whether by charterparty or otherwise;’

²⁰⁸ Admiralty Jurisdiction Regulation Amendment Act. Act 87 of 1992.

²⁰⁹ Hofmeyr, *op cit* note 16 at 35 see, s 1(1)(i) of AJRA

²¹⁰ Section 3(5) of AJRA provides : ‘An action in rem shall be instituted by the arrest within the area of jurisdiction of the court concerned of property of one or more of the following categories against or in respect of which the claim lies:

- (a) The ship, with or without its equipment, furniture, stores or bunkers;
- (b) the whole or any part of the equipment, furniture, stores or bunkers;
- (c) the whole or any part of the cargo;
- (d) the freight;’
- (e) any container, if the claim arises out of or relates to the use of that container in or on a ship or the carriage of goods by sea or by water otherwise in that container;
- (f) a fund.

By comparison, s 2(3)(f) of AJA provides for ‘a claim arising out of an agreement relating to the carriage of goods or persons by a ship or the use or hire of a ship, whether by a charter party or otherwise.’²¹¹ If one should interpret this provision grammatically, it can be construed to mean any agreement relating to the carriage of goods by sea or the use or hire of a ship. Thus any agreement contravening this grammatical meaning would be said to fall outside the jurisdiction of the admiralty court.

This is illustrated in the case of *TSKJ (Nig.)Ltd..v. Otochem (Nig.) Ltd.*,²¹² an appeal case from the Supreme High Court (SHC) in River State to the CA, the plaintiff (respondent on appeal) had instituted an action at the SHC River State for damages and general damages respectively. This was a case that dealt with an agreement to supply a houseboat for the temporary use of the appellant’s staff. On this note, the appellant was charged with an advance payment which would serve as a rental value for two months mainly for the transportation of the appellant’s staff from Warri to Bonny Island. Due to the contract between the two parties, the respondent made certain modifications as required and as spelled out in the local purchase order issued by the appellant to the respondent. However, the respondent delivered the boat and requested for payment to be made. The appellant refused to take the delivery of the boat based on the allegations that the respondent failed to deliver the boat on the specific date. Hence the respondent (plaintiff in the court a quo) instituted an action before the SHC River States for the modification payment. The SHC held that the appellant (respondent in the court a quo) should pay the sum of N32,088,000.00. The appellant contested this by appealing to the CA. One of the two prayers before the court was whether the Federal High Court (FHC) River State had admiralty jurisdiction to hear the case, i.e. whether it was a maritime claim. It was held by the learned Judge that the SHC had jurisdiction to hear the case based on its wide civil jurisdiction as enshrined in the Constitution and thus, the court further held that the mere fact that the ship was involved in a houseboat supply contract does not make it to fall under the admiralty jurisdiction.

Arguably could s 2(3)(f) be said to cater for the provision of a container based on an agreement? Unlike AJRA there is no section dealing expressly with claims relating to containers in AJA. The Nigerian court follows the decision in *African Container Express v.*

²¹¹ section 1(1)(j) of AJRA provides: any charter party or the use, hire, employment or operation of a ship, whether such claim arises out of any agreement or otherwise

²¹² (2018) LPECR-44 294(SC)

*The Tourist Company*²¹³ which held that a dispute dealing with the value of a container did not fall within the meaning of a maritime claim.

Thence, under AJRA any claim relating to a container could qualify as a maritime claim if the claimant can prove that it is 'arising of out or relating to' the container. However, in Nigeria, it can be denoted that this type of claim did not fall under English law. It is not listed in the English law that applied in Nigeria²¹⁴ nor is there any interpretation relating to it in the English law except if one is to relate it to goods using the English dictionary meaning as asserted by Hofmeyr.²¹⁵ Thus, a container would not fall as a maritime claim under the provision of AJA which means the admiralty court exercising its admiralty jurisdiction would not have the power to hear such a case. However, if it can be proved that the container claim arises out of an agreement relating to the carriage of goods or persons by a ship or the use or hire of a ship, whether by a charter party or otherwise, then the admiralty jurisdiction can be invoked.

2.7 International Instruments and some Maritime Claims

A table has shown the different types of maritime claims that a plaintiff needs to raise before a vessel can be arrested in both Nigeria and South Africa. Some of these maritime claims have been interpreted differently in the respective countries. Nevertheless, the advent of various international conventions in maritime law has brought changes in maritime law. Those countries that have ratified these conventions are bound to follow their provisions.²¹⁶ Some of the listed maritime claims in the 1952 Arrest Convention²¹⁷ have been incorporated although with modification when necessary into different national admiralty law. Nigeria is a party to the 1952 Arrest Convention, but South Africa is not, arguably based on the provision of its associated ship arrest or for political reasons.²¹⁸

²¹³ Vol. 3 N.S.C. at 268. See, *West African Shipping Agency (Nig.) Ltd. v. Nablico Ltd.* (unreported) Suit No. FHC/L/62/86. All efforts to get the full fact of these cases is futile See, Falase-Aluko *op cit* 17 at 77

²¹⁴ In all the listed maritime claims in s 1(1)(a)-(s) of the Administration of Justice Act 1956 there is no provision for containers.

²¹⁵Hofmeyr, *op cit* note 16 at 34

²¹⁶ It is beyond the scope of the study to examine the international conventions in detail, and the focus of the study is on a comparison of maritime claims in the domestic legislation of South Africa and Nigeria.

²¹⁷Supra note 21

²¹⁸ Wallis, *op cit* note 1 at 85 states: 'Accession to the Convention was probably not politically feasible at the time given the suspension of South Africa from the General Assembly of the United Nations and its pariah status in world politics'

2.7.1 The International Convention Relating to the Arrest of Seagoing Ships (The 1952 Arrest Convention)

The main purpose of the 1952 Arrest Convention is to unify the process of the arrest of seagoing-ships around the world on account of the different national mechanisms used to arrest ships in both ‘common law and civil law countries’.²¹⁹ The different processes for the arresting of ships under the common law can be traced to the English law in which the *res* became the basis of the claim resulting in arrest to satisfy a judgement.²²⁰ However, in civil law jurisdictions, any property of the owner (defendant) could be arrested inasmuch as it was located within the jurisdiction of the court.²²¹ Berlingieri states that under civil law, any property of the owner, including the vessel, can be arrested to satisfy a claim although the claim is not a maritime claim.²²² Moreover, under common law jurisdiction, a vessel can only be arrested in the circumstances where the claimant founds a maritime claim to proceed in *rem*.²²³

The 1952 Arrest Convention came into existence to balance the arrest procedure between the civil and common law jurisdictions by providing and listing different types of claims which qualified as maritime claims that a plaintiff could rely on in respective national courts. Article one of the 1952 Arrest Convention presents a closed list of maritime claims for which a party can arrest a vessel. The listed seventeen claims cut across different meanings causing claimants to apply the convention by way of analogy with claims upheld by local courts, even though in the spirit of interpretation of the convention, it is expected that the claims be ‘construe[d] in a restricted manner’.²²⁴ Moreover, the closed list of claims is not conclusive as it does not extend to other shipping business, whereupon maritime claimants whose claims do not fall under the listed maritime claims would have to seek a remedy under the national law.²²⁵

²¹⁹ Francesco Berlingieri. *Belingieri on Arrest of Ships* 5 ed at 4

²²⁰ David Rhidian Thomas. *Maritime Liens (1980)* at 45

²²¹ Berlingieri, *op cit* note 219 at 4

²²² *Ibid*

²²³ *Ibid*

²²⁴ Jose Alcantara. ‘Some Reflections over the Brussels Convention of 1952 Relating to Arrest of Sea-Going Vessels and its Amending Process’ (1997) 26(3) *Georgia Journal International and Comparative law* at 554

²²⁵ Article 6 of the 1952 Arrest Convention notionally lags far behind most national legal systems, for example. South Africa’s AJRA providing for ‘liability for wrongful arrest’. The 1952 Arrest Convention left the liability for wrongful arrest to be handled by the national laws of different countries, causing maritime claimants to indulge in forum shopping by arranging ports of call in countries that had provision for wrongful arrest. Although each country has the power to make it own law by virtue of constitutional sovereignty, they are still bound to compromise in some instances.

Thus, the 1952 Arrest Convention in article 9²²⁶ refers to the International Convention on Maritime Liens and Mortgages,(the Convention)²²⁷ which in its article 4²²⁸ provides the type of maritime lien. Article 4 of the Convention provides ‘claims for port, canal and other waterway dues and pilotage dues’; as a maritime lien, however, this does not fall under maritime liens recognised in Nigeria and South Africa.

Further in art 1(a), the 1952 Arrest Convention provides for ‘*damage caused by any ship either in collision or otherwise.*’ Berlingieri²²⁹ in analysing the meaning of damage caused by any ship asserts that the word ‘damage’ is used under the Hague rules²³⁰ based on the liability of the carrier for goods lost or damaged; thus damage includes within its meaning the complete loss. Thus ‘it would, in fact, make no sense that the rights of arrest be granted , in case of collision, when one of the colliding vessels is damaged and not when one of them sinks as a consequence of the collision.’²³¹ Moreover, he later affirmed by referring to the British Association submission during the drafting²³² that word ‘otherwise’ was used to cover claims in circumstance where ‘damage is caused by one ship to another without physical contact.’ AJRA in s 1(1)(e)²³³ and AJA in s 2(3)(a)²³⁴ provide for the same things in principle. Although South Africa is not bound by the 1952 Arrest Convention nor compelled to refer to its interpretation.²³⁵

2.7.2 Application of International Convention Relating to the Arrest of Seagoing Ships in Nigeria.

The main point of contention is when a treaty becomes effective in a country. Article 2(1)(a) of the Vienna Convention on the Law of Treaties²³⁶ defines a treaty to mean:

²²⁶ Nothing in this Convention shall be construed as creating a right of action, which, apart from the provisions of this Convention, would arise under the law applied by the court which was seized of the case, nor as creating any maritime liens which do not exist under such law or under the Convention on maritime mortgages and liens, if the latter is applicable

²²⁷ International Convention on Maritime Liens and Mortgages 1993, 19 April to 6 May 1993 (Palais des Nations, Geneva), UNTS 2276

²²⁸ Ibid

²²⁹ Berlingieri, *op cit* note 219 at 51

²³⁰ Ibid

²³¹ Ibid

²³² Ibid

²³³ This reads: ‘damage caused by or to a ship whether by collision or otherwise’

²³⁴ This reads: ‘a claim for damage done by a ship whether by collision or otherwise’

²³⁵ Wallis, *op cit* note 1 at 85 states: ‘However the influence of the Arrest Convention in the drafting of the legislation did not necessarily mean that it would lead to the introduction of any novel concept in South African law or any departure from existing well-established principle’

²³⁶ Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, UNTS 1155

‘[A] n international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.’

Section (12) (1) of the 1999, Constitution of Nigeria states that:

‘No treaty between the Federation and any other country shall have the force of law National except to the extent to which the Assembly has enacted any such treaty into law.’

