Saisie Conservatoire and the Admiralty action in rem: estranged cousins: a comparative analysis between South African and French Admiralty law.

By

Student: Hernandez Deborah

Student number: HRNDEB001

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Supervisor: Professor Graham Bradfield, Department of Commercial Law, University of Cape Town

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Saisie Conservatoire and the Admiralty action in rem: estranged cousins: a comparative analysis between South African and French Admiralty law.

Chapter 1: Introduction

Throughout centuries of conquest, trade and new horizons discovered, sea-going vessels have always been the most important device in every maritime voyage. The specific statute of vessels within maritime ventures justifies the fact that they have always been coveted by maritime investors or creditors, as they have been considered the symbol of riches.

The covetous attitude towards vessels in maritime law forces seamen to be very protective towards their property: they give them affectionate names, personalities (in English grammar, 'ship' is the only word having a gender), a statute, an object needing protection: She becomes the apple of their eye.

Even if today, the dimension of our world, the Globalisation of our trade, our new consumption habits have drastically modified the mission of ships and vessels at seas, one element still links our contemporary world to our maritime past: the economic value of the ship.

In our money-centred society, the economic value of a vessel has throughout the ages been envisaged as being a guarantee, security for various parties involved in the maritime voyage: owners of cargoes, insurance companies, P&I club, ship owners, charterers, and various other creditors are all interested in the commercial value of the ship. When a creditor has a maritime claim, a debt to secure in relation to a specific vessel or the vessel's owner, the most effective remedy available to this creditor is for him to arrest the ship.

With the proliferation of traffic at sea, the only possibility for a worried creditor to secure a maritime claim is when a vessel has to berth in a port. At this moment only, the litigant will be able to put pressure on potentially unscrupulous ship owners by arresting the berthed vessel. The arrest or attachment procedure has always been considered in the shipping law context to be a powerful weapon which needs to be

initiated with precaution. Indeed, when envisaging the total expense related to a vessel carrying goods from one part of the world to another, the decision to arrest the vessel must be carefully considered.

Depending on the admiralty law of the port where the vessel is arrested, conditions, proceedings and criteria for the arrest might differ drastically, or in the contrary, be similar. The subject of this study is to give a realistic illustration to the previous statement.

Through the analysis of historical origins and various notions and procedures, the study will try to draw, when possible, a common link between two countries, France and South Africa, which seem to be as distant geographically as they are legally when examining their enforcement procedures for maritime claim.

The objective of this study is not to describe the detailed and complex regime of the admiralty rules relating to the arrest of ships in South Africa and France, but to provide, as a practical guide, an understanding of the main features of each system, stressing along the way the fundamental differences and eventual similarities, the practical implications and jurisdictional consequences.

Finally, the pros and cons of the various systems will be underlined and the impacts of such practice on the shipping business for both countries will be considered in conclusion.

Chapter 2: Origins of legal systems and relevant sources of law regarding the admiralty jurisdiction and practice in South Africa and France

France is a civil law country with a legal system based mostly on codes whereas South Africa has a common law tradition, in which the main principles of English Admiralty law has been imported into South African law by way of statutory enactments. Through the light of this statement it seems difficult to draw any link or resemblance between South African and French maritime law.
However, a more detailed analysis of the sources of European maritime law might show that these two countries were once closely linked.

2.1 A common heritage: History of European maritime law

With South Africa's origins in Admiralty law lying in the juxtaposition of two legal systems, Roman Dutch and English (as it will be underlined later on in this study), it seems relevant and important to understand the origins of European maritime law.
Without going back too far in time, it appears that historians have traced back the most 'significant maritime law provisions of Roman times'[1] in the Rhodian Laws.
'From the fact that the Romans were allies of the Rhodians and from the reference in the Digest, it is logical to assume that Roman maritime law borrowed heavily from that of Rhodes [...], the maritime code of the later Eastern Empire, dating from the 7th or 8th century, was called the Rhodian Sea Law.'[2]
Because of the fact that at that period, the Mediterranean, controlled by the Romans, was the centre for all types of commercial activities, ' European maritime law evolved as a uniform, supranational, comprehensive body of law'[3].
'The earliest code to emerge beyond the Mediterranean was the Rolls of Oléron [...] apparently dating from the 12th century.'[4] 'This code became the source of all maritime law not only of England and France but also of Scotland, Flanders, Prussia and Castile[...]'[5].

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[1] Hare J *Shipping law and admiralty practice in South Africa* at 4
[2]Encyclopaedia Britannica 'Maritime law' (2008) available at http://www.britannica.com/EBchecked/topic/365510/maritime-law [Accessed 19 September 2008]
[3] Idem
[4] Idem
[5] Idem

From these historical facts it appears that English and French maritime law were similar and headed towards a harmonised set of maritime rules.
However this uniformity of thought around maritime law began to disappear from continental Europe with 'the rise of nationalism in the 17th century'[6].

2.2 Divergences: the separation of South African and French maritime law

The divergence of approachs to maritime law appeared to be most obvious in the 17th century. At that time, nationalism in continental Europe was rising and a wave of codification was invading European systems of law. 'The most significant (codifications) were the Ordinances, prepared under Louis XIV's finance minister, Jean-Baptiste Colbert, as part of his comprehensive though unfulfilled plan for the codification of French law.'[7]
The French Revolution of 1789 served to estrange French and English maritime law by "killing" French Admiralty courts and adopting the Commerce Code (in 1807), which considered maritime law to be simply a branch of commercial law[8], giving commercial courts jurisdiction to decide upon maritime matters.
On the other side of the channel, English maritime law, due to the creation of the High Court of Admiralty and the commercial supremacy of England, departed strongly from the evolutionary path of Continental maritime law.
Even if it appears that at first English and French maritime law shared a common origin, this ended in the 17th century.
When English law was strengthening the jurisdiction of its Admiralty courts, French law 'killed' its own. While 'civil law countries such as France never experienced the conflict between admiralty and common law courts'[9], the English judiciary system was 'plagued' for centuries by this conflict. Indeed these two countries which were once part of the same family, became estranged to one another.

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[6] Idem
[7] Idem
[8] Idem
[9] Tetley William 'Arrest, Attachment and Related Maritime Law procedures' (1999) *Tulane Law Review* at 1895 – 1985 available at http://www.mcgill.ca/maritimelaw/maritime-admiralty/arrest/ [Accessed 23 September 2008]

This difference in evolutionary processes interestingly explains the noticeable departures between South African and French maritime law, one of these being the absence of Admiralty courts and law in France.
The influence of history is important when trying to understand a system of law and South African admiralty rules as well as French maritime law are greatly clarified in the light of their respective histories.

2.3 The history of South African Admiralty law

2.3.1 Historical roots: the juxtaposition of two civilisations

The origin of the Admiralty jurisdiction in South Africa lies in the juxtaposition and the influence of two different systems of law: The Roman Dutch and the English.
The successive waves of colonisation in South Africa created a melting pot of legal principles and conflicting jurisdictions. 'South Africa was colonised by the Dutch in 1652 with the consequent imposition of the law of Holland. In 1759, South Africa became a British possession. The Colonial Court of Justice was staffed by British judges but the residual common law of South Africa (Dutch Law) remained in force by express decree'[10]. The Colonial Courts of the Admiralty Act of 1890 abolished the Vice-Admiralty Courts. The aim of this abolition was to give the same 'consolidation of jurisdiction in the colonies'[11] as the admiralty jurisdiction of the High Court of England. The section 2(1) of the Colonial Court Act stated as follows: 'Every Court of law in the British possession, which is for the time being declared in pursuance of this act to be a court of Admiralty, or which, if no such declaration is in force in the possession, has therein original unlimited jurisdiction [...]'.
The Cape and Natal colonies were British possessions and their Supreme Courts had original unlimited civil jurisdiction, therefore they became Colonial Courts of Admiralty and remained as such until 1983[12].
The applicable law in the South African Supreme Court at that time was the subject of debate. However, it had been clearly underlined that the 1890 Act not only provided for the jurisdiction but also for the substantive law applicable: thus the

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[10] Wagener. M 'South African Admiralty and its English Origins- will it jump or must it be pushed ?' *Journal of Maritime Law and Commerce* (2005) 36 N°1 at 64
[11] Idem
[12] Hare. J *Shipping Law and Admiralty Practice in South Africa* (1999) at 14.

Supreme Court exercising its ordinary jurisdiction administered Roman Dutch law, but when exercising its admiralty jurisdiction it applied the English admiralty law as it was in 1890.[13]

This historical outline gave birth to the modern South African Admiralty regime and explained the original if ambiguous aspect of a singular Act which, in order to determine the law applicable to its own country, refers to the law of a foreign one.

2.3.2 The actual legal framework and the law applicable to Admiralty matters.

The current Admiralty jurisdiction and practice in South Africa is regulated by the Admiralty Jurisdiction and Regulation Act of 1983[14] and the Admiralty Court Rules of 1997.

The AJRA of 1983 created the present Admiralty court division of the High Court of South Africa and, strangely, dealt with the law applying to Admiralty matters.

Section 2 of the South African Admiralty Act provides that the Court: '[...] shall have jurisdiction (hereinafter referred to as admiralty jurisdiction) to hear and determine any maritime claim (including, in the case of salvage, claims in respect of ships, cargo or goods found on land, irrespective of the place where it arose, of the place of registration of the ship concerned, or of the residence, domicile or nationality of its owner).'.

Section 6 of the South African Admiralty act provides for the applicable law and, in a sense emphasises the important link that still connects South African with English law.

Indeed section 6 of the AJRA states, somewhat confusedly, that the law applicable to Admiralty matters would depend on the nature of the claims. In other words, it would have to be determined whether or not the matter involved the jurisdiction prior to November 1983, or the new jurisdiction relevant to this Act.

'The subject matter of the Colonial Courts of Admiralty Act of 1890, to which English law as at 1983 is to apply, is found in two Victorian Statutes, The Admiralty Court Act of 1840 and the Admiralty Court Act of 1841'[15].

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[13]Hofmeyr. G *Admiralty Jurisdiction in South Africa* (2006) at p 5.

[14] It will be referred in this study under the AJRA abbreviation or 'the Act'.

[15]Wagener. M 'South African Admiralty and its English Origins- will it jump or must it be pushed ?' *Journal of Maritime Law and Commerce* (2005) 36 N°1 at 65

It includes various matters, for instance cargo claims for consignments carried into South Africa by a foreign ship under a bill of lading, damage done by a ship, salvage, seamen's wages, pilotage, general average or loss of life and personal injury claim[16]. But is it really practised by the South African Admiralty court? Between 1891 and 1983 the English Courts approach was seen by South African courts as being more of a guidance rather than the binding force as it is seen today[17]. However it must be taken into account that 'all English law [...] can be persuasive to a South African court today where the common law is uncertain. Much of South Africa's present common law [...] to which section 6(1) b of the AJRA refers new admiralty matters, acquired a considerable English law content [...].'[18].

