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An Appraisal of the Features of Admiralty Jurisdiction under Maritime Law

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ABSTRACT

The operation of admiralty jurisdiction depends on well-known features. Maritime lien being a historic feature of modern maritime law has its root in the medieval European lex maritime. This lien which arose by operation of law is a privilege claim on maritime property. Maritime claims given rise to maritime lien under the common law and civil law are greatly different in scope. Within the former legal system claims which give rise to maritime lien will include damage caused by a vessel, salvage, crew accrued wages, master's wages and disbursement. In addition to these claims, under the civil law system repairs to ships, supply of bunkers and other necessaries, stevedores' claim and damage to cargo can also give rise to maritime lien. Saisie conservatoire (conservatory measure) and quasi in rem are part of civil jurisdiction maritime practice and afford better security to a claimnt in a maritime dispute than does the mareva injunction under the common law jurisdiction where injunction is not a right. In maritime practice the possibility of conflict of laws cannot be eliminated. This is due to mobility of ships across international maritime boundaries. Claims in personam and claims in rem are also features which can give rise to a maritime dispute. The analysis of these three features constitutes the objective of the paper.

Keywords: Feature, Admiralty, Maritime

INTRODUCTION

The distinction between claims *in rem* and claims *inpersonam* is a unique to admiralty courts. These two features[1] including maritime liens are the bases upon which an admiralty jurisdiction can be invoked. Claims *in rem*[2] were originally founded on the notion of maritime lien[3] whereby judgement was enforced against the property (*res*) arrested. This was done on the basis that a maritime lien attaches to the property from the moment of creation of such a claim. The right to enforce a maritime lien by an action *in rem* is confined to the ship against which the damage was caused or in relation to which the maritime lien arose, even if it was in the hands of a *bona fide* purchaser[4]. Maritime claims under the admiralty jurisdiction are covered by the 1999 Arrest Convention[5], which extends to maritime claims whether or not the claims gave rise to a maritime lien.

Apart from proceedings against the ship, there is also the possibility of proceedings against the person interested in the property, by arresting him or his property. This is known as maritime attachment. Such attachment also referred to as quasi *in rem* action, is an integral part of the civil law system and affords a claimant the maximum protection or security he needs in ongoing proceedings against the defendant. In *CompagnieProfessionelleD'Assurance v. Zhao Yue Ping, Société the West of English Ship Owners Mutual Insurance Association, Armateur M/V Luo Qing,*[6]the High Court of Wouri issued a warrant to arrest the vessel M/V Luo Qing as a conservatory measure to secure the plaintiff's claim.

1 In rem and inpersonam actions, the former relate to an action against the res (property) and the latter is an action against the owner of the property.

2 These are claims against a res, which can be a ship or property on board a ship. The aim of an in rem claim is to cause the owner of the res to appear and defend the action against the res.

3 Maritime lien is a claim or a privilege upon a thing to be carried out by legal process and it travel with the thing into whosoever's possession it may come. See Sir John Jervis in *The Bold Buccleugh* (1851) 7 Moo PC 267 at 284.

4 Per Sir John Jervis, *ibid*, 286.

5 Article 9. See also Article 149 of the CEMAC Marine Merchant Code 2012. It is important to point out that the 1999 Arrest Convention forms an integral part of the CEMAC Marine Merchant Code.

6 Civil Judgement No. 595 of 1st August 2008 **(**Unreported).

The procedure of maritime attachment is similar to that of an *in rem* action in that it involves the seizure of a vessel. It has been cautioned that this procedure, also referred to as proceedings *quasi in rem* should not be confused with the *in rem* action because it was a device designed to compel the appearance of the defendant in an *in personam* action[7]. The procedure *in personam* founded by the Merchant Shipping Act 1854, is parallel to an *in rem* action in that the defendant appears to defend the *res*[8].

Under common law, an action *in rem* is the basic procedure on which creditors rely for pre-judgment security and post-judgment enforcement. The arrest of the ship or other *res* (e.g. cargo or freight) in the action *in rem* places the *res* under judicial detention pending adjudication of the claim. It usually also secures the appearance in the action of the defendant shipowner and it establishes the jurisdiction of the court. If the court subsequently allows the claim, the judgment is then enforceable against the arrested *res* (by judicial sale) or the security given to take its place[9].

In civil law jurisdictions, where no action *in rem* exists, the action *in personam* may be combined with a "*saisie conservatoire*", or conservatory attachment. The *saisie* permits any property of the debtor (including ships) to be seized and detained under judicial authority pending judgment. The subsequent judgment, if favourable to the plaintiff, may then be enforced against the attached property or the security replacing it[10].

The objective of this paper is to analyse maritime liens, claims inpersonam and claims inrem as features of admiralty jurisdiction. To achieve this objective paper analyses maritime lien (1), it further examines the mode of exercise of admiralty jurisdiction (2) under which claims inpersonam (2-1) and claims in rem (2-2) are discussed. The paper furthermore discusses the connection between a claim and the defendant when a cause of action ensued (3).

1. Maritime Liens

Mari time liens constitute a distinctive and historic feature of modern admiralty law. The court in 1851 defined maritime lien as "a claim or privilege upon a thing to be carried into effect by legal process … that process to be a proceeding 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 attaches, and, when carried into effect by legal process by a proceeding *in rem*, relate back to the period when it first attached[11]".

The roots of maritime liens stretch far back to the Maritime Law of the ancient world[12]and particularly to the medieval European *Lex maritime.* As part of the body of customary transnational mercantile law, maritime liens governed the relations of merchants who travelled by sea with their goods in the middle ages[13]. Originally purely oral, customary sea law was gradually committed to writing in the medieval sea codes[14], which were generally collections of judgements rendered by merchant judges[15].