On a literal interpretation, no treaty will become a law if the Nigerian National Assembly does not enact it into law, even though Nigeria might have acceded to such a treaty.²³⁷ The Nigerian government acceded to the 1952 Arrest Convention²³⁸ on 7 November 1962, but is not lawfully binding in Nigeria until it has been enacted into law. AJA governs the arrest of ships in Nigeria and has incorporated most of the maritime claims provided in the 1952 Arrest Convention.²³⁹ Nevertheless, Chukwucheta asserts that Nigeria’s ratification of the Convention means that the country is bound by the 1952 Convention²⁴⁰ and thus it is incorporated in the municipal law of the country.²⁴¹ However, this cannot be said to be the exact position of the law in Nigeria, reflected in academic analysis of the subject. Authors like Kio D in his article ‘Arrest of ships in Nigeria: the Law, Practice and Procedure’, and Gbadamosi in ‘*Rethinking the administration of justice: Essays in Honour of Hon. Justice Abdullah Mustapha*’ assert that the Nigerian government has not converted the 1952 Arrest Convention into municipal law.²⁴² Thus,

²³⁷ Anele, *op cit* note 5 at 9

²³⁸ Status of the International Convention Relating to the Arrest of Seagoing Ships. Available at <https://treaties.un.org/pages/showDetails.aspx?objid=08000002801338ba> accessed on 22 August 2019

²³⁹ Nigeria has completely incorporated the 1952 Arrest Convention list of maritime claims into its Admiralty Jurisdiction Act though with some necessary modification by expanding on the contexts however some of the maritime claims listed in Admiralty Jurisdiction Act of Nigeria are not listed in the 1952 Arrest Convention. In section 2(3)(q): ‘a claim for an insurance premium , or agent in respect of disbursement relation to a ship or cargoes carried by a ship’ . Section 2(3)(s): ‘a claim for the forfeiture or condemnation of a ship or of goods which are being or have been carried, or have been attempted to be carried in a ship, or for the restoration of a ship or any goods after seizure’ . Finally, in section 2(3)(t); ‘a claim for the enforcement of a claim arising out of an arbitral award including a foreign award within the meaning of the Arbitration and Conciliation Act made in respect of a proprietary maritime claim or a claim referred to in any of the preceding paragraphs’

²⁴⁰ Chukwucheta Emejuru & Frank-Igwe. Arrest of Ship under Nigeria Law and International Law. at 143 available

at https://www.researchgate.net/profile/Ct_Emejuru/publication/275313862_Arrest_of_Ship_Under_Maritime_Law/links/553e4e3a0cf210c0bda93ac5/Arrest-of-Ship-Under-Maritime-Law.pdf accessed on 08/10/2019

²⁴¹ Ibid

²⁴² I see the debate of ratification of the 1952 Arrest Convention as pure academic debate because whether ratified or not, the Convention has a great influence on the Admiralty Jurisdiction Act since it applies to all ships , irrespective of the place where the owner of the ship resides and extends the application to all maritime claims irrespective to where it arose

according to a recent article by Anele, which is the most recent discussion of the Nigerian ship arrest law, it can be denoted that Nigeria has acceded to the 1952 Arrest Convention however due to the failure to domesticate the 1952 Arrest Convention by the National Assembly, the arrest of a sea-going vessel is governed solely by the AJA.²⁴³

In line with the intention of the 1952 Arrest Convention to provide a uniform rule to govern the arrest of ships around the world, Chukwucheta asserts that when the Nigerian court is faced with an issue of interpretation, it will turn to the Convention for assistance in line with the principle of international uniformity on ship arrest.²⁴⁴

However, Christopher Hill cautions:

There is, perhaps a considerable measure of misunderstanding of the extent of uniformity internationally about the rules for ship arrest. It is not as uniform as people tend to imagine. The misconception is probably fuelled by the existence of the International Convention on the Arrest of Sea-going Ships of 1952.²⁴⁵

Thus, in light of the Christopher Hill argument, I concur that the International Convention on the Arrest of Sea-going ships serves as a guide for national courts but not a binding law in the courts of Nigeria on the arrest of sea-going ships.²⁴⁶ Thus, since South Africa is not a party to the convention, South African courts are not bound by its provisions.²⁴⁷ However as Christopher Hill pointed out that the convention is guidance, it can be denoted that some of the maritime claims provided in article 1(a)-(q) of the 1952 Arrest Convention overlap with some maritime claims under section 1(1) (a)-(ff) of the AJRA.

²⁴³ Anele, *op cit* note 5 at 10

²⁴⁴ Emejuru, *op cit* note 240 at 142

²⁴⁵ Christopher Hill in Emejuru *op cit* note 240 at 143

²⁴⁶ *Ibid*

²⁴⁷ In *MV Heavy Metal; Belfry Marine Ltd v Palm Base Maritime Sdn Bhd* 1999 (3) SA 1083 (SCA) para 42-43 it was said that a number of provisions of AJRA, notably the list of maritime claims in section 1, were modelled on the 1952 Arrest Convention, and that although AJRA's provisions go further than many other maritime laws, e.g. arrest of associated ships, 'it was desirable that there should be as great a degree of consistency as can be achieved with other systems of maritime law.' It should be noted that more recently the Supreme Court of Appeal has emphasized that AJRA must be interpreted using ordinary principles of statutory interpretation according to South African law. In *MV Silver Star; Owners of the mv Silver Star v Hilane Ltd* 2015 (2) SA 331 (SCA) held at para 31: '[t]hat is a question to be determined by a conventional process of statutory interpretation in terms of South African law. Foreign law will only enter into the picture if the court needs to determine the nature of a particular claim in order to decide whether it comes within the scope of one of the defined maritime claims.'

2.8 Conclusion

It can be denoted from this chapter that both Nigerian and South African admiralty law share their origin from the English admiralty law. However, South Africa has made an express provision that helps in the interpretation of its listed maritime claims, which deals with whether these maritime claims fall under the old head of jurisdiction which is decided under the English law or the new head of jurisdiction which is decided under the Roman-Dutch law. Contrarily, AJA provides in its s 1(1)(b) that the jurisdiction of the court before the commencement of AJA is applicable but does not specify the law to be applied. Furthermore, not every contract dealing with a ship is a maritime claim. This can be seen in the South African interpretation that there must be a sufficient connection between the maritime object and the claim. The Nigerian courts in the cases analysed did not provide for an express requirement of sufficient connection, but the claimant must be able to show that the claim arises in respect of goods carried or hire of the ship. More so, an important significant difference shown in this chapter, is that AJRA recognizes a claim relating to a container as a maritime claim in as much there is a maritime connection established. Contrarily, a container is not listed as a maritime claim in AJA however, if the claimant can prove that the container claim is arising out of an agreement relating to the carriage of goods or persons by a ship or the use or hire of a ship, then the admiralty jurisdiction of the Court can be invoked. Nigeria incorporated the 'closed list of maritime claims' of the 1952 Arrest Convention in its AJA and follows most of its interpretation to a great extent.²⁴⁸ However, South Africa does not have an international obligation since she has not acceded to the 1952 Arrest Convention although s 1(1) of AJRA incorporates a substantial number of the Convention's listed maritime claims.

In Nigeria, maritime claims can be classified as "maritime liens, general maritime claims or statutory liens and proprietary claims".²⁴⁹ In South Africa, some claims can be classified as maritime liens and others as statutory liens.²⁵⁰ The meaning of a maritime lien under South African and Nigerian law will be discussed in the next chapter, and the statutory lien is discussed in chapter 4.

²⁴⁸ Indication shows from Berlingeri *op cit* note 219 that Nigeria interprets and words the AJA the same. This has been shown on different heads of interpretation in the text book where Nigeria is being referred to

²⁴⁹ Section 2 of AJA

²⁵⁰ Hare, *op cit* note 46 at 35

CHAPTER THREE

Maritime Lien

3.0 Introduction

A maritime lien is one of the pillars of admiralty law which can only be enforced by an action *in rem* that allows the arrest of the *res*.²⁵¹ According to Carver: ‘A maritime lien is a foundation of a proceeding *in rem*, a process to make perfect a right inchoate from the moment the lien attaches.’²⁵²

There is no given jurisdictional definition of a maritime lien; however, South Africa and Nigeria follow their common law in categorising a specific set of maritime claims as maritime liens.²⁵³ Despite this, the three main international conventions on the law of the sea surprisingly fail to offer a definition of a maritime lien. The International Convention on Maritime Liens and Mortgages²⁵⁴ was acceded to by the Nigerian government on the fifth of March 2004;²⁵⁵ however, no further steps were taken by the legislator to incorporate it into domestic law. According to Hare, South Africa is not a party to the Maritime Liens Convention, and it is unlikely for its ratification based on the nature of its associated ship arrest provisions.²⁵⁶ According to Shaw,²⁵⁷ most countries ‘shy away’ from defining a maritime lien. An extract from the judgment in the *Father Thames* case²⁵⁸ states, ‘a maritime lien is more easily recognised than defined’. Thus, it would be more effective to resort to case law to derive a clearer definition of a maritime lien. The cases of *The Nestor*²⁵⁹ and *The Bold Buccleugh*²⁶⁰ provide an adequate definition of a maritime lien. It was described in the latter case as:

‘A claim or privilege upon a thing to be carried into effect by legal process . . . this claim or privilege travels with the thing, into whosoever’s possession it may come. It is inchoate from the moment the claim or privilege attaches, and when carried into effect

²⁵¹Multilaw. Maritime lien. Available at

https://www.multilaw.com/Multilaw/Multilaw_News/Member_Firm_News/Maritime_Liens.aspx
accessed on 10 July 2019

²⁵² Thomas Gilbert Carver & Raoul Colinvaux. *Carver’s Carriage of Goods by Sea* (1952) at 998

²⁵³ Okoli, *op cit* note 6 at 47

²⁵⁴ International Convention on Maritime Liens and Mortgages 6 May 1993, Geneva. UNTS 2276 (hereinafter the Convention)

²⁵⁵ Ibid

²⁵⁶ Hare, *op cit* note 46 at 169

²⁵⁷ Shaw, *op cit* note 43 at 86

²⁵⁸ *The Father Thames* (1979) 2 Lloyd’s Rep 346 at 368

²⁵⁹ (1831) 18 FED. Cas 9 at 83

²⁶⁰ Supra note 111

by legal process, by a proceeding in rem, relates back to the period when it first attached'²⁶¹

One of the main characteristics of, and what differentiates a maritime lien from a common law lien, is that it is not compulsory for the debtor to be in possession of the *res*. According to Hayden, a plaintiff cannot be said to have waived his right by allowing the *res* to sail.²⁶²

The *res* is regarded as 'an earning object' that provides incomes for whoever owns it; therefore a *res* lying at the berth adds no financial value to the businesses.²⁶³ South Africa and Nigeria have adopted the theoretical definition of a maritime lien as developed and refined in English law.

3.1 Definition of Maritime Lien in South Africa

According to Hare, the AJRA did not define a maritime lien and it was necessary to refer back to the common law to obtain an effective definition.²⁶⁴ As a result, the definition of a maritime lien in South Africa bears a meaning similar meaning to that in English law. In *The Ripon City*,²⁶⁵ it was held that a 'maritime lien was a right acquired by one over a thing belonging to another – a *ius in res aliena*.'²⁶⁶ However, Marais J held in the South African case of *The Andrico Unity*²⁶⁷ that one could not construe a maritime lien literally:

'... [T]he special characteristics of a maritime lien should not be taken too literally and should not be allowed to obscure the fact that it is not in truth a *jus in re aliena*, nor is it a subtraction from the absolute property of the owner in the ship. It is a concept, which is sui generis, and its reason for existence is to improve the holder's prospect of his claim being paid. It is therefore designed to secure payment and to confer some priority when there is competition'.

Hare asserts that South African courts have adopted the concept of the English maritime lien as in the case of *The Fidias*:²⁶⁸

²⁶¹ Ibid

²⁶² Raymond Hayden & Kipp Leland. 'Uniqueness of Admiralty and Maritime Law: The Unique Nature of Maritime Liens' (2004) at 1233

²⁶³ Ibid

²⁶⁴ Hare, *op cit* note 46 at 35-36

²⁶⁵ *The Ripon City* (1897) 226. See also, *Transol Bunker Bv V Mv Andrico Unity and others; Grecian Mar Srl V Mv Andrico Unity and others* 1987 (3) Sa 794 (C) at 821

²⁶⁶ Ibid

²⁶⁷ *Supra* note 68 at 821D

²⁶⁸ *Oriental Commercial and Shipping Co Ltd v MV Fidias* 1986 (1) SA 714 (DCLD) at 717 I-J.