It is clear that in order to apply the adequate law to a maritime matter and thus to be sure that the South African Admiralty court has jurisdiction hearing such a matter, any lawyer would have to "gymnastically" manipulate section 6 of the AJRA.

To recapitulate simply, the section 6 provides the applicable law by applying the following reasoning:

- firstly, that the appropriate South African statute prevails;
- secondly, that failing this, the applicable law is stated within the terms of the contract;
- in the absence of applicable legislation, where a matter invokes old jurisdiction that predated November 1983, English law as it was in November 1983 (in actuality the English law of 1890) will be directly applicable;
- finally, where the jurisdiction is created by the 1983 Act, the present South African Roman Dutch law applies.

This rather complicated section of the Act has been often criticised in academic writing for creating a number of difficulties; precluding of the possibility of judicial development of law[19]and conflicting laws may be cited as striking issues.

'In the title of Booysen's article, the word "disaster" is used to describe the effect of the section 6 in supplanting an existing body of Roman Dutch Law in maritime matters by English Law.'[20]

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[16] Idem
[17] Hare. J *Shipping Law and Admiralty Practice in South Africa* at p 24.
[18] Idem
[19] Wagener. M 'South African Admiralty and its English Origins- will it jump or must it be pushed ?' *Journal of Maritime Law and Commerce* (2005) 36 N°1 at 66
[20] Idem at 71

However the most disconcerting aspect is that the domestic admiralty law of South Africa is often influenced by its ties to the British admiralty law as it was in 1890. This fact as well as the wording of the section 6 can easily lead the South African court into a boomerang situation; for instance a case where a South African court seeking the applicable law for an admiralty matter will be lead to apply English law. However, the English law dealing with this matter may state that the applicable law should be the 'lex fori'[21], which in this example refers back to South African legislation.
Clearly the section 6 of the AJRA seems to introduce 'the very uncertainty it sought to avoid' and 'conflicts with the freedom given to judges by the common law system to shape the law.'[22]

Due to its history, South African admiralty law has difficulty in taking a stand and emancipating itself from the old colonial mentality. The actual South African admiralty practice is perhaps overly linked to English law and may gain efficiency and credibility by using 'the considerable foundations of its rich legal history.'[23] instead of replicating it.

2.4 French Origins

2.4.1 Historical roots and sources of the French Maritime Law

In contrast to the South African juxtaposition of various legal systems, French maritime has been the subject of constant codification from the time of the Napoleon's Civil Code in 1804 to the Ordonnance de la Marine (Marine Ordinance) in 1861.[24]

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[21] Idem at 66
[22] Hare. J *Shipping Law and Admiralty Practice in South Africa* at 25
[23] Idem
[24] Personal translation of Zhang Liu. F 'Etude juridique comparative du contrat de transport maritime de marchandises en droit français et en droit chinois' available at http://www.cdmt.droit.u-3mrs.fr/memoires/2004/m04zhliu.html [Accessed 23 September 2008]

During Napoleon's codifications, Maritime acts inspired by the Ordonnance de la Marine (Marine Ordinance) were codified and thereafter incorporated into the Code de Commerce (Commercial Code).[25]

The Ordonnance de la Marine (Marine Ordinance) was only abrogated in April 2006 by the article 7 of the n°200-460 Order.[26]

In the late 1960's, the French maritime law was subjected to numerous updates through the admirable work of the Dean Rodier (a Lecturer at the Paris Faculty of law) and the then Justice Minister, Jean Foyer. At that time a series of laws were promulgated in order to update and modernise various regulations of the Commercial Code .[27]

The most fundamental texts are surely the Loi du 10 Juin 1966 (Law of June 1966) relating to the carriage of goods in shipping law, and the Loi du 3 Janvier 1967 (Law of Januray 1967 or the 1967 Law) concerning the statute of ships and ships attachment (this text has been also completed by the Decree of 27 of October 1967)[28].

The sources of maritime law in France derive from the peculiarity of the French system which (contrary to others countries such as South Africa) recognises solely the existence of an unique hierarchy of legal norms: this system is called the monist system.[29]

This system incorporates international regulations, laws, into the domestic legal systems through various ratifications. Through this integration, international laws and regulations become fully a part of the domestic system and beneficiaries of the same statute as any other domestic laws.

Therefore the sources of French maritime law are multiple and inspired by international regulations.

2.4.2 Applicable regarding French Admiralty matters

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[25] Personal translation of Bonassies. P and Scalpel. C *Traité de droit maritime* (2006) at p17

[26] Idem

[27] Idem

[28] Idem at p19

[29] Personal translation of Zhang Liu. F 'Etude juridique comparative du contrat de transport maritime de marchandises en droit français et en droit chinois' available at http://www.cdmt.droit.u-3mrs.fr/memoires/2004/m04zhliu.html [Accessed 23 September 2008]

The law applicable to ship attachment in France is ruled by two regimes: an international regime (dictated by the Bruxelles Convention relating to the arrest of sea-going ships, signed in 1952, and amended by the 1999 Convention) and a national regime.[30]

A) Domestic regime and scope of the applicable law

The law applicable to ship attachment in France is governed by old regulations (such as the Marine Ordinance) incorporated in the Commercial Code and the 1967 Law on Statut des navires et autres bâtiments de mers (relating to statute of sea going vessels).

The procedure for the Saisie conservatoire (which might be considered as an equivalent to the South African attachment procedure) is governed by the article 30 of the Decree of 27 October 1967. It was later complemented by the Law of the 9 July 1991 and the 31 July 1992 Decree on the Reform of execution measures of movable properties.[31]

However, it is important to underline the fact that the domestic regime applies to the attachment of French vessels in French ports by French residents.[32]

B) Statutory regime or residuary regime

France is party to the Arrest Convention of 1952. The regulation applies to the attachment of sea-going ships flying the flag of a state which is party to the Arrest Convention. Under the article 8 of the Convention, 'where the ship attached is not a French vessel and does not fly the flag of any other state party, it may be attached for a maritime claim recognised under the article 1-1 of the convention or for any other claim permitting the attachment under the law of the state concerned.'[33]. In these circumstances, it should be noted that the creditor wishing to arrest or attach a vessel will be able to do so either by following the prerequisites of the Convention or by opting for a procedure as envisaged by the lex fori, which would be dictated in

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[30] Personal translation of Rossi. A *La Saisie Conservatoire de navire* (2006) at 21

[31] Tetley William 'Arrest, Attachment and Related Maritime Law procedures' (1999) *Tulane Law Review* at 1895 – 1985

[32] Idem

[33] Tetley William 'Arrest, Attachment and Related Maritime Law procedures' (1999) *Tulane Law Review* at 1895 – 1985

France by the 1967 Law[34]. The applicant's choice would be inclined towards the regime most favourable and suitable to his claim[35]/[36].

C) Applicable law relating to the nature of the elements comprising the vessel

Furthermore, when determining the law applicable to the attachment of vessels in France, an important rule must be kept in mind. A fundamental principle has been clearly enunciated in the *Saint-Pierre*[37]case, i.e. the principle that claims relating to the arrest of a vessel are an exception to the standard regime of execution of security measures. Claims relating to debt concerning freight are governed by the normal regime of execution of security measures and not by the specific regulations of claims relating to ships.[38]

However, the regulation applying to the Saisie conservatoire of holds is the same regulation applicable to claims relating to ships. Indeed, in the *Saint Pierre*[39]case, the Court recognised the hold as being an element of the vessel and therefore ruled that it should be governed by the same regime applicable to vessels[40].

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[34] Personal translation of Rossi. A *La Saisie Conservatoire de navire* (2006) at p 23

[35] For instance, if the applicant chooses the Convention regime, he will simply have to prove that he has claim relating to the vessel he wishes to arrest. The conditions relatives to the existence of the claim are more strictly envisaged under the French law than they are under the Convention regime.

[36] Personal translation of Rossi. A *La Saisie Conservatoire de navire* (2006) at p 23

[37] Cour de Cassation, 13 Janvier 1998, *Saint- Pierre* at p 60

[38] Personal translation of Favarel-Veidig 'Saisie Conservatoire de Navire en droit Français' published in La Gazette du Palais , 28 and 29 September 2005. Available at http://www.gepy.fr/dossiers%20GT_files/Saisie_conservatoire.htm [Accessed 23 September 2008]

[39] Cour de Cassation, 13 Janvier 1998, *Saint-Pierre* at p 60

[40] Personal translation of Favarel-Veidig 'Saisie Conservatoire de Navire en droit Français' published in La Gazette du Palais , 28 and 29 September 2005. Available at see footnotes 38

Chapter 3 : Dimensions of the notion of arrest and attachment

Before giving any detailed explanations of what constitute the various enforcement procedures available to any maritime claimant in a Common law or Civil law country, it is fundamental to establish and analyse the pillars of these important admiralty procedures and their "national" nuances.

3.1 The keys to the precincts of the South African Admiralty court.

3.1.1 A maritime claim

Before entering the precincts of a South African Admiralty court, one must first determine whether a maritime claim in fact exists.
The definition of a maritime claim is an essential element of South African Admiralty practice.
Under the AJRA, the definition of a maritime claim is dealt with by the article 1. The wording of article 1 presents a closed list of possibilities constitutive of a maritime claim. The closed list aspect of the article has however been opened up by the catch-all clause of the section (ee) of the article 1: ' any other matter which by virtue of its nature or subject matter is a marine or maritime matter, the meaning of the expression marine or maritime matter not being limited by reasons set forth in the preceding paragraph.'
Simply the article 1(ee) referred to the various natures of maritime claims.
Furthermore, as we have stated in the preceding paragraph, when considering the definition of a maritime claim it is not sufficient to look only under the AJRA section 1 (which actually lists the new South African jurisdiction) but it is required to consider whether the facts of the case constitute a maritime claim under the old English jurisdiction as well (as referred to in the Colonial Court of Admiralty Act of 1890).
The South African jurisprudence brought several concrete applications to the definition of the maritime claim. The *Weissglass* [41] case is an example of the reasoning adopted by the court to define whether or not a claim is a maritime claim.

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[41] *Weissglass NO v Savonnerie Establishment* 1992 (3) SA 928 [A]

In that case, the main task of the Court per Nesdat J, was to determine if the loan granted by the respondent to the appellant was considered as a maritime claim with respect to goods supplied and services rendered[42]. In this case, the judge found that a maritime claim was present. In order to justify his reasoning the judge made clear references to the English jurisprudence and underlined that 'the section is one of those Acts which does not relieve the South African practitioner of the burden of history.'[43]. The English jurisprudence is undoubtedly a primary source of law for the South African court.

