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Mr Samuel Davidson

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CHAPTER 1: INTRODUCTION

A basic feature of the law of insolvency is that all creditors must be treated equitably. Of course, there are different classes of creditors; thus secure creditors will, as the name suggests, be entitled to a greater share of the insolvent estate than ordinary creditors. However, this does not detract from the basic principle: that all creditors share in one unified estate according to a set and predictable order.

Admiralty law though, pays little regard to the basic principle and shipping creditors are armed with procedures and remedies unknown to all other creditors, including when a debtor goes insolvent. Indeed, the difference between an ordinary commercial creditor and a shipping creditor are so marked that shipping creditors have at their disposal a specialised civil jurisdiction to recover their debts.

The essential issue with which this dissertation is concerned is the competition between these two different groups of creditors and how South African law mediates their interests when a shipowner goes insolvent. Whilst seemingly a straightforward matter of competition between creditors, it is anything but when shipping law becomes involved. This is because in South Africa, as in other commonwealth countries that have inherited the English common law tradition, admiralty jurisdiction operates as its own separate civil jurisdiction, applying its own law and with specialised remedies.

Because of this strong link to English law,¹ no evaluation of admiralty law in South Africa can begin without first considering the history of admiralty law in England. So it is to a brief consideration of English legal history that we must first turn to.

Throughout its long history in England, Admiralty law has developed a number of special remedies and rights for maritime claimants. Due to the history of the Admiralty Court, especially its application, traditionally, of civilian law, many of the procedures were unknown at common law. This led to a court exercising a distinct jurisdiction and applying a different law, existing alongside the ordinary common law courts of the time. The many difficulties entailed by separate courts exercising concurrent jurisdictions in England are well

¹ Indeed, s 6 of the Admiralty Jurisdiction and Regulation Act 105 of 1983 ('AJRA'), obliges a South African court, when faced with most maritime matters, to apply English law as at 1983. See *Transol Bunker v MV Andrico Unity and Others* 1989 (4) SA 325 (A) at 334H-336C.

documented.² The problem was thought to be solved by the fusion of the separate courts such as Chancery, King's Bench, Common Bench, High Court of Admiralty, and Exchequer into the Supreme Court of Judicature.³ And whilst the fusion of common law with equity might have been a success, the same cannot wholly be said of common law and admiralty law.

This ill-fitting merger becomes especially obvious when one considers the overlap between admiralty law and the law governing insolvency in both legal systems. The reason for this is simple. One of the chief virtues of admiralty law is the action *in rem*. This remedy enables a maritime claimant⁴ to arrest select maritime property⁵ (usually a ship) against, or in respect of which, a maritime claim has arisen for the purpose of founding jurisdiction and of providing pre-judgment security. These two consequences are unusual from a common law point of view.⁶

Jurisdiction is normally exercised for causes of action arising within the territory of the court hearing the case, and for parties (especially the defendant) who are resident in the

² See CR Lovell *English Constitutional and Legal History* 514-515, FW Maitland *The Constitutional History of England* 470-471 and M Jonsson 'The nature of the action *in rem*' (2001) 75 *ALJ* 105 at 114-116.

³ Supreme Court of Judicature Act 1873 (36 & 37 Vict c. 66).

⁴ That is to say, a person claiming under a defined list of claims, usually termed maritime claims, in s 20(2) and (3) of the now Senior Courts Act, 1981 (UK), formerly called the Supreme Court Act until the Constitutional Reform Act, 2005 (UK), s 59, which commenced on 26 June 2009 by the Constitutional Reform Act 2005 (Commencement No. 11) Order 2009. This list of selected claims is based on the list of maritime claims that appeared in the English Administration of Justice Act, 1956 (4 & 5 Eliz 2 c 46). Both Acts undoubtedly based their lists of maritime claims on the list of claims in the International Convention for the Unification of Certain Rules relating to the Arrest of Sea-going Ships 1952 (the 'Arrest Convention'). One of the great advantages of proceeding in admiralty, especially in relation to the location of the defendant and of the cause of action, is that the jurisdictional rules are much less exacting than normal parochial proceedings. Thus, by virtue of s 20(7)(a) and (b) of the Senior Courts Act: '[the admiralty division has jurisdiction to determine the claims in s 20(2) and (3)], *wherever* the residence or domicile of their owners may be, and in relation to all claims, *wherever* arising' (my emphasis).

The same is true in South Africa where the Admiralty Jurisdiction and Regulation Act 105 of 1983 (hereafter 'AJRA') has a similar list of claims in s 1 as s 20(2) and (3) of the Senior Courts Act, as well as sharing the broad jurisdiction in s 2(1) that '... [any division of the High Court] shall have jurisdiction to hear and determine any maritime claim *irrespective of the place where it arose*, or the place of registration of the ship concerned, *or the residence, domicile or nationality of the owner*' (my emphasis).

⁵ Section 3(5)(a) to (f) of the AJRA.

⁶ Cf attachment to found jurisdiction in South African law for *incolae* and the *saisie conservatoire* well known to civil law countries.

court's territory.⁷ Admiralty law disregards this and allows a *peregrini* plaintiff to have a claim settled in South Africa (or England), against a *peregrini* defendant, for a cause of action arising abroad. The only grounds of jurisdiction needed in admiralty broadly are that the claim be a 'maritime claim' as defined in s 1 of the AJRA and that there be an arrest or attachment, or a deemed arrest/attachment.⁸ An arrest or attachment is needed of course to render any judgment effective by having an asset within the court's jurisdiction against which proceeds any judgment may be enforced.⁹ The novelty of admiralty is that an arrest invariably occurs well before judgment. This is however not unknown in South Africa where, under certain circumstances, a claimant may attach (any) property belonging to a *peregrinus* defendant pre-judgment.¹⁰

The arrest of a ship *in rem* in a dispute between *peregrini* for a cause of action arising abroad would make for an interesting discussion on the extended jurisdiction exercised by the admiralty court, but it is not the topic for discussion here. Of much greater interest for the purposes of this dissertation is the ability of a court sitting in admiralty to order the pre-judgment arrest or attachment of a ship and the consequences this may have for both maritime and parochial creditors of the shipowner.

Insolvency law is triggered by a debtor being unable to settle all his debts as his liabilities exceed his assets. An insolvency order results in a *concursum creditorum*, the estate being fixed so that no further liabilities may be incurred, and in time, an orderly settling of the insolvent estate so that creditors may share in the estate according to a pre-determined ranking. Dispositions of company assets just prior to the insolvency order may also be recovered by the liquidator to be shared by all of the insolvent's creditors. In the oft-quoted words of Innes JA (as he then was):

⁷ See note 4 supra.

⁸ Technically it would be possible to have a South African court exercising admiralty jurisdiction *in personam* without any attachment. This would be the case if the defendant were a South African incola. In such a case, attachment is impermissible according to s 28 of the Supreme Court Act 59 of 1959 (now s 28 of the Superior Courts Act 10 of 2013). The defendant in an action *in personam* may also submit to the court's jurisdiction and so preclude any subsequent attachment, see *Jamieson v Sabingo* 2002 (4) SA 49 (SCA) paras 25-30 and *Tsung v Industrial Development Corporation of SA Ltd* 2006 (4) SA 177 (SCA).

⁹ *Thermo Radiant Oven Sales (Pty) Ltd v Nelspruit Bakeries (Pty) Ltd* 1969 (2) SA 295 (A) at 310H.

¹⁰ See the discussion on the history of attachments *ad fundandam jurisdictionem* (interestingly also taken over by Scottish Law) in Roman-Dutch and South African law in *Thermo Radiant Oven Sales (Pty) Ltd v Nelspruit Bakeries (Pty) Ltd* 1969 (2) SA 295 (A) at 305E-308A.

The [liquidation] order crystallises the insolvent's position; the hand of the law is laid upon the estate, and at once the rights of the general body of creditors have to be taken into consideration. No transaction can thereafter be entered into with regard to estate matters by a single creditor to the prejudice of the general body. The claim of each creditor must be dealt with as it existed at the issue of the order.¹¹

In such a scenario, the capacity for admiralty and insolvency law to clash becomes obvious. The following passage sums up the essential problem admirably well:

The law of corporate liquidation and bankruptcy seems to have developed with little regard to the Admiralty proceeding *in rem*. Certainly it is difficult to fit the Admiralty proceedings into the legislative language of the relevant statutes which regulate the winding up of companies and bankruptcy. Yet the need for the latter to accommodate the action *in rem* and the potential conflict between the two processes is plain. A *res* may concurrently be the subject of an arrest in the Admiralty Court and an asset capable of liquidation in a company winding up or personal bankruptcy. In such a circumstance it is important for a maritime claimant to be able to ascertain whether it is the jurisdiction of the Admiralty Court or some other court which prevails and which mode of legal process is available for the satisfaction of the claim.¹²

The purpose of this dissertation is to evaluate the circumstances in South Africa under which admiralty law, and so by extension maritime claimants, may take priority over the liquidator and the creditors of the estate under normal, parochial law. In order to properly evaluate the South African solution, comparisons with the way in which English law has addressed this issue will be made. As we shall see, English case law has attempted to fit and explain admiralty procedures within insolvency legislation with some quite startling and disorderly results. Along the way, they have had to broaden a discretion given to them by statute in order to accommodate admiralty's distinct procedures (which discretion they would not usually have used to help a normal creditor under common law proceedings). This evinces a marked shipping bias allowing maritime claimants to proceed with their claim where, under similar circumstances, a non-maritime creditor would be barred from doing so. South African law has solved the problem, to some extent, by provisions which I shall argue clearly displace parochial jurisdiction in favour of admiralty jurisdiction and vice versa depending on the circumstances. This is a much simpler way of approaching this sometimes intractable problem and English law would do well to look at the South African example in seeking a more clear-cut and coherent approach. In essence, South African law treats this as a problem of concurrent jurisdiction and its solution is to, depending on the circumstances,

¹¹ *Walker v Syfrets* 1911 AD 141 at 166.

¹² D R Thomas *Maritime Liens* (1980) 65.

have one jurisdiction trump the other. English law on the other hand seeks to straightjacket admiralty procedures into the language of their insolvency legislation; it is especially concerned with whether a maritime claimant can be said to be a ‘secured creditor’. The latter view, on grounds of principle and practicalities, somewhat misses the point.

Chapter two will explore in detail the provisions relating to the procedures and rights available to a maritime creditor and, in chapter three, how these play out when the law relating to corporate winding-up (both on the grounds of inability to pay debts and voluntary winding-up) becomes involved. The law relating personal insolvency (termed ‘sequestration’ in South Africa and ‘bankruptcy’ in England’) and the law of business rescue are unfortunately outside the scope of this paper although anyone interested in these two areas and how they interact with admiralty law will undoubtedly draw much from this paper as the main provisions (automatic stays, void procedures, voidable dispositions, commencement of insolvency/business rescue) are very similar to the provisions analysed in this dissertation. Also outside the scope of this dissertation is the tricky issue of the intersection between cross-border insolvency and shipping law.¹³

Chapter four surveys the English solution to this issue and concludes that English law may benefit by looking at the problem, as s 10 of AJRA does, as one of concurrent jurisdiction – a view which, up until now, has been tersely rejected.¹⁴ Chapter five discusses South Africa’s innovative s 10 of AJRA, whilst chapter six discusses two very interesting arguments that have come up in English cases, though have never been the subject of serious consideration by the courts.

This dissertation is pre-eminently concerned with South African law. However, because South African admiralty law owes its genesis and much of its present day content to

¹³ For an overview of the issues in this area see Melissa KS Alwang ‘Steering the most appropriate course between admiralty and insolvency’ (1995-1996) 64 Fordham LR 2613 and Sarah Derrington ‘Introduction to cross-border maritime insolvency’ CMI Yearbook 2011-2012 at 368 accessible at: <http://www.comitemaritime.org/Uploads/Cross%20Border/Paper%20of%20Sarah%20Derrington.pdf> (accessed 9 September 2014). See also the recent case of *Overseas Shipholding Group Inc* (KZD) unreported case no 12827/12 (7 December 2012) where the court recognised the US chapter 11 bankruptcy order as well as the automatic stay provision in the US’s Bankruptcy Code (s 362) and ordered the stay to apply throughout South Africa.

¹⁴ *In Re Aro Co. Ltd* [1980] Ch. 196 at 209B-C.

English admiralty law¹⁵ and because of the differences which exist between the two systems when it comes to the interface between admiralty and insolvency law, English law will be heavily referred to and compared.

At this point, it would be useful to briefly explain some key concepts, emphasise important distinctions, and set out some of the more important legislative provisions governing the issues.

In admiralty in South Africa¹⁶ (as in England), an action *in rem* may be instituted by the arrest of only certain property against, or in respect of which, the claim lies.¹⁷ For ease of reference only a ship shall be referred to in this thesis as this is frequently the property against or in respect of which a maritime claim will lie. This reference to a ship though should be taken to include the other five types of maritime property which AJRA allows to be arrested *in rem*.¹⁸ To arrest *in rem* the claimant must have either a maritime lien,¹⁹ or the owner of the ship to be arrested would be liable to the claimant in an action *in personam* in respect of the cause of action concerned.²⁰ This is a most important distinction as a maritime lien exists from the time the events giving rise to the claim occur.²¹ Therefore a maritime lien exists and has substantive effect before it is enforced via an arrest *in rem*. A statutory right of action *in rem* (commonly, though perhaps somewhat imprecisely termed a statutory lien) on the other hand, becomes active when the writ is *issued*. Finally, there is also the possibility of proceeding *in personam* by attaching any of the property of the defendant in South Africa.²²

¹⁵ By virtue of s 6 of AJRA which obliges a South African court exercising admiralty jurisdiction to apply English admiralty law for matters falling within SA courts' pre-existing jurisdiction (ie the jurisdiction it exercised before the commencement of AJRA in 1983).

¹⁶ Section 3(5) of AJRA.

¹⁷ A remnant of the 'guilty ship' concept. Bar certain exceptions which are not important for present purposes, it is only the ship which did the damage or incurred the debt which may be arrested. This personification of the ship as the party against which a claim lies informs much of shipping law and is a helpful tool to understand parts of admiralty law. However, the ship personification concept should not be taken too far. It helps to explain some, though by no means all, of the consequences of admiralty law.

¹⁸ Section 3(5) of AJRA.

¹⁹ Section 3(4)(a) of AJRA.

²⁰ Section 3(4)(b) of AJRA.

²¹ *The Bold Buccleugh* (1851) 7 Moo 267 (PC) at 284-286.

²² This is the usual civil mode of proceeding in South Africa. Of course, if the defendant is an *incola* of the Republic, attachment is impermissible (see s 28 of the Supreme Court Act 59 of 1959), although interestingly arrest *in rem* is permissible. If the defendant is not an *incola* of the Republic however, an attachment is necessary (to render effective any judgment of the SA court). As the claim would be a maritime claim under s 1

Frequently, this will be a ship passing through SA waters. So again, a reference in this thesis to attaching a ship should be taken to include other property – ‘ship’ is used as a convenient shorthand. And unlike arrest, attachment can be directed against any of the owner’s property (and not just those listed in s 3(5)(a) to (e)) and this property need not be ‘against, or in respect of which the claim lies.’

Timing is an essential underlying theme that runs throughout this paper. Therefore though these distinctions may seem slight, each stage of the procedure has different consequences for claimants, defendants and liquidators.

To summarise the position thus far; the essential problem is the overlap between admiralty and insolvency law. This is because admiralty creditors are armed with procedures unknown at common law and because insolvency legislation and nomenclature has developed with little or no regard to these special admiralty procedures. In admiralty, a ship arrested would, unless security is forthcoming, be sold and form a fund to satisfy the claims of maritime creditors who can prove their (maritime) claims against the fund.²³ The object of a maritime claim (usually a ship) may thus fall into the admiralty estate (so called as it satisfies only maritime claims to the exclusion of ordinary civil claims) or into the insolvent estate. The main issue therefore is how the laws of England and South Africa have responded to this rather obvious conflict.

of AJRA, the cause of action need not have arisen in SA for a SA court to exercise jurisdiction. In this respect then, admiralty jurisdiction extends well beyond that exercisable by a parochial court.

²³ Section 11 of AJRA contains a statutory scheme of distribution when prioritising claims against the fund formed from the sale of the ship. In English law, there is no prescribed statutory ranking. The ranking of claims is instead determined by the court’s equitable discretion, largely on the basis of precedent. See Meeson *Admiralty Jurisdiction and Practice* 4 ed (2011) at 219 and Hofmeyr *Admiralty Jurisdiction and Practice in South Africa* 2 ed (2012) at 281.