‘... [T]he legislature, for some reason or another, deliberately chose not to define the terms “maritime lien” . . . that can only mean that the legislature was content to leave it to the English law’.²⁶⁹

3.2 Definition of Maritime Lien in Nigeria

The Nigerian definition of a maritime lien is aligned with the decision of *The Bold Buccleugh*,²⁷⁰ a decision that is heavily relied on in Nigeria as a ‘*locus classicus*’. It was affirmed in the case of *Mercantile Bank of Nigeria Ltd v E.R. Tucker and Ors, The Bosnia*.²⁷¹ in which Karibi-Whyte J defined a maritime lien as ‘a claim or privilege upon a maritime *res* in respect of service done to it or injury caused by it and attaches to the *res* and travels with it into whosoever possession the *res* comes’.²⁷² Olagunju²⁷³ explains that even if the property is in the hands of a third party, the maritime lien remains on the property until the claim is settled or fully paid.²⁷⁴ The same decision was alluded to in the case of *Francis Obi Iroegbu v Mv Calabar Carrier*²⁷⁵ where it was held

‘Maritime liens are a revered and restricted class of admiralty rights, which are enforceable in rem following the traditional practice of sea merchants. These principles are developed for the convenience of resolving disputes which arise on the high seas and in relation to maritime-related transactions and injuries suffered therefrom’²⁷⁶

3.3 Maritime Claims Recognised as Maritime Liens in South Africa

Hofmeyr states that the concept of a maritime lien exist in different countries however, what differs is the type of maritime claim that is recognised as being subject to a maritime lien in that particular country.²⁷⁷ Most countries whose legal systems are based on common law share the same theoretical underpinning of a maritime lien, but in South Africa courts must apply the

²⁶⁹ Hare, *op cit* note 46 at at 36

²⁷⁰ *Supra* note 111 it was held by an extract from the judgement .. ‘it is a claim or privilege upon a thing to be carried into effect by legal process, that process to be a proceedings in rem. This claim or privilege travels with the thing into whosoever possession it may come, it is inchoate from the moment the claim or privilege attached, when carried into legal effect by legal process by proceeding in rem it relates back to the period when it first attached.’

²⁷¹ NGA (1978), 1 NSC 428 (Bosnia)

²⁷² *Ibid*

²⁷³ Olagunju *op cit* note 20 at 321

²⁷⁴ *Ibid*

²⁷⁵ (2003-2008) Nigeria Shipping Cases, Vol. 10, 507

²⁷⁶ *Ibid* at 166, Para. D-E

²⁷⁷ Hofmeyr, *op cit* note 16 at 240

law as it appears in section 6 (1) of AJRA.²⁷⁸ Hare²⁷⁹ states that the maritime lien is recognised in cases of:

1. Damage caused by or to a ship, whether by collision or otherwise;
2. Salvage;
3. Seamen's wages;
4. Master's wages and disbursements;
5. Bottomry and respondentia.

An understanding of these maritime claims listed as capable of being maritime liens requires further explanation.

3.3.1 Damage Caused by or to a Ship, Whether by Collision or Otherwise

Hofmeyr asserts that before the coming into operation of AJRA, 'damage done to a ship' existed as a maritime claim in South Africa.²⁸⁰ This could be found in s 7 of the Admiralty Court Act of 1861 read with s 2 of the Colonial Courts of Admiralty Act of 1890. However, just like any international shipping community colonised by the British, the phrase 'damage done to a ship' is always retained, notwithstanding South Africa departed slightly from the traditional construction of the phrase.²⁸¹

Section 1(1)(e) of AJRA provides for 'damage caused by or to a ship, whether by collision or otherwise' being a maritime claim; however, in the absence of further explanation, a better understanding must be found in the relevant literature. Hare explains that 'damage done by a ship' under the English law requires the ship to be seen as the 'instrument of mischief'.²⁸² Hofmeyr refers to the 'ship as the instrument of damage'.²⁸³ In *The Vera Cruz (No 2)*²⁸⁴ the court held that even though the damage is done under the hand of the navigator, the ship itself

²⁷⁸ Section 6(1) reads: '(1) Notwithstanding anything to the contrary in any law or the common law contained a court in the exercise of its admiralty jurisdiction shall-

(a) with regard to any matter in respect of which a court of admiralty of the Republic referred to in the Colonial Courts of Admiralty Act, 1890, of the United Kingdom, had jurisdiction immediately before the commencement of this Act, apply the law which the High Court of Justice of the United Kingdom in the exercise of its admiralty jurisdiction would have applied with regard to such a matter at such commencement, in so far as that law can be applied'

²⁷⁹ Hare, *op cit* note 46 at 37

²⁸⁰ Hofmeyr, *op cit* note 16 at 30

²⁸¹ This raises the question why South Africa would depart from the old construction of 'damage done to a ship'. In many circumstances, countries like New Zealand, Australia and Nigeria have stuck to the old construction of the phrase. On this note, the provocative question to ask is what effect does this change carry?

²⁸² Hare, *op cit* note 46 at 62

²⁸³ Hofmeyr, *op cit* note 16 at 258

²⁸⁴ (1884) 9 PD 96 (CA) at 101

must be the ‘noxious instrument’.²⁸⁵ South Africa has departed from the English law by construing ‘damage done by a ship’ as being ‘caused by’ the ship, an interpretation which is broader than the English law. In addition, the ‘damage caused by’ principle legitimises an action against a ship indirectly involved and which had not caused the actual damage.²⁸⁶

Similarly, Hofmeyr asserts that the change in the construction of the phrase carries a ‘wider and less restrictive meaning’.²⁸⁷ Hare alluded with Hofmeyr, although in a different direction, that the change in wording has not changed the definition of ‘damage done by a ship’ and South Africa must be guided by the English law to see if a claim is ‘caused by the ship’, and if the claim would result in a maritime lien.²⁸⁸ In *Currie v M’Knight*²⁸⁹ damage was caused when the master cut the mooring rope of another vessel. Hare maintains that under English law, that would not constitute damage done by the ship, but would be a maritime matter subject to admiralty jurisdiction in South Africa.²⁹⁰ Nevertheless, the most important question is what is the effect of departing from the wording of English law and what problems does it create by applying s 6(1)(a) of AJRA based on the classification of claims as old or new heads of jurisdiction? According to Hofmeyr, the application of law will be the subject of the old head of jurisdiction.²⁹¹ In addition, the nature of damage caused is not limited to the physical damage caused by the ship but incorporates the ‘financial damages’ or loss caused by the ship.²⁹²

3.3.2 Salvage

Salvage is an ancient concept, which originated from the time when a person got rewarded for helping to save a ship.²⁹³ Hofmeyr states ‘salvage is used to denote both the salvage service and the salvage reward.’²⁹⁴ Section 1(1)(k)²⁹⁵ of AJRA gives the High Court the power to adjudicate on salvage matters. On the contrary, the Admiralty Court of England only exercised its admiralty jurisdiction in respect of salvage services that occur on the high seas. However, s

²⁸⁵ Ibid

²⁸⁶ Hare, *op cit* note 46 at 62

²⁸⁷ Hofmeyr, *op cit* note 16 at 30

²⁸⁸ Hare, *op cit* note 46 at 62

²⁸⁹ (1897) AC 38

²⁹⁰ Hare, *op cit* note 46 at 62

²⁹¹ Hofmeyr, *op cit* note 16 at 30

²⁹² Ibid

²⁹³ Hofmeyr, *op cit* note 16 at 269

²⁹⁴ Ibid

²⁹⁵ This reads: ‘Salvage, including salvage relating to any aircraft and the sharing or apportionment of salvage and any right in respect of property salvaged or which would, but for the negligence or default of the salvor or a person who attempted to salvage it, have been salvaged, and any claim arising out of the Wreck and Salvage Act, 1996.’

6 of the Admiralty Court Act,²⁹⁶ removed the high seas requirement and allowed for ‘salvage within the territorial waters.’²⁹⁷ In addition, before a salvor can claim a maritime lien in a salvage case, the salvor must have rendered the service voluntarily with the core purpose of saving property or *res* without any contractual obligation.²⁹⁸ The court held in the case of *Transnet Ltd t/a National Ports Authority v The MV Cleopatra Dream and Anor*:²⁹⁹

‘The rationale for not allowing a salvage reward to a salvor acting under a pre-existing duty to render assistance, whether the duty arises from a contract or otherwise, is that such a person should not be encouraged to neglect his duty and, by doing so, cause or contribute to the danger necessitating salvage. Nor should the (prospective) salvor be tempted to refuse to render services falling within his duty in order to obtain a salvage reward.’³⁰⁰

Section 1(1)(k) of AJRA requires reference to the Wreck and Salvage Act of 1996³⁰¹ (‘Salvage Act’) as a legislative instrument incorporating the International Convention on Salvage of 1989³⁰² by stating in its s 2(1)³⁰³ that the ‘Convention shall, subject to the provisions of this Act, have the force of law and apply in the Republic.’³⁰⁴ However, Hofmeyr asserts that although the Salvage Act ‘incorporated the traditional and general principle of salvage’, it could not be said that it was a complete enunciation of the law or the general principle of salvage. A complete understanding of salvage law required reference to the English law and would apply in situations not covered by s 6 of the Salvage Act.³⁰⁵

3.3.3 Seamen’s Wages

The provision for seamen’s wages came as a form of sympathy prompted by considerations of public policy. It was stated in the case of *The Minerva*:³⁰⁶

‘It was this desire to protect the seaman from his own business inadequacy that led Lord Stowell to emphasise the imbalance existing in contracts between ship-owner and seaman in the following terms: ‘on the one side are gentlemen possessed of

²⁹⁶ Admiralty Court Act of 1840

²⁹⁷ Hofmeyr, *op cit* note 16 at 270

²⁹⁸ *Transnet Ltd t/a National Ports Authority v The MV Cleopatra Dream and Anor* 2011 (3) SA 279 (SCA)

²⁹⁹ *Ibid*

³⁰⁰ *Ibid* at para 31

³⁰¹ 94 of 1996

³⁰² International Convention on Salvage 1989, 28 April 1989, London. UNTS 1953

³⁰³ *Supra* note 301

³⁰⁴ *Ibid*

³⁰⁵ Hofmeyr, *op cit* note 16 at 270

³⁰⁶ (1825) 1 Hagg 347 at 355. Also Hofmeyr, *op cit* note 16 at 263

wealth . . . conversant in business, and possessing the means of calling in the aid of practical and professional knowledge. On the other side, is a set of men, generally ignorant and illiterate, notoriously and proverbially reckless and improvident, ill provided with the means of obtaining useful information . . . and on all account requiring protection, even against themselves'.³⁰⁷

AJRA provides, in s 1(1)(s), that the court has admiralty jurisdiction in a matter:

‘arising or relating to: the employment of any master, officer or seaman of a ship in connection with or in relation to a ship, including remuneration of any such person, and contributions in respect of any such person to any pension fund, provident fund, medical aid fund, benefit fund, similar fund, association or institution in relation to or for the benefit of any master, officer or seaman’.

Hofmeyr asserts that the definition reflects the jurisdiction applicable before the commencement of AJRA in respect of seamen’s wages; thus, s 6(1) of AJRA would be applicable and thus English law determines the ambit of the lien.³⁰⁸ Hofmeyr further asserts that the wage claims have always enjoyed the status of a maritime lien under the English law and still enjoy that status. The claim would fall under and enjoy the status of a maritime lien.³⁰⁹

3.3.4 Master’s Wages and Disbursements

The Admiralty Court did not originally have the power to adjudicate on the issue of a master’s disbursement lien; however; s 10 of the Admiralty Court Act³¹⁰ conferred on the Admiralty Court the power to hear and determine such master’s disbursements cases. The English law conferred lien status on master’s disbursements and, through the application of s 6(1) of AJRA, master’s disbursement claims enjoy the status of a maritime lien in South Africa. Section 1(1)(o) of AJRA, conferred admiralty jurisdiction in respect of ‘payments or disbursements by a master, shipper, charterer, agent or any other person for or on behalf of or on account of a ship or the owner or charterer of a ship;’. Despite being included in a wider category of claims, it is Hofmeyr’s assertion, that ‘no lien will exist in respect of the wider jurisdiction based on [the fact] that the jurisdiction was extended by the incorporation of

³⁰⁷ Ibid

³⁰⁸ Hofmeyr *op cit* note 16 at 266

³⁰⁹ Ibid

³¹⁰ Admiralty Court Act of 1861. S10 provided for ‘any claim by the master of any ship for disbursements made by him on account of the ship’

disbursements on account of the ship and disbursements on account of the owner or charterer'.³¹¹ In addition, s 143 of the Merchant Shipping Act³¹² provides:

‘that the master of a South Africa ship shall, so far as the case permits, have the same rights, liens and remedies for the recovery of his wages as a seaman has under the Act or by any law or custom and that such master shall, so far as the case permits, have the same rights, liens and remedies for the recovery of disbursements or liabilities properly made or incurred by him on account of the ship as he has for the recovery of his wages’.³¹³

3.3.5 Bottomry and Respondentia

This type of lien is now obsolete. There is no need to examine it further.