But a claim which is alleged to be a maritime claim arising from the English maritime law jurisdiction must have some relationship to a maritime topic in order to be characterised as a maritime claim in South Africa[44]. This fact was stressed by the case *Peros v Rose*[45].

The importance of having a maritime claim as defined by the AJRA act is an essential element for any claimant and has multiple consequences: 'The significance of choosing the correct maritime claim may well become apparent when the claimant seeks to rank its claim against other claimant upon a distribution of the fund derived from the sale of the vessel in execution.'[46].

Without a maritime claim it is impossible for a claimant to ask for the jurisdiction of the South African Admiralty court and, often, an incorrect definition of a maritime claim can be considered to be the same as having no maritime claim at all.

In addition to the closed list of maritime claims, the section 1 of the AJRA has also included another link that would connect the claim to the South African Admiralty jurisdiction: the maritime lien.

3.1.2 A maritime lien

The section 1(y) of the AJRA states that: 'any maritime lien whether or not falling under any of the preceding paragraphs' is considered to be a maritime claim.

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[42] 'AJRA' s1 subsection 1

[43] *Weissglass NO v Savonnerie Establishment* 1992 (3) SA 928 A, p 934

[44] Stranex. M *Shipping cases of South Africa Summaries of Superior Court judgements from inception of the Admiralty jurisdiction Regulation Act* (2000) at 78

[45] *Peros v Rose* 1990 (1) SA 420 [N]

[46] Hare. J *Shipping law and Admiralty practice in South Africa* at p 45

There is no statutory definition of a maritime lien. The common law approach, through cases, tried to define it: '[...] having its origin in this rule in civil law, a maritime lien is well defined [...] to mean a claim or privilege upon a maritime res to be carried into effect by legal process [...] .'[47].

It would seem safe to say that 'the maritime lien is more easily recognised than defined'[48].

However, the essential elements of the maritime lien are well established[49]: 'The maritime lien comes into existence and follow the res irrespective of the possession.'[50]. The principal maritime liens recognised in English law are bottomry and respondentia, salvage, damage done by a ship, seamen's wages and master's wages and disbursements[51].

The South African jurisprudence relative to the maritime lien definition based its decision upon the English approach. The court in the *Transol Bunker*[52]case stated that: 'the essential effect of a maritime lien in English admiralty law at any rate is that it attaches ex lege to the ship or other property in respect of which the maritime claim arose and it follows the ship irrespective of changes of ownership or possession, and irrespective of the knowledge of the new owner or possessor.'

The most commonly accepted definition of the maritime lien (established by Sir John Jervis in the *Bold Buccleugh* case[53]), underlined that both substantive and procedural rights are derived from the maritime lien notion[54].

Having a claim classified as a maritime claim is essential: for example a maritime lien will determine the place and the priority when ranking the claim as determined by the section 11 of the AJRA.

But one of the most important consequence is that a maritime lien 'gives a claim (a substantive right) which can be enforced by legal process, for instance by one of the

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[47] *Harmer v Bell, The Bold Buccleugh* (1861) 7 Moore at 267 (PC).

[48]Bradfield. G 'The Nature and Scope of the Contemporary Maritime Liens in South African Admiralty Law' at p 3, unpublished article available at http://web.uct.ac.za/depts/shiplaw/theses/bradfram.htm [Accessed 23 September 2008]

[49]Hofmeyr. G *Admiralty Jurisdiction law and practice in South Africa* at 148 .

[50] Idem at p 142

[51] Idem at p 144

[52] *Transol Bunker BV v MV Andrico Unity* 1989 (4) 325 (A)

[53] *Harmer v Bell, The Bold Buccleugh* 1861 7 Moore PC 267

[54] Hare. J *Shipping law and Admiralty practice in South Africa* at p 36

most powerful enforcement procedures in admiralty practice, an action in rem (an arrest)."[55].

The presence of a maritime claim or a maritime lien has a major consequence for any claimant in admiralty matters in South Africa, it affirms the jurisdiction of the South African Admiralty court.

If the existence of a maritime claim or lien has been established, then the South African admiralty court will exercise its jurisdiction over the matter[56]. However this is not an exclusive presumption. The *Wave Dancer*[57] case affirmed this: ' if it is of the opinion that any other court in the Republic (including itself at common law) will exercise its jurisdiction[...]and that it is more appropriate, the High Court has the discretion to decline its jurisdiction.'[58].

3.2 The French concept of attachment

In order to fully understand the scope of the French notion of arrest and attachment and its similarities or differences with the common law approach, it is imperative to study the terminology of two important legal concepts and how they are approached under French Law: the notion of patrimony and the notion of arrest or attachment.

3.2.1 The French notion of patrimony

Under French law, the notion of patrimony forms the foundation of numerous legal concepts.

Under the Civil Code of 1804, the notion of patrimony is simply defined as the economic wealth held by a family or by an individual.

This purist approach to the concept of patrimony by the old Civil Code was then modified to become what is considered today to be the juristic expression, the legal dimension of the legal personality.

Indeed in 1837, two French jurists, Aubry and Rau, while translating the manuscript of a German jurist lecturing French law at the Heidelberg University in Germany,

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[55] Schlichting. P. M *The Arrest of Ships in German and South African Law* at p 151.
[56] 'AJRA' s2
[57] *The Wave Dancer: Nel v Toron Screen Corporation (Pty) Ltd* 1996 (4) SA 1167 SCA
[58] *The Wave Dancer* 1996 (4) SA 1167 SCA

realised the outmoded nature of the patrimony notion as defined in the Civil Code and introduced the contemporary notion of patrimony[59].

Aubry and Rau broadly envisaged the definition of patrimony and introduced the modern concept of the indivisibility and universality of patrimony.

Under the universality angle, Aubry and Rau defined the patrimony of a person as a whole, as being an entity which differs from its constitutive elements. The patrimony consists of positive and negative items (such as credits or debts).The patrimony is a legal universality[60].

Exploring the concept of indivisibility, Aubry and Rau emphasized a fundamental element: only a juristic person can possess a patrimony. This juristic person can be a legal entity (e.g. a corporation) or a physical individual. But only one patrimony can be possessed by a single juristic person and this patrimony cannot be entirely transferred from the actual living owner to other living persons (in other words, there can not be a donation inter vivos (between living person) of the patrimony). The only possibility for the transfer of patrimony would be in case of the death of the juristic person (or the liquidation, or bankruptcy, of the legal owning corporation).The patrimony could then be transferred or inherited.

The concept of indivisibility of the patrimony in French law varies greatly from the common law concepts of trust. Under the scope of French law, the notion of trust, which is a legal way of establishing a divisible patrimony (when the patrimony can be split and its individual components divided) has been often considered to be a legal aberration.

The action of transferring by contractual agreement a part of the patrimony to a fiduciary in order to fulfil contractual obligations is not legally acceptable[61]. However, within shipping law, it is a concept that clearly contradicts notions such as the limitation of liability of shipowners or carriers, notions which symbolise the principle that a vessel is assigned to a specific maritime voyage as a divisible patrimony[62].

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[59] Personal translation of Hassenforder. J, 'L'étude de la notion de patrimoine dans le programme rénové de 1ere STG' available at http://www.educnet.education.fr/ecogest/veille/droit/droit19.htm [Accessed 23 September 2008]

[60] Idem

[61] Personal translation of 'La notion de patrimoine' available at http://www.juris.freesurf.fr/droit_civil/patrimoine.html [Accessed 23 September 2008]

[62] Personal translation of Mouillet. J 'La Saisie conservatoire du navire suite a son adjudication' available at http://www.cdmt.droit.u-3mrs.fr/memoires/2002/m02moje.html

This limitation of the French indivisibility notion has been debated and criticised amongst intellectuals and jurists.

It was only recently that the concept of Trust was finally incorporated into French law.

The new law of the 19 February 2007 enacted by the Parliament, institutes the Fiducie, the French equivalent of trust under Common law. The new provisions introduced into the French Civil Code (article 2011 to 2013) provide France with a new legal vehicle allowing it to create arrangements equivalent to trusts of other countries[63].

The Fiducie will allow 'an independent patrimony to be created that is not that of the settlor (the constituent) but which does not form part of that of the fiduciary either.'[64].The regulation that applies to the Fiducie is very flexible insofar as the Civil Code merely defines the principal characteristics and thus leaves great freedom to the parties to determine their terms and conditions contractually[65].'The fiduciary patrimony may only be seized by creditors whose claims arise from the holding and the management of the patrimony: neither the personal creditors or the fiduciary nor the creditors of the settlor may seize the fiduciary patrimony.'[66].

Various practical applications can then be envisaged thanks to the Fiducie [67], and the enforcement of a maritime claim, or securities given to creditors in the maritime area, would no longer be considered as overriding the French concept of indivisibility of the patrimony.

After having analysed the notion of patrimony in French law, it is now important to define what is understood exactly by arrest or attachment of vessels in France.

3.2.2 Terminology relative to Saisie exécution and Saisie conservatoire

Article 1 of the 1991 Law states that[68]: ' All creditors can force their debtors to fulfil their contractual obligations, within the legal framework; Creditors can initiate a

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[63] Personal translation of Bernard. T' The Fiducie: the concept of Trust is finally incorporated in French Law' (2007) volume 4, issue 2, *International legal* available at http://www.imakenews.com/iln/e_article000867025.cfm?x=b11,0,w [Accessed 23 September 2008]

[64] Idem

[65] Idem

[66] Idem

[67] Idem

[68] Personal translation of Article 1 of the Law n° 91-650 of July 9th of 1991 relating to the Reform of civil execution procedures.

conservatory measure against the assets of their debtors in order to secure their claims.'

French law contains a basic distinction between Saisie conservatoire (conservatory attachment) and Saisie exécutoire (attachment in execution).

The creditor under French law has two options when trying to secure his claim relating to an immovable property: he can either decide to sell the property (in other words the creditor expropriates the debtor's property with the execution of a judicial sale) or he can decide to immobilise the property as a means of pressuring the debtor (in other words the creditor decides "to conserve" the property).

A) Important distinction: the absence of a French equivalent to the the action in rem

It is important to note that there is not a real French equivalent of the action in rem, nor does exist in French law the distinction between arrest and attachment.

As a civilian country and because of the peculiar approach of the notion of patrimony, France consider the action in rem as being a legal aberration than an effective remedy to secure a maritime claim. 'Rather civilian countries to this day have but a single action, the action in personam, which may however, be combined with a Saisie conservatoire, or conservatory attachment, in order to give the claimant security for his claim before judgement.'[69].

This important principle being enunciated, the definition of the various types of Saisie under French law could now be described and envisaged.

B) Definitions

Under French law, executory measures are part of a legal right available to creditors to obtain, or secure the satisfaction of their claims.