CHAPTER 2: KEY CONCEPTS IN ADMIRALTY

I. The action in rem, the action in personam, and maritime liens

In chapter one, it was said that certain key concepts must be kept in mind. In admiralty, the most important distinction is that between the dual ways of pursuing a maritime claim: by an action *in rem*, or by an action *in personam*.²⁴ These are not two separate causes of action but simply alternate methods of enforcing a maritime claim.²⁵ Both require either an arrest (actual or deemed) of *specific* maritime property against or in respect of which the claim arose, or an attachment of *any* of the defendant's property within the court's jurisdiction. Of course, arrest is limited to six types of property,²⁶ and the property must be the 'guilty property'.²⁷ Practically speaking though, whether property is attached or arrested, the result (in terms of what property is detained by the sheriff) is likely to be the same; if a creditor wanted to attach rather than arrest, the only property within the court's jurisdiction is likely to be exactly the same sort of property that would have been arrested *in rem* ie maritime property. Superficially then, arrest and attachment seem quite similar especially as the property to be arrested or attached is almost invariably of the same type. The superficial similarities remain when one considers that both an action *in rem* and one *in personam* require that the property to be arrested or attached as the case may be, is owned by the defendant, ie there must be personal liability on the claim by the defendant (although an action *in rem* may also be instituted not on the basis of the defendant's underlying liability, but on the basis of a maritime lien, see *infra*).

But of course, the procedure for an arrest is quite different from that of an attachment; the former, for example, is a much quicker process and does not require service

²⁴ Hofmeyr *Admiralty Jurisdiction and Practice in South Africa* 2 ed (2012) at 7.

²⁵ Although the admiralty rules under AJRA seem to allow the institution of both actions at the same time, see Hofmeyr *Admiralty Jurisdiction and Practice in South Africa* 2 ed (2012) at 97, 184. See also *MV Alina II (No 2) Transnet Ltd v Owner of MV Alina II* 2011 (6) SA 206 (SCA) at 211-212.

²⁶ Section 3(5) of AJRA. As said in chapter one, although there are five types of maritime property that may be arrested *in rem* viz., bunkers, containers etc, only a ship will be referred to in this thesis. This should be taken to include the other five types of property amenable to arrest *in rem* though unless otherwise stated.

²⁷ With the exception of course of associated ship arrests, see Wallis *The Associated Ship and South African Admiralty Jurisdiction* (2010) at 60-64.

of the summons on the person of the defendant²⁸ (who is, by the very nature of the shipping trade, often domiciled abroad). Further, and more importantly, the different consequences between arrest and attachment are marked. Whether an action *in rem* is pursued over an action *in personam* will have a bearing on *inter alia*: the amount of security that may be claimed,²⁹ the consequences of any submission to the court's jurisdiction, the amount immediately available for satisfaction of a judgment, the enforcement of a successful judgment on other assets of the defendant, or whether whole new proceedings need be instituted.

An action *in rem* may be instituted on the basis that the defendant who owns the property to be arrested would be liable on the claim *in personam*, or on the basis of a maritime lien.³⁰ There can be no doubt that the concept of a maritime lien is one of the distinguishing features of admiralty law and has done much to shape the jurisprudence of the law in this area.³¹ Historically, it was seen as the necessary precursor to an arrest *in rem* – not that they were the same, but that the one could not exist without the other. Present interpretations of the action *in rem* have uncoupled this interdependent nature, clearly separating the maritime lien from the action *in rem*. Thus the dictum of Sir John Jervis in the *Bold Buccleugh* is not at present (nor has it been for a long time) accepted as good law:

[W]herever a lien or claim is given upon the thing, then the Admiralty enforces it by a proceeding *in rem*, and indeed is the only Court competent to enforce it. A maritime lien is the foundation of the proceeding *in rem*, a process to make perfect a right inchoate from the moment the lien attaches; and whilst it must be admitted that where such a lien exists, a proceeding *in rem* may be had, it will be found to be equally true, that in all cases where a proceeding *in rem* is the proper course, there a maritime lien exists, which gives a privilege or claim upon the thing, to be carried into effect by legal process.³²

²⁸ The summons in an action *in rem* is usually served on the ship itself, Admiralty Rules, 1997 r 6(2) and 6(3).

²⁹ Security to release property under arrest is to the value of the ship arrested or to the value of the claim, whichever is the lesser amount (therefore the value of the ship under arrest represents the upper limit), Admiralty Rule 4(7). Property under attachment though may only be released upon security to the full value of the claim, Admiralty Rule 5(4)(a).

³⁰ Section 3(4) of AJRA and bar of course certain exceptions (true *in rem* claims) like a claim for possession, ownership or mortgage.

³¹ See Meeson *Admiralty Jurisdiction and Practice* 4 ed (2011) at 17-19.

³² *The Bold Buccleugh* 1851 PC 261 at 284.

That a maritime lien is but one way of enforcing an action *in rem* cannot be doubted.³³ Therefore just because an action *in rem* is instituted does not mean that the underlying reason for doing so is a maritime lien.

Historical interpretations of the maritime lien aside, its essential nature can best be described by the classic dictum of Sir John Jervis in the same case:

A maritime lien does not include or require possession... [it is] 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 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*, relates back to the period when it first attached.³⁴

The quite startling results of the maritime lien may not be immediately apparent so it would be appropriate at this stage to briefly elaborate on some of these consequences. A maritime lien is a possession-less, unregistered (and therefore secret) security charge on a ship ranking highly³⁵ if a fund is formed after a judicial sale of that ship. As a secret charge, the security can be executed against the ship *in rem* no matter who owns the ship at the time the security is enforced and even against a bona fide purchaser. Therefore a person quite innocent and in no way liable to the claimant may find his ship arrested to satisfy a pre-existing maritime lien. His only remedy in such a case is a contractual one against the person who sold him the ship and who incurred the maritime lien (assuming there are no intermediate buyers and sellers in the chain).

English and South African law recognise only six claims as giving rise to a maritime lien (salvage, bottomry and respondentia, damage done by a ship, crew wages, master's wages, master's disbursements).³⁶ Other countries, like the USA recognise many more claims as giving rise to a maritime lien.³⁷

The major importance of the maritime lien in the context of this dissertation is that it relates back to the period when the facts underlying the claim first occurred. This is important for security purposes in that, the maritime lien holder's security over the res commences

³³ In the *Henrich Bjorn* (1886) 11 App Cas 270 the House of Lords settled a long running controversy by deciding that the number of claims giving rise to a maritime lien was not extended further than the original six by the addition, in the 1840 and 1861 Admiralty Acts, of new claims falling under the Admiralty Court's jurisdiction.

³⁴ *The Bold Buccleugh* 1851 PC 261 at 284-285.

³⁵ Section 11(4)(c) to (e) of AJRA.

³⁶ *The Halcyon Isle* [1980] 2 Lloyd's Rep 325 (PC) and *Transol Bunker BV v MV Andrico Unity & Others* 1989 (4) SA 325 (A).

³⁷ *Hare Shipping Law and Admiralty Jurisdiction in South Africa* 2 ed (2009) at 39.

when the events giving rise to the maritime lien (ie the underlying claim) occur and not when the maritime lien is enforced in court. A statutory lien on the other hand, arises only when the action *in rem* has been commenced in court. The accrual of the security in a statutory right of action *in rem* has been the subject of judicial comment in England and the topic there at least, would seem to be settled.³⁸ On the other hand, in South Africa, there have been no cases on this issue and it is likely that a South African court, if faced with the question of when the statutory right of action *in rem* ‘accrues’, would come to a quite different result from the English Courts.

II. The ‘statutory lien’ and the accrual of the security

A maritime lien holder is thus a secured creditor from the moment the facts giving rise to the maritime lien occur. However, a maritime claimant who has a claim enforceable by an action *in rem*, though not one based on a maritime lien, does not become a secured creditor until he commences his claim. Up until that point, the claimant is in the same unsecured position as any other potential claimant. However, it is accepted law in England, as in South Africa, that by the enforcement of a statutory right of action *in rem*, the claimant gains a proprietary right in the *res* and thus becomes secured in his claim³⁹ (pre-judgment security is, after all, one of the main virtues of an arrest *in rem*).⁴⁰ The question which has arisen in England (though not yet in South Africa) is the point in time at which this security interest attaches to the *res*. This may not necessarily be the time at which the action is commenced and the two should be distinguished. A number of possibilities present themselves. Does the security accrue when the claimant issues his summons, or when the order for arrest is made, or when the arrest is actually executed?

In the *Monica S*⁴¹ Brandon J decided that the crucial point is when the summons is issued. From then onwards, the claimant is a secured creditor (at least in respect of the sale of the ship). The judgment is instructive and some of its more salient features will be briefly summarised.

³⁸ *In Re Aro Co Ltd* [1980] Ch 196 (CA).

³⁹ Derrington and Turner *The Law and Practice of Admiralty Matters* (2007) at 14-15. *The Cella* (1888) 13 PD 82 at 85, 87, and *John Carlbom & Co Ltd v The Owners of the Zafiro* [1960] P 1 at 11.

⁴⁰ *In Re Aro Co Ltd* [1980] Ch 196 at 207: ‘The usual object of suing *in rem* is to obtain security’.

⁴¹ [1968] P 741.

The decision was reached in the context of a sale of a ship after the writ⁴² *in rem* had been issued but before service and arrest. Importantly, this was simply a claim for necessaries and thus did not give rise to a maritime lien. Of course, under usual circumstances, the person who would be liable on the claim *in personam* owns the ship at the time the claim arises and also at the time when it is enforced and so no issues arise. In this case however, the person liable *in personam* on the claim was not the same person against whom the writ was eventually served as the ship had changed hands in the interim. The question which thus arose was whether the action (a statutory right of action *in rem*) was maintainable despite a change in ownership in the ship to be arrested after issue but before service and arrest. Brandon J, both on the basis of past cases, and on the narrower basis of s 3(4) of the Administration of Justice Act, 1956,⁴³ decided that from the time the writ is *issued*, the plaintiff becomes a secured creditor and is entitled to enforce his security by arrest notwithstanding a change of ownership after issue but before service and arrest. Although it was accepted that this may cause hardship for a bona fide buyer of a ship in that, the asset that he has just bought is now being arrested (and will eventually be sold and its proceeds distributed) on a claim for which he is not personally liable or responsible for in any way, this was dismissed on the grounds that this is a commonly assumed risk for buyers of ships in the context of maritime liens, that any potential buyer could do a due diligence to check whether any claims *in rem* had been issued at the admiralty registry, and that a buyer could put an indemnity in the sale contract.

Of utmost importance, Brandon J remarked that there are three types of cases where the timing of enforcing a statutory right of action *in rem* may be important,⁴⁴ when, as in this case, the ship is sold before or after the action is begun, when a question arises as to the ranking of claims (prior claims of course usually rank higher), and finally if the ship-owning defendant becomes insolvent. In all such cases, it is essential to know whether a claimant's statutory right of action *in rem* is maintainable against third parties. On two occasions though, the judge warns against confusing the principles applicable to these three classes. Thus whilst the principle in a sale case might be that issue of the writ is the key point in time, this may not necessarily be so for the other two classes.⁴⁵

⁴² This is equivalent in South Africa to the arrest warrant.

⁴³ Equivalent to s 3(4)(b) of AJRA which says that the owner of the property to be arrested must be liable on the claim *in personam*.

⁴⁴ *The Monica S* [1968] P 741 at 748-749.

⁴⁵ *Ibid* at 748-749 and 770.

This is an important caveat to the decision and would weigh heavily on any South African judge considering whether to follow the *Monica S*. This is because English admiralty law⁴⁶ must be applied by a South African court exercising admiralty jurisdiction for any claim over which it had pre-existing jurisdiction⁴⁷ (pre-existing the commencement, in 1983, of the AJRA). The case is obiter with regards to intervening insolvency matters then even if it is found that this issue is a matter over which a South African court had jurisdiction before 1983 (and hence would be bound to apply English law, including the *Monica S*). The case is nevertheless very persuasive - all the more so since it has never been departed from in subsequent English cases.⁴⁸

After a lengthy review of past cases, Brandon J decided that even though some of them inclined towards arrest as being the crucial point in time that, on balance, it was the time when the writ is issued that is decisive. The judge went on to say that even if he were wrong regarding what past cases had decided, the meaning of s 3(4)⁴⁹ of the Administration of Justice Act is ‘plain and seems to admit of only one construction’;⁵⁰ that in terms of s 3(4) an action is ‘brought’ (and the jurisdiction of the admiralty division accordingly triggered) when the writ is issued. As a result of which a claimant is secured from the time the writ is issued. The crux of the reasoning appears from the following passage:

It is, I think, important, when considering this passage, and other passages in later judgments on the same lines, to keep clearly in mind the distinction between having a right to arrest a ship in order to obtain security for a claim, and the actual exercise of that right by arrest. *It is the arrest which actually gives the claimant security; but a necessary preliminary to arrest is the acquisition, by the institution of a cause in rem, of the right to arrest*⁵¹ (my emphasis).

With respect, rather than convince the reader of the cogency of the reasoning, this passage seems to in fact achieve quite the opposite. Even if the claim *in rem* is instituted and the claimant gains, as the judge says, a right to arrest, this is still only a right unperfected by any concrete action. Many claimants can be said to have a right to enforce their security –

⁴⁶ This includes rules of English private international law: *Transol Bunker BV v MV Andrico Unity & Others* 1989 (4) SA 325 (A) at 335G - 336C.

⁴⁷ Section 6 of the AJRA.

⁴⁸ See *In Re Aro Co Ltd* [1980] Ch 196 (CA).

⁴⁹ Section 3(4) states that a statutory action *in rem* may be brought for certain claims against a ship if the owner is liable in personam *when the action is brought*. The latter wording was interpreted by Brandon J to mean when the writ was issued, *The Monica S* [1968] P 741 at 771.

⁵⁰ *The Monica S* [1968] P 741 at 772.

⁵¹ *Ibid* at 754.

however unless a more concrete step is taken in the process (and it is submitted that the mere issue of a summons does not qualify), the right to security remains just that: a right to (enforce) security and not a secured right.

The decision has been the subject of criticism locally. The reasoning in the *Monica S* is applicable only to situations where the ship has been *sold* after issue of summons. Section 10 of AJRA states however that a maritime claimant is only protected against the owner's insolvency or business rescue proceedings if the ship is actually arrested before insolvency or business rescue commences.⁵² Hofmeyr's justified criticism is that it would be jurisprudentially unsound for the security interest to attach to the res at different times depending on whether the ship has been sold or has fallen into the insolvent estate.⁵³

Wallis⁵⁴ criticises the applicability of the reasoning in South Africa on more technical grounds. Arrest is an essential requirement of the action *in rem*.⁵⁵ Section 3(4)(b) of AJRA he argues, makes it clear that the owner of the ship to be arrested who would be liable on the claim *in personam* must own the ship both at the time the claim arises and when the claim is enforced *by arrest*: '[A] maritime claim may be enforced by an action *in rem*... if the owner of the property to be arrested would be [personally] liable.' It is true that on a purely textual reading, s 3(4) does seem to say that only if the owner of the property is liable *in personam* may the ship be arrested. Therefore if the res changes ownership, then the person who now owns the property is not personally liable on the claim and consequently the res may not be arrested to begin an action *in rem*.

Further, given that the doctrine of effectiveness is one of the underlying reasons for an attachment to found or confirm jurisdiction,⁵⁶ it would seem far-fetched to claim that in South African law a claimant gains security at any time before actual attachment – if there is no attachment, what property could any judgment be enforced against for execution purposes? It is of course true that the doctrine of effectiveness should not be taken too far since courts have found that even property which bears no realistic value to the amount claimed, can nevertheless be attached,⁵⁷ but this should not be taken as meaning that a South African court

⁵² See chapter five.

⁵³ Hofmeyr op cit note 24 at 129.

⁵⁴ Wallis M *The Associated Ship and South African Admiralty Jurisdiction* (2010) at 338-340.

⁵⁵ Section 3(5) of AJRA.

⁵⁶ Herbstein and Van Winsen *The Civil Practice of the High Courts and of the Supreme Court of Appeal* 5 ed (2012) at 94.

⁵⁷ *Thermo Radiant Oven Sales (Pty) Ltd v Nelspruit Bakeries (Pty) Ltd* 1969 (2) SA 295 (A) at 300H-301C.

would consider a claimant secured merely because summons was issued. This issue has however never directly arisen in the South African law of attachments because the practice is that the summons in an action against a *peregrinus* will be issued *only once there has been an attachment of property*.⁵⁸ This, it is submitted, goes some way to show that the courts will only assume jurisdiction once the claimant is secured and that this security arises not from the issue of a summons but from an actual attachment.