3.4 Maritime Claims Recognised as Maritime Liens in Nigeria

According to Olagunju,³¹⁴ Nigeria has adopted a system of maritime claims as set out by the International Arrest Convention of 1952.³¹⁵ In the case of *Mercantile Bank of Nigeria Ltd. v E.R. Tucker & Ors., The Bosnia 27*,³¹⁶ a maritime lien was defined as ‘a claim or privilege upon a maritime *res* in respect of service done to it or injury caused by it and attaches to the *res* and travels with it into whosoever possession the *res* comes’.³¹⁷ The maritime claims that give rise to maritime liens in Nigeria are expressly set out in terms of s 5(3)³¹⁸ of AJA as being:

1. Salvage;
2. Damage done by a ship;
3. Wages of master or a member of the crew;
4. Master’s disbursements.

3.4.1 Salvage

Whilst Nigeria cannot be said to have departed from the basic principles of English law, it has partly developed its own principles of law. As seen above, salvage is any voluntary service rendered to save a vessel in distress from imminent danger or damage. Claims arising out of

³¹¹ Hofmeyr, *op cit* note 16 at 268

³¹² 57 of 1951

³¹³ *Ibid*

³¹⁴ Olagunju, *op cit* note 20 at 166

³¹⁵ *Supra* note 21

³¹⁶ NGA (1978), 1 NSC 428 (Bosnia)

³¹⁷ *Ibid*

³¹⁸ This reads: ‘In any case in which there is a maritime lien or other charge on any ship, aircraft or other property for the amount claimed, an action in *rem* may be brought in the court against that ship, aircraft or property and for the purpose of this subsection, maritime lien means a lien for: Salvage or damage done by a ship, wages of the master or of a member of the crew of a ship; of master’s disbursements.’

such service fall under the category of salvage. The major legislative instrument in Nigeria regarding salvage is the Merchant Shipping Act (MSA),³¹⁹ and in particular, the provisions set out in s 215(j) and part xxvii of the MSA. In addition s 2(3)(g) of AJA provides for salvage claims as maritime claims. Thus, s 388(1) of the MSA brought into being the application of the Brussels Convention (overtaken by the International Convention on Salvage of 1989) by Nigeria. For the service to be salvage, the salvage must be done voluntarily and the salvors must at least record some level of achievement regarding the service rendered.³²⁰

3.4.2 Damage Done by a Ship

Clarke J in the case of *Berliner Bank, v C Czarnikow Sugar Ltd*³²¹ held that in cases of ‘damage done by a ship’ three criteria must be satisfied:

1. The damage must be caused by something done by those engaged in the navigation or management of the ship in a physical sense;
2. The ship must be the actual or noxious instrument by which the damage is done; and
3. The damage must be sustained by a person or property external to the ship’.

The first criterion arose for interpretation in the case of *Fournier v Ship Magaret Z*,³²² in which the court held that the damage done must occur by virtue of the active operation of the crew of the vessel. However, the major question remained whether it was only crew operation that qualified the damage as being done by a ship because the damage could have been caused by a passenger or other person onboard and navigating the ship. It has been suggested the jurisdiction of the court would be unlikely to be excluded in such a situation.³²³

In *Westminister Dredging Company v Adeyemi Ikeusan*³²⁴ the plaintiff, who worked on deck lost his leg while discharging sand from a stationary dredger. The court held ‘that a claim in tort of negligence committed in a ship comes squarely under paragraphs (d) and (f) of section 1 of the Administration of Justice Act 1956 (which is equivalent to s 2(3)(a) and 2(3)(c) of the AJA)’³²⁵. In order words, the court was confirming that this was a general maritime claim under s 2(3) and therefore the court has admiralty jurisdiction over such claims. However, what is not clear from the report of the decision is whether the court also categorised the claim as one giving rise to a maritime lien. I, therefore, submit that the plaintiff’s injury was not

³¹⁹ No 27 of 2007, Laws of the Federation of Nigeria. 2007

³²⁰ *The Cheerful* (1855) 11 PD 3; *Melamine v the San Onofire* (1925) AC 246, *The Killeena* (1881) 6 PD 193

³²¹ (1996) 2 Lloyds Rep at 293

³²² (1999) 3 NZLR 111

³²³ *Ibid*

³²⁴ (1985) NSC vol II 314

³²⁵ *Ibid*

conclusively caused by the ship but simply occurred while he was working on the ship. The reported facts did not provide sufficient details. However Nigeria is a party to the 1993 Maritime Liens Convention³²⁶ and in terms of art 4(1)(b) that a maritime lien includes ‘claims in respect of loss of life or personal injury occurring, whether on land or on water, in direct connection with the operation of the vessel.’ By contrast, the maritime claim is not listed in the AJA as a maritime lien.

3.4.3 Wages of Master or a Member of the Crew

The provisions of s 2(3)(r) and s 5(3) of the AJA³²⁷ classify the wages of master and crew as maritime claims with further clarification in s 5(3)(c) of this claim’s status as a maritime lien. The assertion is that both the crew’s and the master’s wages must be paid by the employer. It is not clear whether the obligation arises out of a contract of employment or the application of law, but what is certain is that the wages, dues, repatriation fee and allowances must be paid as a maritime claim and have the status of a maritime lien. In the case of *Joseph Eustace Fernando v Owners of M.V Rhodian Trader*,³²⁸ 18 crewmembers of the *M.V Rhodian* brought an action *in rem* against the vessel for non-payment of wages. The owner in Lagos without adequate payment for the crewmembers abandoned the vessel.

The court held:

1. . . . that the crew had a valid maritime lien on the vessel and were entitled to an order for the sale of the vessel in satisfaction of their wages
2. That an allowance for food as well for repatriation expenses was equivalent to wages and therefore enjoyed a maritime lien
3. That in view of the provisions of section 1(1)(o), 3(4) and (6) of Administration of Justice Act 1956, which is similar in effect to the above section 5(3) of the Admiralty Jurisdiction Act of 1991, one month’s salary in lieu of notice was allowable
4. And in view of the position that the vessel should proceed for sale in satisfaction of the judgment’.³²⁹

³²⁶ Supra note 254

³²⁷ AJA

³²⁸ N.S.C vol II 339

³²⁹ Ibid.

3.4.4 Master's Disbursements

Section 3(5)(d) of AJA, in explaining the type of maritime claims that amount to maritime liens classifies master's disbursements as a maritime lien. In the case of *M.V. Nikos*,³³⁰ the captain and 18 crew members of the defendant's vessel brought an action *in rem* claiming jointly and severally from the defendant outstanding wages for between 8 and 24 months. The defendant, as an owner of the vessel, neither filed any pleading nor appeared at the trial to contest the claim. It was held that under s 2(3)(r) of the AJA a claim by a master or a member of the crew of a ship qualified as a maritime lien within the jurisdiction of the Federal High Court of Nigeria.

3.5 Recognition of Foreign Maritime Liens in South Africa

An important question is whether South Africa recognises foreign maritime liens as maritime claims that also enjoy the status of maritime liens under South African admiralty law. Booyesen asserts the need for direct recourse to English law either, as it existed in 1890 in terms of the repealed CCAA or the AJRA,³³¹ The decision of the Privy Council in the case of *Bankers Trust International Ltd v. Todd Shipyard Corporation; The Halcyon Isle*,³³² dealt with whether a mortgage claim should take priority over a claim for the cost of ship repairs performed by 'necessaries men' (those in the business of providing goods and services to ships) in the United States. Under United States law, such a claim qualified as a maritime lien. Lord Diplock held that:

'English law (the *lex fori*) gives the maritime lien created by the *lex loci contractus* precedence over the appellants' mortgage. A maritime lien in English law has the result that the recognition of any new class of claim, arising under foreign law as giving rise to a maritime lien because it does so under its own *lex causa*, affects not only priorities but also the classes of persons who are entitled to bring an action *in rem* against a ship'.³³³

In the majority decision, it was held that the claim of the mortgagee outranked that of the ship-repairers. Whilst a maritime lien would normally take precedence over the mortgage or another

³³⁰ *Capt Karadoukas Stergios v MV Nikos*, 4 NSC 315

³³¹ Hercules Booyesen. 'The Recognition of Foreign Maritime liens In South Africa Law; A Final Word by the Appellate Division' (1991) 40 (1) *International and Comparative Law Quarterly* at 151

³³² (1980) 2 Lloyd's Rep 325 (1980) 3 All E.R 197 (PC)

³³³ *Ibid* at 235B-C

claim, the problem lay in the fact that the lien had come about under New York law. Lord Diplock concluded:

‘The English authorities . . . support the principle that, in the application of English rules of conflict of laws, maritime claims are classified as giving rise to maritime liens which are enforceable in actions in rem in English courts where and only where the events on which the claim is founded would have given rise to a maritime lien in English law, if those events had occurred within the territorial jurisdiction of the English court’³³⁴.

The decisions of *Transol Bunker BV v MV Andrico Unity and others*³³⁵ and *Brady-Hamilton Stevedore Co and others v MV Kalantiao*,³³⁶ deal with the issue of recognition of foreign maritime liens. The *Andrico Unity* deals with Argentinian law in respect of bunker oil supplied to the vessel while *MV Kalantiao* deals with stevedoring services in terms of the United States federal law. Surprisingly the court followed the precedent of the *The Halcyon Isle* and held that a ‘foreign maritime lien not falling within one of the categories of lien recognised by the domestic rules of English law is not accorded the status of a maritime lien in an English court either for the purpose of founding an action in rem or for the purpose of ranking priorities’³³⁷. Thus, the position in South Africa is that a foreign maritime lien is not recognised in South Africa unless the facts would have given rise to a maritime lien if they had occurred in South Africa. This reasoning is based on the purpose of ranking priorities.³³⁸

3.6 Recognition of Foreign Maritime Liens in Nigeria

Nigeria adopts the same position as South Africa by following the precedent of its former colonial master. According to Olagunju,³³⁹ Nigeria still classifies the supply of necessities and services to a vessel as a maritime claim, but not a maritime lien, based on the English decision in the *Halcyon Isle*.³⁴⁰ The English court held that the status of foreign maritime liens was a procedural matter and should be decided according to the *lex fori*.³⁴¹ This implies that where there is a foreign maritime lien the claims recognised under s 5(3) of AJA as maritime liens

³³⁴ *Bankers Trust International Ltd v. Todd Shipyard Corporation; The Halcyon Isle* (1980) 2 Lloyd’s Rep.325 at 41

³³⁵ Supra note 68 and *Transol Bunker Bv V Mv Andrico Unity and others; Grecian-Mar Srl V Mv Andrico Unity And Others* [1989] 2 All SA 303 (A)

³³⁶ 1987 (4) SA 250 (DCLD)

³³⁷ *Transol Bunker BV v MV Andrico Unity and others* (1989) ZASCA 30:(1989) 2 All SA 303 (A) at 94-95

³³⁸ Ibid

³³⁹ Olagunju, *op cit* note 20 at 167

³⁴⁰ Supra note 332

³⁴¹ Olagunju, *op cit* note 20 at 167

will be ranked before that foreign lien. The same is applicable to Nigeria. Although Nigeria is not faced with a ranking problem, Olagunju asserts ‘the necessity to alter its position’ as no foreign claim on the supply of necessities and services to the ship could rank above its own established maritime liens.³⁴²

3.7 The Importance of the Similarities of Maritime Liens in Both Jurisdictions

Through the above discussion of what the maritime lien means in both jurisdictions, it can be denoted that both have interpreted and adopted the same set of maritime liens, following the English law. Although there is broadly uniformity as to which maritime claims enjoy maritime lien status, there are some slight differences. The 1993 Maritime Liens Convention extends maritime lien to include in its art 4(1)(d) ‘claims for port, canal, and other waterway dues and pilotage dues’. In addition, in art 4(1)(e), ‘claims based in tort arising out of physical loss or damage caused by the operation of the vessel other than loss of or damage to cargo, containers and passengers effects carried on the vessel’ Moreover, both AJA and AJRA failed to provide for these as a maritime lien.