The article 2092 of the Civil Code stipulates that when someone engages himself contractually his patrimony is likewise engaged, movable or immovable, present or

[69] Tetley William 'Arrest, Attachment and Related Maritime Law procedures' (1999) *Tulane Law Review* at 1895 – 1985

future. The article 2093 precisely states that all the patrimony of a debtor can be used to secure a creditor's claim.

Therefore, creditors can secure their claim by using executory measures to attach the entire patrimony of the debtor. There are various executory measures under French law and the Saisie conservatoire and the Saisie execution relating to vessels are specific ones.

The Saisie conservatoire can be described as a provisional remedy available to the claimant in order to prevent assets of the debtor from being dissipated to the detriment of the claimant. It is seen as a means for creditors to pressure their debtors into fulfilling their contractual obligations.

The Saisie exécutoire is considered as being a definitive remedy, leading to the judicial sale of property following a final judgement in favour of the claimant on the merits.

C) Objectives of the various procedures

The objective of the Saisie exécutoire (attachment in execution) is to obtain the reimbursement of a loan granted by the creditor to the debtor by way of a judicial sale. Through the procedure of the attachment in execution, the creditor's needs are satisfied as his claim is secured by the judicial sale of the property.

However, the objective of the Saisie conservatoire (conservatory attachment) varies from the previous procedure. The objective of the conservatory attachment is to temporarily satisfy the needs of the creditor by making the property and the relative rights unavailable to the debtor.

The conservatory attachment, often seen as an imperfect procedure of execution, is nonetheless an effective way to obtain from the courts a 'main -mise' (seizure) of the debtor's patrimony and to freeze for a significant period of time all his ownership rights.

D) Common rules applicable to the two types of attachment procedures and legal effect of the Saisie

The 1967 Law provides for a special regime applying to the procedure for attachment of vessels, as ships are considered to be a specific category of immovable property.

Even if the two type of attachment have different objectives, they both have an identical legal effect on the vessel attached:
- the vessel is not allowed to leave berth: this is stipulated under the article26 and 28 of the 1967 Decree;
- the vessel becomes unavailable to the debtor (inalienability of the patrimony): this effect is stipulated under the article 30 of the 1967 Decree;
- as a result of the attachment procedure, the judicial sale occurs, putting to an end the functions and obligations of the Master of the vessel.

E) Saisie exécutoire or Saisie conservatoire ?

When compared to the South African enforcement procedure of the action in rem or in personam, the decision to make a conservatoire or exécutoire attachment is more the result of the procedural stage reached at that point than a strategic option for the creditor.
Usually, when a creditor is in possession of a definitive and final judgement, such as a Court order, with an executory clause inserted in the final judgment, the creditor can exercise their rights and satisfy their claim by means of an executory attachment, without having to solicit the judge's approval. This principle has been established under the article 3 of the Law of 9 July 1991 relating to the executory measures proceedings[70].
If to the contrary, the creditor does not have a definitive judgement, they (the individual or company) have the right to solicit from the judge a conservatory measure in order to secure the claim while waiting for the definitive judgement. This conservatory measure prevents debtors from fully disposing of their property which is subject to the 'main-mise' (seizure). In this case, the creditor wishing to enforce the conservatory measure would have to obtain from the juge de l'exécution (judge of the execution) an authorisation to proceed with a conservatory measure such as an conservatory attachment. The judge's authorisation would take the form of an ordonnance (ordinance) and the conservatory measure would have to be executed

[70] Personal translation of summarised informations of Montagne Avocat 'Exécutions forcées et mesures conservatoires, droit des voies d'exécutions' available at http://www.montaigne-avocat.com/executions_forcees_et_mesures_conservatoires [Accessed 23 September 2008]

within 3 months following the signing[71] of the ordinance. Failure to do so will lead to the invalidation of such a measure. In addition, the article 68 of the 9 July Law of 1991 provides that in specific circumstances, the judge's authorisation would not be required.

These circumstances are laid out under the article 68 of the 1991 Law and generally refer to two special occasions:

- when the creditor is in possession of a Court order, which is not yet definitive and which does not yet have executive force;
- or when the creditor's claim appears to be founded in principle (article 67 of the 1991 Law).

In these conditions conservatory measure will take the form of an conservatory attachment and would not have to be authorised by the judge of the execution. However, due to the peculiar nature of the conservatory attachment of vessel in shipping law and the great impacts of such procedure upon the economic wealth of the shipowners, carrier and others participants to the maritime voyage, the French jurisprudence has found that in maritime law, it would be required for all types of attachment operated upon vessel to be justified by the authorisation of the judge of the execution[72]. But, the judge's role in that procedure will only be limited to verify that the attachment of the vessel is opportune for the creditor, that the vessel subjected to the attachment belongs to the debtor. In other words the judge of the execution does not judge the validity of the debt, of the maritime claim, but decides whether or not the parties has the right to attach the vessel[73]. Point of law such as the validity of the debt or its existence would be envisaged by another judge, who will rule the claim later on. Indeed, the article 215 of the 31 July 1992 Decree provides that the creditor, in possession of a conservatory measure have one month to obtain an executory judgement[74].

Even if it appears that the safest way to satisfy a creditor's claim would be through the enforcement of an executory attachment, the Saisie conservatoire (the conservatory attachment) is often used as an urgency measure to satisfy or to secure a maritime claim.

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[71] Personal translation of Décret du 31 Juillet 1992 article 214

[72] Cour de Cassation , Chambre Commerciale, 1er Octobre 1997, *Navire Secil Angola*, B, IV, n° 234, Revue. Crit . 1997

[73] Personal translation of Rossi. A *La saisie conservatoire de navire* at p 211

[74] Idem

Indeed, as the real effect of the conservatory attachment are softened in the relevant Act: 'The conservatory attachment impedes the vessel from departure but does not have legal consequences upon the ownership's right of the owners.'[75], the conservatory attachment is a real coercive measure, authorised through a very simple judgement which does not often protect the reality of the creditor rights and does not legitimise the use of legal force, violent aspect of any Saisie[76].

The following chapter will underline the fact that compare to the South African criteria required to trigger a procedure of enforcement of maritime claims, French conditions are resumed under the existence of one concept which if found to be present in a claim, will trigger a unique but efficient enforcement procedure, the conservatory attachment procedure.

[75] Personal translation of the Law of the 3 January 1967, article 30.
[76] Personal translation of Rossi. A La saisie conservatoire de navire at p 30

Chapter 4: Enforcement procedures for maritime claims

Enforcement procedures of maritime claim are the essence of the admiralty practice. These procedures allow unlucky creditors who invested and believed in the maritime venture to finally obtain satisfaction of their rights.
Such enforcement procedures are strongly influenced by the legal culture of the country of arrest (or attachment) and have an important influence in the international shipping world. Indeed the reputation of a country regarding the arrest or attachment procedure can easily attract or repulse shipping business opportunities.
Regarding the conditions for enforcement procedure, a net difference appears between the common law country, South Africa and the heiress of the Lex maritime of Continental Europe, a civil law country, France.

4.1 South African enforcement procedures: various legal weapons available to creditors of a maritime claim

In admiralty and more specifically under South African Admiralty law, two enforcement procedures are available[77]: the faster although possibly less secure action in rem (which is the arrest procedure) as well as the slower, more secure action in personam (which is known as the attachment procedure).
However before going into further details regarding these procedures, certain elements need to be understood.

4.1.1 What can be arrested or attached?

Under the action in personam, any property can be attached if the defendant's ownership is indisputable and if the property is located within the area of the court's jurisdiction.
However under the remedy of the action in rem, the section 3(5) of the AJRA defines that only 'property against or in respect of which the claim lies' can be arrested. This definition of property encloses the ship and/or its equipment, the bunkers, furniture, stores, cargoes, containers and freight. Indeed, the *Meilhuizen*[78]case stated the

[77] *MV Lash Atlantico* 1996 (1) 22 (A)
[78] *The Melhuizen Freight* 2005 (3) SA 148 (C) 2003 SA p 155.

circumstances under which a freight could be arrested. Davis J explained how the freight, an intangible element, could be arrested. He referred to Carver who stated: ' thus where proceedings in rem are taken against a ship which has carried goods [...] the parties complaining may proceed against the freight as well as against the ship and they may for that purpose arrest the cargo for security.'[79].

But what is exactly the definition of ship, as understood by this Act ?

A ship is defined under the section 1(vii) of the AJRA as: 'any vessel used or capable of being used on the sea or internal waters, and includes any hovercraft, powerboat, yacht, fishing boat, submarine vessel, barge, crane barge, floating crane, floating dock, oil or other floating ring, floating mooring installation or similar floating installation, whether self propelled or not.'.

This definition excludes then boats or ships in the course of construction[80]. However state-owned ships, used primarily for the purposes of commercial trade, are susceptible to being arrested by the South African Admiralty courts[81]. The *KJ International*[82] case is a good illustration of that notion. In the facts of the case, the Romanian Government established three new commercial entities for the purpose of exercising operational control of its fleet of ships. One of these companies was called the Romline and a ship was allocated to it: the MV Oscar Jupiter[83]. The Jupiter was bare-boated by another state-owned company, Maldova Shipping. The owners of a cargo of rice on board of the Oscar Jupiter claimed damages after the rice was delivered in a damaged state. They obtained the arrest of the vessel[84]. However Romline intervened as a respondent and claimed that the vessel was protected from the claim by the Foreign States Immunities Act (n° 87 of 1981). Alexander. J in that case ruled that this specific immunity did not apply. Indeed, the section 11 of the Act provides that a foreign states shall not be immune from the admiralty jurisdiction of South African court in certain actions, if at the time when the cause of the action arose, the ship was in use or intended use for commercial purpose[85] as was the case of the MV Oscar Jupiter.[86]

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[79] Idem
[80] Hare. J *Shipping law and Admiralty practice in South Africa* at p 73
[81] Idem.
[82] *KJ International v. The MV Oscar Jupiter* [1997] 3 ALL SA 475 (D)
[83] Facts resumed from Stranex. M *Shipping case of South Africa* at p 4
[84] Idem
[85] Idem p 5
[86] Idem p 5

Bearing in mind what can be attached or arrested, it is essential to now determine who can enforce these procedures.

4.1.2 Who can arrest or attach?

The section 2 of the AJRA opens the door of the court's jurisdiction to all claimants who have a maritime claim[87]'irrespective of the place where it arose, of the place of registration of the ship concerned or of the residence, domicile or nationality of its owner.'[88].

Therefore any natural or juristic person may come to court for enforcement procedures[89].

When the property to be subjected to attach or arrest has been identified as well as the person able to enforce such procedure, it is now necessary to outline what the required conditions are in order to attach or to arrest a property in Admiralty procedure.

The article 5 of the AJRA stipulates the powers of court in this situation: 'A court may in the exercise of its admiralty jurisdiction order the arrest of any property for the purpose of providing security for a claim which is or may be the subject of an arbitration [...] contemplated, pending or proceedings, either in the Republic or elsewhere, [...], if the person seeking the arrest has a claim enforceable by an action in personam against the owner of the property concerned or an action in rem against such property or which would be so enforceable but for any such arbitration or proceedings.'