Though it is accepted that admiralty has always been a separate civil jurisdiction with its own distinct rules, it seems less than logical in this situation that there should be such a fundamental difference between attachment and arrest. If the reasoning of the *Monica S* were accepted in South Africa this would mean that a creditor is secured in an arrest *in rem* by issue of the summons, whilst a creditor attaching *in personam* (following South African common law authority) would only be secured when the property is attached. And though this may seem like an acceptable difference between admiralty and parochial jurisdiction it must be remembered that the principles behind attachment to found or confirm jurisdiction are now also part of South African admiralty law: a maritime claimant can pursue her claim *in rem* or *in personam*.⁵⁹ So this most important consequence cannot be argued away on the basis of a difference between admiralty and parochial law (which differences have always been accepted by the law - hence why admiralty survives as its own separate jurisdiction). The fundamental difference is now within admiralty for acts which are essentially the same: arrest or attachment provides security and a basis for the exercise of the court's jurisdiction. No matter whether attachment or arrest is used, the security must accrue at the same time. Anything less would be irrational.

The reasoning of the *Monica S* is also impeachable on another principle of South African law: that any changes in real rights should be made known (doctrine of publicity).⁶⁰ The trend in South African law has consistently been towards the elimination of secret rights in property. For example tacit hypothecs (South African common law security rights very similar to maritime liens)⁶¹ were all, bar the landlord's tacit hypothec for arrear rent and the

⁵⁸ Herbstein and Van Winsen *The Civil Practice of the High Courts and of the Supreme Court of Appeal* 5 ed (2012) at 120-121.

⁵⁹ Sec 3(2) AJRA.

⁶⁰ Mostert and Pope *The Principles of the Law of Property in South Africa* (2010) at 56.

⁶¹ See further Hilton Staniland 'Roman Law as the Origin of the Maritime Lien and the Action in Rem in the South African Admiralty Court' 1993 5 *SAMercLJ* 276.

tacit hypothec under a hire purchase contract,⁶² abolished by statute even before Union.⁶³ The creation of a right of security enforceable against third parties on the basis only that a summons has been issued is an inherently secret affair and it is submitted inconsistent with fundamental principles of South African law.⁶⁴

Finally, it is also worth noting that the landlord's tacit hypothec for arrear rent is secured only when the landlord *attaches* the moveable property subject to the hypothec⁶⁵ (and not at any time beforehand). Without an attachment, the landlord is not secured and in the event of the lessee's insolvency, has only a preferent right to the proceeds of the hypothecated property.⁶⁶

Though impeachable on a great many grounds in English and South African law, it must be said that the *Monica S* is a very pragmatic decision reached by a most experienced admiralty judge (later Lord Brandon) to meet the specific exigencies of the shipping trade. It cannot be gainsaid that one of the basic underlying tenets of admiralty law is the greater ease with which maritime creditors can enforce their claims. This is often justified on the basis of the international, fast and very mobile shipping industry which makes it difficult for claimants to follow up debts. The *Monica S* remedies a rather obvious way for debtors to avoid their creditors: by selling the ship subject to a pending claim to a third party or, following the usual practice in the shipping trade, by setting up a new one ship company in the corporate group and transferring ownership to it.⁶⁷ Brandon J was clearly alive to the stratagems employed by debtors in the shipping trade (one ship companies are rife). The decision can be more easily understood on this basis, though these factors are never explicitly mentioned in the judgment.⁶⁸

⁶² See s 85(1) of the Insolvency Act 24 of 1936.

⁶³ See Cape Tacit Hypothec Amendment Act 5 of 1861 ss 8–9; Transvaal Administration of Estates Proclamation 28 of 1902 ss 130–132; Natal Act 13 of 1887 s 5. The Cape and Natal measures have been repealed by the Pre-Union Statute Law Revision Act 36 of 1976 s 1.

⁶⁴ Wallis *op cit* note 58 at 340.

⁶⁵ GF Lubbe 'Mortgage and pledge' in *The Law of South Africa* vol 17(2) Second Reissue (2008) paras 441–443.

⁶⁶ Section 85 of the Insolvency Act 24 of 1936.

⁶⁷ For a case decided on these same considerations see *The Helene Roth* [1980] Q.B. 273 where the defendants transferred their ship to a newly set-up company in the corporate group after the plaintiffs had issued their writ but before the summons and writ were served, to avoid the claim. Needless to say, the change in ownership before service and arrest was not enough to defeat the plaintiffs' irrevocably accrued right of arrest and the plaintiffs were allowed to arrest the ship.

⁶⁸ Mandaraka-Sheppard *Modern Maritime Law* 2 ed (2007) at 76.

However, the sale of the ship concerned to a one ship company to sever the *in personam* link necessary to found a statutory right of action *in rem* would be much less of a concern in South Africa. This is because the associated ship provisions in AJRA go far beyond any of the comparable sister ship provisions in the admiralty law of any other jurisdiction.⁶⁹ English law is limited to the arrest of sister ships. A bogus sale to a one ship company within the same corporate group would thus defeat any action *in rem* founded on a statutory lien in England. Through its much wider associated ship provisions however, South Africa does not share this problem. It is thus arguable that one of the main considerations that occupied Brandon J's mind would not be as important a factor in South Africa.

The commencement of an admiralty action is obviously a critical stage to any creditor wanting to enforce security before the onset of insolvency or the involvement of other creditors who may also wish to enforce security rights against the ship. In England, the decision of Brandon J in *The Monica S* has stood unchallenged for nearly half a century – a maritime creditor is secured in a statutory action *in rem* from the moment the claim form (summons) is issued.⁷⁰ The commencement of security for a maritime claimant in South Africa must however be considered an open question. It is submitted though that the proper approach in this country, dictated by logic and consistency, is that security commences in a maritime claim only once the ship is arrested or attached.

⁶⁹ On the extended scope of South African associated ship arrests compared to sister ship arrests see Wallis op cit note 54 at 60-64.

⁷⁰ In the insolvency context too, *The Monica S* has been affirmed by the Court of Appeal in *In Re Aro Co Ltd* [1980] Ch 196.

CHAPTER 3: CORPORATE WINDING-UP IN SOUTH AFRICA⁷¹

In the above section, the time at which the security commences in an admiralty claim in South Africa and England was considered. In this section, insolvency and winding-up issues specific to admiralty are addressed. These include the commencement of insolvency (whether from the time of the notice of surrender, initial application, interim order, or final order), vesting of assets, and automatic stays. More specifically, it may be asked up until what point can a maritime creditor arrest a ship before it falls into the insolvent estate?

Case law in both South Africa and England has answered these questions differently between the two jurisdictions. This is slightly curious since the legislation governing these issues in both countries is very similar. Indeed, many of the specific sections of the Companies and Insolvency Acts in South Africa which will be addressed in this chapter are worded almost identically to the comparable English provisions. Even within each jurisdiction, there have been some marked differences of opinion between courts, especially in England. The crucial difference is that South Africa, through the approach set out in s 10 of AJRA, clearly sets out which court has jurisdiction over the matter and when. Section 10 ‘ring-fences’ maritime property arrested in admiralty from the parochial courts, leaving said property to be used to settle maritime claims only by the High Court when exercising its admiralty jurisdiction.⁷² In effect, that the estate of the debtor is split between maritime property and non-maritime property, with different procedures and different creditors entitled to participate in each.

The focus here will not be on the requirements for winding-up but on the necessary steps leading up to the final winding-up order and the consequences of each these steps on the ability of a maritime claimant to enforce his claim. There are two ways of winding-up a company: voluntary and compulsory winding-up.

⁷¹ Given the rarity of non-corporate ownership of ships, individual insolvency (termed sequestration in South Africa and bankruptcy in England) will not be discussed. However, given that s 339 of the Companies Act, 1973 explicitly incorporates parts of the Insolvency Act 24 of 1936, some reference to the latter Act will perforce be made.

⁷² See section chapter 5.

I. The commencement of winding-up proceedings under the Companies Act 61 of 1973.

Although the 2008 Companies Act⁷³ is in force and repealed the 1973 Companies Act,⁷⁴ by virtue of item 9 of schedule 5 of the 2008 Act, the chapter on winding-up of companies in the 1973 Act (chap 14) remains in force until the Minister decides that item 9 ceases to have effect. The Minister may only do so though if there is a substitute that adequately deals with the winding-up of companies.⁷⁵ This is unlikely to happen in the near future until a new combined insolvency legislation is passed by Parliament. The result is that corporate winding-up in South Africa is still governed by Chapter XIV the Companies Act of 1973 despite the repeal of that Act by the Companies Act of 2008.

A company may be wound-up in one of two broad ways: voluntarily, or compulsorily. In the case of a voluntary winding up, the company must pass a special resolution. Importantly, the registration of the special resolution has certain effects. Section 352 provides that a voluntary winding-up commences not when the special resolution is passed by the company nor when the order for winding-up is made by the court, but when the special resolution is registered with the Companies Commission⁷⁶ in terms of s 200. This must be done within a month of the special resolution.⁷⁷

A compulsory winding-up on the other hand, is deemed to commence at the time of the presentation to the court of the application of winding-up and not from the date of the winding-up order.⁷⁸

The importance of the deemed commencement date for compulsory windings-up, bearing in mind that a court has not yet considered the matter, lies in the following: that certain transactions may be made retrospectively void, including arrests or attachments in admiralty. Clearly by the time a court ruling is made on the merits authorising winding-up to actually commence, it would be too late for any creditor, including maritime ones, from

⁷³ 71 of 2008 ('the Companies Act, 2008).

⁷⁴ Section 224 of the Companies Act, 2008.

⁷⁵ Item 9(4)(a) of sch 5 of the Companies Act, 2008.

⁷⁶ Now called the Companies and Intellectual Property Commission (CIPRO). See Chap 8 of the Companies Act 71 of 2008.

⁷⁷ Section 352 of the Companies Act, 1973.

⁷⁸ Section 348 of the Companies Act, 1973.

enforcing any security in admiralty that they may have had.⁷⁹ And by virtue of s 10 of AJRA (see chapter five *infra*), any arrest of a ship before the deemed commencement dates is also uncontentious in that such an arrest crystallises the admiralty division's jurisdiction and excludes the parochial court's jurisdiction. The crucial period for a maritime creditor then, over which there is uncertainty, is that between the deemed commencement dates and the order for winding-up.

The question then arises for both voluntary and compulsory corporate winding-up: can a maritime creditor still seek to enforce his security between the deemed commencement date and the time when an order is made for winding-up by the court?⁸⁰ Unlike English law, South African courts have answered the question negatively. Two provisions of the Companies Act, 1973 are particularly important in this respect: ss 358 and 359(1)(b).⁸¹

Section 358 provides for the stay or restraint of proceedings against the company at any time between the presentation of the application for winding-up and the order for winding-up. So even before the court has ordered the company to be wound-up, s 358 allows creditors of the company or the company itself to apply for a stay for any proceedings against the company, as long as the application for winding-up has been presented to court. Importantly, and unlike s 359(1)(a) which is an automatic stay against all proceedings against the company from the time the winding-up order is made,⁸² s 358 does not depend on an order for winding-up having been granted. Instead, it can operate straight after the application for winding-up has been made. It is thus a powerful tool for creditors to protect the remaining assets of a company about to be declared insolvent.

Section 358(a) states that the company (or any creditor) may approach the court in which any action or proceeding is pending against the company, and ask the court for a stay. 'Any action or proceeding' are words of wide import and would safely cover both arrests *in rem* by summons as well as applications to attach *in personam*. This subsection though only covers proceedings which are pending. The solution for the concerned creditor is to approach the court in which the proceedings are pending to request a stay. This is unlike subsection (b)

⁷⁹ Although see the *obiter* comments to the contrary by the court in the *The Nantai Princess Line Co Ltd v Cargo Laden on the Nantai Princess* 1997 (2) SA 580 (D) at 590-591.

⁸⁰ Or for voluntary winding-up, between the time the winding-up resolution is registered and the time the order is made for winding-up by the court.

⁸¹ Given the importance of the two provisions, they are quoted in full in Annexure A.

⁸² This includes a provisional winding-up order see *sv* 'winding-up order' in s 1 of the Companies Act, 1973.

where the creditors applying for a stay may approach the *court in which the winding-up application is proceeding*.

It may be wondered whether, in the case of a maritime claim pending in admiralty, the court there would indeed grant a stay to the parochial creditor. It would depend on how far the maritime claim had proceeded. Of course, if the maritime claimant had already arrested, attached or security had been given, then s 10 of AJRA operates to exclude said property from falling into the insolvent estate; preferentially ring-fencing the property to satisfy only maritime claims. On the other hand it is an open question if the claim in admiralty, having been instituted,⁸³ though not up to the stage of arrest, attachment or security, could proceed in the face of a stay application from a parochial creditor. Certainly no court in South Africa has been faced with such a question and so this must be considered an open question.

However, given that a parochial creditor would have to approach the court in which the action or proceeding is pending, being the admiralty division for our purposes, and ask that court to stop a maritime creditor from enforcing its security merely because an application had been made to court for winding-up (bearing in mind the possibility that such application may not be granted) would seem far-fetched. This is especially so because the admiralty division is specifically constituted for maritime claims. In effect, a parochial creditor would be asking the admiralty division to stay maritime claims, its *raison d'être*, in favour of parochial creditors merely because an application for winding-up has been lodged (and may not even be granted).

Subsection (b) would seem to offer more certainty. It is concerned not with pending proceedings, but with proceedings which are about to be instituted. This would mean that the admiralty division would not have had any involvement in the matter. Also, rather than approaching the court in which the proceedings are pending for the stay, a creditor can now approach the court in which the application for the winding up of the company is pending. In

⁸³ A common occurrence in admiralty is that creditors will issue their legal papers in anticipation of a ship's arrival in a South African port (which may take many months or the ship may not even arrive) and hence that this would be an action or proceeding pending before the admiralty division. Section 1(2)(b) of the AJRA gives the plaintiff in an action *in rem* a year to serve his summons and arrest warrant. The AJRA also makes provision for the renewal of any process in s 5(2)(dA). Section 1(2)(a) of the AJRA also specifies that an admiralty action commences at the making of an application for attachment for an action *in personam*, by the issue of any process in an action *in rem* or by the giving of security. For the seminal English case on the practice in admiralty of issuing multiple writs *in rem* against all the ships owned by the defendant see the *Banco* [1971] P 137 (CA) at 153 and 158.

the situation with which this thesis is concerned, this would essentially boil down to a home-ground advantage for the parochial creditor. Under s 358(b), he would not have the paradoxical problem of approaching a court specifically constituted for maritime claims and ask that court to stay a maritime claim – as would be the case under s 358(a). Interestingly, s 358(b) provides for a restraint order whilst s 358(a) speaks of a stay order.

For a parochial creditor looking to stay proceedings initiated by maritime creditors there is however a problem with this section. It refers to restraining any ‘action or proceeding’. The wide import of the words ‘action or proceeding’ has already been noted and clearly includes action proceedings to arrest and application proceedings to attach. It would also cover proceedings in which the court is considering the sale of the ship. However, it would not seem to cover the giving of security, as this is not usually an ‘action or proceeding about to be instituted [in court]’. Section 10 of AJRA it will be remembered, is triggered by three events: arrest/attachment, sale and security. It is very common in maritime matters for security to be given to the creditor to avoid an arrest or to release property already under arrest.⁸⁴ It is important here to distinguish the giving of security to *avoid* arrest and the giving of security to release already under arrest. In the latter case, the ship has already been arrested and thus s 10 of AJRA would already have been triggered to protect arrested assets (or the security substitute) from all except maritime claimants.

Apart then from the unusual and slightly old-fashioned method of putting up bail to the court (which might be seen as a proceeding before the court) for the release of arrested property, the giving of security in admiralty is a private, contractual affair⁸⁵ which cannot be described as an ‘action or proceeding’ nor, in the case of security to *avoid* arrest can it be said to be something that is ‘pending or about to be instituted in a court’.

The essential problem for the parochial creditor in this instance would be that, though s 10 of AJRA has not yet been triggered, an application for winding-up has been made, he (the parochial creditor) would not be able to restrain or stay a debtor from giving security to avoid arrest under the admiralty procedure. This is because, as a private matter of contract between creditor and debtor, security here simply cannot be described as an action or proceeding before a court. A maritime creditor could thus successfully avoid the stay provisions of s 358 whilst crystallising the admiralty division’s jurisdiction (through s 10 of AJRA) by negotiating that the debtor give security to avoid his ship from being arrested. And

⁸⁴ Section 3(10)(a) of AJRA.

⁸⁵ See *The Merak S 2002* (4) SA 273 (SCA) at 278E-279J.

even though a parochial may be satisfied with this state of affairs since the ship, on the giving of security, is released from arrest and can thus form part of the insolvent estate, the amount of security given to release the ship might be a substantial depletion of the debtor's assets just prior to winding-up.⁸⁶ Arrest and attachment on the other hand could be stayed by the parochial creditor as these are both 'actions or proceedings', 'pending or about to be instituted before the court'. And if these are stayed, then necessarily no security need be given by the shipowner (which could reduce the value of the latter's estate).

Also, whether a stay or restraint is requested, the court is given a broad discretion to 'stay or restrain the proceedings on such terms as it thinks fit.' The authors of *Henochsberg*⁸⁷ suggest that this is a narrow discretion which should only be exercised in special circumstances. This is because once an order for winding-up is made, an automatic stay on all proceedings against the company is triggered by s 359(1)(a).