The Nigerian AJA in its s 2 retains the same phrase as England, namely, damage done by a ship. However, in South Africa, the AJRA provides for ‘damage caused by or to a ship whether by collision or otherwise’ making it broader than AJA and the traditional English law provision. Though Hare asserts that the change in words has not changed the definition,³⁴³ then the question arises as to why the change? According to Hofmeyr as stated in 3.3.1 of this dissertation that the change in wording has not changed the definition and thus, interpretation must be guided by the English law.³⁴⁴

In the case of *Transol Bunker BV v MV Andrico Unity*³⁴⁵ the court followed the English principle, based on the provision of section 6(1)(a) of AJRA that the applicable law was the law which the High Court of Justice of the United Kingdom would have applied on 1 November 1983 which is the date of the commencement of AJRA. On this note, under the English law, the supply of bunkers does not give rise to a maritime lien. Moreover, another issue was on how the court approach the conflict of laws issue, given that the court was faced with a bunker contract that was subject to Argentine law, and Argentine law recognised a maritime lien over necessities claims

³⁴² Ibid

³⁴³ Hare, *op cit* note 46 at 62

³⁴⁴ Hofmeyr, *op cit* note 16 at 30

³⁴⁵ *Supra* note 68

The court expressed the position as follows:

'The issue for decision was whether a notional United Kingdom High Court exercising its admiralty jurisdiction on 1 November 1983 would have recognised the Argentine privileged credit as a maritime lien for the purpose of assuming jurisdiction in an action in rem despite the fact that the events which had given rise to the Argentine lien would not have give rise to maritime lien in English law if those events had arisen within the territorial jurisdiction of the English court and should South Africa be obliged to decide the matter in a similar fashion'

The court looked at the decision of the Privy Council in *Bankers Trust International Ltd v Todd Shipyard Corporation: The Halcyon Isle*.³⁴⁶ It was held by the court that a foreign maritime lien would not be recognised and enforced if it would have arisen in circumstances that will not give rise to an English maritime lien even if they have occurred in the territorial jurisdiction of the English court.³⁴⁷

On this note, the advent of section 6(1)(a) is applicable although the South African court is not bound by the decision of the English case however section 6 accommodates the English principle. Wallis,³⁴⁸ when looking at the debate surrounding AJRA about the law to be applied, asserted that:

'...the early proposal of AJRA would have enabled the courts to develop a South African maritime jurisprudence with a good deal of flexibility based on Roman Dutch law, English admiralty law and the general concept of the law of the sea'

On this note, in order to establish a 'definite legal regime'³⁴⁹ a compromise was reached in section 6(1) of AJRA that applies the English law with a little resort to the Roman Dutch law or any other sources. Moreover, section 6(1)(a) compels the South African court to follow the English law. This was shown in the case of *Andrico Unity* which was whether the arrest of a ship should be set aside based on the fact that the arresting party did not have a maritime lien over the arrested vessel. Thus, Wallis³⁵⁰ asserted that one would have thought that the question

³⁴⁶ Supra note 332

³⁴⁷ Ibid.at 795

³⁴⁸ Wallis, *op cit* note 1 at 104

³⁴⁹ Wallis, *op cit* note 1 at 105

³⁵⁰ Wallis, *op cit* note 1 at 432

whether the arrest made under AJRA was properly made should be a question under AJRA. However, the court had considered this point in the *Andrico Unity* and held that it was a case that would have fallen under the pre-1983/AJRA jurisdiction. It was a case which would have afforded the court jurisdiction under the CCAA because the jurisdiction of the CCAA included the jurisdiction to hear a case of an action in *rem* that is based on a maritime lien. The court held:

'The issue relates to the right of the claimant to pursue a certain remedy, viz an action in *rem*, rather than the jurisdiction of the court to entertain the suit. And even if the result of the Court deciding that no maritime lien exists can be regarded in effect as a denial of jurisdiction, a Court always has jurisdiction to determine its own jurisdiction.'³⁵¹

On this note, according to Wallis³⁵² who stated that 'the choice is between following slavishly and passively the English courts or having our own 'vibrant and evolving admiralty jurisdiction' it can be denoted that the court was presented with an opportunity to follow its own law in the case of *Andrico Unity* but failed by following the English principle. Moreover, both jurisdictions follow the English law, but the question raised by criticism of the *Andrico Unity* case is whether this should be the approach followed.

3.8 Conclusion

The nature and definition of a maritime lien are not straightforward, but courts have developed a number of principles to give a precise meaning to the recognition of maritime liens. However, irrespective of the question remains whether South Africa and Nigeria have given different meanings to maritime liens. This chapter shows that both countries are still tied to the British interpretation of a maritime lien. The characteristics of maritime liens in both countries are the same, to the effect that the lien travels with the vessel until payment is made to settle the debt, of who is in the possession of the vessel. Similarly, both countries failed to recognised foreign maritime lien as part of its maritime lien based on the principle of the English law.

³⁵¹ Supra note 68 at 335B-C

³⁵² Wallis, *op cit* note 1 at 436

CHAPTER FOUR

Statutory Liens

4.0 Introduction

This chapter will deal in detail with what constitutes a statutory lien. As shown in chapter 3, an action *in rem* can be against the ship where the maritime claim constitutes a maritime lien. However, there is another situation in which a maritime claim can be brought by action *in rem*, and this is where the owner of the vessel might be personally liable in respect of the maritime claim. Accordingly, it is necessary to examine the concept of a statutory lien in South Africa and Nigeria.

4.1 Statutory Lien in South Africa

Like other common law countries, in the absence of maritime lien, the claimant must establish that the owner of the property (*res*) would be liable *in personam*; however, this did not mean that the proceeding had to be in *personam*, but that if the claimant could not arrest the *res* under a maritime lien, the claimant should be able to proceed in circumstances where the owner of the *res* would be liable in an action in *personam* in respect of the maritime claim. Thus, s 3(4)(b) of AJRA provides for a situation in which ‘the owner of the property to be arrested would be liable to the claimant in an action *in personam* in respect of the cause of action concerned’. This procedure is described as being tantamount ‘to pursuing a single claim before a single court’.³⁵³ In addition, academics describe this as a statutory right *in rem*³⁵⁴ and it greatly expands the availability of the action *in rem* procedure from the six maritime liens (*supra in chapter 3*) to any maritime claim arising in respect of the vessel for which the owner is personally liable.³⁵⁵

4.2 Statutory Lien in Nigeria

The nature of the statutory lien or general maritime claim in Nigeria arises from the application of English law when Nigeria was colonised by the British. The Administration of Justice Act, which was used during the colonial era, still maintains some recognition in the Admiralty

³⁵³ Wallis, *op cit* note 1 at 479

³⁵⁴ Hare, *op cit* note 46 at 33

³⁵⁵ *Ibid*

Jurisdiction Act (AJA). According to Olagunju,³⁵⁶ the statutory lien originated from the statute and extends the admiralty jurisdiction of the Federal High Court to claims that would not have fallen under the classes of maritime lien recognised by the court (as described in chapter 3). Thus, a statutory lien constitutes the remainder of the maritime claims listed in section 2 of AJA. In addition, whilst the provision of s5(4) of AJA has a provision similar to s 3(4)b of AJRA, a close interpretation reveals a more complicated meaning. This will be examined later in this chapter.

Statutory liens in South Africa and Nigeria share the same origin; however, there is a category of statutory lien that has been interpreted differently in the two countries. It is paramount to examine those sets of claims and how the courts have interpreted them in their respective jurisdictions.

4.3 The Interpretation of Some Statutory Liens in South Africa

In this section, I will consider 1(1)(g),(h) and (ee) of AJRA

On the face of it, the provisions of s 1(1)(g) and (h) of the AJRA bear similar meanings but can be better understood if mutually examined from the same perspective. Hence, both provisions will be analysed concurrently. Section 1(1)(g) provides for:

[L]oss of or damage to goods (including the baggage and personal belongings of the master officers or seamen of a ship) carried or which ought to have been carried in a ship, whether such claim arises out of any agreement or otherwise.

Section (1)(1)(h) refers to ‘the carriage of goods in a ship, or any agreement for or relating to such carriage’

According to Hofmeyr, the provisions extend the jurisdiction that was in existence by virtue of s 6 of the Admiralty Court Act of 1861 prior to the commencement of AJRA.³⁵⁷ Claims referred to in subsection (g) overlap with those in subsection (h); however, closer interpretation connotes that the goods must be carried on board the ship when the damage occurred. Section 1(1)(g) first specifically mentions ‘loss or damage to goods’ that were ‘carried ... in a ship,’ and includes the situation where the goods ‘ought to have been carried in a ship’. This poses the question of whether the intention of the legislature envisaged damage to goods that ought to have been carried on board the ship but did not reach the ship. Hofmeyr asserts that the

³⁵⁶ Olagunju, *op cit* note 20 at 319

³⁵⁷ Hofmeyr, *op cit* note 16 at 32

section covers goods that were not loaded on board but ‘should have been loaded’.³⁵⁸ However, the section refers to ‘damage to goods carried in a ship’, which did not need further interpretation because the damage to goods that were on board the ship would be subject to being a maritime claim.³⁵⁹ Contrarily, the question arises whether damage to goods that had been previously carried on board the ship would qualify as a maritime claim if the damage occurs after discharge. Hofmeyr asserts that whilst the goods would have lost the maritime connection because the goods might have been sold or moved by multimodal modes of transport, the goods still fell under the jurisdiction of the AJRA.³⁶⁰ However, this has not been discussed further by other scholars in South Africa.³⁶¹ The opening paragraph of s 1(1) employs the phrase in relation to maritime claims as ‘arising out of or relating to’, connoting that the damage must relate to or arise from maritime claims. Hofmeyr states that the phrase is useful for interpreting the context of s 1(1) of AJRA. In the case of *Minesa Energy (Pty) Ltd v Stinnes International AG*.³⁶² dealt with the transportation of coal in which the applicant sold coal to the respondent whereafter the coal was shipped to Spain. However, the respondent did not pay the full purchase price, claiming set-off due to delay that occurred during the loading of the coal, amounting to damages for demurrage. The court had to decide whether the claim for ‘payment of purchase price’ by the applicant constituted a maritime claim under the AJRA. The judge held:

It seems to me to be irrelevant that the coal was conveyed by sea to Spain. That is a mere incident of the contractThe claim arises out of an agreement which, it is true, refers to the carriage of the coal by sea, but that is not, it seems to me, enough to make it a maritime claim. I cannot believe that the mere claim for the purchase price of goods, which happen to be delivered by sea, can constitute a maritime claim. It must surely be a claim touching the carriage by sea in order to fall within subpara (h) [T]he applicant’s claim does not arise out of an agreement for the carriage of goods in a ship. The purpose of the contract was sale, not carriage. The latter was referred to as a part of the duty to deliver [T]he provisions relating to loading, payment of demurrage and so forth in the contracts of sale are not in themselves agreements of carriage. They are merely provisions regulating the applicant’s duty to deliver to the vessel nominated by the respondent Hence I

³⁵⁸ Ibid

³⁵⁹ Ibid

³⁶⁰ Ibid

³⁶¹ I have searched using all searching engine that I am privy to by the law faculty, Juta, jstor, nexis , text books, including that on an associated ship by Judge Malcom Wallis and Hofmeyr texts books but in futility

³⁶² 1988(30 SA 903 (D)

conclude that the applicant's claim does not even relate to the carriage of goods in a ship. It arises out of an agreement for, and relating to, the purchase and sale of goods.³⁶³

Thus, the phrase 'arising out of or relating to' has been considered in a number of cases like the case of *Peros v Rose*³⁶⁴ or *Kuehne & Nagel (Pty) Ltd v Moncada Energy Group SRL*.³⁶⁵ The case of *Kuehne & Nagel v Moncada Energy*, concerned an application for edictal citation and substituted service., The applicant was seeking for payment under two 'demand guarantees.' The applicant shied away from attaching the local property of the respondent, who was a *peregrinus* to the court and South Africa, but relied on the consent clause provision in the demand guarantees and instituted action before Gauteng Local Division court. However, the respondent disputed the court's jurisdiction by asserting that the claim was a maritime claim. Hence the court lacked jurisdiction to hear the case.