The *Dimitris*[90]case affirmed this principle: ' the intention of the Legislature was to make it possible for a B claimant to apply to a court for, inter alia [...] an order for the arrest of a ship with the object of obtaining security in respect of a claim which is the subject of proceedings contemplated in a foreign court. A prerequisite for the grant of such an order is that the claimant must have a claim enforceable by an action in rem.'[91]. Furthermore the court per Botha JA clarified the practical use of that specific provision of the AJRA: 'A claimant applying for an order in terms of the

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[87] Idem p 72
[88] Section 2(1) of the AJRA
[89] Hare. J *Shipping law and Admiralty practice in South Africa* at p 72
[90] *Cargo Laden and lately laden on board the MV Thalassini AVG v MV Dimitris* 1989 (3) SA 820 (A) F, p 380
[91] Idem

section 5(3) (a) should be required [...] to nominating the forum of his choice, to show prima facie evidence that his claim is enforceable under that forum.'[92]. Therefore, it is important to know the various legal requirements in connection with the various enforcement mechanisms.

4.1.3 The action in personam: creditor's safest option for enforcing a maritime claim.

The conditions related to an action in personam in South Africa are quite complex and may test the patience of any applicant. The conditions are difficult to fulfil but the result of the attachment is worth the tenacity. The applicant who has a maritime claim and wishes to institute a action in personam has to ensure that the following conditions are satisfied:

A) Types of person against whom an action in personam may be institued

A maritime claim may be enforced by an action in personam only against the types of persons described by the section 3 of the AJRA:
'(a) resident or carrying business at any place in the Republic;
(b) whose property within the court's area of jurisdiction has been attached by the plaintiff or applicant, to found or to confirm jurisdiction;
(c) who has consented or submitted to the jurisdiction of the court;
(d) in respect of whom any court in the Republic has jurisdiction in term of Chapter IV of the Insurance Act 1943;
(e) in the case of a company, if the company has a registered office in the Republic.'
These conditions are not cumulative but alternative.[93]

B) Criteria for the attachment of property

In addition to the stated criteria, the applicant will have to ensure that he has no security or insufficient security and good reason for attaching the property[94].

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[92] Idem p 381
[93] Hare. J *Shipping law and Admiralty practice in South Africa* at p 59

Furthermore, he has to insure that the property he wishes to attach is owned by the defendant and that it is situated or likely to come within the jurisdiction[95] as envisaged by the section 4(4) of the AJRA.

C) Procedure and miscellaneous elements to consider

The onus is on the applicant to prove[96] on a balance of probabilities that the property in question is owned by the respondent in whole or in part.

Moreover, in the *MV Vallabhbhai Patel*[97] case, the judge Corbett CJ demonstrated the reasoning for the determination of the law applicable to the attachment procedure. He centred his reasoning around the fundamental point of deciding whether the matter at the origin of the attachment procedure referred to an old English jurisdiction and was therefore subject to the English admiralty law as applied in 1890, or to a new South African jurisdiction and being thus subject to modern Roman Dutch law.[98]

As soon as the preceding requirements are satisfied, 'the order for the attachment of a maritime property is given by the court in a hearing upon the filing of a notice of motion supported by an affidavit. The application may be ex parte where it is urgent or where the claimant has reasonable belief that the defendant will absent his property from the jurisdiction.'[99].The affidavit contains the following important statements: 'that the claim is a maritime claim for which the defendant is liable and that the court will have jurisdiction to the proposed attachment; that the property sought to be attached is property belonging to the defendant or in respect of which he has an attachable interest; whether any security has been given in respect of the claim and the reasons for the court' aid being required; the reason if any for urgency.'[100].

Following the common law, under the attachment proceedings, the full value of the claim must be secured regardless of the value of the asset[101].

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[94]Rules regulating the conduct of the Admiralty proceedings of the several provincial and local divisions of the Supreme Court of South Africa (Government Notice R571 in Government Gazette 17926 of 18 April 1997) or Admiralty Rules at section 5(2) and 4(3)c

[95] Admiralty Rules section 3(2) b

[96] *Summit One* 2005 (1) 428 SCA

[97] *MV Vallabhbhai Patel* 1994 1 SA 550 (A) p 550

[98] *MV Vallabhbhai Patel* 1994 1 SA 550 (A) p 559

[99] Hare. J *Shipping law and Admiralty practice in South Africa* at p 64

[100]Schlitching. M *The arrest of ships in German and South African Law* (1991) at p 159

[101] Idem p68

When compared to these requirements, the conditions related to the arrest seem easier to satisfy.

4.1.4 The action in rem: what make South Africa an Eden for creditor's enforcement rights

Indeed it appears that the arrest procedure would seem to be the quickest way to enforce a maritime claim.
An applicant who has a maritime claim and wishes to enforce it by means of an arrest must first satisfy the following conditions:

A) The preconditions of the sub section 3(4) and (5) of the AJRA

The Acts deals with the action in rem under the sub section 3(4) and (5):
' (4) without prejudice to any other remedy that may be available to a claimant or to the rules relating to the joinder of causes of an action a maritime claim my be enforced by an action in rem.
(a) if the claimant has a maritime lien over the property to be arrested or;
(b) if the owner of the property to be arrested would be liable to the claimant in an action in personam in respect of the cause of an action concerned.
(5) An action in rem shall be instituted by the arrest within the area of jurisdiction of the court concerned of property of one or more of the following [...] in respect of which the claim lies:
(a) the ship, with or without its equipment, furniture stores or bunkers
[...]
(b) the freight
(c) any container, if the claim arises out of or relates to the use of that container in or on a ship or the carriage of goods by sea or by water otherwise in that container;
(d) a fund'.
Thus, the claimant must first present evidence of a maritime claim as defined in the Act.

Then, he has to prove that the property to be arrested is that against which the claim lies or is an associated ship thereof [102].

Finally, he would have to show that he has a maritime lien and/or a claim against the owner of the property in personam; and/or an alternate method for enforcing the claim and finally that he has no security or insufficient security and good reason for instigating proceedings.

The *MV Cape Athos*[103] case defined the scope of the 'good reason' justification for the proceedings and referred to various South African and English cases: 'it thus appears that the lack of honest belief negatives the defences of reasonable and probable cause.'[104].

B) The procedure

The procedure for obtaining an arrest is quicker than that for an attachment: the claimant and his attorney may submit a certificate in terms of the Rules of the Court confirming the above requirements. An arrest warrant is then issued by the Registrar without any application to the Court. However it is not a judicial discretion[105].

The law applicable to the arrest procedure has been demonstrated in the *MT Argun*[106] case. The reasoning of the court per Farlam JA is close to the one adopted in the *Vallabhbhai Patel*[107]case. Farlam JA centred his reasoning around the crucial point of deciding whether the maritime lien envisaged by the applicant for the action in rem procedure referred to an old English jurisdiction and was thus subject to English Admiralty law as they applied in 1890, or to a new South African jurisdiction and thus subject to modern Roman Dutch law[108].

As previously described, there is usually one basic reason for a claimant to proceed before an admiralty court: to enforce a maritime claim. However, there are various other motives that can trigger an admiralty action procedure.

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[102] Sub section 6 of the AJRA : 'an action in rem, other than such an action in respect of a maritime claim contemplated in paragraph (d) [...] may be brought by the arrest of an associated ship instead of the ship in respect of which the maritime claim arose.'

[103] *Cape Athos Shipping Ltd v Blue Emerald Shipping Ltd and others* 2000 (2) SA at p 336

[104] Idem

[105] Hare. J *Shipping law and Admiralty practice in South Africa* at p 67.

[106] *MT Argun* [2001] 4 ALL SA 309 (A)

[107] *MV Vallabhbhai Patel* 1994 (1) SA 550 (A)

[108] See p 16 of this research

4.1.5 The other uses of the arrest or attachment procedure in South African admiralty law

The arrest and attachment procedures can serve various other purposes under the South African admiralty practice.

A) The associated ship arrest

This South African procedure first saw light with the 1952 Arrest Convention recognising the sister ship procedure.
The sister ship procedure introduces the possibility (recognised by the 1952 Arrest Convention) opens to a maritime creditor to take action against the owner of the ship (in the case of debt collection) by attaching any one of the ships of the line to found the jurisdiction of the court[109].
However, 'ship owning companies were quick to limit the exposure of their fleets by refinancing their ships into one-ship companies.'[110]. By doing so, it became more and more difficult for a maritime creditor to use the sister ship procedure to justify the arrest of a specific ship in order to satisfy his debt: 'And thus the maritime creditor found itself stone-walled against the evasive mechanisms of the one ship operation with bearers shares, registry of convenience [...]'[111].
In order to counter this move and its associated negative economic impact, the South African legislator adopted an 'innovative approach'[112], to the associated ship arrest: ' [...] the South African Act allowed a creditor to enforce its maritime claim by arresting a ship other than that in respect of which the claimant had either a maritime lien or a claim in personam.'[113].
When enacting this new legal mean available for any maritime creditor, providing that the specific requirements are satisfied, the South African Act 'extended the concept of lifting the corporate veil [...] to maritime application.'[114].
The provision for arresting an associated ship is enacted under the article 3(6) of the AJRA: " [...] an action in rem, other than such an action in respect of a maritime

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[109] Hare. J *Shipping law and Admiralty practice in South Africa* at p 78
[110] Hare. J *Shipping law and Admiralty practice in South Africa* at p 79
[111] Idem
[112] Idem
[113] Idem
[114] Idem

claim [...] of the definition of 'maritime claim', may be brought by the arrest of an associated ship instead of the ship in respect of which the maritime claim arose.'
The scope of this article clearly excludes the use of an associated ship arrest procedure to collect debt relating to 'mortgages, hypothecation, right of retention, pledge or other charge, bottomry or respondentia.'[115]. These specific maritime claims are defined by their unique connection with the particular ship to which the claim relates and therefore can not be satisfied with the arrest of another ship[116].
In addition, the wording of the article clearly emphasizes that 'the claimant must either choose to pursue the guilty ship or to tackle the associated ship. Once the proceedings have been commenced against the associated ship, the claimant may not then proceed against the guilty ship.'[117].
A precise definition of an associated ship is then given by the article 3(7) of the Act. Various conditions must to be fulfilled in order for the claimant to initiate the arrest of a ship other than the guilty ship. But most of all, great attention is given within the wording of the article to the notion of control within the company owning the associated ship. This notion has been the subject of various debates in South African cases, demonstrating how the South African court approaches the difficult subject of control.
The *MV Stavroula*[118] case is a good example of the Court's willingness to lift the corporate veil. In this case, the MV Stavroula was arrested by the Haselbacher company, who alleged that she was an associated ship of the Manolis L[119]. The company had a maritime claim against the owners of the Manolis L, Dunnet Bay Shipping. The Dunnet company applied for arrest to be set aside, arguing that the Stavroula was not in any way associated with the Manolis L[120]. The shares in Dunnet were controlled by a captain. Both ships were among 38 ships managed by Universal Glow[121]. The Stavroula was placed under the management and control of Universal Glow by the same person who held the shares in Dunnet as trustee for the captain[122].