Finally, it is certainly arguable that the restraining order in subsec (b) could operate generally; ie that all actions or proceedings about to be instituted are restrained. This is because the discretion refers to the court being able to order the stay or restraint of *proceedings* (plural). The heading of s 358 is also phrased in the plural to refer to stay of proceedings. On the other hand, the authors of *Henochsberg*⁸⁸ posit the opposite; that because of the reference in both subsecs (a) and (b) to only an action or proceeding (in the singular) pending or about to be instituted, that a court may only stay or restrain individual cases. If a general stay were ordered by one division of the High Court it would be hard to imagine in such circumstances another division proceeding notwithstanding a restraint order from a court which is its equal.⁸⁹ Given that the admiralty division is structurally exactly the same as the High Court – indeed, it is part of the High Court (just exercising a different jurisdiction and applying a slightly different law).

⁸⁶ Security in an action *in rem* must be to the value of the claim or of the ship, whichever is the lesser amount; the value of the ship thus represents the limit of security that can be demanded, Admiralty Rule 4(7)(a)(ii). In an action *in personam* on the other hand, security must be given to the full value of the claim even if this exceeds the value of the ship, Admiralty Rule 5(4)(a).

⁸⁷ Delpont & Vorster (eds) *Henochsberg on the Companies Act 71 of 2008* (2011) vol 2, appendix 1 at 112.

⁸⁸ Delpont & Vorster (eds) *Henochsberg on the Companies Act 71 of 2008* (2011) vol 2, appendix 1 at 112.

⁸⁹ See also the recent case of *Overseas Shipholding Group Inc* (KZD) unreported case no 12827/12 (7 December 2012) where the court recognised the US chapter 11 bankruptcy order as well as the automatic stay provision in the US's Bankruptcy Code (s 362) and ordered the stay to apply throughout South Africa.

II. Section 359(1)(b) and admiralty jurisdiction in South Africa

Section 359(1) is broadly concerned with the situation after a winding-up order has been granted. Subsection (a) states that all civil proceedings against the company are automatically suspended once the order has been granted. Subsection (b) though, is for our purposes, as interesting as it is unclear. It states that any attachment or execution put in force against the company is void.

The confusing part of subsection (b) is that it is structurally part of s 359(1) as a whole which operates from the date of the winding-up order.⁹⁰ Based on this then s 359(1)(b) should also operate from the time of the winding-up order. The wording of this subsection though is at odds with the section as a whole since it states that any attachment or execution put in force against the company *after the commencement of the winding-up* shall be void. This particular wording has a familiar ring to it and brings us back to the deemed commencement provisions of s 348 which contains the similar formula: that the winding-up of a company shall be deemed to commence at the time the application is presented to court. Though the wording is slightly different (viz. ‘commencement of winding-up’ versus ‘winding-up commences’), it would seem that the intention behind s 359(1)(b) is that it commences from the time the application is presented to court and not, as the rest of s 359(1) states, from the time the order for winding-up is made.⁹¹ Section 359(1)(b) would thus operate from the same time as s 358 operates: between application and order for winding-up. But whereas s 358 requires an interested creditor to approach a court to stay any proceedings, s 359(1)(b) automatically voids two specific proceedings against the company: ‘attachments or executions, put in force’ after the application for winding-up.

Does s 359(1)(b) then mean that maritime creditors are barred from enforcing their rights in admiralty from the deemed commencement date of winding-up? Put differently, is an arrest or attachment in admiralty after the deemed commencement date (ie when the application is presented) automatically void? This could potentially have the effect that a maritime creditor would not have the benefit of s 10 of AJRA from the time ‘the application [for winding-up] is presented to court’. A maritime creditor may thus not be necessarily safe from parochial jurisdiction even after he has arrested in admiralty (thereby triggering s 10 of

⁹⁰ *LL Mining Corporation Ltd v Namco (Pty) Ltd* 2004 (3) SA 407 (C) at 413.

⁹¹ *LL Mining Corporation Ltd v Namco (Pty) Ltd* 2004 (3) SA 407 (C) at 413F-H. And cf the misleading headnote in the report which states that s 359(1)(b) operates from the winding-up order when in fact Davis J held that the section operates from the deemed commencement of the winding-up.

AJRA) if, before such an arrest, an application was made for winding-up since, such an arrest could be made retrospectively void according to s 359(1)(b).⁹²

For the purposes of this section, it is important to distinguish execution from attachment. Execution, it has been said, succeeds and does not precede judgment.⁹³ Therefore an arrest *in rem* (or attachment) of a ship in admiralty, as a *pre-judgment type process*, could not be described as an ‘execution’ as that word has hitherto been interpreted. Case law in South Africa on the interpretation of s 359(1)(b) has stated that ‘execution’ means when the sheriff, *in pursuance of a warrant of execution* enters into possession of the property.⁹⁴ So it would seem that an arrest or attachment in admiralty for the purpose of obtaining security cannot fit under the definition of execution in this section. This is because property is invariably arrested/attached in admiralty pre-judgment under an arrest warrant and not a warrant of execution (pre-judgment arrest is after all one of the main advantages of proceeding in admiralty). Also, as used in the commonly understood sense of the word, and in the sense used by s 359(1)(b), execution would not need to occur in admiralty. This is because, when arrested or attached, the ship is already under the admiralty division’s control and there would therefore be no need for a writ of execution if the admiralty division ordered the ship to be sold. It is therefore doubtful whether ‘execution’ in s 359(1)(b) was ever intended to apply to admiralty arrests or attachments.

Section 359(1)(b) also prohibits ‘attachment’ which would seem to include attachments to found or confirm jurisdiction. However, it would also seem that the reference in s 359(1)(b) to voiding ‘executions’ and ‘attachments’, could be limited only to *post-judgment, execution type processes*. So even at common law, a creditor might be able to attach property *to confirm or found jurisdiction* (after commencement of the winding-up) and not be affected by s 359(1)(b). There does not seem to be any direct authority on ‘attachment’ as all reported cases deal only with the meaning of execution. However, an instructive case,

⁹² Unlike arrests or attachments being potentially void, security to avoid arrest cannot be said to be an ‘attachment’ or ‘execution’ put in force against the company. Thus, getting security from the debtor without actually arresting (ie security to avoid arrest) after the commencement of the winding-up would thus be a good way to avoid s 359(1)(b) and also crystallise the admiralty court’s jurisdiction in terms of s 10 of AJRA. Granted, this would require a degree of cooperation seldom seen from any debtor, but it is possible.

⁹³ *John Carlbom & Co Ltd v Zafiro (Owners)* [1960] P. 1 at 15

⁹⁴ *Pols v R. Pols-Bouers en Ingenieurs (Edms.) Bpk* 1953 (3) SA 107 (T) at 110E-H, and *Rennie No v Registrar of Deeds and Another* 1977 (2) SA 513 (C) at 515.

Meaker NO v Campbell's New Quarries (Pty) Ltd and Others,⁹⁵ seems to suggest that 'attachment' is limited to post-judgment type processes only. This observation also finds support in a dictum of Jennett J where the judge seems to view attachment as one of the steps in the post-judgment execution process:⁹⁶ 'Execution includes attachment of the property and the sale of the property and it seems to me that to sell the seized property in execution is to put in force the execution.'

English authority on the genesis of s 359(1)(b) would also seem to support this as all of their reported cases (dealing with the English statutory equivalents to s 359(1)(b)) limit the operation of the words 'attachment and execution' to post-judgment type processes only and not pre-judgment processes like an arrest *in rem* or an attachment to found or confirm jurisdiction.⁹⁷ English case authority on their version of s 359(1)(b) has also consistently held, since *In Re Australian Direct Steam Navigation Company*,⁹⁸ that an arrest *in rem* is a 'sequestration' and not an 'attachment' or 'execution'; how then, if an arrest *in rem* is a sequestration, could it also be an attachment or an execution?

In admiralty it would be quite important for a maritime creditor to know whether s 359(1)(b) prohibits pre-judgment attachments, as an attachment in admiralty (like arrest) triggers s 10 of AJRA (which then crystallises the admiralty division's jurisdiction over the arrested or attached property and excludes it from falling into the insolvent estate). So does s 359(1)(b) prohibit pre-judgment attachments even at common law (and therefore by extension in admiralty)? Or is it, as the language of the section seems to suggest, concerned only with post-judgment, execution type processes? The argument in this dissertation is that s 359(1)(b), just like its English forbears, was designed solely with post-judgment processes in mind therefore excluding from its ambit arrests *in rem* as well as attachments to found or confirm jurisdiction. For the maritime creditor this would then mean that an admiralty arrest or attachment effected after the commencement of the winding-up would not fall foul of s 359(1)(b) and therefore not be void. This would ensure that maritime property remains under the admiralty division's control to meet maritime claims.

⁹⁵ 1973 (3) SA 157 (R) at 162.

⁹⁶ *Ex parte Flynn: In re United Investment and Development Corporation Ltd* 1953 (3) SA 443 (E) at 445A.

⁹⁷ Although of course, it is important to remember that English law does not have an equivalent to the South African attachment to found or confirm jurisdiction (a pre-judgment process designed to gain security and personal jurisdiction over the peregrinus defendant). It is therefore unsurprising that their courts would never have considered the word 'attachment' as being anything other than a post-judgment type process.

⁹⁸ (1875) LR 20 Eq 325.

So it is certainly debatable whether s 359(1)(b) makes pre-judgment attachments or arrests in admiralty void after the contentious deemed commencement time of the winding-up. Unfortunately for the maritime creditor in South Africa, there have been a few decisions on the interface of admiralty and insolvency law which dealt specifically with whether s 359(1)(b) applies to admiralty arrests or attachments. From these decisions, it would seem as if the admiralty creditor would be deprived of the advantage of s 10 of AJRA if she arrests *in rem* (or attaches) between the deemed commencement and the actual commencement of winding-up.

III. Cases of admiralty conflicting with insolvency law in South Africa

Two quite recent cases best illustrate the problems for a maritime creditor in seeking to enforce a claim in admiralty against a company about to be declared insolvent: *Rennie NO v South African Sea Products Ltd*⁹⁹ (*Rennie*) and *The Nantai Princess Line Co Ltd v Cargo Laden on the Nantai Princess*¹⁰⁰ (*The Nantai Princess*).

In both cases, an arrest *in rem* was effected prior to an order for winding-up being granted but after the application for winding-up had been made. In each case after the order for winding-up had been made, the respective liquidators applied to court under s 359(1)(b) of the Companies Act, 1973 to have the arrests declared void as the arrests had occurred after the commencement of the winding up in terms of s 348.

Clearly, from the reference in s 359(1)(b) to ‘the commencement of the winding-up’ the intention was to make the section operative from the time set down in s 348.¹⁰¹ Section 348 lays down that winding-up of a company by the court is deemed to commence at the time of the *presentation to the court of the application* for the winding-up (my emphasis). Despite persuasive argument to the contrary,¹⁰² both judgments held, in accordance with long-standing practice,¹⁰³ that the time the application is presented to court is the time when the application is filed with the registrar. This is despite the literal meaning of the words ‘presented to court’ (and not to the registrar) as being the first hearing of the application by

⁹⁹ *Rennie NO v South African Sea Products Ltd* 1986 (2) SA 138 (C).

¹⁰⁰ *The Nantai Princess Line Co Ltd v Cargo Laden on the Nantai Princess* 1997 (2) SA 580 (D).

¹⁰¹ *LL Mining Corporation Ltd v Namco (Pty) Ltd* 2004 (3) SA 407 (C) at 413C-H.

¹⁰² *Nantai Princess* at 584G-586H.

¹⁰³ Relying on a case decided on s 348’s predecessor in the 1926 Companies Act *Lief NO v Western Credit (Africa) (Pty) Ltd* 1966 (3) SA 344 (W) at 348-349.

the court. It is also despite a slight change of language in s 348 from previous versions of the same section the older Companies Act 46 of 1926 (s 115). Whereas under its 1926 predecessor s 348 said only that the deemed commencement is from the time the application is ‘presented’, s 348 further specifies that it is ‘presentation *to the court*’ which matters.

Had the maritime creditors succeeded in their arguments that s 348 was operative not from the time the application is filed with the registrar, but at the later time of when it is heard in court for the first time, then this would have significantly increased the time in which all claims (including maritime ones) could be enforced without falling foul of s 359(1)(b). As it was, the courts stuck with the long-established meaning of the provision.

Once it had been established that winding-up was deemed to commence from the date the application is filed with the registrar, then, the arrests *in rem* having occurred afterwards, s 359(1)(b) came into play. Crisply, the question which arose for both courts was whether it could be said that an arrest *in rem* is an ‘attachment or execution put in force’. If it were, then the arrests by the maritime creditors would be void unless s 10 of the AJRA could be read so widely as to include arrests effected even after commencement of winding-up.

Both cases accepted that the words ‘execution put in force’ meant the following: when, in pursuance of a writ of execution, the Sheriff enters into possession of the property, ie when execution is levied.¹⁰⁴ This is according to long-standing practice in both England and South Africa.¹⁰⁵ However, it cannot be said that an arrest *in rem* (or an attachment to found or confirm jurisdiction) is in pursuance of a writ of execution. On the contrary, by their very nature, these processes are pre-judgment type processes and not post-judgment. The only way then to fit an arrest *in rem* under s 359(1)(b) would thus be under the word ‘attachment’. Berman AJ in *Rennie* sums up the problem in the following terms:

[In no case previously decided] was consideration given to the situation where an attachment of property is effected by the Sheriff *otherwise than pursuant to a judgment with a view to execution*, and the question arises for what seems to me to be the first time in our courts as to whether an arrest of a vessel (or for that matter an attachment to found or confirm jurisdiction) is an ‘attachment’ within the meaning of the word as employed by s 359(1)(b) (my emphasis).¹⁰⁶

¹⁰⁴ See *Rennie NO v Registrar of Deeds* 1977 (2) SA 513 (C).

¹⁰⁵ *Rennie NO v Registrar of Deeds* 1977 (2) SA 513 (C) at 515-516A.

¹⁰⁶ *Rennie* at 143D-143E.

On this point, Levinsohn J in the *Nantai Princess* adopted the reasoning in *Rennie* verbatim.¹⁰⁷ In the latter case, Berman AJ had essentially three main reasons for setting aside the arrest *in rem* in terms of s 359(1)(b).

Relying on previous authority on the wide meaning to be attached to the word ‘any’, Berman AJ states that the section is wide enough to comprehend any restraint which may be imposed on a company’s assets, and that this includes arrests *in rem*. This is despite the clear wording relating to ‘attachments’ only and not arrests (*expressio unius est exclusio alterius*). The authority relied upon by Berman AJ for the wide meaning to be attached to the word ‘any’ would also seem to be tenuous. He relied on the case of *Hayne & Co v Kaffrarian Steam Mill Co Ltd* 1914 AD 363. However, that case dealt with the meaning of the term ‘any’ in the context of a contract of sale. This is apparent from the case itself where Innes JA at 397 says: ‘[I]n its natural and ordinary sense “any” - *unless restricted by the context* - is an indefinite term which includes all of the things to which it relates’ (my emphasis).¹⁰⁸ It is submitted that conflating contractual and statutory interpretations is not appropriate¹⁰⁹ – as Innes JA stated, context matters, and the context of a statutory provision which may have a profound effect on the rights of creditors should be restrictively interpreted. As stated by Snyman J in relation to the retrospective effect of s 348:

Another aspect which I must bear in mind is that normally statutes must be interpreted in such a way as to cause a minimum of interference with, or deprivation of, rights. Sec. 115 [now s 348] on occasion may be an interference with the rights of people who have legitimately acquired rights after the presentation of the petition for winding-up but before the order is granted by the Court.¹¹⁰

Berman AJ’s second argument was that an arrest *in rem* has a far-reaching effect in that it affords the arrestor security where none previously existed and that it is precisely this sort of result which s 359(1)(b) seeks to avoid by fixing the rights of creditors *inter se* at the commencement of the winding-up. The first part of the argument is debatable because it fails to properly distinguish actions *in rem* based on maritime liens from those based on statutory

¹⁰⁷ *Nantai Princess* at 589E-590A.

¹⁰⁸ See also similar reasoning in *Birkenruth Estates (Pty) Ltd v Unitrans Motors (Pty) Ltd and Others* 2005 (3) All SA 128 (W) para 31.

¹⁰⁹ Statutory and contractual interpretation are broadly quite similar, however the latter seeks the parties’ intent, whilst the former deals with objective purpose of statute in context. See *Herbert Porter & Co Ltd and Another v Johannesburg Stock Exchange* [1974] 3 All SA 543 (W) at 551,553.