The respondent's subsidiary company in South Africa entered into two forwarding service agreements on the 13 November 2012 and 13 November 2013, respectively. It was agreed by the applicant that the claims in both agreements would be maritime claims as specified in s 3(1) of AJRA which states that any maritime claim could be enforced by an action in *personam* read with s 1(1)(p) and (i). On 13 November 2012, the subsidiary parent company in Italy (respondent) issued two documents called the 'parent company guarantees' which detailed the company as the principal obligator. Thus, when the respondent subsidiary company in South Africa failed to pay the fee, the applicant wrote the principal obligator in Italy. However, it was argued by the applicant that the claims could not be a maritime claim and did not arise out of or relate to the remuneration of a forwarding agent; rather it was the applicant's underlying claims against the subsidiary that arose out of or related to the remuneration of the forwarding agent. Contrarily, the respondent argued that the claim was a maritime claim in that the claim arose out of or related to the remuneration of a forwarding agent.

An important set of interpretative guidelines were set out on what constitutes a maritime claim. The court has to look at the grammatical meaning of the claim as the starting

³⁶³ Ibid

³⁶⁴ Supra note 157 This case has been discussed in Chapter 2

³⁶⁵ Supra note 170

point, as envisaged by the constitutional court.³⁶⁶ In the claim before the court, under 1(1)(p) the question was thus: Does the claim 'relate', using the grammatical meaning, to the remuneration of a forwarding agent? It was asserted that the claim related to the remuneration of a forwarding agent based on the interpretation and the meaning in the Webster's Unabridged Dictionary that the word 'relate' means to 'to bring into or establish association, connection, or relation: to relate events to probable causes.' However, one must not take into consideration the wideness of the meaning without considering the intention of the legislature which means that the interpretation of the AJRA should be done purposively in order to give effect to the purpose for which it was established. The court reasoned that the legislature made use of the word 'relating to' based on the fact that admiralty jurisdiction 'imports a specialized field of the law'³⁶⁷ which connects several issues with admiralty law that can only be decided by the court having jurisdiction. Thus, considering the meaning of the interpretation, the court also held that although there are several issues connected to admiralty jurisdiction, there should also be a limitation to the concept. This means those issues that are not connected to the admiralty jurisdiction should not be decided by the court when exercising its admiralty jurisdiction.

One of the references made in the reasoning is to Hofmeyr³⁶⁸ where he asserted that AJRA and the Admiralty Jurisdiction Regulation Amendments Act of 1992 have expanded the boundaries of the admiralty jurisdiction than what was inherited from the English Admiralty law. In which I totally agree that these boundaries must not be stretched too far in order for the country not to have a diluted of well-recognised principles.

Furthermore, the court refers to the quotes of Hofmeyr³⁶⁹ in the case of *The Sandrina*³⁷⁰ that the reference to 'relating to', requiring that there must 'be some reasonably direct connection with such a maritime activities'. Thus considering the above interpretation the court reasoned that there must be 'a legally relevant connection'³⁷¹ between the claim being made and the object which the claim is required to relate for the purpose of the definition of a maritime claim. The claim and its object must be related either in procedural or substantive law.

³⁶⁶ *Cool Ideas 1186 CC v Hubbard and Another*, 2014(4)SA 474(CC) at 28

³⁶⁷ *Supra* note 170 at 27

³⁶⁸ Hofmeyr, *op cite* note 16 at 21

³⁶⁹ Hofmeyr, *op cite* note 16 at 33

³⁷⁰ (1985)1 Lloyd's Rep 181 (HL)

³⁷¹ *Supra* note 170 at 30

On this note, the applicant relied on the case of *Repo Wild CC v Oceanland Cargo Terminal (pty) Ltd*,³⁷² and *MFV El Shaddai, Oxacelay and Another v MFV El Shaddai and Others*,³⁷³ that a restrictive approach should be taken³⁷⁴. In *Repo Wild* the plaintiff (Repo Wild) sued the defendant for damages arising from a contractual obligation to insure a shipping container that would be transported to Johannesburg. However, this shipping container was to remain in Kazerne until the plaintiff gave further instructions for it to be moved to Durban for further transportation to Shanghai. Nevertheless, when in transit one of the containers got lost which made the plaintiff suffer damages. Again, the issue was whether it was a maritime claim or not. The learned Judge held that an agreement between the parties is just an agreement for the conveyance of goods and the fact that they have agreed to convey the goods by sea in the future does not have a bearing in the terms of the agreement.³⁷⁵ On this note, the claim was not relevant to the container.

Furthermore, the issue was raised again in the case of *MFV El Shaddai, Oxacelay and Another v MFV El Shaddai and Others*³⁷⁶ in which two applicants had lent out money to a shipowner for him to carry out a business around the South Africa coast. Hence, an acknowledgment of debt was signed by the debtor which stood for repayment. Nevertheless, based on the undertaking the applicants instituted an action in Montevideo, Uruguay, against the defendant, and pending the decision, the applicant also moved to South African High Court exercising its admiralty jurisdiction to apply for an arrest of ship to provide for security. The arrest was granted.

In addition, in delivering the judgment in South Africa, the learned judge came across the judgement in Montevideo Uruguay which favoured the applicant. Thus, the judge examined the judgement in Montevideo, Uruguay, to determine whether it was 'related to' a maritime claim for s 1(1) (ee) of AJRA. The judge referred to Hofmeyr³⁷⁷ and took a restrictive interpretation of maritime claims held that the underlying nature of the claim is a loan in which the loan has given the defendant the benefit to carry out business in South Africa hence it did not render the nature of the loan as a maritime claim.³⁷⁸

³⁷² Case No. 23044/2010 unreported case (14 November 2013)

³⁷³ 2015 (3) SA 55(KZD)

³⁷⁴ Supra note 170 at 15

³⁷⁵ *Repo Wild CC v Oceanland Cargo Terminal (pty) Ltd* Case No. 23044/2010 at 37

³⁷⁶ 2015 (3) SA 55 (KZD)

³⁷⁷ Hofmeyr, *op cit* note 16 at 21

³⁷⁸ *MFV El Shaddai, Oxacelay and Another v MFV El Shaddai and Others* 2015 (3) SA 55 (KZD) at 41-42

On this note, it must be noted that there must be a 'relevant connection between the claim being made and the object to which the claim is required to relate for purposes of the definition of maritime claims'³⁷⁹

Furthermore, it was argued by Hofmeyr³⁸⁰ by referring to *Cremean*³⁸¹ that there is no express provision that the damage to goods or loss must occur on a ship in a multimodal mode of transportation whereby the goods are being transported by road or rail. He asserted that although the goods have lost a direct maritime connection when the damage occurs on roads, however, the phrase 'arising out of or relating to' is wide enough to accommodate them as a maritime claim.³⁸²

Furthermore, s 1(1)(ee)³⁸³ provided for a catch all provision in which some claims that should have not necessary falls under maritime claims will fall due to the 'marine or maritime matter' clause in the provision. According to Hofmeyr, the subsection is to bring any matter not falling within the remaining listed maritime claims.³⁸⁴ He further asserted that there are categories of claims that would fall under the marine matter which is different from what constitutes maritime matters and will fall under the admiralty court jurisdiction. Moreover, this subsection, according to Hofmeyr, has created the impression that there are two separate categories of matter that fall under the admiralty court but which should not have been included.³⁸⁵ However, the advent of s 1(1)(ee) broadens the scope of the admiralty jurisdiction. In the case of *The Galaecia*.³⁸⁶ This is a case that deals with an agreement to purchase and sale of fish which ordinarily should fall under contract law.³⁸⁷ It was argued by the plaintiff that the case has no connection with the land and is a marine or maritime matter based on the reason that ship, fish are products of the sea and everything occurs on the sea. While the case concerned s1(1)(ee) of AJRA the court offered no factual or legal differentiation between marine and maritime matters in the judgment. Combrinck J set aside the claims by asserting that the fact that

³⁷⁹ Supra note 170 at 29

³⁸⁰ Hofmyer *op cit* note 16 at 32

³⁸¹ Damien Cremean. *Admiralty Jurisdiction: Law and Practice: Australia, New Zealand, Singapore, Hong Kong and Malaysia* 3 ed (2015) at 74

³⁸² Hofmeyr, *op cite* note 16 at 32

³⁸³ any other matter which by virtue of its nature or subject matter is a marine or maritime matter, the meaning of the expression marine or maritime matter not being limited by reason of the matters set forth in the preceding paragraphs;

³⁸⁴ Hofmeyr, *op cit* note 16 at 58

³⁸⁵ Hofmeyr, *op cite* note 16 at 58

³⁸⁶ Supra note 153

³⁸⁷ See also, *Minesa Energy (Pty) Ltd v Stinnes International AG* 1988 (3) SA 903 (D)

the contract is about the purchase and sale of a frozen fish and the mere fact the fish were caught on a moving ship does not make the matter to falls under maritime claims.³⁸⁸ Moreover, the 1952 Arrest Convention³⁸⁹ does not have a catch it up provision neither does the Nigeria AJA³⁹⁰ provides for a Catch it all provision.

4.4 The Interpretation of Some Statutory Liens in Nigeria

One would assume that Nigerian and South African admiralty jurisdictions would carry the same interpretation regarding maritime claims for damage to or loss of goods carried by ship as envisaged in s 2(3)(e) of the AJA.³⁹¹ However, court decisions of the two nations have interpreted the concept of damage to goods carried by ships differently. In Nigeria, the admiralty jurisdiction of the Federal High Court cannot be invoked where the damage did not occur on a ship, or where the plaintiff commences an action for damage that occurred after the cargo has been discharged from the ship at the harbour, or on route to its destination, there is no admiralty jurisdiction. In the case of *Aluminium Manufacturing Company (Nigeria) Ltd v, NPA*³⁹² the judge held:

[A]ny claim for loss of or damage to goods carried in a ship must be given their ordinary and natural meaning. In that respect, the goods concerned in a claim in the admiralty court must have been lost when they were being carried in a ship as cargo and not lost after they have been unloaded from the ship.³⁹³

The court referred to the fact that the phrase ‘arising out of ‘ does not appear in the maritime claim for damage to goods on a ship³⁹⁴ thus it only appears in paragraph (h),³⁹⁵ (q)³⁹⁶ and (r)³⁹⁷ thus, in a claim to ‘ damage or loss to goods carries on a ship’ must be

³⁸⁸ Supra note 153

³⁸⁹ Article 1(a)-(q)

³⁹⁰ Section 2 of AJA provides for the list of maritime claims in Nigeria

³⁹¹ a claim for loss of or damage to goods carried by a ship

³⁹² (1987) LPELR-438(SC)

³⁹³ Ibid

³⁹⁴ Section 2(3)(e) (f) AJA (e) a claim for loss of or damage to goods carried by a ship. (f) a claim out of an agreement relating to the carriage of goods or person by a ship or to the use or hire of a ship, whether by charterparty or otherwise;

³⁹⁵ A claim in respect of general average

³⁹⁶ A claim for an insurance premium, or for a mutual insurance call, in relation to a ship, or goods or cargoes carried by a ship

³⁹⁷ A claim by a master, or a member of the crew, of a ship for (i) wages or (ii) an amount that a person, as employer, is under an obligation to pay to a person as employee, whether the obligation arose out of the contract of employment or by operation of law, including by operation of the law of a foreign country

construed with its ordinary meaning which means that the cargo must have lost when they were being carried in a ship and not when they were being offloaded at the harbour.³⁹⁸ The *Aluminium Manufacturing*³⁹⁹ decision align with the recent case of *Pacers Multi-Dynamics Ltd v The MV Dancing Sister & another*⁴⁰⁰ which involved the issue whether the Federal High Court, in exercising its admiralty jurisdiction, had jurisdiction to entertain a case of damage to goods that had been discharged from the vessel. The plaintiff claimed that part of a cargo of Brazilian sugar was damaged en route from Brazil to Apapa Lagos. The plaintiff, being the owner and an assignee of the cargo sued both the defendant and the carrier, the *MV Dancing Sister*, for damages done to the goods during the voyage.