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[115] Idem p 80
[116] Idem p 80
[117] Idem p 81
[118] *Hasselbacher Papier Import and Export v MV Stavroula* 1987 (1) SA 75 C
[119] Personal translation of facts summarised from Stranex. M *Shipping cases of South Africa* at p 35
[120] Idem
[121] Idem
[122] Idem

The Court decided that the management of ships by the same agent did not make the two associated ships. But the management exerted by Universal Glow was shown to be clear enough to indicate that the association between the ships was suitable for[123] the arrest to take place. The arrest of the Stavroula was therefore validated by the Court.

However, the associated ship arrest is not the only weapon available to the maritime claimant in South Africa.

B) The security arrest

The Arrest procedure can also be used as means to provide security for a pending claim.

Under the section 5(3) of the AJRA, 'A court may in the exercise of its admiralty jurisdiction order the arrest of any property for the purpose of providing security for a claim which is or may be the subject of an arbitration or any proceedings contemplated, pending or proceeding, either in the Republic or elsewhere, and whether or not it is subject to the law of the Republic, if the person seeking the arrest has a claim enforceable by an action in personam against the owner of the property concerned or an action in rem against such property or which would be so enforceable but for any such arbitration or proceedings.'.

This provision is incontestably a powerful weapon offered by South African Courts to maritime claimants, which purposefully 'bring the res and not the person of the defendant before the court.'[124].

In order to be granted a security arrest the applicant must first satisfy the court[125] :

- that he has a claim enforceable by an action in rem or in personam against the ship in question or against an associated ship (on a balance of probabilities);
- that he has a prima facie case in respect of his claim, which is prima facie enforceable in the nominated forum of his choice;
- that the forum in which that claim has been or is to be enforced has jurisdiction to hear the matter;

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[123] Idem

[124] Hare. J *Shipping law and Admiralty practice in South Africa* at p 86

[125] Conditions resumed from article 5(3) of AJRA, from Hare. J *Shipping law and Admiralty practice in South Africa* at p 86 and from Peters. J *Arrest of ships : a comparative analysis between Belgium law and South African law* (1995) at p 45

- that the property to be arrested has not previously been arrested nor has security already been given in another court for the same claim to the same claimant;
- and that he has a genuine and reasonable need for security in respect of the claim[126].

Having in mind the diversity of South African enforcement procedure, one might think (such as an unfortunate creditor) that French mechanism seems restrict , almost unsuitable for a common law creditor.

4.2. French mechanisms of enforcement of maritime claims: a unique but efficient tool for the creditor

When compared to the South African admiralty practice, there is only one type of mechanism available under French law to enforce a maritime claim: the conservatory attachment.
Before gathering the required documents in respect to the various conditions stipulated by French law or Decree, the applicant for an attachment procedure relating to a vessel must first assure the court that the subject of his attachment is indeed a vessel.

4.2.1 What can be attached: the definition of what constitutes a vessel under French law

A) Objective criteria

Unlike certain foreign jurisdictions, under French law a general definition of what is considered to be a vessel does not exist[127]. Specific definitions are given in various decrees or laws[128] with differing considerations applied to what actually constitutes a vessel, but never attempting to give a definitive meaning to this fundamental pillar of maritime law.

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[126] All the conditions relative to the granting of a security arrest have been practically envisaged and emphasized by the South African Admiralty Court in the *Dimitris* case: *Cargo Laden and lately laden on board the MV Thalassini AVGI v MV Dimitris.*
[127] Personal translation of summarised notions extracted from Bonassies. P and Scalpel.C *Traité de droit maritime* § 145 at p104
[128] Idem

Nonetheless, various criteria can be suggested and should be satisfied by any applicant wishing to attach an immovable property understood as being a vessel. Firstly, differently to some other jurisdictions, such as South Africa, the notion of the size of the vessel (tonnage) does not under French law interfere or influence the notion of what constitutes a ship. In other words, the notion of size does not have positive or negative consequences on this definition[129]. This was affirmed early on in French jurisprudence and the Cour de Cassation's judgement of 1844[130] underlined this important concept. As a result, any kind of small recreational craft is considered to be a vessel. However, the 9th of July 1962 Decree introduced few exceptions. Kayaks, surfboards and windsurfing boards are not considered to be vessels. The Decree provides that this exception will be the case for all types of small craft in which the sum of the three dimensions (i.e. length, width and depth) expressed in meters is less than 2, or in which the width is less than 1,20 meters[131]. As an example, jet skis, under French law, are considered to be vessels (as they exceed 1,20 meters in width).

Secondly, it is strictly required, in order to qualify any immovable property as being a vessel that it floats on water. Indeed, a vessel is an immovable property which floats on or below the surface (such as the case of a submarine). This aspect of the definition of a vessel has never been challenged and has been affirmed by various decrees and laws. However, the specific example of an offshore installation, like an oil ring station, has been excluded from being defined as a vessel. The same exception also applies to pontoons and floating hotels.

Thirdly, not all floating devices can be considered vessels. This suggests another criteria that is taken into consideration when defining a vessel: a floating device is considered to be a ship if its structure is designed to overcome the perils of the seas and appropriate to the exercise of its activities in 'maritime waters'[132]. This principle was affirmed by a Cour de cassation decision in 1976, relating to the boat Poupin Sport[133]: her structure was too fragile to enable her to challenge the perils of rough seas and therefore the boat saw its qualification as a vessel rejected.

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[129] Idem p 105

[130] Cour de Cassation, 20 Février 1844, Sirey 1844.1.97 and see as well Cour de Cassation , 20 Décembre 1972, *navire Gipsy* II, DMF 1973.160 relating to a inflatable embarkation (zodiac type).

[131] Personal translation of summarised notions extracted from Bonassies. Pand Scalpel. C *Traité de droit maritime* at §147 p 106

[132] Idem at p106 and 107

[133] Cour de cassation 6 Décembre 1976, *Poupin Sport*, DMF 1977.513

B) Subjective criteria

It is important to note that under French law, the activities of a vessel do not interfere with the validity of the definition. In other words, commercial, scientific or recreational activities can be conducted by a vessel.

Once a creditor has identified a vessel susceptible to being attached, what conditions should be satisfied under French law, in order for him to secure his claim and proceed to a Saisie conservatoire?

4.2.2. The conservatory attachment of a vessel, an estranged cousin of the common law action in personam

A) Conditions relating to the debt: claims permitting maritime attachment

i) French residuary regime

Under France's domestic regime, ships may be attached for any claims, maritime or otherwise[134]. This right is open to any creditors provided that their claim satisfies the following conditions: the claim must be 'certain and serious' and founded in its principle. The 1967 Decree introduced the notion of certainty to the claim, but this approach was softened by the 1971 Decree which stated that the claim should be 'founded in its principle'[135]. This notion, inspired by the general regime relating to executory measures of the 1955 Law, has not been entirely defined legally. In courts, judges must therefore be satisfied that the claim is 'certain and serious' before authorising the vessel's attachment[136].

Moreover, unlike the common law procedure of attachment, there is no need for the applicant to ascertain that he has a reasonable need to attach the property and there is no security or insufficient security to satisfy his claim (see Cour de Cassation,

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[134] Tetley William 'Arrest, Attachment and Related Maritime Law procedures' (1999) *Tulane Law Review* at 1895 – 1985

[135] Personal translation of Bonassies. P and Scalpel. C *Traité de droit maritime* at §592 p392

[136] Tetley William 'Arrest, Attachment and Related Maritime Law procedures' (1999) *Tulane Law Review* at 1895 – 1985

November 18, 1986, DMF 1987.696). This absence of urgent criteria is also noticeable within the 1952 Bruxelles Convention[137]

ii) Bruxelles convention: the 1952 Arrest Convention

Under this international convention, ratified by France, the spectrum of maritime claims is both more restrictive and more open than the one recognised by the French residuary law of 1967.

On one hand, the definition of maritime claim is more restrictive in the sense that ships can be attached only by creditors who have a maritime claim or 'partially maritime' claim[138]. A closed list of maritime claims is given under the article 1(1) of the Arrest Convention of 1952. Under this closed list, rigidly implemented by courts, two types of creditors may proceed with a Saisie conservatoire in order to enforce their claims.

The first category consists of creditors who have claims resulting from maritime mortgage or ownership rights in connection with the attached vessel. The second category consists of creditors who have claims resulting from the exploitation of the vessel, such as claims arising from the employment contract of the master, crew or other persons engaged in on-board work, claims relating to damage resulting from collisions, or claims relating to remuneration of salvage, pilotage, etc[139].

On the other hand, the Arrest convention opens up a range of claims allowing for maritime attachment. The simple fact of alleging that one has a claim falling within article 1 of the Convention, allows the claimant to proceed with a Saisie conservatoire[140].

To conclude, it appears that neither regime, international or French, limits the attachment procedure of claims which give rise to a privilège maritime (a maritime lien)[141]. However, French law recognises maritime liens on ships for:

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[137] Personal translation of Bonassies. P and Scalpel. C *Traité de droit maritime* at §592 p392

[138] Idem at §593 p 392

[139] Tetley William 'Arrest, Attachment and Related Maritime Law procedures' (1999) *Tulane Law Review* at 1895 – 1985 and personal translation of Bonassies. P and Scalpel. C *Traité de droit maritime* at p393

[140] Personal translation of Favarel-Veidig. B 'Saisie conservatoire des navires en droit français' available at http://www.gepy.fr/dossiers%20GT_files/Saisie_conservatoire.htm [Accessed 23 September 2008]

[141] Tetley William 'Arrest, Attachment and Related Maritime Law procedures' (1999) *Tulane Law Review* at 1895 – 1985

- claims relating to legal costs, Court's costs[142];
- claims relating to tonnage, port charges, pilotage and costs of preservation of the vessel since its entry into the last port (port where the attachment takes place)[143];
- claims relating to master's disbursement, crew wages and those of other persons engaged in on- board work;
- claims relating to remuneration for salvage[144];
- and 'claims arising from contracts concluded or operations carried out by the master away from the ship's home port, under its legal powers, for the real needs of the preservation of the ships or the continuation of the voyage'[145].

These French maritime liens are all stipulated by the article 1(1) of the 1952 Arrest Convention and provide for the ranking of claims for French maritime creditors who possess one of these maritime liens. As an example, their rights will, by stipulation of the article 32 of the 1967 Law, be satisfied prior to those of creditors who possess maritime claims connected to a maritime mortgage[146].