The substantive right of maritime lien arises upon the occurrence of the mischief done by the ship[16]. For this reason it exists irrespective of an action in rem but needs to be enforced by the proceeding in rem[17] since the lien is on the res. Statutory rights in rem which are not maritime liens, crystallise on the ship upon commencement of proceedings in rem as was seen in *The Monica S*[18]. These rights are otherwise referred to as statutory lien.

A maritime lien is a privileged charge on maritime property and arises by operation of law. It does not depend on possession of the property or an agreement between parties. Rather, it accrues from the moment of the event which gives rise to the cause of action and remains attached to the property. Maritime lien is invisible in the sense that it is not subject to any scheme of registration. It survives into the hands of a *bona fide* purchaser for value without notice. A maritime lien is enforced by a claim in rem.

As a privilege, the lien has been recognised as a right in the property of another[19]. This is an advantage of maritime lien over a statutory lien. The latter depends on the issue of the claim in rem form for it to crystallise on the property.

Despite the fact that a maritime lien is similar to a mortgage[20], there exist some differences between them as follows:

A. Unlike a maritime lien, a mortgage is created by an agreement in a form prescribed by statute;
B. A mortgage needs registration which serves as notice to third parties and the date of registration determines its priority over subsequent registered mortgages;

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7 F. L. Wiswall, (Jr), *Development of Admiralty Jurisdiction Since 1800* CUP (London, 1970). 13

8 *Ibid*, 14.

9 William Tetley, Arrest, Attachment and Related Maritime Law Procedures (1999) 73 Tul. L. Rev.

10 Ibid.

11 Sir John Jervis in the Bold Buccleugh (1851) Moo PC 267

12 Willim Tetley, *Maritime Liens and Claims* 2nd Ed., (Les Editions YvonBlais, Canada, 1998) 7-8.

13 Leon Trakman, *The Law Merchant, The Evolution of Commercial Law* (Litttleton Colorado, 1983) 8.

14 Of the early codifications, the Roles of Oleron was the most important dating from the twelfth century and were composed on the Island of Oleron off the coast of Bordeaux, then the center of wine trade between Aquitaine and England. See James Shephard, *Les Orgines des Roles d'Oleron*, an unpublished Master's Thesis, University of Poitiers France, 1983, quoted by William Tetley in, 'Maritime Liens in the Conflict of Laws' an Art. published in Law and Justice in a Multistate World, Essays in Honour of Arthue T. von Mehren, by Transnational Publishers Inc. N.Y. USA 2010 at 444.

15 Leon Trakman, *op. cit*. 10.

16 William Tetley, *op. cit*. 11.

17 AlekaMandaraka-Sheppard, *op. cit*. 22.

18 (1967) 2 Lloyd's Rep. 113.

19 Gorell Barnes in *The Ripon City*(1897) 226. In this case, Gorell Barnes J. declared that … a lien is a privileged claim upon a vessel in respect of services done to it or injury caused by it, to be carried into effect by legal process. It is a right acquired by one over a thing belonging to another. It is so to speak, a subtraction from the absolute property of the owner in the thing.

20 Their similarity arises from the fact that both are charges on the ship and can be enforced against the owner and any subsequent purchaser.

C. While a mortgage has priority over other statutory rights in rem, a maritime lien has priority over all other maritime claims and;
D. A maritime lien travels with the ship from the moment of creation, even when the ship is transferred to a *bona fide* purchaser without notice[21].

Furthermore, a maritime lien is distinguished from the common law possessory lien, which is a right to retain possession of a chattel pending payment of an outstanding obligation for services rendered. In other words, a possessory lien is the right in one man to retain that which is in his possession, but belonging to another until certain demands are met. The moment possession is lost, the right to lien is also lost.

Another type of lien created by operation of law is an equitable lien. This lien does not depend on possession of the thing. It can be lost by sale of the thing to a *bona fide* purchaser for value without notice.

In most claims in rem, the vessel is often released on bail. There may however arise a situation whereby the lien (or rights) in rem against the ship exceed the value of the ship. In such situations, the owner will likely not enter appearance to have the ship released on bail. At this juncture, the admiralty court's execution function [22]of arresting and selling the ship so as to give a clear title to the purchaser will be put into operation. After the sale, the court will then proceed to distribute the proceeds amongst the lien creditors in order of priority. Important to note is the fact that maritime liens can be enforced, as all other maritime claims by an in rem claim. Also worth noting is the fact that the court will always strive to protect the interest of the plaintiff in situations where the defendant may want to deal with the property before judgement is passed. While waiting for the judgement, a plaintiff cannot prevent the defendant from dealing with assets before judgement the way he pleases. The court would then intervene and grant an injunction if it finds it just.

1.1 Power of the admiralty court to issue an injunction with respect to a maritime claim

The general rule under common law[23] before 1975 was that a plaintiff could not obtain an injunction order to prevent the defendant from disposing of his property before judgement becomes final, unless the asset in the hands of the defendant belongs to the plaintiff. This reputed loss of the admiralty attachment in England was partially mitigated by the invention of the Mareva injunction[24]. The Mareva injunction also known as the freezing injunction is simply an interlocutory injunction issued by the competent court, prohibiting the defendant before or during a suit, or even after judgement, from removing assets, real or personal, moveable or immoveable from the court's jurisdiction, or from dealing with them where it appears to the court that without such an order, the plaintiff's recovery on his claim will be jeopardised[25].