In consequence, the plaintiff (later appellant in the Supreme Court) applied for and was granted an *ex parte* order for the arrest of the *MV Dancing Sister* (1st defendant). However, on 25 April 1995, the Federal High Court ordered the unconditional release of the *MV Dancing Sister* on the ground that the 1st defendant was not a party to the contract of carriage as consignee or endorsee and thus not a party to the bill of lading; accordingly, the plaintiff did not have *locus standi*. On appeal, the Supreme Court held that the Federal High Court could not exercise its admiralty jurisdiction after the goods had been discharged at the harbour or delivered to their destination. For admiralty jurisdiction of the court to be properly invoked in such claims the goods must thus remain on board the vessel. The court finally held that no person could invoke the admiralty jurisdiction for damage to goods or loss of goods that had been discharged from the ship even though that person was a party to the bill of lading as consignee or endorsee (although in this event, the plaintiff was not a party to the bill of lading). The decision of *Texaco Overseas (Nig) Petroleum Company Unlimited v Pedmar Nigeria Limited*⁴⁰¹ had correctly held that for the court to exercise its admiralty jurisdiction the goods must not have been discharged either at the harbour or at the point of the destination. The cargo had to remain on board the vessel. The decisions illustrate the limited jurisdiction of the Admiralty Court of Nigeria in regard to claims for ‘damage to goods carried on board a ship’. On

³⁹⁸ Supra note 392

³⁹⁹ Ibid

⁴⁰⁰ (2012) LPELR -7848(SC)

⁴⁰¹ (2002)LPELR-3145(SC)

the contrary, the South Africa admiralty jurisdiction as shown in 4.3 of this chapter extends its jurisdiction beyond the scope of the harbour.

It is submitted that the Nigerian position is too narrow on its interpretation because only when the goods have reached their final destination that it can be said that the claim has lost its maritime character. Meanwhile, the Nigeria Federal Government started constructions of inland dry port⁴⁰² in almost all the major cities in Nigeria however would the goods lost its maritime connection if damage occurs during transportation from the main port to the inland dry port? it is assumed based on the decision in the *Aluminium Manufacturing Company (Nigeria)Ltd.v NPA*⁴⁰³ that the damage or loss must have occurs onboard the vessel. Thus, in the carriage of goods by sea, a through bill of lading⁴⁰⁴ in which the carrier contractual obligation ends when the cargoes reach its final destination, even though they may be carried by another multi-modal mode of transportation.⁴⁰⁵ On this note, significantly, as it will be recommended in chapter 5, Nigeria needs to adopt the South Africa interpretation of damage to goods.

4.5 Interpretation of the Concept of Ownership in South Africa under Admiralty Jurisdiction

Section 3(4)(b) of the AJRA provides that ‘a maritime claim can be enforced by an action *in rem* if the owner of the property to be arrested would be liable to the claimant in an action *in personam* in respect of the cause of action concerned’.⁴⁰⁶ Furthermore, the ground for arrest has been expanded in s 1(3) in which the demise charterer is deemed to be the owner of the vessel for the period of the charter: ‘For the purposes of an action *in rem*, a charterer by demise shall be deemed to be, or to have been, the owner of the ship for the period of the charter by demise.’ In other words, the registered owner is the owner of the vessel except where it is deemed to be owned by the demise charter for the period of the charter.

According to Hare, a demise charterer is seen as a lessee.⁴⁰⁷ The demise charterer usually hires the vessel from its owner for more than one year and during this period; the demise charterer

⁴⁰² Nigeria: Dry Ports- Shippers’ Council Moves to Attract Investors’ available at <https://allafrica.com/stories/201904290785.html>, accessed on 02/11/2019

⁴⁰³ (1987)LPELR-438) (SC)

⁴⁰⁴ John Wilson. *Carriage of Goods by Sea*. 7th ed (2010) at 6. A through bill of lading which provide that the carrier issuing the bill undertakes responsibility for the entire carriage through to the destination. It involves different modes of transport, it is know as combined or multimodal transport document.

⁴⁰⁵ Ibid

⁴⁰⁶ It is beyond the scope of this thesis to discuss the concept of the Associated ship arrest provided for in s 3(6) (7) of AJRA.

⁴⁰⁷ Hare, *op cit* note 46 at 738

is responsible for the possession and control of the ship, and payment and employment of master, crew and all shipboard personnel. On the other hand, the legal ownership is retained by the owner of the vessel until the charter ends, after which the charterer is given an option to purchase the vessel in order to have full ownership of the vessel.⁴⁰⁸ Nevertheless, the literal interpretation of s 1(3) suggests that the demise charterer and not the legal owner is considered the owner of the vessel.⁴⁰⁹ Hofmeyr asserts that during the period of charter, a creditor will not be able to pursue a claim against the legal owner in respect of a maritime claim pertaining to the ship on the ground of their personal liability because he is no longer the 'owner', although he is the nominal owner until the end of the charter.⁴¹⁰ Where there is a claim against the vessel for which the charterer is personally liable in respect of the maritime claim, the charterer is seen as the owner of the vessel;⁴¹¹ thus, the claim cannot be instituted against the legal owner.

Wallis⁴¹² asserts that 'ownership means the legal ownership, which is possession of the legal rights that ownership confers upon a person.'⁴¹³ Thus, he referred to Shaw by asserting that beneficial ownership is not recognised in South Africa, however, it has been mentioned in several associated ship cases.⁴¹⁴ In other words, when referring to the owner of the ship, it is certain in South Africa that it is the legal owner that is being referred to and this means the person who is on the registration of the ship register. However, the Ship Registration Act⁴¹⁵ explains that ownership of a ship can rest with another person other than a way of registration.⁴¹⁶ Thus, recognition is given in s 32 that 'a person having beneficial interest in a ship will be held liable for any pecuniary penalty payable in terms of the Shipping Acts.'⁴¹⁷ It is further allowed for a bareboat/ demise charterer to register a ship and at that point, the legal owner will not be referred to as the owner of the ship.⁴¹⁸ Therefore the concept of beneficial ownership does have some application in South African law but it is not referred to in s 3(4) of AJRA. The concept of beneficial ownership came into existence by virtue of the English

⁴⁰⁸ Hare, *op cit* note 46 at 741

⁴⁰⁹ Hofmeyr, *op cit* note 16 at 123

⁴¹⁰ *Ibid*

⁴¹¹ *Ibid*

⁴¹² Wallis, *op cit* note 1 at 219

⁴¹³ *Ibid*

⁴¹⁴ *MV Heavy Metal: Belfry Marine v Palm Base Maritime SDN BHD* 1999 (3) SA 1083 (SCA).

⁴¹⁵ Section 4 of schedule 1 of Act 58 of 1998

⁴¹⁶ *Ibid*

⁴¹⁷ Section 1(1)

⁴¹⁸ Section 16(c) of the Ship Registration Act 58 of 1998

Administration of Justice Act.⁴¹⁹ In its s 3(4)⁴²⁰ it requires that the claimant needs to look beyond the corporate status of the company in order to be able to ascertain who is the owner of the ship. Thus, the claimant will have to investigate who is the trustee or nominee in the scenario.⁴²¹ In the case of *Andrea Ursula*⁴²² Justice Brandon explained the meaning of beneficial owner to mean ‘a ship would be beneficially owned by a person who, whether he was the legal or equitable owner or not, lawfully had full possession and control of her, and, by virtue of such control, had all the benefit and use of her which a legal or equitable owner would ordinarily have’.⁴²³ However, the concept of the associated ship in s 3(6) and (7) of AJRA is wider.⁴²⁴

4.6 Interpretation of the Concept of Ownership in Nigeria under Admiralty Jurisdiction

Section 5(4) of the AJA gives a broader meaning to a statutory lien than s 3(4)b read with s 1(3) of the AJRA. It provides:

In any other claim under section 2 of this Act, where the claim arises in connection with a ship and the person who would be liable on the claim in an action *in personam* (in this Act referred to as “the relevant person”) was”, “when the cause of action arose, the owner or charterer of or in possession or in control of the ship, an action *in rem* may (whether or not the claim gives rise to a maritime lien on that ship) be brought against:

(a) that ship, if at the time the action is brought the relevant person is either the beneficial owner of that ship in respect of all the shares in it or the charterer of the ship under a charter by demise; or

(b) any other ship of which, at the time when the action is brought, the relevant person is the beneficial owner in respect of all the shares in the ship.

⁴¹⁹ Administration of Justice Act of 1956

⁴²⁰ ‘In the case of any ... claim...being a claim in connection with a ship, where the person who would be liable on the claim in an action *in personam* was when the cause of action arose the owner or charterer of or in possession or in control of the ship the Admiralty jurisdiction of the High Court may... be invoked by an action *in rem* against (a) that ship if at the time when the action is brought it is beneficially owned as respects all the shares therein by that person...’

⁴²¹ *Ibid*

⁴²² *Medway Drydock & Engineering Co Ltd v Mv The Andrea Ursula* (1971) 1 Lloyd’s Rep 145

⁴²³ *Ibid* at 47

⁴²⁴ Wallis, *op cit* note 1 at 222

The Administration of Justice Act,⁴²⁵ which was in operation before the promulgation of the AJA, limited the arrest of ships only to situations when the beneficial owners were liable; however, the subsequent AJA provides that an arrest of a ship can also be enforceable when the demise charterer is responsible.⁴²⁶ A plaintiff/claimant arresting a ship must demonstrate to the court that the relevant person is the ‘beneficial owner of the shares in the vessel’, or alternatively the relevant person is the demise charterer. In the case of *MV Araz v LPG shipping SA*,⁴²⁷ the arrest of the vessel was set aside because the person cited in the cause of action was not the ‘beneficial owner of the vessel’. Thus, according to the *MV Araz*,⁴²⁸ beneficial owner is defined as the person who owns the ship either legally or equitable. Mohammad *JCA* went further to include the person who has the full control and possession of the vessel and as well as that person who enjoys all benefits of the ship, in which the legal and equitable owner would have enjoys.⁴²⁹ In addition, according to Jackson who asserted that a ship can be registered on one-person name while the beneficial owner is on another name.⁴³⁰ In the *Advance case*,⁴³¹ the arrest of a vessel was refused because no evidence was adduced to prove the 1st defendant to be the ‘beneficial owner of the vessel’. The court held that it was paramount to establish a charter party by demise in such a case for the arrest of the vessel.

In addition, when arresting a sister ship, the claimant must be able to establish that the relevant person is the beneficial owner of the sister ship to be arrested. This was affirmed in the case of *MV Araz v NV Scheep*⁴³² where it was held that where the claimant failed to establish the identity of the person who was the beneficial owner, the court did not have jurisdiction to order the arrest of the vessel. This decision established the importance of personal liability of the beneficial owner.⁴³³ However, this does not apply to a maritime lien because, as discussed in chapter 3, liens cling to the vessel irrespective of who might purchase the vessel until the debt is fully settled.