French law relating to the definition of claims permitting maritime attachment might be considered as being more open when considering the scope of claims permitting a Saisie, in comparison to the closed list of the article1(1) of the Arrest convention. Nevertheless, the international regime is more flexible when considering the existence of the debt. Indeed, in French law, a greater degree of certainty is required when affirming that an attachment procedure can proceed. This may occur only if the claim appears to be founded in principle and is certain and serious.

B) What can be attached in a vessel

i) Principle

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[142] Tetley William 'Arrest, Attachment and Related Maritime Law procedures' (1999) *Tulane Law Review* at 1895 – 1985

[143] Idem

[144] Idem

[145] Idem and see personal translation of Favarel-Veidig. B 'Saisie conservatoire des navires en droit français' available at http://www.gepy.fr/dossiers%20GT_files/Saisie_conservatoire.htm [Accessed 23 September 2008]

[146] Personal translation of Favarel-Veidig. B 'Saisie conservatoire des navires en droit français' available at see footnote 145

Bearing in mind what is understood to be a vessel according to the French definition, it is now necessary to consider what components of the vessel would be susceptible to being attached.

Under the Decree of the 27th October 1967 and the 1967 Law, hull, machinery, holds, bunkers[147] and the vessel itself are susceptible of attachment. The procedure of attachment regarding these components is determined under the special regime of civil procedure of execution for maritime immovable properties established by the Decree of 1967. It is important to note that questions and debates arose amongst French jurists when trying to understand why French law and court[148]consider holds as an natural legal extension of the vessel and therefore as an immovable. Various French legal theories[149] tried to explain this approach but failed to do so. The only justification that would seem to give sense to this legal situation remains in a Latin expression: 'holds become unattachable ut singuli; they cannot be attached without attaching the vessel herself.'[150].

Nevertheless, procedure regulating the attachment of cargo and freight is subject to the general law of France regarding civil procedure of execution. Indeed, in French law, with freight being considered as an independent element of the vessel, the rules of the attachment procedure differ from those established by the 1967 Decree. The 1991 Decree relating to general civil procedure of execution applies instead[151].

ii) Exception

It is necessary to note that in French law certain vessels benefit from an executive immunity. The article 592 of the old Civil Procedure Code, modified by the 1977 Decree, provides that 'working instruments necessary to the conduct of professional

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[147] 'Cour de Cassation [...] held that, because bunkers were a component of the ship their attachment, like that of the vessel itself, was to be governed by maritime law (i.e the 1967 Decree), rather than by the general legislation of the 1991/1992 on execution on movable property.' See Tetley William 'Arrest, Attachment and Related Maritime Law procedures' (1999) *Tulane Law Review* at 1895 – 1985

[148] Cour de Cassation, 13 Janvier 1998, *Saint –Pierre*, DMF, 1998.823

[149] Such as: Theory des 'grés et apparaux' in which the economic unity is protected through the application of an identical legal regime to all the 'accessories of the principal'; or Theory de 'l'accession' in which accessories follows the regime of 'principal' (theory provided by the Civil Code under article 565 to 577)

[150] Personal translation of Rossi. A *La saisie conservatoire des navires* at §134 p 96

[151]Personal translation of Bonassies. P and Scalpel. C *Traité de droit maritime* at§ 615 p 410

activity' cannot be subjected to Saisie procedures[152]. This principle is applied to fishing vessels and is stringently adhered to by French courts. Even if this solution, affirmed by Dean Rodier, has as an objective the protection of economic wealth of maritime workers, one might think that it goes against the specificity of the maritime attachment procedure[153].

In addition to vessel exercising professional activities, French State owned vessels are not attachable before a French court, no matter the nature of the activities conducted by the vessel (commercial; scientific, etc...). This French exclusion differs greatly from the international approach in which arrest or attachment procedure of foreign state owned vessel is often accepted in cases where vessels are conducting commercial activities at the time at which the claim arose (see South African case, the *KJ International v MV Oscar Jupiter*)[154].

Once it has been admitted under French law that a creditor can attach a ship for any claim whatsoever, whether or not the claim is a maritime claim, French courts have found themselves facing a challenge: would it be possible for a creditor to arrest ship (A), associated to the guilty ship (B), bearing in mind that a company owned shares in both A and B, and where A and B appeared to be sister-ships?

4.2.3 The French attachment of sister-ships

A) The 1952 Arrest Convention

The 1952 Arrest Convention brought the first answer to this question, when providing that: 'Ships shall be deemed to be in the same ownership when all the shares therein are owned by the same person or persons.'

This article constituted the basis of the French théorie de l'apparence (theory of appearance).

B) The French residuary regime

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[152] Idem p 395
[153] Idem p 395
[154] *KJ International v MV Oscar Jupiter* [1997] 3 All SA 475 (D)

When interpreting this article, French courts at first envisaged that ownership should be understood as being ownership of all shares, ownership of all company capital[155]. Later on, French courts extended this understanding: in the case of a company (B), owning shares (however not in totality) of a company (A), creditors of A could attach any vessel owned by B where a community of interest was found between the legal entities, A and B (such as common commercial address, same banking details or other elements indicating a community of interest)[156].
The theory of appearance was born and at first received the approbation of the Cour de Cassation.

i) Theory of appearance: extensive interpretation of the 1952 Arrest Convention

Before going into further details pertaining to the jurisprudence development of the theory, a definition of this concept should first be provided.

a) Definition

The word 'appearance' describes the external aspect of a person or a thing, something that is visible to the eye. This external aspect can be the true reflection of the person or thing's reality or reveal a manipulated, false reality. Relating to the legal environment, the word appearance describes a falsified legal situation, a sham in order to perpetrate a fraud[157]. The theory of appearance recognises the rights of the claimant to file an action as a consequence of misrepresentation from creditors. French courts have relied upon the application of the appearance theory in order to 'lift the corporate veil', 'to determine the true ownership [...] where the reality of related shipowners and ships has been concealed behind the mask of "one ship" companies.'[158].
In order to be considered as a façade, legally speaking, two important elements must be present when considering the notion of appearance: the material and the

[155] Personal translation of Bonassies. P and Scalpel. C *Traité de droit maritime* at p398
[156] Idem and see Tetley William 'Arrest, Attachment and Related Maritime Law procedures' (1999) *Tulane Law Review* at 1895 – 1985
[157] Personal translation of Rossi. A *La saisie conservatoire des navires* at p108
[158] Tetley William 'Arrest, Attachment and Related Maritime Law procedures' (1999) *Tulane Law Review* at 1895 – 1985

psychological. Materialistically speaking, appearance is present when a common legal identity as well as common funding is found to be present in both companies, for example, having the same register licence number or shares being jointly owned by the related companies.

The psychological element is present when it is shown that the appearance aimed to mislead, to confuse the creditor or to manipulate him in order to perpetrate a fraud[159]. Through years and cases, French courts firmly followed the lead provided by this definition, until the definition of the 1952 Arrest Convention became a vague dot on the horizon.

b) Jurisprudence interpretation

1. The Brave Mother[160] case: theory of the community of interest, a step too far

In this case, creditors of the company which owned the Brave Themis (the guilty ship) performed a conservatory attachment of the Brave Mother (associated ship), owned by another company. Some few shares of the Brave Mother were owned by a family who owned shares of the Brave Themis[161]. The judge of the executory procedure did not however find that this fact impeded the claimant from proceeding with a conservatory attachment, stating that unity of the patrimony was present with the existence of a community interest within the two companies through the family who owned shares in both the guilty ship and the associated ship[162].

The owners of the Brave Mother appealed against the decision, affirming that the judgement did not respect the article 3.2 of the Arrest convention. Indeed the article 3.2 states that 'all shares' shall be owned by the same person or persons in order to qualify a vessel as an associated ship. The Supreme Court of France (the Cour de Cassation) rejected this argument and appeal. They affirmed that a simple finding of a unity of patrimony between two companies through the existence of a community

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[159] Personal translation of Rossi. A *La saisie conservatoire des navires* at p113

[160] Cour d 'Appel de Rennes, 21 Juin 1989 and Cour de Cassation, 12 Février 1991, DMF, 1991.315

[161] Personal translation of Bonassies. P and Scalpel. C *Traité de droit maritime* at p399

[162] 'Idem

of interest was evidence enough to justify the conservatory attachment of the associated ship[163].

This decision of the Supreme court extensively applied the material element of the appearance definition, pushing too far the concept of the theory of appearance.

2. The Osiris I and Kareliya: the death of the "extreme" approach to the theory of appearance

The end of the theory of appearance occurred in two phases[164]. Firstly, the Court of Appeal decided that the fictitious aspect of a company, in company law, was justified and not systematically referring to a falsehood, and could not justify the conservatory attachment of an associated ship[165]. This principle is also affirmed by the article 1842 of the Civil Code recognising the moral personality of companies. The *Osiris*[166]case was an illustration of this principle. The second phase of this 'death' of the theory of appearance, was finally carried out with the *Kareliya*[167]case. In this case, the vessel Kareliya was owned by the Maddock company. The creditors of another company, the Blasco company, in order to satisfy their claim relating to debts in connection with payment of container fees, proceeded against the vessel Kareliya with a conservatory attachment. The basis for their attachment was that the state of Ukraine was the owners in totality of the shares of the Blasco company and a sole associate in the Maddock company, owner of the Kareliya vessel. This conservatory attachment was authorised by the judge of the executory measure, but the owners of the associated vessel (the Maddock company) appealed against the decision and the Appeal Court of Nouméa released the vessel. The Blasco creditors decide to appeal against the decision before the Cour de Cassation, affirming that the Nouméa Appeal of Court did not respect in its judgement the theory of 'community of interests'. The Cour de Cassation took a rather different approach from previous cases, firmly

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[163] Supreme Court, 12 February 1991, D.M.F, 1991.315 and see Personal translation of Bonassies. P and Scalpel. C *Traité de droit maritime* at p 399

[164] Personal translation of Bonassies. P and Scalpel. C *Traité de droit maritime* at p399

[165] Idem p 400

[166] Cour de Cassation, 30 Juin 1998, *Navire Osiris* I, DMF 1995.135

[167] Cour de Cassation, 23 Novembre 1999, DMF 2000.719

putting an end to the extensive interpretation of the theory of appearance, and rejected the appeal[168].

Indeed the Court decided to strictly follow the wording of the article 3.2 of the 1952 Arrest Convention and decided that in order for the Kareliya to have been considered associated ship, the shares in the vessel would have had to have been owned in totality by the state of Ukraine. The fact that the Ukraine was the sole associate in the company which owned the vessel was not enough to justify the conservatory attachment of the vessel[169].