¹¹⁰ *LiefNO v Western Credit (Africa) (Pty) Ltd* 1966 (3) SA 344 (W) at 349B.

liens. As previously stated,¹¹¹ a maritime lien holder is secured the moment the facts giving rise to the lien occur and not when it is enforced by an action *in rem* – therefore the security has been in existence long before winding-up commences.¹¹² The second part of the argument is also debatable in that s 359(1)(b) does not fix the rights of the creditors *inter se* – that is achieved by the order for winding-up. Section 359(1)(b) is, like its insolvency counterpart in s 20(1)(a),¹¹³ concerned with stopping post-judgment type processes, like executions, against a debtor against whom winding-up proceedings have commenced. It also ignores the statutory preference given specifically to maritime creditors in s 10 of AJRA¹¹⁴ as well as the preference given to maritime creditors generally to proceed *in rem* directly against the ship itself to secure their claims.¹¹⁵

His final reason seems slightly off-point. It is that an arrest *in rem* is the institution of an action, and no action, whether *in rem* or *in personam* may be instituted against an insolvent.¹¹⁶ This is certainly true in relation to processes commenced by anyone *after* the order for winding-up has been made (see the automatic stay provisions in s 359(1)(a)). The maritime creditors in *Rennie* though arrested the ship prior to the automatic stay and their actions were covered by the *discretionary* stay and restraint processes in s 358. So it is not true that the maritime creditors in *Rennie* were automatically precluded from arresting the ship – prior to the winding-up order they were in fact entitled to do so but that this type of process *may* be stayed or restrained by the court according to s 358.

Section 359(1)(b) is not a new provision. Its roots can be traced to the 1862 and 1948 English Companies Acts (ss 163 and 228 respectively).¹¹⁷ The language in all of the section's guises is very similar except that the South African Companies Act is limited to 'attachments and executions', whilst the English Acts further include 'distress and sequestration' as acts against the company which are void (sequestration being defined in England as any detention of property by a Court of Justice for the purpose of answering a demand which is made).¹¹⁸ One of the earliest cases, which incidentally, also concerned an arrest *in rem*, was *In Re*

¹¹¹ See chapter two.

¹¹² *In Re Aro Co Ltd* [1980] Ch 196 (CA) at 205C.

¹¹³ Of the Insolvency Act 24 of 1936.

¹¹⁴ On which, see chapter five.

¹¹⁵ See the *Zafiro* at 14-15 and *The Heinrich Bjorn* (1885) 11 App.Cas. 270 at 277.

¹¹⁶ *Rennie* at 143.

¹¹⁷ See annexure A.

¹¹⁸ *In Re Australian Direct Steam Navigation Company* (1875) LR 20 Eq 325 at 326.

*Australian Direct Steam Navigation Company*¹¹⁹ where the court decided that an arrest *in rem* was a ‘sequestration’ and thus fell to be set aside as a void action against a company being wound-up. Importantly, it was not considered that an arrest *in rem* was an ‘attachment’ and in no case since, has it be held than an arrest *in rem* is anything other than a ‘sequestration’. So it would seem quite strange for a South African court interpreting what is essentially the same section, to view an arrest *in rem* as an ‘attachment’ when English cases have pointedly not used ‘attachment’ to describe the same act. Granted, ‘sequestration’ is not part of South Africa’s s 359(1)(b) but it is still an odd difference.

In both jurisdictions however, no court has ever considered s 359(1)(b) as being applicable to pre-judgment type processes – all have dealt with the section as prohibiting post-judgment type processes. It must be acknowledged though that English common law has no direct¹²⁰ equivalent to South Africa’s attachment to found or confirm jurisdiction and so it is unsurprising that there has been no reported English case of their version of s 359(1)(b) being applied to pre-judgment type processes outside of admiralty law.

¹¹⁹ (1875) LR 20 Eq 325.

¹²⁰ See however the special procedure of foreign attachment allowed only in the Mayor’s Court of the City of London in FL Wiswall *The Development of Admiralty Jurisdiction and Practice since 1800* at 17.

CHAPTER 4: THE ENGLISH LAW APPROACH

The English approach to cases involving admiralty and insolvency has been rather different. Instead of deciding whether the admiralty division or any of the other divisions of the High Court have jurisdiction (as s 10 of AJRA forces South Africa courts to do), English law has approached the problem by asking whether the maritime creditor is a secured creditor – with varying results. Importantly, this is done solely through the lens of insolvency legislation. The result is a lack of any conceptual unity to the problem and an awkward straight-jacketing of admiralty processes in insolvency nomenclature.

Ironically though, despite the lack of a specific statutory preference towards maritime creditors, as is achieved in part by s 10 of AJRA, English case law has evinced a remarkable bias towards maritime claimants by allowing them to proceed in circumstances where parochial creditors would not be allowed. For example in the *Zafiro*, the maritime creditors were allowed to proceed despite only having arrested *in rem* after the commencement of the winding-up. This they were allowed to do as English courts have a general statutory discretion to allow any creditor to proceed against the company or its property after the commencement of the winding-up. However this discretion is rarely exercised (apart from fraud) in favour of parochial creditors seeking to perfect a security right after the commencement of the winding-up – maritime creditors on the other hand, are permitted to do so.

This ‘shipping bias’ has been achieved by extending the discretion, much debated but long accepted, that s 228¹²¹ voiding attachments, executions and sequestrations should nevertheless be read subject to s 231, which enables the court to allow ‘proceedings’ to proceed despite the order for winding-up having been granted.¹²²

I. Early cases

One of the first reported cases on this issue was *In Re Australian Direct Steam Navigation Company*¹²³ where a creditor wanted to enforce a maritime lien by an arrest *in rem* (the claim being one for master’s wages) against a ship owned by a company that had already been

¹²¹ Of the Companies Act, 1948 (UK), see Annexure A.

¹²² *In Re Aro Co Ltd* [1980] Ch 196 (CA) at 205A-B, the *Constellation* [1966] 1 WLR 272 at 274C.

¹²³ (1875) LR 20 Eq 325.

ordered to be wound-up. It was held that the arrest was a void ‘sequestration’ in terms of s 163 of the Companies Act, 1862¹²⁴ but that the arresting creditor could proceed in the winding-up proceedings. For Jessel MR this was not seen as a hardship on the maritime creditor as: ‘Instead of going to the admiralty court he could have applied to this court [ie chancery] by a process at least as cheap and at least as speedy as that of the admiralty court.’¹²⁵

This decision was also reached despite an interesting argument raised by counsel for the master: that the arrest *in rem* is an action against the ship itself and not against the company. This argument was never addressed by the court; though in a slightly different guise it rears its head again in the most recent case in England on the matter: *Linabol*.¹²⁶

In almost identical circumstances some two years later is the case of *Rio Grande Do Sul Steamship Company*.¹²⁷ The master in this case attempted to enforce a pre-existing maritime lien for master’s disbursements¹²⁸ in the chancery division (based on the authority of *In Re Australian Direct Steam Navigation Company*) after the order for winding-up had been made. After a number of applications in admiralty and chancery,¹²⁹ the master was given leave to proceed *in admiralty*. Even though this latter course of action was rendered unnecessary, as the liquidator put aside a separate sum in the liquidation to answer the master’s claim, an important point of principle does seem to be at stake in this case: how was *In Re Australian Direct Steam Navigation Company* distinguished to allow the master to proceed in admiralty instead of in the liquidation, even though the facts of the two cases were nearly identical.

¹²⁴ Equivalent to section 228 of the 1948 Companies Act (UK) and s 359(1)(b) of the Companies Act, 1973 in South Africa, see table 1 on Annexure A.

¹²⁵ *In Re Australian Direct Steam Navigation Company* (1875) LR 20 Eq 325 at 327.

¹²⁶ See discussion in chapter six.

¹²⁷ (1877) LT 603; 5 Ch. D. 282.

¹²⁸ The master’s maritime lien for disbursements had been accepted since Dr Lushington’s decision in *The Mary Ann* Law Rep. 1 A. & E. 8 which was followed in *The Feronia* Law Rep. 2 A. & E. 65, and in *The Ringdove* 11 P. D. 120. The House of Lords in *Hamilton v Baker (The Sara)* (1889) 14 App. Cas. 209 however, overruled *The Mary Ann* by deciding that the master of a ship did not have a maritime lien for necessary disbursements. The decision in *The Sara* was in turn reversed by statute, Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60, s. 167), which reinstated the position in Dr Lushington’s time, so that masters again had, and continue to have to this day, a maritime lien for necessary disbursements.

¹²⁹ (1877) LT 603 at 604.

Unfortunately for maritime creditors who only act after the winding-up order is made, the *Rio Grande Do Sul* seems to be a point less about principle and all about the unique facts of that case. The master in that case, advised by his solicitors, and based on the authority of *In Re Australian Direct Steam Navigation Company* (1875) LR 20 Eq 325, was told that the only way to enforce his maritime lien on a vessel belonging to a company ordered to be wound-up was in the liquidation proceedings and not by an action *in rem* in the admiralty court.¹³⁰ However, this was found to be impossible since the mortgagees had taken possession of the ship and, due to the rules at the time, the chancery division did not have jurisdiction to summon the mortgagees before it. Thus the only option available to the master, and the order made by the chancery division was to grant the master leave to pursue his claim in the admiralty court. This approach was ultimately upheld by the Court of Appeal.

In both these cases then, an arrest *in rem* was not effected (or if effected, was declared void) and the shipping claims of master's wages and disbursements were dealt with in the parochial courts under insolvency legislation. Importantly though, and unlike later cases which deal only with statutory liens, these two cases concerned maritime claims giving rise to maritime liens. This is important since, regardless of whether admiralty or insolvency law is applied to these maritime creditors (and regardless also of the court which has jurisdiction over the matter) their claims are secured over the ship the moment the facts giving rise to the claim occur.¹³¹

Three points emerge from these cases: first that an arrest *in rem* is a void 'sequestration' in terms of the important s 163,¹³² and not an 'attachment' or 'execution'.¹³³ Secondly, that after the order for winding-up has been made, the proper forum to enforce a maritime lien is not through the admiralty court with an action *in rem* but in the insolvency proceedings in chancery.¹³⁴ Thirdly and most importantly, the court preferred to apply

¹³⁰ Ibid.

¹³¹ *The Bold Buccleugh* 1851 PC 261, and *In Re Australian Direct Steam Navigation Company* (1875) LR 20 Eq 325, where it is recognised by the court that a claim giving rise to maritime lien will be as secured in the proceedings of the Admiralty court as it would in the Chancery court.

¹³² The foundation of s 228 of the Companies Act, 1948 (UK) and s 359(1)(b) of the Companies Act 61 of 1973 in South Africa. See annexure A.

¹³³ Cf the decisions in South Africa, discussed in chapter 3.3 to the opposite effect.

¹³⁴ Cf the observations in *In Re Aro Co Ltd* [1980] Ch 196 (CA) at 205C, relying on *In re Rio Grande Do Sul* (1877) LT 603; (1877) 5 ChD 282, where it was said that leave will automatically be given to the holder of a maritime lien to pursue his claim *in admiralty* even after a winding-up order has been made. This must be regarded as obiter as *In Re Aro* was concerned with statutory liens and not maritime liens. It also contradicts the

insolvency legislation nomenclature to shipping law issues. In the circumstances of this case, where the arrest occurred after the order for winding-up had been made this was probably fair to do. Unfortunately this case sets the tone in basic approach for all subsequent cases on this issue: the refusal to decide the case as a jurisdiction issue (ie which court should hear the matter), but, through the lens of company insolvency legislation, whether the maritime claimant is a secured creditor.

II. Later cases

The *Zafiro*¹³⁵ is an interesting case as the maritime creditor was allowed to execute against the fund formed from the sale of the arrested ship even after the liquidation had commenced (and the creditor was also aware that the winding-up had commenced).¹³⁶ The maritime creditor had arrested the ship *in rem* after the commencement of the winding-up. In spite of this, the chancery division¹³⁷ had given the creditor permission to have the ship sold by the admiralty registrar despite the arrest being prima facie void under s 228 of the Companies Act, 1948.¹³⁸

The liquidator then tried to challenge the arresting creditor retaining the benefits of his execution under s 325 of the Companies Act, 1948. This is an interesting provision, not often used, which provides that no creditor may maintain the benefit of any attachment or execution against a company being wound-up unless such execution or attachment is

approach in the earlier case of *In Re Australian Direct Steam Navigation Company* (1875) LR 20 Eq 325 where a holder of a pre-existing maritime lien was ordered to proceed in chancery after the order for winding-up had been made.

¹³⁵ *John Carlbom & Co Ltd v Zafiro (Owners)* [1960] P. 1 ('the *Zafiro*').

¹³⁶ The ship owning company did in fact enter into a voluntary liquidation. Nothing though turns on this difference with other cases discussed in this dissertation as the steps leading to voluntary liquidation in England (notice of voluntary liquidation and special resolution) are analogous to the steps in a compulsory liquidation of presentation of the application to wind-up (which commences liquidation) and the order to wind-up. For the purposes of the discussion of this case, commencement and order will be used to keep the language and comparisons with other cases consistent.

¹³⁷ Which has jurisdiction over corporate windings-up. See s 61(1) and (3) read with sch 1 of the Supreme Court Act, 1981 (UK).

¹³⁸ The English equivalent to South Africa's s 359(1)(b) voiding attachments and executions of the company's assets after commencement of the winding-up. Also *In Re Australian Direct Steam Navigation Company* (1875) LR 20 Eq 325 which held that an arrest *in rem* is a 'sequestration' and is void if effected after the commencement of the winding up.

completed before the commencement of the winding-up (ie before the application for winding-up is presented to court). Additionally, if despite the creditor not completing the execution or attachment before winding-up commences, the court may exercise its discretion to allow him to do so.¹³⁹

Counsel for the liquidator had argued that the general policy of the courts was to stay all actions against a company where winding-up has commenced and that it was only in very exceptional circumstances that the court would depart from its general practice of staying actions against the company or its assets as any execution would necessarily interfere with the distribution of the assets *pari passu*.¹⁴⁰

The court's reasoning was quite straightforward and it was that simply, s 325 did not apply to this case. This is because only attachments or executions are not allowed to be retained in terms of s 325 (the court only considered whether an arrest *in rem* was an 'execution' and did not consider whether it could have been an 'attachment'). Two reasons militated against the argument that an arrest of a ship *in rem* is such an execution in the eyes of the court: first, execution follows judgment whilst an arrest *in rem* precedes it.¹⁴¹ Also, unlike s 228 which includes sequestrations as well as attachments and executions, s 325 only specifies executions and attachments. As *In Re Australian Direct Steam Navigation Company* decided however, an arrest of a ship *in rem* is a sequestration (by implication excluding an *in rem* arrest from being an attachment or execution).¹⁴² Even if this were wrong though, the court would still have exercised the discretion given to it under s 325(1)(c) to allow the shipping creditor to proceed because:

Necessaries men are given a right to secure the risks they take in catering for shipping, and if they exercise their rights without undue delay their rights to become secured creditors should be respected and enforced.¹⁴³

The exercise of the discretion in this manner, ie in favour of allowing specifically maritime creditors leave to proceed after the commencement of the winding-up, in circumstances where parochial creditors would not be so permitted, is a trend in later cases. It may be noted that the *Zafiro* is the only case to have dealt with an application under s 325 whilst other cases have dealt with ss 228 and 231. The discretion, whether to allow the

¹³⁹ Section 325(1)(c) of the Companies Act, 1948 (UK).

¹⁴⁰ Quoting *Anglo-Baltic & Mediterranean Bank v Barber & Co* [1924] 2 KB 410.

¹⁴¹ *The Zafiro* [1960] P. 1 at 14.

¹⁴² *In Re Australian Direct Steam Navigation Company* (1875) LR 20 Eq 325 at 326.

¹⁴³ *The Zafiro* [1960] P. 1 at 16.

creditor to execute under s 231, or to maintain the benefit of his execution or attachment s 325, has however been held to be the same.¹⁴⁴ to do what is right fair in the circumstances. Though creditors will only be given leave to proceed after commencement in ‘exceptional circumstances’.¹⁴⁵

In the *Constellation*,¹⁴⁶ leave had already been given by the chancery division for the sale of three vessels arrested after the commencement of winding-up. In the course of his judgment Hewson J makes a number of important points. First, that it is important that ships arrested (as a diminishing asset) be sold as soon as possible and should get the best possible price. Both of these are best achieved in the admiralty division which is familiar with the ship-broking market.¹⁴⁷ More importantly, in order to achieve the best possible price a purchaser must be assured that the ship is free of all liens and encumbrances – such a sale is only possible in the admiralty division.¹⁴⁸

Hewson J also reviews the case history on the relationship between ss 228 and 231 of the Companies Act, 1948 commenting that the interpretation that s 228 must be read subject to the discretion is s 231 is strained, though despite much criticism, has long been accepted by the courts.¹⁴⁹ Section 228 it will be recalled, voids attachments, sequestrations and executions put in force against a company after the commencement of the winding-up, whilst s 231 provides that despite an order for winding-up having been made, the court may, in its discretion, allow an action or proceeding against an insolvent company to be continued.¹⁵⁰ The court accepted this long-standing construction of the Companies Act, 1948 and allowed the maritime creditors to proceed against the ships by having the ships sold in admiralty and for the distribution of the fund to be in the normal manner in admiralty.¹⁵¹

A most important case on this issue is *In Re Aro Co Ltd* [1980] Ch 96 in the Court of Appeal which also reiterated an important point of admiralty procedure in respect of the consequences of caveats. The result, ultimately granting the maritime creditor leave to

¹⁴⁴ *In Re Aro Co Ltd* [1980] Ch 196 (CA) at 200H-201A and 209F-H.