⁴²⁵ Administration of Justice Act 1956

⁴²⁶ Emejuru, *op cit* note 240 at 127

⁴²⁷ (1996) 6 NWLR (PT. 457) 720 (C.A)

⁴²⁸ Ibid

⁴²⁹ (1996) 6 NWLR (part 456) 729

⁴³⁰ Jackson, *op cit* note 139 at 565

⁴³¹ Vol. 4 NSC at 54 also available at

<http://webcache.googleusercontent.com/search?q=cache:TBynb7ZrgV0J:mikeigbokwe.com/wp-content/uploads/2018/06/IN-REM-OR-IN-PERSONAM-MODE-OF-EXERCISE-OF-ADMIRALTY-JURISDICTION.pdf+&cd=7&hl=en&ct=clnk&gl=za>, accessed on 19/08/2019

⁴³² (1996) 5 NWLR (PT.447)204 (C.A)

⁴³³ Olagunju, *op cit* note 20 at 175

In addition, a claimant can arrest a vessel under a demise charter in which the charterer is personally liable in respect of the underlying maritime claim. However, one must not mistake the legal owner of the vessel for a demise charterer, although a claimant can arrest any other ship owned by the demise charterer.⁴³⁴

4.7 Conclusion

The Nigeria AJA and the South African AJRA both provide for statutory liens in which it is paramount for any claimant contemplating arrest to be aware of precise details of maritime claims and whether the owner of the vessel is personally liable in respect of the maritime claims. However, what differs is the interpretation of similar maritime claims in either country. For example, Nigeria adopts a rigorous interpretation in respect of cargo discharged from the ship to fall outside the jurisdiction of the court, while South Africa extends its jurisdiction beyond the harbour. Thus, one question that needed to be asked is what is the importance of multimodal mode of transportation? It can be denoted that most goods discharge at the port are being conveyed to its destination through other means like railways, trucks, and trailers. However, this should not imply that the goods will lose its maritime connection once it has been discharged at the seaport. What is important is that the claimant must be able to show a legally relevant connection between the claim and the object to which the claim is required to relate for the purpose of the definition of a maritime claim.⁴³⁵ I would submit that this provision is one of the important provisions that put South Africa as a favourable jurisdiction in Africa because the claimant knows that its goods would not lose its maritime claim at the seaport in as much that he or she has a reasonable connection between the claim and goods. Thus, the important question is should Nigeria AJA adopt this interpretation? I, therefore, submitted that for Nigeria to have a more favourable arrest jurisdiction, goods that have been discharged from the ship should not fall outside the jurisdiction of the court because damage can still occur while using a multimodal mode of transportation to convey the goods to its final destination or to another dry/inland port.

On this note, significantly, Nigeria court should interpret the already existing provision of ‘damage to or loss of goods carried by ship’ to be similar to South Africa interpretation that caters for goods discharged from port to be a maritime claim in as much there is a relevant connection between the good and the claims. More so, the provision of ‘arising out of or

⁴³⁴ Emejuru, *op cit* note 240 at 317

⁴³⁵ *Supra* note 170 at 29

relating to' was introduced by the Admiralty Jurisdiction Regulation Amendment Act of 1992 should also be introduced into the Nigeria Admiralty Act.

In addition, the arrest of a vessel can be executed on the ground that either the owner of the vessel or the demise charterer may be liable. Whilst both countries agree on this, Nigeria goes further to expand the nature of statutory lien to a beneficial owner. The South Africa AJRA did not mention beneficial owner and according to Wallis in establishing who is the owner of the ship when the maritime claims arose states 'ownership means legal ownership, that is possession of the legal rights that ownership confers upon a person'. However, the concept beneficial owner has been used in several associated ship⁴³⁶ cases.⁴³⁷ Thus, the court has looked beyond the mere nominee whose identity has been used in other to conceal the identity of the actual and beneficial owner of shares.⁴³⁸ In other words nominee act as a director who adheres to the direction or instruction of the actual owner. Nigeria sticks with the definition and meaning of beneficial owner provided under the English Administration of Justice Act of 1956⁴³⁹

⁴³⁶ Associated ship arrest in s 3(6) and (7) of AJRA is beyond the concept of this dissertation

⁴³⁷ *MV Heavy Metal: Belfry Marine v Palm Base Maritime SDN BHD* 1999 (3) SA 1083 (SCA)

⁴³⁸ *The Eleftherotria (No 2) Crusader Shipping Co Ltd v Canadian Forest Navigation Ltd* SCOSA C5

⁴³⁹ (1996) 6 NWLR (PT. 457) 720 (C.A)

CHAPTER FIVE

Conclusions and Recommendations

5.0 Introduction

This chapter offers a summary of each chapter. It also provides recommendations and conclusions.

5.1 Summary of Chapter Conclusions

Chapter One provided the background to the study. In this chapter, the object of the study was set out as a comparative study of the nature and role of maritime claims in the arrest in *rem* jurisdiction under the AJRA of South Africa and the Nigerian AJA and what Nigeria could learn/adapt from South Africa. The reason for having this kind of comparative study was also set out in the rationale.

Chapter two discussed the application of the law in both jurisdictions. The 1952 Arrest Convention laid down the classes of maritime claims mainly to effect unification of ship arrest around the world. Nigeria acceded to the Convention whereas South Africa shied away from ratification. moreover, whilst most of the classes of maritime claims in the Convention are incorporated in both South Africa and Nigeria's municipal laws, the nature of interpretations differs. The arrest of ships in South Africa is founded on s 1(1) of the AJRA⁴⁴⁰ which details several types of claim that a claimant may rely on in exercising admiralty arrest jurisdiction. Section 2 of the Nigeria AJA⁴⁴¹ sets out the classes of claims regarded as maritime claims. In this chapter, reference was made to the two heads of jurisdiction recognized in AJRA. In which the old head of jurisdiction applies the English law while the new head of jurisdiction applies the Roman-Dutch law. Contrarily, the Nigeria AJA did not recognize or have two head of jurisdiction. However, from the provision of s 1(1)(b) of AJA, It could be noted that reference is being made to English law and with the ratification of the 1952 Arrest convention, most of its maritime claims are incorporated into AJA.

⁴⁴⁰ AJRA

⁴⁴¹ AJA

More so, there is an interpretation of marine matter and maritime matter as specified in s 1(1)(ee) which according to Hofmeyr was included in order to bring matters that are not covered in s 1(1)(a-f). On the other hand, Nigeria AJA, looking at what constitutes a maritime claim held that not all contract that involves ship is a maritime claim. AJRA interpretation connotes that a maritime connection must be established between the goods and the claim. One of the most important interpretations after the tabular differentiation of maritime claims in both countries is the use of the container in which South Africa classify a container as a maritime claim. On the other hand, it is not listed in s 2 of AJA as a maritime claim but it can be denoted that once the claimant can ascertain that the container claim is arising out of an agreement relating to the carriage of goods or persons by a ship or the use or hire of a ship, then the Admiralty Jurisdiction of the court can be invoked.

In Chapter Three, it can be denoted that maritime lien follows the vessel even in the hands of new ownership but ceases after the debt has been settled. Thus, South Africa and Nigeria still follow the English law procedure on maritime claims that qualify as maritime liens. Although some of the maritime claims referred to as maritime liens in the AJRA⁴⁴² carry different wording from that of other common law countries, this has no practical effect on interpretation. Nevertheless, both countries shy away from recognising foreign maritime liens.

Chapter Four offers the statutory lien explanation. There are some problems of interpretation of the types of maritime claims that fall under the statutory right *in rem* in both countries. Whilst South Africa allowed goods discharged at the harbour to qualify as the subject of a maritime claim under admiralty jurisdiction, Nigerian courts have emphatically held that goods discharged at the harbour are not subject to a maritime claim under its admiralty jurisdiction. Thus, whilst South African and Nigerian admiralty law are still influenced by the English law, South Africa has envisaged by AJRA amend and interpret its law to fit a contemporary world.

5.2 Recommendations

The lack of uniformity in what type of maritime claims can found maritime and statutory liens suggests the need for slight changes in the law interpretation: This dissertation has

⁴⁴² AJRA

shown how both countries have interpreted some set of maritime claims. On this note, the below recommendations will show what Nigeria should adopt which is the significant of the difference of this dissertation.

- A. The use of containers cannot be overlooked in a contemporary shipping world. Containers are used in packing all types of goods either consumer, refrigerated or dangerous goods. AJRA listed container as a maritime claim although it was inserted in the 1992 amendment Act. Nigeria should adopt the claim in its list of maritime claims.

- B. The South African interpretation of damage to goods that have previously been carried onboard but are damaged after discharge qualify to invoke the jurisdiction of a court exercising its admiralty jurisdiction and as it was asserted by Hofmeyr, that whilst the goods would have lost the maritime connection because the goods might have been sold or moved by multimodal modes of transport, the goods still fell under the jurisdiction of the AJRA.⁴⁴³ Moreover, the phrase ‘arising out of or relating to’, could be employed on the note that the damage relates to or arises from the listed maritime claims. This is a phrase that Nigeria needs to adopt in its AJA.

Furthermore, Nigeria should follow the South African interpretation that claims of damage done to cargo should include goods discharged at harbour and goods carried from the harbour using multimodal transportation. The Nigerian court through the interpretation of case law as provided in chapter four of this dissertation asserts that damage to goods that have been discharged from the vessel would not qualify as a maritime claim; in which the admiralty court’s jurisdiction cannot be invoked in a case where the goods have been discharged from a vessel. Thus, it would only be a maritime claim if the damaged goods remain on board the vessel. Nevertheless, what will happen to goods that have been discharged from the harbour and got damaged during transit from the harbour to an inland or dry port for the purpose of port decongestion? According

⁴⁴³ Ibid

to the digest of Judgments of the Supreme Court of Nigeria⁴⁴⁴, the goods once it has been discharged, a notification will be send to the agent who will arrange for the clearance and this agent has no audience before the Admiralty Court. On this note, the construction of different inland ports going on in different parts of the country, it is paramount for the revision on an interpretation of the clause damage done to goods to include claims for damage after discharge at the harbour and during transportation of the goods from the harbour to its final destination. This will help parties who have contracted under a through bill of lading.

5.3 Concluding Remarks

A maritime claim is one of the key elements to arrest in *rem*. In a scenario where the claimant does not have a maritime claim, the court will lack jurisdiction to hear such matters as an admiralty matter. As it has been discussed in chapter one, the dissertation provides a comparative study of the nature and role of maritime claims in the arrest in *rem* jurisdiction under the AJRA of South Africa and the Nigerian AJA. It can be seen from the chapters of this dissertation and most especially in the recommendation on what Nigeria could learn and adopt. On the other hand, both countries tend to follow the English law; moreover, South Africa have not just slavishly applied the English law but modified it to suit its needs This has been shown in the chapters of this dissertation, considering the various type of maritime claims we have in both countries and how the court has interpreted some of the claims.

Practitioners and scholars must, therefore, be aware that what is a maritime claim in Nigeria might not be the same in South Africa, based on differences in interpretation. However, it can be denoted that Nigeria needs to adopt the interpretation of ‘damage or loss to goods’ and incorporate containers into the list of its maritime claims.

In order to build on maritime scholarship in Africa further study in this area is needed, which should also include the East African countries. Furthermore, it will be important for future studies to examine the arrest mechanisms in both countries, and in particular to compare the associated ship arrest and security arrest available in South Africa to that of Nigeria where Mareva injunctions and sister ship arrest are being used.

⁴⁴⁴ Olatokunbo John Bamgbose. *Digest of Judgements of the Supreme Court of Nigeria* (2014) at 28

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30 May 2019

Mr Bayode Sunday Ayo-Ojo (218046906)
School of Law
Howard College Campus

Dear Mr Ayo-Ojo,

Protocol reference number: HSS/0399/019M

Project Title: Maritime Claims: Gangway to ship arrest – A case study of South Africa and Nigeria

Full Approval – No Risk / Exempt Application

In response to your application received 30 April 2019, the Humanities & Social Sciences Research Ethics Committee has considered the abovementioned application and the protocol has been granted **FULL APPROVAL**.

Any alteration/s to the approved research protocol i.e. Questionnaire/Interview Schedule, Informed Consent Form, Title of the Project, Location of the Study, Research Approach and Methods must be reviewed and approved through the amendment /modification prior to its implementation. In case you have further queries, please quote the above reference number.

PLEASE NOTE: Research data should be securely stored in the discipline/department for a period of 5 years.

The ethical clearance certificate is only valid for a period of 3 years from the date of issue. Thereafter Recertification must be applied for on an annual basis.

I take this opportunity of wishing you everything of the best with your study.

Yours faithfully



.....
Dr Rosemary Sibanda

/ms

cc Supervisor: Mrs Dusty-Lee Donnelly
cc. Academic Leader Research: Dr Donrich Thaldard
cc. School Administrator: Mr Pradeep Ramsewak

Humanities & Social Sciences Research Ethics Committee

Dr Rosemary Sibanda (Chair)

Westville Campus, Govan Mbeki Building

Postal Address: Private Bag X54001, Durban 4000

Telephone: +27 (0) 31 260 3587/8350/4557 Facsimile: +27 (0) 31 260 4609 Email: ximbap@ukzn.ac.za / snymann@ukzn.ac.za / mohunp@ukzn.ac.za

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