The freezing injunction is not a statutory remedy[26]; it is rather an interim and ancillary measure covering any type of injunction sought to restrain a party from removing his property located within or without the jurisdiction. The purpose of this injunction is to preserve assets of the defendant for execution of a judgement or enforcement of an award subsequently obtained. In principle, there can be no objection to a defendant being allowed by the court to employ the property covered by the injunction, for the purpose of his business or where necessary, to pay living expenses, legal fees, or to ask in good faith to repay loans in the ordinary course of business as was the case in *Devonshire*[27]. In order for this injunction to be granted, the claimant must show that:

A. He has a good arguable case[28];
B. He has a present and not a future cause of action against the defendant[29];
C. The defendant has assets within the jurisdiction and there is a real risk that such property will disappear or be dissipated before a judgement can be enforced. This was the position in *Third Chandris Shipping Corp. v Unimarine S.A.*[30]
D. The balance of convenience favours the issuing of the injunction[31].

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[21] For more on this distinction, see AlekaMandarak-Sheppard, 22-23.

[22] According to Scolt LJ in *TheTolten* **(**1946**)** 135 (C.A). This function of the court is called executive because once the lien is admitted or established by evidence of the right to compensation for damage suffered through the defendant ship's negligence, there is then no further judicial function for the court to perform apart from that in the registry where priorities, quantum and distribution are dealt with.

[23] Under the civil law system, the plaintiff has always been covered owing to the operation of the *quasi in rem* jurisdiction also referred to as maritime attachment. This power was lost in England by the end of the eighteenth century thereby leaving common law courts only with the action in *rem* (today referred to as in rem claim) and the action *in personam* (presently referred to as *in personam* claim). For this reason, most Commonwealth countries whose maritime procedure took after the English Admiralty law have only these two forms of maritime lawsuit. See William Tetley, International Maritime and Admiralty Law at 408. As a member of the Commonwealth however, Cameroon is free from such obstacles since she operates both civil law and the common law legal systems. So Cameroonian plaintiffs have been protected under the civil law *saisie conservatoire,* (this measure of obtaining pre-judgement security for the plaintiff is covered by Articles 144 to 156 of the CEMAC Code 2012), which prevents the defendant from dealing with property or removing it within jurisdiction pending judgment.

[24] The injunction takes its name from Lord Denning's decision in *Mareva Compania Naviera S.A v International Bulkcarriers S.A* (1975) 2 Lloyd's Rep. 509.

[25] William Tetley, *op. cit*. p 410.

[26] Per Lord Mustil in *Mercedes-Benz AG v Leiduck* [1995] WLR 718 (PC) p728.

[27] (1999) 62(4) MLR 539, 539 - 563.

[28] This condition was arrived at in, *Ninemia Maritime Corp. v TraveSchilffahrlsgesellchaft* (1983) 2 Lloyd's Rep. 660, *Aetna Financial Services v Feigelman* (1985) 1 S.C.R 2 at 27.

[29] See *Veracruz Transportation Inc v VC Shipping Co Inc* (1992) 1 Lloyd's Rep. 353 (AC).

[30] (1979) QB 645, 669.

[31] See *The Niederschsen* (1983) 2 Lloyd's Rep 600 at 605.

In addition to the above, the claimant must make a full and frank disclosure in his statement of claim of all necessary facts[32]. Further, the claimant is also expected to give an undertaking in damages to the court. The effect of this is that the defendant can ask the court to enforce it in case he suffered any loss as a result of the order.

Within the CEMAC zone and in Cameroon particularly, ship arrest as a conservatory measure, which is arrest for security pending a substantive matter, is similar to the freezing injunction under English law. Such a measure entails a temporary immobilisation of the ship by the claimant following a court order[33]. The court may in the interest of business, instead of ordering an arrest as a conservatory measure, order a financial security. In *Comastrans S.A v Corlett Actividades Maritimas Lda & MV Nadine Corlett*[34], Forbang J. of the High Court of Buea, after having declined to make an outright order for the arrest of the vessel, MV Nadine Corlett berthed at the Tiko sea port until the motion for the arrest of the vessel was endorsed by the relevant maritime officials[35], held that it will be inequitable to allow the ship sail out of the port before the determination of the plaintiff's claim. He then ordered financial security from the owner of the ship *in lieu* of arrest. He said: "in order to water down the harsh economic effect that the arrest of a ship may cause to the ship owner, the modern and common practice has been for the courts to order security from the ship owner *in lieu* of arrest as a just, equitable and valuable measure. Such guarantee is usually in the form of a written undertaking or a bank guarantee[36]".

The shortcoming of the freezing injunction is that it only prevents movement or dissipation either partially or totally of the defendant's assets. Unlike the admiralty attachment (maritime attachment applicable in the civil law system), it does not place the property under the jurisdiction of the court, nor does it permit execution against it by way of judicial sale, enforcing a final judgement[37]. In the United States of America, the freezing injunction is absent as was judicially ascertained in the case of *Groupo Mexicano de Desaroolo v Alliance Bond Fund Inc*[38]. Another reason for the absence of the freezing injunction in the U.S. is that the admiralty procedure takes its roots from the civil law thus preserving the quasi in rem jurisdiction.

From the above, it is clear that a claimant is highly protected under the civil law system than under the common law system due to the availability of the quasi in rem jurisdiction under the former. This is simply to say that maritime claimants in Cameroon are protected as they can rely solely on maritime attachment[39] and not a freezing injunction for security pending a judgement. In *Ayabe & Fils Sarl and CIMED Sarl v Imperial Shipping, M/V Thuleland*[40], the second respondent (M/V Thuleland) transported three hundred and sixty thousand (360,000) bags of rice for the applicant from Vietnam to Cameroon. Some of the bags were lost and by a motion on notice, the applicant prayed the High Court Fako to arrest the ship which was within Cameroonian territorial waters and that the said arrest should serve as a conservatory measure. Upon the understanding that the applicant's action was intended to cause the respondents to settle their contractual obligations towards the applicant worth 270, 900 Euros (177, 710, 400 FCFA), the court ordered the arrest of the ship as a conservatory measure[41].