¹⁴⁵ *In Re Aro Co Ltd* [1980] Ch 196 (CA) at 204G.

¹⁴⁶ [1966] 1 WLR 272.

¹⁴⁷ *The Constellation* at 274.

¹⁴⁸ *Ibid* and see also the *Goulandris* [1927] P. 182 at 193-195 and *In Re Aro* [1979] Ch 613 at 627D.

¹⁴⁹ Since the case of *In Re Great Ship Co.* (1863) 4 De GJ. & S. 63.

¹⁵⁰ See the *Constellation* [1966] 1 WLR 272 at 275 for a summary of the arguments against reading s 228 subject to s 231.

¹⁵¹ *The Constellation* at 276.

proceed under s 231, was fair and correct. Unfortunately, the Court of Appeal continued the trend of looking at whether the maritime claim was secured in terms of insolvency legislation instead of, as the court *a quo* had attempted,¹⁵² to see this as a problem of overlapping jurisdiction.

The facts of the case were that the defendant company's ship had already been arrested *in rem* by another creditor (Shell) on a claim for bunkers and the ship was therefore already under the admiralty division's control. The plaintiff had a claim for short delivery of cargo but instead of re-arresting the ship, the plaintiff adopted the quicker and cheaper course of having a caveat issued against release in the admiralty registry and then issuing summons. This is the standard procedure for any subsequent shipping creditor – to enter a caveat rather than arrest the same property again. So far then, the plaintiff had done everything that was expected of it except serve its summons.¹⁵³ An application was then made by another creditor of the ship-owning company to have it wound-up, which order was granted shortly thereafter. So in an application for leave to continue its action *in rem* under s 231 the question was whether the mere issue of the summons in addition to the entry of the caveat against release, the plaintiff had become a secured creditor (as against the liquidator of the insolvent estate).

This was a very similar issue to that which arose in the *Monica S*.¹⁵⁴ But whereas that case dealt with whether a shipping creditor who had issued a summons *in rem* without having served or arrested the ship could proceed against a bona fide subsequent purchaser of the ship, this case dealt with whether the plaintiff who had only issued a summons *in rem* (and entered a caveat) could nevertheless proceed against the ship when the ship-owning company had subsequently been wound-up.

The court made its approach very clear – whether the plaintiff's application should be upheld depended on whether, by issuing the writ *in rem* and entering a caveat against release, they had attained the status of secured creditors.¹⁵⁵ Really though, given the straightforward reasoning on caveats, this case, like the *Monica S*, centred on whether issue of the writ was enough to secure the plaintiff's claim. As an alternative approach¹⁵⁶ the court also held that

¹⁵² *In Re Aro* [1979] Ch 613 at 637 where Oliver J in the court *a quo* had attempted to link the time at which the maritime claimants became secured with the invocation of the Admiralty court's jurisdiction – in effect, a mixture between the jurisdiction and secured creditor approaches.

¹⁵³ *In re Aro* [1980] Ch. 96 at 202H.

¹⁵⁴ [1968] P 741. See also the discussion of the *Monica S* at pp14-17 *supra*.

¹⁵⁵ *In Re Aro Co Ltd* [1980] Ch 196 (CA) at 207.

¹⁵⁶ *In Re Aro Co Ltd* [1980] Ch 196 (CA) from 209.

even if it were wrong to view the plaintiff as a secured creditor, that it was right and fair to allow the claimants to proceed under the discretion in s 231.

A side-issue to this case, though an important point for admiralty creditors who only enter a caveat against the ship's release, was that a caveat should essentially be considered to be the equivalent to arrest.¹⁵⁷ This is may not such an important point in England where a maritime creditor becomes secured on issue of summons (and therefore arrest/caveat or its absence is immaterial),¹⁵⁸ though it would be an important and persuasive re-statement of principle for South African admiralty law. The result is that even if the reasoning of the *Monica S* is not accepted in South Africa, a maritime creditor seeking to enforce her claim after the ship against which his claim lies has already been arrested, should be satisfied that the effect of entering a caveat is equivalent to arrest.

Turning to the main point of the case, it will be recalled that Brandon J in the *Monica S* had identified three scenarios in which it would be important to identify when the maritime claimant's security accrues in an action *in rem*: if there has been a sale of the ship after issue but before arrest, when priorities arising from an admiralty sale are in issue, and also when the ship-owning company goes insolvent.¹⁵⁹ In the *Monica S* the problem was the sale of the ship after the creditor had issued his writ and Brandon J was particularly careful to confine his reasoning solely to the scenario he had to decide. So much so that, at two separate points in his judgment,¹⁶⁰ he warns against using the reasoning he employs to the two other factual scenarios, saying there would be different considerations in the latter two scenarios.¹⁶¹

Unfortunately, the Court of Appeal does not heed these warnings, indeed, does not even refer to them anywhere in its judgment. Instead, the reasoning in the *Monica S* is wholly endorsed in the following two passages:

The case [the *Monica S*] is of critical importance to our decision because, applied to the instant case, it means that, had the liquidator sold the ship, he could only have sold subject to the plaintiffs' claim.¹⁶²

And later:

¹⁵⁷ *In Re Aro Co Ltd* [1980] Ch 196 (CA) at 210.

¹⁵⁸ See discussion of the *Monica S* at pp14-17 *supra*.

¹⁵⁹ *Monica S* [1968] P 741 at 749.

¹⁶⁰ *Monica S* at 749 and 771.

¹⁶¹ Indeed, in his lengthy and thorough review of past cases on the matter, Brandon J acknowledged that the cases on admiralty and insolvency all favoured *arrest*, and not issue, as being the critical point at which the maritime creditor could be said to have a secured right, the *Monica S* at 771.

¹⁶² *In Re Aro* at 208B.

If it is correct to say, as was not challenged in the court below and is not challenged in this court,¹⁶³ that after the issue of the writ in rem the plaintiffs could serve the writ on the *Aro*, and arrest the *Aro*, in the hands of a transferee from the liquidator and all subsequent transferees, it seems to us difficult to argue that the *Aro* was not effectively encumbered with the plaintiffs' claim. In our judgment the plaintiffs ought to be considered as secured creditors for the purpose of deciding whether or not the discretion of the court should be exercised in their favour under section 231.¹⁶⁴

As the above passages show, the Court of Appeal assumed the correctness of the *Monica S* in order to reach its decision. It is unfortunate that the court did not use the opportunity in this case to put the reasoning in the *Monica S* under closer scrutiny. If however, the *Monica S* is acknowledged as good law, then the Court of Appeal's reasoning is sound, for if one accepts the proposition that the burden of the statutory right of action *in rem* travels with the ship into a new purchaser's hands after issue, with the result that the liquidator could only transfer the ship to the new purchaser subject to this burden, then it would be almost impossible to argue that the ship was not subject to the plaintiff's claim and that they were thus a secured creditor. Of course, this also reinforces the principle that it is only the admiralty division which may sell a vessel free of all liens, charges and encumbrances. A liquidator and even another court would only be able to sell a ship subject to these liens, charges and encumbrances.¹⁶⁵

The court's alternative approach was that the dispensing power in s 231 depended not on whether the plaintiff was a secured creditor, but on the court's discretion. So that even if it was wrong to view the plaintiff as a secured creditor, the court would have in any event exercised its discretion in its favour.¹⁶⁶ The test for the discretion in s 231 was whether it was 'right and fair' to grant the plaintiff leave to proceed with its action. The court went on to hold that this is the same test as that required by s 325(1)(c) (creditor maintaining benefit of execution or attachment not completed before commencement of winding-up). Under the circumstances of this case, where the plaintiff was found to be a secured creditor well before even the commencement of the winding-up, the exercise of the court's discretion was undoubtedly correct and in harmony with other cases allowing non-maritime creditors leave to proceed against a company ordered to be wound-up. The discretion in ss 231 and 325

¹⁶³ This is unsurprising seeing as the liquidator chose not to be represented at the appeal. Had he been, the decision in the *Monica S* would undoubtedly have been put under closer scrutiny.

¹⁶⁴ *In Re Aro* at 209C.

¹⁶⁵ See also the *Goulandris* [1927] P. 182 at 193-195.

¹⁶⁶ *In Re Aro* at 209E-H.

though, has been enlarged by English courts looking to favour shipping creditors in circumstances where parochial creditors would, under similar circumstances, not be allowed to proceed with their action.¹⁶⁷

Finally there is the most confusing case of all: *Linabol*¹⁶⁸ - surely a prime example of the shortfalls of the English approach and why a simpler approach, along the lines of s 10 of AJRA, would be beneficial to English law. In this case the plaintiffs applied for leave in the chancery division to proceed with their actions *in rem* in admiralty against the ship *Bolivia* though they issued their writs after commencement of the winding-up. The ship had however already been arrested *in rem* before the commencement by another creditor, Tramp Oil. This creditor had also obtained an order in the admiralty division for the appraisal and sale of the *Bolivia* which was granted by the admiralty division (even though the winding-up had already commenced).¹⁶⁹ The question was thus whether the creditors (the plaintiffs) who had only issued their writs after commencement of the winding-up should be granted leave to proceed and participate in the distribution of the fund under ss 128 and 130 of the Insolvency Act, 1986 (UK).¹⁷⁰

At the outset it must be stated that the advantage of the jurisdiction approach to a case such as this one is manifest. In this case, a shipping creditor was forced to approach the chancery division for leave to participate in the distribution of the fund of a ship that had already been sold by the admiralty division.

Given the complexity of the issues involved and the differences in the past cases as well as the fact that a judge not trained in admiralty matters was asked to resolve the issue, it is unsurprising that the reasoning employed by the judge is at times, confused and contradictory. For instance, the liquidator challenged the issue of the plaintiffs' writs as being a void sequestration under s 128 (formerly s 228). One of the problems faced by Arden J in this regard was that, under the secured creditor approach set down by the Court of Appeal in *In Re Aro*, the plaintiffs became secured in their claim on the mere issue of writ. However, they had done so after commencement of the winding-up. But, the mere issue of a writ is not

¹⁶⁷ See the discussion of 'shipping bias' in English law at pp 49-51 *infra*.

¹⁶⁸ *Lineas Navieras Bolivianas SAM* [1995] BCC 666.

¹⁶⁹ Leave had been given by the chancery division, in a separate application, to Tramp Oil to proceed with its action and for an order for the sale of the ship, subject to Tramp Oil getting further leave by the chancery division for the distribution of the fund.

¹⁷⁰ Nothing turns on the change in legislation: ss 128 and 130 of the Insolvency Act are the exact same as ss 228 and 231 of the Companies Act, 1948. See annexure A.

enough to trigger s 228 voiding certain proceedings after commencement of winding-up, as issuing a writ is not a ‘sequestration’. So the plaintiffs had essentially secured their claims after commencement of the winding-up – surely a ‘sequestration’ or ‘attachment’ by stealth and therefore an unfair result for unsecured creditors. Under this seemingly contradictory approach, there was nothing in the insolvency legislation to stop the plaintiffs from securing their claim by issuing their writ. On the other hand, and in the maritime claimant’s favour, Arden J was faced by the reality that the ship had already been legitimately arrested and sold in admiralty for another creditor. There was also the practical reality that refusing the plaintiffs leave would result in an undeserved boon for Tramp Oil, the creditor that first arrested the ship in admiralty, in that it would be free to claim against the fund without any competing claims. The ultimate result, granting the plaintiffs leave to proceed was correct, if only for the reason that the practical consequences of refusing leave would have meant an unexpected and undeserved windfall for Tramp Oil.

One of the liquidator’s arguments was quite interesting and was something that was first raised in *In Re Australian Direct Steam Navigation Company*.¹⁷¹ The argument,¹⁷² following the well-established rule of English insolvency law laid down in *Ayerst v C & K (Construction) Ltd*,¹⁷³ was that, at the commencement of the winding-up, the assets of the company passed into a statutory scheme of arrangement with the result that the necessary unity of ownership to launch a statutory action *in rem* was missing (ie the liquidator now ‘owns’ the ship concerned and not the person who would be liable on the claim *in personam*).¹⁷⁴ This argument was never addressed directly by Arden J who instead, chose to turn it on its head.

The crux of her argument turned not on the commencement of the winding-up as the liquidator had contended, but on the sale of the ship ordered by the admiralty court:

The effect of the order for sale made by the Admiralty Court on the assets of the company must, it seems to me, have been *to convert the company's interest in the ship into a right to receive the balance of the proceeds of sale remaining* after satisfaction of the prior claimants. As a result of conversion it would appear that the present applicants do not in

¹⁷¹*In Re Australian Direct Steam Navigation Company* (1875) LR 20 Eq 325.

¹⁷²*Linabol* at 675.

¹⁷³ [1976] AC 167.

¹⁷⁴ Under s 20 of the Supreme Court Act, 1981 it will be recalled that in order to enforce a statutory lien, the person who would be personally liable on the claim must own the ship. The same rule applies in South Africa, see s 3(4) of AJRA.

fact require leave under s. 130(2) because they are not proceeding against either the company or the company's property (my emphasis).¹⁷⁵

This has been subject to rightful criticism by Derrington¹⁷⁶ who argues that carried to its logical conclusion, this argument would mean that any subsequent creditor in admiralty, after the ship had already been arrested and sold, would not be able to enforce his statutory lien against the resulting fund.¹⁷⁷ This just cannot be the case as the admiralty rules in England (as well as South Africa) oblige maritime claimants to claim against the fund instead of the ship.¹⁷⁸ This was a somewhat surprising conclusion to reach as Arden J had in fact referred to this feature of admiralty law earlier in her judgment.¹⁷⁹ Thus she quotes Meeson,¹⁸⁰ and *The Acrux*¹⁸¹ both of which state that that after a sale in admiralty all maritime claims can only be enforced against the fund formed from the sale of the ship. Thus a sale in admiralty cannot have the effect, as Arden J contends, to convert the company's interest in the ship into a right to receive the balance of proceeds for otherwise, and contrary to long-standing admiralty law and practice, subsequent claimants *in rem* would not be able to enforce their claims against the fund.

III. Comments on the English approach

Unlike the court *a quo* in the *Aro* case,¹⁸² which had attempted to view this as a problem of overlapping jurisdiction, all the cases surveyed chose to continue the trend of deciding whether a maritime creditor was a secured creditor in terms of insolvency legislation before allowing him to continue his action in the admiralty division. For maritime creditors in general this is a less than satisfactory approach as it multiplies the legal proceedings they have to launch in a number of courts, as well as providing the liquidator with the opportunity of challenging their claims on a number of grounds in the insolvency legislation (*viz.*, stays and restraints in s 231, void executions or sequestrations in s 228, and retaining the benefit of

¹⁷⁵ *Linabol* at 676.

¹⁷⁶ Sarah Derrington 'The Interaction between Admiralty and Insolvency Law' (2009) *ANZMLJ* 30.

¹⁷⁷ Sarah Derrington 'The Interaction between Admiralty and Insolvency Law' (2009) *ANZMLJ* 30 at 33.

¹⁷⁸ In England r 31 of the Admiralty Rules 1988 and r 4(4) and r 6(3)(e) of the Admiralty Rules 1997 in South Africa.

¹⁷⁹ *Linabol* at 670.

¹⁸⁰ N Meeson *Admiralty Jurisdiction and Practice* (1993).

¹⁸¹ *The Acrux* [1965] P. 391.

¹⁸² *In Re Aro* [1979] Ch 613.

uncompleted attachments or executions in s 325). For example, the maritime claimant in the *Zafiro* had already been given leave by the chancery division to proceed with its arrest *in rem* under s 231 of the Companies Act, 1948 despite the fact that the winding-up had already commenced. The liquidator then decided to further challenge the maritime claimant by making an argument under s 325 of the Companies Act, 1948. And in *In Re Aro*, a straightforward claim for short delivery of cargo became subject to numerous applications and counter-applications, in both admiralty and chancery, and then even had to go on appeal.

Far better would it have been for the English courts to borrow from South Africa's s 10 of AJRA and view this as a problem of overlapping jurisdiction. All the more so in those cases¹⁸³ where the subject matter of the overlapping jurisdiction, the ship, was already under arrest in admiralty at the instance of other maritime claimants. If this approach had been adopted in those cases, the maritime claimants could all have submitted their claims for determination in the court specially designed for their claims, and the residue of whatever would have been left of the judicial fund after the sale of the ship could then have been transferred to the liquidator. This is fairer to maritime creditors who often assume risks of a special nature due in part to the international nature of shipping.¹⁸⁴ It is also far simpler and more efficient than the approach hitherto adopted by the English courts asking whether each shipping claimant is a secured creditor (on the basis of a maritime or statutory lien, before or after the commencement of the winding-up, or the order for winding-up).

Of course this would mean that parochial creditors would first have to wait for all concerned maritime creditors to have their claims satisfied. Although this may seem unfair at first glance, the only ground for the parochial creditors to apply for winding-up in the first place is because the ship is within the courts' jurisdiction. But often, the only reason why the ship is within the jurisdiction in the first place is because it has been arrested in admiralty under that court's wide jurisdiction.¹⁸⁵ As remarked in a case involving, as is often the case, a foreign ship owning company: 'had the admiralty jurisdiction not been invoked, there would have been no basis upon which parochial creditors would have been able to commence

¹⁸³ *The Constellation, In Re Aro* and *Linabol*.

¹⁸⁴ See the comments by Hewson J in *The Zafiro* [1960] P. 1 at 14-15.

¹⁸⁵ This is because most of the cases deal with ships owned by foreign companies, registered outside England. Thus the only ground of jurisdiction for the court to liquidate these foreign or external companies is by the presence of movable property within the court's jurisdiction, see ss 399-407 of the Companies Act, 1948 (UK) and s 337 read with s 1 sv 'external company' and 'place of business' of the Companies Act, 1973 (SA).

winding-up proceedings.¹⁸⁶ So without a maritime claimant first arresting the ship in admiralty, there would be no basis whatsoever for a parochial creditor to claim the chancery division's jurisdiction to order a winding-up over a foreign-based company.

Further it ensures that all maritime claimants are treated equitably. In other words, the jurisdiction approach ensures the priority of all maritime claims inter se against the res. Say for instance, on the facts of *In Re Aro*, the plaintiff had issued its claim in admiralty only after the commencement of the winding-up and had therefore not become a secured creditor with the result that it would have had to pursue its claim with the liquidator. The creditor who had arrested the ship *in rem* before commencement of the winding-up on the other hand, would be allowed to continue its action in admiralty and therefore completely satisfy its claim first. Of course, this would be unproblematic if the fund formed from the sale of the ship was large enough to cover all claims against it, but this is rarely the case, as in *In Re Aro*. The result would be a disturbance of the priorities between maritime claimants, with one being allowed to satisfy its claim first admiralty, whilst the other would have to be satisfied with whatever residue is left and would, in addition, have to compete with the parochial creditors. Such a result could even be open to abuse by maritime creditors seeking to steal a march on other maritime creditors by arresting *in rem* and shortly thereafter, commencing winding-up proceedings, thereby locking out other maritime creditors from enforcing their claims in admiralty.

Finally, it would also go a long way to ensuring that maritime assets are dealt with in the court specially designed for them. It must be remembered that it is only the admiralty division which can sell a ship free of all liens and charges¹⁸⁷ and this is accepted in international conventions.¹⁸⁸ So it is only the admiralty division which can fetch the highest price for the ship – surely the most efficient and advantageous outcome for all creditors.

¹⁸⁶ *Linabol* [1995] BCC 666 at 673.

¹⁸⁷ The *Goulandris* [1927] P. 182 at 193-195, the *Constellation* [1966] 1 WLR 272 at 274A, the *Acrux* [1962] 1 Lloyd's Rep 405, the *Tremont* (1841) 1 W Rob 163, and N Meeson *Admiralty Jurisdiction and Practice* 4 ed (2011) at 220.

¹⁸⁸ See *Linabol* at 673, the *Cerro Colorado* [1993] 1 Lloyd's Rep 58 at 61, and the International Convention for the Unification of Certain Rules of Law Relating to Maritime Liens and Mortgages, 1926.

IV. Shipping bias in English courts: s 231

The object behind s 228 and its predecessors is of course to help ensure the equal and unhindered collection and distribution of assets. This principle has long been recognised. In the words of Sir R Malins VC: ‘the object of the Act being to secure as far as possible the equality of payments amongst all creditors’.¹⁸⁹ Any action which disturbs this balance is void subject to the safety valve in s 231 which allows the court to exercise its discretion and allow the creditor to proceed after commencement of the winding-up.

The trend in the English cases seems to be based around the concept of a ‘secured creditor’. The importance of such a classification for maritime creditors can be seen from the following dictum in *In Re Aro*:

Most of the cases deal with shipping creditors by classifying them as secured creditors. The approach seems to be that a creditor who is secured is outside of the liquidation as he is claiming his own property. Sections 228 and 231 apply to secured as well as to unsecured creditors. But a secured creditor is in a position where he can justly claim that he is independent of the liquidation, since he is enforcing a right, not against the company, but to his own property: see *In re David Lloyd & Co.* (1877) 6 Ch.D. 339, a case under the predecessor of section 231.¹⁹⁰

However, nearly all of the cases also argue the alternative approach of allowing maritime creditors to proceed with their claims, notwithstanding the commencement of winding-up, not on the basis of whether they have a secured claim, but on the discretion in s 231 and 325 of Companies Act, 1948. In other words, the policy of the English courts seems to be that maritime creditors would in any event be given leave to continue with their actions against the ship, even though these proceedings were initiated after the commencement of the winding-up.

The discretion in both s 231 and s 325 is for the court to do what is right and fair in the circumstances.¹⁹¹ In general, a creditor who has commenced proceedings before the commencement of the winding-up should be allowed to continue once winding-up commences. However it is only in *special circumstances* that a creditor would be allowed to commence proceedings once winding-up has commenced.¹⁹² This of course, ties in neatly

¹⁸⁹ *Re London and Devon Biscuit Co* (1871) L.R. 12 Eq. 190 at 193. See also Turner LJ in *Smith, Fleming & Co.* Law Rep. 1 Ch. 538 at 545 and *Anglo-Baltic and Mediterranean Bank v Barber & Co.* [1924] 2 KB 410 at 418 and *Roberts Petroleum Ltd v Bernard Kenny Ltd (In Liquidation)* [1983] 2 AC 192 (HL) at 208.

¹⁹⁰ *In Re Aro Co Ltd* [1980] Ch 196 (CA) at 204.

¹⁹¹ *In Re Aro Co Ltd* [1980] Ch 196 (CA) at 209F-H.

¹⁹² *In Re Roundwood Colliery Co.* [1897] 1 Ch. 373 at 381.

with the general policy that, at the commencement of the winding-up, the debtor's estate should not be subject to myriad separate claims, but should allow for the orderly and equitable collection and distribution of the remaining assets for the benefit of all creditors.

However the exercise of the discretion in favour of maritime claimants *in rem*, after commencement of the winding-up, is entirely at odds with the position parochial creditors face. Thus, parochial creditors applying to the courts for leave to proceed with an attachment, execution or distress, after commencement, have all, bar a few exceptional cases, been refused. The following was remarked in an early case:

On the other hand, the case of *In re Lancashire Cotton Spinning Co.* 35 Ch.D. 656 (CA) shews that a creditor who does not issue execution or a landlord who does not levy a distress until after the commencement of the winding up will not be allowed to proceed unless there are special reasons which render such a course inequitable.¹⁹³

The bar faced by parochial creditors to convince the courts to allow them to proceed is exceptionally high, especially when compared to maritime creditors in an action *in rem*. Some judgments go further than the 'exceptional circumstances' and posit that the creditor must advance 'weighty reasons' to justify his proceeding despite the commencement of winding-up.¹⁹⁴

One of the few cases in which the 'special or exceptional circumstances, or weighty reasons' test was satisfied was *Armorduct Manufacturing Co Ltd v General Incandescent Co Ltd* [1911] 2 K.B. 143 (Court of Appeal). Leave was granted to a creditor to execute upon a judgment after commencement but only because execution had been delayed by trickery on the part of the defendant. Indeed, a later case, though dealing with the discretion in s 325(1)(c),¹⁹⁵ said that trickery was the only circumstance which qualified as a special circumstance allowing the creditor to retain benefit of execution even though this was

¹⁹³ *In Re Roundwood Colliery Co.* [1897] 1 Ch. 373 at 381. See also *Re London and Devon Biscuit Co* (1871) L.R. 12 Eq. 190, *In re Exhall Coal Mining Co.* (1864) 4 De G. J. & Sm. 377, *In re Lancashire Cotton Spinning Co.* 35 Ch.D. 656 (CA), *Croshaw v Lyndhurst Ship Co* [1897] 2 Ch. 154 at 162-163, *Dimson's Estate Fire-Clay Co, Re* (1874-75) L.R. 19 Eq. 202, *Vron Colliery Co, Re* (1882) 20 ChD 442 (CA) at 445, *Anglo-Baltic and Mediterranean Bank v Barber & Co.* [1924] 2 KB 410 at 418, *Armorduct Manufacturing Co Ltd v General Incandescent Co Ltd* [1911] 2 K.B. 143 (Court of Appeal), *Buckingham International Plc (In Liquidation) (No.2), Re* [1998] B.C.C. 943 (Court of Appeal). See also *Gore-Browne on Companies* 43 ed, vol 2 (1977) at 35-4 and *Halsbury's Laws of England* vol 7(4) (2004) para 888.

¹⁹⁴ *Re Redman (Builders) Ltd* [1964] 1 WLR 541.

¹⁹⁵ Discretion in s 325 and 231 have been held to be the same, see *In Re Aro Co Ltd* [1980] Ch 196 (CA) at 209G-H.

uncompleted by the time winding-up commenced.¹⁹⁶ As can be seen from the *Zafiro*, *Linabol*, and the *Constellation* cases, maritime creditors do not have to satisfy such a difficult test. Instead the discretion seems to be automatically exercised in their favour with little or no justification for such a departure from settled principles.

There seems to be only a slight hint on the courts' part justifying this 'shipping bias'. *Linabol* allows the shipping claimant to continue without properly explaining what 'special circumstances' the claimant found himself in that would justify his continuing an action after the commencement of the winding-up – bar being a shipping creditor. Neither does the *Zafiro* or the *Constellation*. All allow maritime creditors to proceed despite winding-up having already begun. The only hint that perhaps reveals why the court allowed shipping creditors to proceed in circumstances where parochial creditors would not be permitted, is that all three cases refer to the special risks faced by maritime creditors.¹⁹⁷

¹⁹⁶ *Re Grosvenor Metal Co Ltd* [1950] Ch. 63.

¹⁹⁷ *Linabol* at 677, the *Zafiro* at 14-15, and the *Constellation* at 276.

CHAPTER 5: TRIUMPH OF ADMIRALTY OVER PAROCHIAL LAW?

SECTION 10 OF AJRA

Section 10 of AJRA,¹⁹⁸ though having thus far received little attention in South Africa, is one of the outstanding features of South African admiralty practice since it so neatly avoids all the problems that English law faces when it comes to the interface between admiralty and insolvency law.¹⁹⁹ Though it is one section, it would have been better to split it into two subsections to properly distinguish between its two separate but mutually reinforcing parts.

The overall purpose of the section, and the emphasis in the first part is to, in line with the scheme of the AJRA,²⁰⁰ exclude property that is under the admiralty division's jurisdiction from the control of the liquidator in a winding-up (as well as a trustee in a sequestration) – in essence, to ring-fence maritime property under the admiralty division's control from the liquidator so that said maritime property (or more precisely, the fund formed from the sale of such property under s 9 of AJRA) can be used to satisfy *solely* maritime claims in the order of priorities as set out in s 11 of AJRA. This ensures that maritime property satisfies maritime claims first. Section 10 of AJRA is however subject to s 11(13) which states that if there is anything left in the maritime fund after all maritime claims have first been settled, then this balance is to be paid over to the liquidator. This small caveat gives us an insight into the nature of s 10 - that by arresting (or getting security in admiralty), the admiralty division's jurisdiction over the property is crystallised to the exclusion of all other courts with the aim of using the maritime fund to satisfy maritime claims first with any remainder being paid over to the liquidator. This, in essence, amounts to a statutory preference for maritime creditors over parochial creditors (as long as they act before the winding-up).

Section 10 is triggered by three events: an arrest in admiralty, security given in respect of any maritime claim or a sale in admiralty. Only the first two need our attention since a sale in admiralty necessarily entails that there has first been an arrest or security. The fact that only an 'arrest' and not an attachment triggers s 10 may seem perplexing at first since it could mean that any maritime claimant that attaches *in personam* would not have the benefit of s 10 - with the potential that the property attached would fall into the insolvent

¹⁹⁸ See Annexure A.

¹⁹⁹ See the discussion of some of the shortfalls of the English approach at pp 46-48 *supra*.

²⁰⁰ See ss 3(5), 3(10), 9 and 11.

estate rather than remain under the admiralty division's control. A less than satisfactory result as the maritime claimant would then have to compete with the claims of parochial creditors. However, s 8(2) of the AJRA clears up any potential confusion by saying that an attachment *in personam* for a maritime claim shall have the same result as an action *in rem* in respect of ss 9, 10 and 11. Therefore an attachment of maritime property²⁰¹ also triggers the operation of s 10 (only an arrest shall be referred to in the rest of this section, but this should be taken to include attachments also unless the contrary is specified).

Security in admiralty includes security to secure the release of any arrested property as well as security to avoid arrest.²⁰² Once security is given, then it forms a fund under the admiralty division's control which can be used to satisfy any maritime claims for which the security was given.²⁰³ Security to avoid arrest is the interesting feature for the purposes of this dissertation since security given to release property necessarily means that the ship is under arrest (thus already triggering s 10). Security to avoid arrest on the other hand would be its own triggering event as s 10 does not limit 'security' to security to release the ship from arrest but should be taken so as to also include security to avoid arrest. The threat of arrest to get pre-emptive security might be a way for a maritime claimant to get the protection of s 10 quickly if the insolvency of the ship-owning company is imminent.²⁰⁴

The second part of s 10 simply states that no claim in respect of any arrested property or any security, or the claim for which the arrest or security was given shall be stayed by, or by reason of, any sequestration or winding-up. A useful provision which, if it were part of English law, would avoid the flurry of applications and counter-applications from maritime claimants, parochial creditors, and liquidators, in two separate courts, when a ship-owning company is about to be wound-up.²⁰⁵

Section 10 was considered in both the *Rennie*²⁰⁶ and *Nantai Princess*²⁰⁷ cases. In *Rennie*, counsel for the maritime creditor had tried to argue that, because of the special nature

²⁰¹ Ie the six types of property which appear in s 3(5)(a) to (e) of AJRA. Property attached outside of this list of six does not form a fund in the same way as maritime property does (s 9), and the execution process for non-maritime property that is attached is the same as the usual, civil method of execution (s11(1)(b)).

²⁰² See *The Merak S 2002* (4) SA 273 (SCA) at 278E-279J for a discussion of security in admiralty claims.

²⁰³ Sections 3(10) and 3(11) of the AJRA.

²⁰⁴ See chapter 3.2 and note 92.

²⁰⁵ As in the *Linabol* case, see discussion at pp 44-46.

²⁰⁶ *Rennie NO v South African Sea Products Ltd* 1986 (2) SA 138 (C).

²⁰⁷ *The Nantai Princess Line Co Ltd v Cargo Laden on the Nantai Princess* 1997 (2) SA 580 (D).

of the security given to maritime claimants, s 10 should be read so widely as to exclude property arrested (or security given) in admiralty even after the winding-up order had been made. On this point,²⁰⁸ Berman AJ reasoned that it is quite obvious, on a grammatical analysis of s 10, that it is definitely limited in time to arrests that occur before the winding-up order. This is because the section states that arrested property shall not form part of the assets *to be* administered by the liquidator. Had the section been intended to include arrests occurring after the order had been made this would have instead been read to say: to be administered *or under administration* by the liquidator'. In fact, it becomes even more obvious that s 10 is limited to arrests that occur before liquidation when one considers personal insolvency ('sequestration'). For, in that regard, s 10 states that any arrested property shall not vest in the trustee in insolvency. The insolvent's property vests in the trustee on his appointment.²⁰⁹ And of course, if property has already vested with the trustee it cannot also simultaneously vest in the admiralty division – property cannot vest in two persons.

Levinsohn J in the *Nantai Princess* agreed with this analysis²¹⁰ and it must be admitted, it would be hard to argue against it. Indeed, it is telling that counsel for the maritime claimants in the *Nantai Princess*, Mr Douglas Shaw QC (who authored one of the leading textbooks on admiralty in South Africa²¹¹ as well as drafted most of the AJRA) did not even attempt to argue against Berman AJ's reasoning on this point even though it would have been, if successful, determinative of the case in his client's favour.