In maritime practice, there is always a question of which law to apply when there is a maritime claim or dispute. This worry is often associated to conflict of laws.

1.2 Laws Applicable to Maritime Liens and Conflict of Laws

The concept of maritime lien originated in the 19th century[42]. These liens attach on the ship in connection with which the claim arose and cannot be extinguished until a court sale. Under common law, claims which attract maritime lien include: damage lien, salvage lien, crew accrued wages, master's wages and disbursements[43].

Other maritime claims can be assigned the status of a maritime lien by the law of the country in which the claim arose or where the contract was concluded. As ships move from one jurisdiction to another, the chances of a mortgagee's right being affected cannot be minimised. This movement raises a problem of conflict[44] of laws when a court is seized to determine the validity of a foreign lien before it determines priorities for the distribution of proceeds of sale of a ship.

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32 See *The Giovana* (1999) 1 Lloyd's Rep 867a case concerning non-sufficient disclosure where the claimant was denied the injunction.

33 See 'ship Arrest as a Conservatory Measure in Cameroon' by Feh Henry Baaboh, being a paper presented during the 3rd General Meeting of SHIPARREST.COM in Marseilles, France. 2006. Violation of an order to arrest by the owner of the vessel amount to contempt of court.

34 Suit No HCF/166/05-06/2M/06.

35 The Learned Judge by declining to make such an order was simply implementing the provisions of the statute regulating maritime activities in Cameroon. (See Article 120 of CEMAC Marine Merchant Code 2001). Article 150 of the 2012 CEMAC Marine Merchant Code is a replica of Article 120 of the old Code.

36 See Yanou A. Micheal, *Practice and Procedure in Civil Matters in the Courts of Records in Anglophone Cameroon* (Wusen Publishers, Nigeria, 2012) 52.

37 William Tetley, *op. cit*, 411.

38 527 U.S 308, 119 S.Ct 1961, 1999 AMC 1963 (1999).

39 This is covered by Articles 144 to126 of CEMAC Marine Merchant Code. These Articles deals with arrest as a conservatory measure (*saisie conservatoire*) under the 2012 CEMAC Marine Merchant Code *saisie conservatoire* is covered by Articles 144 to 156.

40 Suit No. HCF/0244/M/10 (2010) (Unreported).

41 See also *SoacamSarl v Golden Ace Shipping Ltd, Cyprus* (1st respondent), M/V Master (2nd respondent). Suit No. HCF/0071/M/11 (2011) (Unreported), United Commodities *Inc. v Fioralba Shipping Co. Ltd* (1st respondent), M/V Kalisti (2nd respondent). TCFI/69m/2010 (unreported) and *SoacamSarl v Xela TransportationServices Inc*. (1st respondent) *M/V Xela* (2nd respondent) TCFI/115m/2010 (unreported) in which the arrest of the 2nd respondent in each of the cases served as a conservatory measure to secure the claims of the applicants.

42 See Sir John Jervis definition in *The Bold Buccleugh* (1851) 7 Moo PC 267 at 284.

43 Aleka Mandaraka-Sheppard, *op. cit* 145.

44 *Ibid*.

Common law recognises the priority of a mortgage over the statutory rights in rem, but not over a maritime lien. In the United States whose admiralty law follows that of the civil law family, maritime lien includes repairs to a ship, supply of bunkers, other supplies (necessaries), stevedores' claims, claims under towage and even damage to cargo. It follows therefore that these will have priority over mortgages under civil law but not under common law. In this wise, we can safely hold that the scope of maritime lien under civil law is wider than under the common law. Under common law, what is considered as maritime lien in civil law jurisdiction will simply be classified as statutory rights in rem which become statutory liens in rem from the issue of the claim form. They will not however have priority over a mortgage[45]. For the purpose of priority, a crucial question is whether or not the recognition of a maritime lien should be decided by applying the law of the State where the claim arose, that is, the *lexcausae*, or the law of the forum, that is, the *lexfori*. To answer this question, the guiding principle is whether the maritime lien is considered as a substantive right or a procedural remedy? Where it is considered as a substantive right given by the law of the State (*lexcausae*), then in enforcing it in another jurisdiction where the claim against the vessel is being tried, it should be afforded the priority it deserves by its nature. On the contrary, if it is a procedural remedy, then its enforcement will depend on the procedure of the forum of the court determining the priorities. In situations like this, the potential for conflict of laws is very real.

The Halcyon Isle[46]is a case which involved the priority of claims between a mortgagee, an English bank granted under English law and an American ship-repair yard[47], which carried out repairs to the vessel in New York. The mortgage was not registered. Knowing that his rights were protected under American law, the repairer let the vessel sail without payment of the cost of repairs. Later, the mortgage was registered. The ship was diverted by the mortgagees to Singapore and was arrested by them (the mortgagees). She was subsequently sold by order of the High Court of Singapore. The court applied English law[48]. When the proceeds of sale were insufficient to satisfy all claims, the question arose whether the claim of the mortgagees should take priority over that of the ship repairers. Since the claim of the ship repairer gave rise to a maritime lien under US law, the judge decided in favour of the law of the State, that is, in favour of the ship repairer. This decision was reversed on appeal. Upon further appeal to the Privy Council, the issue was which law should be applied? The law of the country where the contract was concluded (*lex loci contractus*), or the law of the country where the matter was tried (*lexfori*)? By a majority of 3 to 2, it was held that a maritime lien was a remedy and therefore, subject to the *lexfori*, that is, English law which regarded the claim of the ship repairer as a statutory right in *rem* ranking after mortgages[49]. Their Lordships simply did not take into cognizance the law of the State where the agreement between the ship repairers and the ship owners took place, that is, the law of the U.S. For this reason, they considered claims of the ship repairers as ranking only after the mortgagee's claim. This was (and still is) because under English admiralty law, ship repair does not fall under the categories of claims[50] giving rights to maritime claims which will operate to rank in priority over a mortgage. Trite to note here is the fact that had it been the vessel was diverted by the mortgagees to Cameroon, that is within CEMAC, and arrested and the matter tried in Cameroonian courts, the ship repairers' claim would have ranked over the mortgagees' claim since ship repair under Cameroon admiralty law[51] gives rise to maritime lien.

In an earlier case[52] decided in Canada by the Canadian Supreme Court, it was held that the shipyard's claim had priority over a mortgage. The court relied on an English decision in *The Colorado*[53]. The facts of *The Ioannis Daskalelis* and the statement of Lord Justice Ritchie will shed more light here. In that case, a Panamanian ship was subject to a Greek-registered mortgage. Ship repairers rendered necessary repairs to a vessel in New York. The ship left the shipyard without payment of the cost of repairs and was diverted by the mortgagees to a port in Vancouver, Canada, where they arrested her. The question the Supreme Court of Canada had to resolve was whether the shipyard's claim had priority over the mortgage? In answering this question in the affirmative, Ritchie LJ said:

Where, for instance, two or more persons prosecute claims against a ship that has been arrested in England, the order in which they are entitled to be paid is governed exclusively by the English law. In the case of a right in rem such as a lien however, this principle must not be allowed to obscure the rule that the substantive right of a creditor depends upon its proper law. The validity and nature of the right must be distinguished from the order in which it ranks in relation to other claims. Before it determines the order of payment, the court must examine the proper law of the transaction upon which the claimant relies in order to verify the validity of the right and to establish its precise nature[54].

In reliance upon Lord Justice Ritchie's statement, the court recognised the ship repairer's claim applying U.S law and forth with held that the lien was a substantive right governed by the law of the country where it was created.

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45 Under the civil law system, they will have priority even over preferred mortgages especially when they enter into force before the filing of the mortgage.

46 (1981) AC 221, p 234

47 It should be remembered that under American admiralty law, unlike the English admiralty law, ship repairs is a maritime claim which gives rise to a maritime lien

48 From above we discovered that under English law, ship repair (does not give rise to a maritime lien which can be prioritised over a mortgage) is only a statutory right in *rem* which became a statutory lien in *rem* following the issue of a claim form.

49 See Lord Diplock's statement who delivers the majority judgement at 234.

50 Under the English Supreme Court Act 1981, claims recognised as giving rise to maritime liens are, a) damage done by ship, b) salvage, c) seamen's wages, d) master's wages and disbursement, e) bottomry bond, but under American law whose admiralty follows that of the civil law legal system, ship repairs, falling under necessaries, constitute a maritime lien and not a statutory right in rem.

51 See Article. 149 of the 2012 CEMAC Marine Merchant Code.

52 *The IoannisDaskalelis* (1974) 1 Lloyd's Rep. 174.

53 (1923) 102.

54 Ritchie LJ in *The IoannisDaskalelis*(1974) 1 Lloyd's Rep. at 177.

Hence, by applying Canadian law on priorities, the court held that the ship repairer's claim had priority over the mortgagee's claim.

As mentioned above, the Canadian Supreme Court relied on the English decision in *The Colorado*, which the Court interpreted as the authority for the contention that, where a right in the nature of a maritime lien exists under foreign law which is the proper law of the contract, the English courts will recognise it and will accord it priority which would be given under English procedure. From the above two decisions, it is evident that *The Ioannis Daskalelis* is more advantageous since it affords suppliers of necessaries to ships and ship repairers more protection as compared to mortgagees.

Under French law, necessaries are accorded the status of maritime lien. It is clear, taking into account the common law admiralty position with regard to necessaries that the scope of maritime claims constituting maritime liens under civil law system is wider. Since the maritime activities of member countries of CEMAC are governed by a common maritime code which is civil law oriented, the scope of maritime claims giving rise to maritime liens within the region follows that of the civil law legal system[55]. From here, it is evident that when Cameroonian ship repairers carry out repairs on a ship in the Cameroon shipyard in Douala, and the vessel sails out of jurisdiction without paying the cost of repairs, the ship repairer's claim will lead to a maritime lien. It will therefore, following the decision in *The Ioannis Daskalelis*, rank over any registered mortgage on the ship. This case simply illustrates how a certain type of claim may carry a maritime lien under the law of one country but under the laws of another country the same type of claim is merely a possessory right in rem which will be lost should the claimant lose possession of the *res*.

The mortgagee can protect his position in the light of conflicts that exist in this area, by entering into an agreement (deed of covenant) with the owner, requiring him to provide information with regard to the movement of the ship should she call at a port of a jurisdiction where *The Halcyon Isle* has been applied. Provision of information in this case will however depend on the honesty of the ship owner. The ship repairer can also protect his own interest by keeping the ship till he is paid. This will most probably be when the repairers suspect or get information that the ship will sail to a port where *The Halcyon Isle* has been applied.

Maritime lien is a right incapable of being registered[56]. It attaches to the property at the moment the cause of action arises and runs with it to any new owners. It is inchoate and does not depend on possession nor is it defeated or extinguished because the *res* has been transferred to a new owner for value without notice. This is a right which springs from general maritime law and is based on the concept that the ship has itself caused harm, loss or damage to others or their property and must itself make good the loss[57]. Since the ship must pay for the wrong it has committed, it must be compelled to do so by Admiralty process- by forced sale. After the sale, the proceeds are used to satisfy the lien holders. In case the proceeds are insufficient, each privileged creditor will be satisfied in order of priority until the available proceeds are exhausted. This will then extinguish any lien on the property or *res*.