After surveying the English and South African approaches to the interface between admiralty and insolvency law, it is not too hard to see the advantages of the jurisdiction approach as evinced by s 10 of the AJRA. The English secured creditor approach is confused, inconsistent, time-consuming and expensive. South Africa's jurisdiction approach is none of these things. It is a much simpler and cleaner approach to the whole problem. It avoids a multiplicity of proceedings in two different courts. By clearly setting out which court has jurisdiction over the subject matter, it avoids courts being set up against one another. It is fairer to maritime claimants who have been given special rights by statute to secure and

²⁰⁸ *Rennie* at 144I-145C.

²⁰⁹ Section 20(1)(a) of the Insolvency Act 24 of 1936.

²¹⁰ *Nantai Princess* at 590I-591B. Though the learned judge also wondered whether, given the special nature of the protection given to maritime claimants, s 10 should be amended to exclude property arrested in admiralty *at any time* from falling into the insolvent estate.

²¹¹ DJ Shaw *Admiralty Jurisdiction and Practice in South Africa* (1987).

enforce their claims. Finally, the jurisdiction approach ensures that maritime property remains under the admiralty division's control to satisfy maritime debts and where ships can be sold quickly, under a well-known process, for the best price and free from any encumbrances, charges and liens. By so doing, it avoids the unfair situation where a ship is already under arrest in the admiralty division when its company gets wound-up which thereby prevents subsequent maritime creditors from enforcing their claims.

In fairness to the English approach, though it is confusing and time-consuming, it has ironically turned out to be much friendlier to maritime creditors than South Africa. This is because of the discretion in s 231 of the Companies Act, 1948, which is not part of South African law, and which gives English courts the liberty to allow shipping creditors to proceed with their claim despite the commencement of the winding-up. As we have seen from the South African cases of *Rennie* and the *Nantai Princess*, once winding-up commences (and provided of course the order is made final) a maritime creditor seeking to enforce her claim in South Africa cannot proceed in admiralty and would be forced to share in the insolvent estate with parochial creditors instead of with just maritime creditors.

CHAPTER 6: THE NATURE OF THE ACTION IN REM AND UNITY OF OWNERSHIP FOR STATUTORY LIENS IN ENGLISH LAW

I. The nature of the action in rem

An interesting argument to counter any contention by the liquidator that any proceeding against the company after commencement of the winding-up is void, first raised by counsel in *In Re Australian Direct Steam Navigation Company*,²¹² is that by its very nature, an action *in rem* is an action against the ship itself and not the owner. This was also a point raised by counsel for the maritime claimant in *In Re Aro*²¹³ though not argued before the court. The argument proceeds along the following lines: as the action *in rem* is an action against the ship itself, the arrest does not fall foul of the provisions in the Companies Act that void certain actions *against the company* after commencement of winding-up. This is an argument which, if true, could have implications for the debate over the nature of the action *in rem*.²¹⁴ Unfortunately for the argument, the action *in rem*, at least in England,²¹⁵ has for some time been held to be an action designed to compel the owner who is personally liable to appear before the court – the procedural theory.²¹⁶ Therefore, from its outset,²¹⁷ the action *in rem* is against the owner of the ship. There is thus no room to argue, if one accepts the long-standing procedural view of the action *in rem*, that an arrest is directly against the ship and thus does not fall foul of those provisions in the Companies Act which void proceedings against the company after commencement of the winding-up.

There is however a more substantial reason not to accept this argument and that is that s 228 of the Companies Act, 1948, like all its predecessors and successors, voids an arrest

²¹² (1875) LR 20 Eq 325.

²¹³ [1979] Ch 613.

²¹⁴ For an overview of the debate see Derrington and Turner *The Law and Practice of Admiralty Matters* (2007) at 18-30 and Hofmeyr *Admiralty Jurisdiction and Practice in South Africa* 2 ed (2012) at 98-116.

²¹⁵ And probably also in South Africa since the decision in the *MV Alina II (No 2) Transnet Ltd v Owner of MV Alina II* 2011 (6) SA 206 (SCA).

²¹⁶ See the *Dictator* [1892] P 304, the *Indian Grace (No 2)* [1997] UKHL 40; [1998] AC 878.

²¹⁷ The *Indian Grace* suggests that the action *in rem* is from the outset against the owner of the ship. This is subject to trenchant criticism by N Teare QC ‘The Admiralty action *in rem* and the House of Lords’ [1998] *LMCLQ* 33 however, who argues that it is only entry of appearance which turns the action into a hybrid.

effected after the commencement of the winding-up as a ‘sequestration’ put in force against the company *or its effects*. The section is clearly not designed to void certain proceedings only against the company, but also against the company’s assets (or ‘effects’ as the section describes it). The arrest would thus be void. Section 231 is of no use in this scenario either as the dispensing power in that section to nevertheless allow void proceedings in terms of s 228 to proceed, is limited to proceedings against the company, and not proceedings against the company and its effects.²¹⁸

II. Unity of ownership for statutory liens

Another argument, though this time raised on behalf of liquidators seeking to have arrests *in rem* disallowed after commencement of the winding-up, is to be found in *Linabol*. Before discussing the argument itself, it would be useful to first remember the important distinction between an action *in rem* based on maritime lien, to one based on statutory lien, which was discussed *supra*.²¹⁹ An action *in rem* based on a statutory lien, both in England²²⁰ and South Africa,²²¹ requires that the owner of the property to be arrested would be liable on the cause of action *in personam* – in essence, there must be a same link in the ownership of the ship by the owner who is personally liable, both at the time the cause of action arose, and when it is enforced.²²²

The argument followed an old and well established rule of English insolvency law that is to the effect that, at the commencement of the winding-up, the assets of the company pass into a statutory scheme of arrangement.²²³ Therefore an arrest *in rem* based on a statutory lien after commencement is actually not possible because there is not the necessary

²¹⁸ Section 130 of the Insolvency Act, 1986 (the successor to s 231) however does include the company as well as its assets as part of the discretion.

²¹⁹ See chapter 2.1.

²²⁰ Section 21(4)(b) of the Supreme Court Act, 1981 says an action *in rem* may be enforced against the ship concerned if the beneficial owner was the same when the cause of action arose to when the action is enforced.

²²¹ Section 3(4)(b) of the AJRA is to the same effect as the SCA, 1981 except it speaks of the ‘owner’ and not the ‘beneficial owner’.

²²² The only exception to this rule, which need not detain us, is the associated and sister ship provisions in South Africa and England respectively.

²²³ *Ayerst v C & K (Construction) Ltd* [1976] AC 167 at 176-177, *Roberts Petroleum Ltd v Bernard Kenny Ltd* [1983] 2 AC 192 and *In Re Oriental Inland Steam Co* (1874) 9 Ch. App. 557.

unity of ownership²²⁴ (as the ship would have passed from the personally liable owner to the trustee in the time between the cause of action to the time the claim is enforced). In effect, that the link in ownership necessary for the action *in rem* based on statutory lien is missing right from the very beginning of the action.

If accepted, this would be a formidable obstacle for maritime claimants seeking to enforce their claim *in rem*. Fortunately, this argument has never been the basis for a court's decision not to allow an action *in rem* to proceed. As discussed *supra*²²⁵ in the one case where the argument was seriously raised, it was turned on its head by the court and therefore not critically considered. It however raises issues of fundamental importance to maritime creditors since, the Supreme Court Act, 1981²²⁶ requires *beneficial ownership* of the ship to be the same both when the cause of action arose and when it is enforced. As seen from the *Ayerst*²²⁷ case, it is exactly this beneficial ownership which passes from the shipowner into the statutory scheme once winding-up commences and which could in the future, be a problem for maritime claimants.

This issue is also discussed by the learned authors of *The Law and Practice of Admiralty Matters*²²⁸ where they cite cases involving just this point in Australia and Hong Kong and where the courts in each of these countries refused to follow the *Ayerst* principle. These cases instead reasoned that ownership of the company's assets must be distinguished from control – the statutory scheme only gives the liquidator control of the company's assets and not ownership. The maritime claimants could therefore still commence their actions *in rem* based on a statutory lien even after commencement of the winding-up. Interestingly this same distinction has long been recognised in the law of corporate winding-up in South Africa, see s 361 of the Companies Act, 1973 (cf though individual insolvency in South Africa, sequestration, where under s 20(1)(a) of the Insolvency Act, 1936, the assets of the insolvent do *vest* in the trustee when the sequestration order is made (which includes a provisional order see s 2 sv 'sequestration order').

This is yet another reason for English law to heed South Africa's jurisdiction approach since issues of vesting and beneficial ownership would not matter if the South African approach were followed.

²²⁴ *Linabol* [1995] BCC 666 at 675.

²²⁵ See discussion on *Linabol supra* pp 44-46.

²²⁶ Section 21(4)(b).

²²⁷ *Ayerst v C & K (Construction) Ltd* [1976] AC 167.

²²⁸ Derrington and Turner *The Law and Practice of Admiralty Matters* (2007) at 203-204 and 206-209.

CONCLUSION

At the beginning of this dissertation we considered the timing of two crucial events: the accrual of the security in admiralty claims (based on maritime liens, *in rem* claims, and *in personam* claims) as well as the commencement of winding-up proceedings. Both are problematic. The former because the answer would seem to be that, at least for the contentious statutory lien, the security accrues once the writ is issued. This has however, been shown to be problematic and not consistent with South African common law. The latter is problematic mainly because of the retrospective effect of the winding-up order – that it is deemed to commence, and hence that a number of provisions come into play which hinder enforcement of claims against the debtor, when the application for winding-up is presented to court and not when an order for winding-up is made.

South African case law has not been as generous to maritime creditors as s 10 of AJRA would seem to suggest. Instead it has been quite strict to enforce the retrospective effects of the winding-up process to maritime creditors. English law on the other hand has, despite a number of contradictory and at times confusing approaches, ultimately dealt with maritime creditors in a much more free-handed manner.

This dissertation has attempted to demonstrate the awkward overlap between two areas of law that have developed with little regard to one another. Arguably the approach of South African law, which is to look first and foremost at which court has jurisdiction over the subject matter, is far superior conceptually, as well as in its practical results, than English law. The English approach attempts to fit admiralty processes into the nomenclature and legal framework of insolvency law with varying results. Ultimately, in order to fit the admiralty action *in rem* English courts have had to unjustifiably enlarge a statutory discretion. It is also costly, time-consuming and unfair to litigants. The South African approach is none of these things and though not as accommodating to maritime creditors as English law, it is at least very clear and recognises the problem for what it truly is: one of jurisdiction. English law would do well to borrow from the South African example to clear up this confusing area of its law.

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Annexure A – Table of statutory provisions

Type of Provision	United Kingdom	South Africa
Void Actions	<ul style="list-style-type: none"> - s 163 of the Companies Act, 1862 (56 & 57 Vict. c. 14.): ‘Where any company is being wound up by the Court or subject to the supervision of the Court, any attachment, sequestration, distress, or execution put in force against the estate or effects of the company after the commencement of the winding-up shall be void to all intents.’ - s 228 of the Companies Act, 1948: ‘Where any company registered in England is being wound up by the court, any attachment, sequestration, distress or execution put in force against the estate or effects of the company after the commencement of the winding up shall be void to all intents.’ - s 128 of the Insolvency Act, 1986: ‘Where a company registered in England and Wales is being wound up by the court, any attachment, sequestration, distress or execution put in force against the estate or effects of the company after the commencement of the winding up is void.’ 	<ul style="list-style-type: none"> - s 359(1)(b) of the Companies Act 61 of 1973: ‘Any attachment or execution put in force against the estate or assets of the company after the commencement of the winding-up shall be void.’
Proceedings after winding-up order (notice South Africa has no discretion).	<ul style="list-style-type: none"> - s 87 of the Companies Act, 1862 (56 & 57 Vict. c. 14.): ‘When an order has been made for winding up a company under this Act, no suit, action, or other proceeding shall be proceeded with or commenced against the company, except with the leave of the Court, and subject to such terms as the Court may impose.’ - s 231 of the Companies Act, 1948: ‘When a winding-up order has been made or a provisional liquidator has been appointed, no action or proceeding shall be proceeded with or commenced 	<ul style="list-style-type: none"> - s 359(1) of the Companies Act 61 of 1973: ‘When the Court has made an order for the winding-up of a company or a special

	<p>against the company except by leave of the court and subject to such terms as the court may impose.’</p> <ul style="list-style-type: none"> - s 130 of the Insolvency Act, 1986: ‘When a winding-up order has been made or a provisional liquidator has been appointed, no action or proceeding shall be proceeded with or commenced against the company or its property, except by leave of the court and subject to such terms as the court may impose.’ 	<p>resolution for the voluntary winding-up of a company has been registered in terms of section 200 –</p> <p>(a) all civil proceedings by or against the company concerned shall be suspended until the appointment of a liquidator.’</p>
<p>Maintaining benefit of attachment or execution</p>	<ul style="list-style-type: none"> - s 325(1) of the Companies Act, 1948: ‘Where a creditor has issued execution against the goods or lands of a company or has attached any debt due to the company, and the company is subsequently wound-up, he shall not be entitled to retain the benefit of the execution or attachment against the liquidator in the winding up of the company unless he has completed the execution or attachment before the commencement of the winding up; (c) the rights conferred by this subsection on the liquidator may be set aside by the court in favour of the creditor to such extent and subject to such terms as the court may think fit.’ - s 183(1) of the Insolvency Act, 1986: ‘Where a creditor has issued execution against the goods or land of a company or has attached any debt due to it, and the company is subsequently wound up, he is not entitled to retain the benefit of the execution or attachment against the liquidator unless he has completed the execution or attachment before the commencement of the winding 	<ul style="list-style-type: none"> - No Equivalent in South Africa

	<p>up. (c) the rights conferred by subsection (1) on the liquidator may be set aside by the court in favour of the creditor to such extent and subject to such terms as the court thinks fit.’</p>	
<p>Discretionary stay after application for winding-up presented but before order</p>	<p>- s 226 of the Companies Act, 1948: ‘At any time after the presentation of a winding-up petition, and before a winding-up order has been made, the company, or any creditor or contributory, may— (a) where any action or proceeding against the company is pending in the High Court or Court of Appeal in England or Northern Ireland, apply to the court in which the action or proceeding is pending for a stay of proceedings therein; and (b) where any other action or proceeding is pending against the company, apply to the court having jurisdiction to wind-up the company to restrain further proceedings in the action or proceeding; and the court to which application is so made may, as the case may be, stay or restrain the proceedings accordingly on such terms as it thinks fit.’</p>	<p>- s 358 of the Companies Act 61 of 1973: ‘At any time after the presentation of an application for winding-up and before a winding-up order has been made, the company concerned or any creditor or member thereof may— (a) where any action or proceeding by or against the company is pending in any court in the Republic, apply to such court for a stay of the proceedings; and (b) where any other action or proceeding is being or about to be instituted against the company, apply to the Court to which the application for winding-up has been presented, for an order restraining further proceedings in the action or proceeding, and the court may stay or restrain the proceedings accordingly on such terms as it thinks fit.’</p>
<p>Commencement of winding-up</p>	<p>- s 84 of the Companies Act, 1862: ‘A winding up of a company by the Court shall be deemed to commence at the time of the presentation of the petition for the winding-up.’ - s 229 of the Companies Act, 1948:</p>	<p>- s 348 of the Companies Act 61 of 1973: ‘A winding-up of a company by the Court shall be deemed to commence at</p>

	<p>‘(1) Where, before the presentation of a petition for the winding-up of a company by the court, a resolution has been passed by the company for voluntary winding up, the winding-up of the company shall be deemed to have commenced at the time of the passing of the resolution, and unless the court, on proof of fraud or mistake, thinks fit otherwise to direct, all proceedings taken in the voluntary winding up shall be deemed to have been validly taken.</p> <p>(2) In any other case, the winding up of a company by the court shall be deemed to commence at the time of the presentation of the petition for the winding up.’</p>	<p>the time of the presentation to the Court of the application for the winding-up.’</p>
<p>Section 10 of the AJRA</p>	<p>- No equivalent in Supreme Court Act, 1981</p>	<p>- Any property arrested in respect of a maritime claim or any security given in respect of any property, or the proceeds of any property sold in execution or under an order of a court in the exercise of its admiralty jurisdiction, shall not, except as provided in section 11 (13), vest in a trustee in insolvency and shall not form part of the assets to be administered by a liquidator or judicial manager of the owner of the property or of any other person who might otherwise be entitled to such property, security or proceeds, and no proceedings in respect of such property, security or proceeds, or the claim in respect of which that property was arrested, shall be stayed by or by reason</p>

		of any sequestration, winding-up or judicial management with respect to that owner or person.
Section 11(13) of the AJRA	- No equivalent in Supreme Court Act, 1981	- Any balance remaining after the claims mentioned in paragraphs (a) to (e) of subsection (4) and the claims mentioned in subsection (11) have been paid, shall be paid over to any trustee, liquidator or judicial manager who, but for the provisions of section 10, would have been entitled thereto or otherwise to any other person entitled thereto.