1.3 Extinction of Maritime Liens

Extinction of maritime liens can take place in one of five ways:

A. Prescription of the debt for which the lien is security. This will normally be due to delay[58] of suit to enforce the lien by an in rem claim;
B. Destruction of the ship or cargo upon which the lien is placed since the object for which it attaches no longer exists[59];
C. Judicial sale of the ship and the buyer will receive the vessel free of encumbrances[60];
D. Waiver[61] or general principle of estoppel (which estops the lien holder from exercising his right); and
E. Provision of bail, payment into court, or provision of security by way of an undertaking or guarantee[62].

2. Mode of Exercise of Admiralty Jurisdiction

In the exercise of admiralty jurisdiction, a distinction is always made between truly and non-truly in *rem* claims. Truly in *rem* causes involve claims dealing with proprietary rights on the ship and maritime liens in which the defendant is the ship. Other maritime claims not concerned with proprietary rights in a ship are referred to as non-truly in *rem* claims[63]. Truly in *rem* claims can be brought against the relevant ship without considerations of who would be liable personally (in *personam*) for the claim, or who the beneficial owner of the ship to be arrested is[64]. Maritime lien attaches to the ship. On the other hand, a non-truly in *rem* claim is brought against the ship only when consideration of ownership or liability in *personam* is to be determined. Below is a discussion of two types of claims.

2.1 Claims *in Personam*

These are claims against a person. Admiralty jurisdiction under the civil law legal system has always proceeded on the basis of claims or actions in *personam*. The civil law

55 The exception is of course Cameroon where both civil law and common law are practiced. Under the common law system, necessaries include repairs, towage, stevedoring, goods and materials needed for the vessel's operation as well as claims arising from the contract of carriage and charter parties, though maritime claims are only secured by a statutory right in *rem* because they are never considered as giving rise to maritime lien under this legal system.

56 Christopher Hill, *op. cit*. 122.

57 *Ibid*, 124.

58 By virtue of Article 9 of the Brussels Convention on Liens and Mortgages, any maritime lien which is not enforced within a period of one year is extinguished. The statute made it clear that this period should be continuous i.e. without interruption or suspension.

59 See also D.C. Jackson, *Enforcement of Maritime Claims*, 4thed. (London, LLP, 2005) 501 who noted that the capture of the res and its condemnation as price extinguishes a lien.

60 This is so because a buyer of a vessel in an admiralty sale acquires a clean title.

61 A waiver of a lien is an intentional renunciation either expressly or impliedly, of the right to claim upon the lien security.

62 See *The Ruta*(2000) 1 Lloyd's Rep. 359.

63 AlekaMandaraka-Sheppard, *op. cit*. 68.

64 *Ibid*.

countries did not know the action *in rem*. The reason for this is that France which is a prototype of the civil law legal system never experienced the conflicts between the royal courts and other courts as was the case in England[65]. Plaintiffs including maritime claimants under civil law may add to their *in personam* claims, a *saisie conservatoire*[66] in order to compel the defendant's appearance and obtain a pre-judgement seizure of the defendant's ship or other asset within the court's territorial jurisdiction[67]. Judgements in *personam*upholding the claim may be enforced against the whole of the defendant's property whether moveable or immoveable.

A proceeding *in personam* has two weaknesses: the first is that it is sometimes difficult to obtain permission to serve the defendant when he is out of jurisdiction and the second is that, unlike the *in rem* claim, the *in personam* claim provides no security for the claim. This means that any judgement obtained is not beneficial to the judgement creditor unless a security is obtained to satisfy the judgement. Hence for the claimant to be on a safe side he needs to pray the competent court to arrest the ship[68].

2.2 Claims in *Rem*

The distinguishing feature of an *in rem* claim has always been the ability of the claimant to proceed against the ship directly, since the ship was regarded or personified as the actual defendant. This notion gave rise to the personification theory aimed at explaining the nature of an *in rem* action[69]. If the person interested in the vessel appeared at the proceedings, or acknowledged service of the writ *in rem*, the action would also become an action against him. The significance of this step is that it helps to advance the procedural theory which considers the *in rem* action as a necessary step aimed at bringing the person liable for the claim in the proceedings[70].

The claim *in rem* can also be initiated by service on or arrest of the ship when she comes within the jurisdiction of an admiralty court. Whenever a claim attracts a maritime lien, the property to be arrested includes the cargo on board the ship in question as well as the freight due in relation to the cargo and voyage of the ship. The English courts have resolved that an *in rem* proceeding can even be brought merely to obtain security for claims referred to arbitration, or to claims for which a court other than the admiralty court has jurisdiction[71].

The exercise of admiralty jurisdiction is however limited. Not all vessels are amenable under admiralty jurisdiction. Vessels owned by the government are on grounds of governmental immunities exempted from arrest[72]. In other words, a claim *in rem* cannot be brought against government ships which are ships whose beneficial interest is vested in the government or ships registered as Government ships[73].

We shall examine among others issues here the function of proceedings in *rem,* nature and features of such claims.

2.2.1 Function of Proceedings in Rem

An *in rem* claim is claim against property such as the relevant ship, cargo, or freight as the case may be. For this claim to lie, the ship or property must be within jurisdiction for it to be arrested or the defendant submit itself to jurisdiction and provide security in place of arrest. The unique feature of an in *rem* claim, procedurally, lies in its triple function: it assists the plaintiff;

A. to obtain security for the claim;
B. to invoke the jurisdiction of Cameroonian court on the merits of the case;
C. to have the right in *rem* crystallised on the property from the time of issue of the in *rem* claim form. This is with regard to non-truly in *rem* claims.

The idea of crystallisation of non-truly in *rem* claim on the ship against which proceedings in *rem* has been issued was established by Brandon J. in *The Monica s*[74]. In this case, the owners of the cargo on board the vessel claimed damages to their cargo and issued a writ in rem. At the time of the issue, the ship was named Monica Smith and was owned by S. but before the writ was served, the ship was transferred to T and was renamed Monica S. the writ was subsequently, amended to describe the name and the defendants as the owners of the ship formerly called Monica Smith and now known as Monica S. the writ was then served on the ship. The new owner T entered conditional appearance and applied by motion to set aside the writ or service. After the service, T sold the ship to someone else. T claim, inter alia, a declaration that no lien or charge arose against Monica S by reason of issue of the writ or service on grounds that:

1. he (T) was not the owner of the vessel at date of issue, or when the course of action arose;
2. he would not be liable in *personam*;
3. the claim gave no right to maritime lien or charge on the ship;

He further claimed that the plaintiff had only a statutory right of action in *rem* under the Administration of Justice Act 1956, which was only enforceable against the res if (i) the

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65 William Tetley, 406 - 408.

66 Temporal immobilisation of a ship which compel its owner to appear in court and answer a case against him.

67 William Tetley, 962-963. Sister ships may also be seized in a *saisie conservatoire*.

68 It is worth noting that under the common law tradition, security in this case can only be by means of a freezing injunction and as already seen this injunction will not definitely secure the claimant since the asset made subject to the injunction may not be sufficient to satisfy the claim or the defendant can even obtain a variation of the injunction by which the asset may be used for his business.

69 AlekaMandaraka-Sheppard, *op. cit.*, 11.

70 *Ibid*.

71 *The Bazias* (1993) 1 Lloyd's Rep. 101.

72 See Article 144 of the CEMAC Marine Merchant Code 2012. By virtue of this Article, a vessel owned (or a private vessel been exploited for the benefit of the State) by the government of Cameroon is immune from arrest.

73 This immunity is succinctly covered by Article 144 (2) of the CEMAC Marine Merchant Code 2012. The Article provide: ships belonging to the State or exploited her, cannot be arrested if at the moment that the claim arose, the ship was exclusively carrying out a governmental and not a commercial service (this Code is entirely in French so the translation here is not official and main for the purpose of this paper).

74 (1967) 2 Lloyd's Rep. 133.

res was arrested while still owned by the person liable in *personam*, or (ii) the writ had been served before change of ownership.

Brandon J. had to decide the issue whether a change of ownership of the ship, occurring after the institution of proceedings but before service of process or arrest, defeated the statutory right of action in *rem*? In other words, whether the steps as mentioned prohibited the crystallisation of a non-truly *in rem* claim on the property? After having reviewed all previous authorities relevant to the issue at stake, Brandon J. held that, T was the owner of the ship at the time of service of writ and had an interest in defending it (i.e. he was the person liable *in personam*). As a matter of principle, he continued, if creation of substantive right could occur on arrest, then it could occur at date of action brought. To this end he concluded that the defendant contention was wrong.

What we should note in the above decision is that it was the institution of the suit or claim which gave the plaintiffs the right to arrest and which arrest provided them with security. The relevance of the facts and decision of this case to Cameroonian shipper as well as maritime practitioners in the country is that it serves as precedent to matters concerning damage to cargo being shipped. Practitioners in maritime law in Cameroon should take particular note on this case since the International Convention on the Arrest of Ships 1999[75] makes it clear that nothing in the Convention shall be construed as creating a maritime lien[76] and damage caused by operation of the ship is one of the claims envisaged by the statute.

2.2.2 Nature and elements of Claims in *rem*

By nature, a claim in *rem* is separate from a claim in *personam*. For many years, the view has been that an *in rem* claim is entirely independent from a claim in *personam*[77]. The claim is against the ship or in appropriate circumstances, against other property such as cargo and freight and not against its owner. The owner may take part in an in *rem* claim where he deems it necessary to defend his property, but it is essentially an action against his property and not him.

The features of an in *rem* claim include the following:

1. it is primarily a means of obtaining security for a claim;
2. it is a means of having jurisdiction by arresting the ship within jurisdiction;
3. with regard to a maritime lien, the in *rem* proceeding gives effect to a right already accrued on the ship, which dates back to the date of its creation. The maritime lien is enforceable against the ship in question notwithstanding the change of ownership, either prior to, or after the issue of the proceeding or liability in *personam*;
4. Concerning non-truly in *rem* claims, the in *rem* proceeding causes a statutory right in *rem* to crystallise on the ship from the time of issue of the in *rem* proceeding[78]. From that time, the in *rem* claim or statutory lien is enforceable against the ship irrespective of subsequent change of ownership even if the new owner is a *bona fide* purchaser without notice.
5. In both truly and non-truly in *rem* claims, the value of the ship has always been the limit for the satisfaction of maritime claims, unless the defendant acknowledged service of the in *rem* proceeding, or otherwise submitted to jurisdiction unconditionally, in which case the action also became one in *personam*[79];
6. In the absence of acknowledgement of service or submission to jurisdiction, the in *rem* proceedings as far as domestic law is concerned remain solely in *rem* and no personal jurisdiction over the owner, or the person liable in *personam* would be created by service.
7. A court sale by the Admiralty Marshal, consequent to judgement in the action in *rem*, extinguishes all encumbrances on the ship and gives a clean title to the purchaser.

2.2.3 Conditions for Enforcing a Claim in *rem*

Actions in *rem* can be brought against the ship irrespective of owner at the time the claim form is issued, or who would be liable personally when the cause of action arises[80]. For this reason, it is said that the claims are truly in rem. The claims are proprietary rights which attach on the relevant ship from the moment of their creation. No conditions are required to enforce truly in *rem* claims[81].

Contrary to maritime claims which give rise to liens, for a plaintiff to enforce a maritime claim which does not give rise to a lien, referred to above as non-truly in *rem* claim, there must be a personal liability and ownership link between the person liable and the relevant ship[82].

3. Connection between a claim and the defendant when a cause of action arose

In *rem* proceedings can be instituted where the claim arises in connection with a ship, and also where the person who would be liable on an action in *personam* was, at the time the action arose, the owner or charterer or person in possession or control of the ship. A claimant in a non-truly in *rem* claim needs to first of all identify who would be liable in *personam*. That may be the owner, or charterer, or the person in possession or control when the cause of action arose.

Owner would literally be interpreted to mean the registered owner of the ship. In *The EvpoAgnic*[83], Lord Donaldson said:

… in real commercial life, … registered owners, even in one-ship companies, are not bare legal owners. They are both legal and beneficial owners of all the shares in the ship and any division between legal and equitable interest occurs in relation to the registered owner itself, which is almost always a juridical person. The legal property in its shares may well be held by A and the equitable property by B, but

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75 The Law governing ship arrest in Cameroon as from July 2012 is the Merchant Marine Community Code of 22nd July 2012. This law replaces the old 2001 law.

76 Article 9.

77 Christophe Hill, 102.

78 See *The Monica S* (1967) 2 Lloyd's Rep. 113.

79 See *The MaciejRataj (sub nom The Tatry)* (1992) 2 Lloyd's Rep 552 (CA), where after acknowledgement, the action continued as a hybrid action both in rem and in personam, but not losing its previous character. The same principle was applied in *The Anna H* (1995) 1 Lloyd's Rep. 11 (CA).

80 S. 21(2) of the English Supreme Court Act (SCA) 1981.

81 *The Bold Buccleugh*(1851) 7 Moo PC 267.

82 See s. 21(4) (b) (i) (ii) of the English SCA 1981.

83 (1988) 2 Lloyd's Rep. 411 (AC).

this does not affect the ownership of the ship, or the shares in the ship. They are the legal and equitable property of the ship[84].

In *Haji Ioannou v Frangos*[85], the Court of Appeal held that the ownership of the ship for the purpose of admiralty jurisdiction means legal ownership (i.e. registered owner). A similar position was held in *The Tian Sheng*[86] wherein the Hong Kong Court of Final Appeal explained that as far as owner is concerned, registration is virtually conclusive unless there was a fraudulent procurement of registration.

Charterer is not to be limited to demise charterer as was decided by Lord Donaldson in *the EvpoAgnic,* but extends to time charterer[87] and voyage charterer[88], while person in possession or control refers to one in the position of a demise charterer who can be a manager or operator of the ship[89].

The liability of the owner or charterer or the person in possession or control must have arisen when he had the status at the particular time when the cause of action arose. In *Hussein El SarJi c/Getmam Cameroun S.A, Grimaldi Lines, Cpt Cdt M/V Grande Argentina*[90], the Court of First Instance Bonanjo[91] Douala held that defendants were liable for damage caused to the plaintiff as they were in possession and control of the ship when the cause of action arose. The plaintiff in this case agreed with the carrier to transport his car from Hamburg Germany to Cameroon. On delivery, the car was seriously damaged and the plaintiff brought a successful claim against the defendants.

Conclusion

Maritime liens, claims inpersonam and claims in rem constitute the fundamental features of admiralty jurisdiction and in reliance upon either of these features a claimant can cease the admiralty court's jurisdiction. For one to invoke the jurisdiction of an admiralty court the object of his claim should be within the jurisdiction of the court. The court can on the application of the plaintiff issue an injunction order to prevent the defendant from dealing away with the property in dispute. The mobility of vessels across international maritime borders has also given to issues of conflict of laws in maritime practice. The reason for this conflict stems from the fact that what constitute a maritime claim given rise to a maritime lien differ from one jurisdiction to the other. The discussion above reveals that claims in personam are directed to the owner of the property unlike claims in rem which directed at the property (ship, freight and cargoes). It is also clear from the above analysis that owner refers to the registered owner of the ship, and charterer is limited not only to demise charterer but also includes time and voyage charterer. It is further clear that when a ship other than the one in connection with which the claim arose is to be arrested, that other ship must be, at the time of issuing the writ, beneficially owned by the relevant person who was identified as the person who will be liable in *personam.* This therefore establishes link between the Person liable and the relevant ship.

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84 *Ibid* 415.

85 (1999) 2 Lloyd's Rep. 337.

86 (2000) 2 Lloyd's Rep 430.

87 *The Span Terza* (1982) 1 Lloyd's Rep. 225 (CA). In this case, the court held that demise charterer must include 'time charterer'.

88 *The Tychy* (1999) 2 Lloyd's Rep. 11 (CA). Lord Justice Clarke in this case said demise charterer includes even a voyage charterer.

89 AlekaMandaraka-Sheppard, 96.

90 Commercial Judgement No 56 of 13th December 2006 (Unreported).

91 The Court of First Instance (CFI) was competent here because the amount claimed by the plaintiff was inferior to ten million (10000000) FCFA. This material competent of the CFI is provided by s. 15(2) of Law No 2006/015 of 29th December 2006 organising the Judiciary in Cameroon. By the same Law any claim equals to or above ten million (10,000,000) FCFA falls within the material competence of the High Court. The CFIs and High are therefore admiralty courts in Cameroon.