The theory of appearance has been turned by judges from its original goal in order to keep open the range of assets available to creditors seeking to secure their claims. By doing so Courts ignored the realities faced by shipping companies and frenetically attached vessels under the notion of community of interest. However, the Supreme Court of France intervened, putting an end to this practice and introducing a new approach which offered more consideration to the integrity of corporate structure and personality.

ii) Fictitious Theory: recognition of single-ship company

The Fictitious theory came into existence through the famous *Osiris I* and *Kareliya* cases.

The Fictitious theory is based upon the commercial law notion of fictitiousness: 'The fictitious aspect is characterised by when an association's members (company owners, creators) mislead the public perception of their company. The company is created as a sham in order to perpetrate fraud; and the constitutive elements of a company as laid out by French law are absent (such as a lack of affectio societatis).' [170].

It appears that the main characteristic of the Fictitious notion is the presence of fraudulent elements in the creation of the company and in the conduct of its business and activities. Indeed, French courts based their decision (when considering the attachment of a sister ship) upon considering whether or not sufficient proof relating

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[168] Personal translation of facts summarised from Personal translation of Bonassies. P and Scalpel. C *Traité de droit maritime* at p 400

[169] Personal translation of Bonassies. P and Scalpel. C *Traité de droit maritime* at p 398

[170] Personal translation of Delebecques. P *Groupes de sociétés et procédure collective* p132 cited in Rossi. A *La saisie conservatoire de navire* at p129

to the fictitious aspect of the single ship company had been given[171]. The Cour de Cassation strongly underlined that the perfect evidence of fraud in the creation of a corporate sham is the lack of affectio societatis, an essential element of a company under French Law. Affectio societatis is the reason behind founding a company or association and the reason why the company conducts its activities[172]. The *Osiris I* case illustrates this approach as the Cour de Cassation, deciding upon the appeal, stated that the companies which were the focus of this case were a sham and were lacking the affection societatis element.
This theory marked the end of the extensive use of the appearance theory and interpretation of the article 3.2 of the 1952 Arrest Convention, and recognised the principle of single ship companies.

Under French maritime Law, various principles are considered sacred by Courts and practitioners, such as the unity of the patrimony, symbol of the French concept of in personam. However, in order to adapt to the international playground and to shipping law practice, French maritime law acknowledged certain exceptions to this notion.

4.2.4 The case of the attachment of a vessel which does not belong to the real debtor: an attempt to recognise the common law concept of action in rem

A) Internal regime: French negation of the concept of action in rem

Under French law, creditors are not allowed to attach assets that do not belong to the debtor: 'Under French law, debts are only connected to the personality of the debtor and not to his assets [...], in principle debt does not directly affect the assets of the debtor.'[173]. This approach constitutes the main difference between a civil law country such as France and a common law country such as South Africa, where the in rem procedure allows a creditor to arrest a vessel in connection with its claim, regardless of the owner.
The French negation of the in rem procedure is connected to the personification theory of the patrimony, a fundamental concept in French law. Any executory

[171] Rossi. A *La saisie conservatoire de navire* at p 133
[172] Idem p 133
[173] Personal translation of A. Sériaux, op, cit , p 802 cited in Rossi. A *La saisie conservatoire de navire* at p 138

measures, conservatory or not, will not proceed under French law if the property attached does not belong to the person of the debtor. As it has been underlined earlier (chapter 3, § 3.2.1) this concept seems to contradict the particular nature of the shipping industry in which, as an example, a bareboat vessel may be the sole security provided by a charterer to its debtors: in other words, a vessel which does not belong to him.

It seems however, that under French law, this would be the unique case where an in rem action would be partially considered, where the vessel chartered (which does not belong to the debtor) could be attached. This procedure would only be accepted by Courts if the creditor had a créance privilégiée[174](a privileged debt) completed by a droit de suite (a right of suite).

Indeed, contrary to the normal regime of movable property, in maritime law there is a right of suite which 'follows' ships. This right of suite allows the creditor to follow a vessel which is no longer the property of its debtor. Thanks to the right of suite the creditor would be able to claim for the satisfaction of his debt from the new owner[175]. Applied to the shipping law context, a creditor would therefore be able to attach a vessel which has been bareboat-chartered[176].

This condition (privileged debt) is synonymous with the possibility of acting directly against the asset. This principle was established under the 1967 Law. Only then would a creditor be able to attach an asset (a vessel) in order to secure his claim, which does not belong to the debtor.

The *Namrata*[177] case is an illustration of the Courts approach to the limited possibility under French law for proceeding in rem. In this case, the Court agreed to the attachment of the Namrata vessel (bareboat-chartered), in order to secure the creditors' claim against the charterer of the Namrata. This attachment was to proceed only if the applicant could show that he had a privileged debt and a right of suite. In the *Navire R-One*[178]case, the Court applied the same strict principle.

However, it appears that French law tends to limit the possibility for in rem proceedings by strictly controlling the conditions which need to be satisfied.

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[174]Rossi. A *La saisie conservatoire de navire* at p 141

[175] Idem at p142

[176] Personal translation of Professor Vialard 'La saisie conservatoire du navire pour dettes de l'affreteur à temps' commenting a case law , the Spartan, *DMF*, 1988, p587 cited in Rossi. A *La saisie conservatoire de navire* at p 142

[177] Cour d'Appel d'Aix- en- Provence, 3 Décembre 1983, navire *Namrata,* DMF 1984

[178] Cour de Cassation, 4 Octobre 2005

B) The Bruxelles Convention: a mitigated acceptance of the action in rem [179]

The Bruxelles Convention, in its wording, is inspired by the Common law approach. The Convention allows a creditor to proceed with an action in rem in order to secure a maritime claim in relation with the vessel (article 3.1)

Indeed, the Convention allows creditors to secure their claim by attaching or arresting the vessel relating to which the claim arises, providing that they have a maritime claim, and this without having to worry about the person of the debtor (unlike French law and personification theory of the patrimony)[180].

However, in the subparagraph 6 of this same article, the Arrest Convention provides that procedures relating to the arrest or attachment of a vessel shall be governed by the law of the contracting states in which the arrest or attachment takes place. This subparagraph muddles the common law approach, mitigating the opportunity to proceed with an action in rem. The intent of the Arrest Convention is to introduce general concepts, practices of shipping law, bearing in mind the diversity of jurisdictions and laws within the contracting states.

The 1952 Arrest Convention provides French creditors with a supplementary tool for enforcing a maritime claim. The Convention allows creditors seeking to secure a maritime claim to proceed with an action in rem, a concept which French courts are reluctant to apply. However, the efficacy of the action in rem procedure of the 1952 Arrest Convention might be endangered by the strict interpretation of action in rem by French tribunals, and French creditors might find themselves obliged to satisfy the strict conditions of privileged debt and right of suite, established by French law in order to benefit from this common-law action. When doing so, the speedy nature of the action in rem, an essential characteristic of this shipping law procedure, dies in the process, business reality and law becoming once again estranged, if not incompatible.

4.2.5 The French notion of Saisie Conservatoire and the South African action in rem: a possible link?

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[179] Rossi. A *La saisie conservatoire de navire* at p 154
[180] Rossi. A *La saisie conservatoire de navire* at p 154

As it has been admitted into French law that a creditor can attach any ship or any property belonging to his debtors for any claim whatsoever, it appears extremely difficult to draw any comparison with the specific common law procedure of enforcement for maritime claims, the South African action in rem.

However, if one looks closely at the wording of the section of the Act relating to the action in rem, a subtle link can be drawn between the French civil law procedure of Saisie conservatoire and the common law procedure of action in rem.

Indeed section 4(b) of the Act provides that an action in rem may be enforced if the owner of the property would be liable to the claimant in an action in personam.

While this device considers the vessel as being the defendant, it appears to do so in order to proceed against the 'real' defendant of the action in rem, the owner of the vessel. 'The underlying personal liability upon which the action in rem largely depends'[181] was strongly defined in the early English jurisprudence.

In the *India Steamship Company*[182] case, the House of Lords, justifying the dismissal of the appeal (appellants being the Republic of India), described clearly the nature and historical origin of the actual action in rem. What can be surmised from this historical description is that originally, the enforcement procedure of the action in rem was the symbol of the personification theory: 'the ship herself was the "wrongdoer"'[183]. But the fact that the action in rem was permitted in 'new categories which did not involve maritime liens'[184] made progressively difficult the personification of the ship as being the real defendant. Facing this dilemma, the English jurisprudence slowly evolved towards defining two different and 'parallel actions'[185]: the action in personam, in which the owners are the defendants and the action in rem in which the vessel is the defendant.

Therefore, in a tenuous way, it could be said that the action in rem as described by the section 4(b) of the South African Act, could be a limited equivalent of the French Saisie conservatoire as they are both trying to bring to court the real defendant, who is in fact the owner of the vessel and not the vessel herself.

4.2.6 Absence of a French equivalent to the South African security arrest

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[181] Hare. J *Shipping law and Admiralty practice in South Africa* at p 66
[182] *Republic of India and others v India Steamship Company Limited* [1999] 1 Lloyd's Rep 1 (HL)
[183] Idem at 3
[184] Idem at 3
[185] Idem at 3

As has been previously stated in this study, the South African admiralty rules offer an interesting weapon to foreign creditors wishing to arrest a vessel in order to secure their claim which is or may be the subject of a case, pending or proceeding, elsewhere in the Republic or in the world[186].

This interesting device does not have a French equivalent as it goes against a fundamental principle of international law, applied with rigor and seriousness by French courts: the notion of territoriality.

The notion of territoriality express the fundamental right that any state has to detain an exclusive jurisdiction over legal matters occurring within its territory. This notion therefore excludes the possibility of any states interfering with the jurisdictional competence of another state within that state's territory. In other words, when applying this notion, French judges are not allowed to intervene in a legal process occurring outside French territory nor do they have the right to enforce a claim in France which has been heard by a foreign court.

The notion of territoriality defines the right of states to determine the rules and conditions under which a foreign legal decision may be enforceable, and recognised under its domestic law.

In France, the procedure of exequatur determines under which conditions a judgment rendered by a foreign court may be domestically enforceable[187]. These conditions are strict (one of them being that the foreign judgment is not fraudulent and does not conflict with the French public order)[188] and often impede the local enforcement of a foreign judgement. The only judge competent to begin the exequatur process is the judge of the execution, at the Tribunal de Grande Instance.

Even if multiple international conventions and European agreements try to soften theses conditions (such as the article 24 of the Bruxelles Convention of 1968), French law does not bend and unless the foreign judgement is recognised by the exequatur procedure, French judges are not authorise to enforce any claim pending outside of their jurisdiction.

4.2.7 Procedure

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[186] AJRA section 3(a)

[187] Personal translation of Gourion A and Peyrard *G Droit du commerce international*, 3rd edition, 2001, at p199

[188] Idem.

'Under both domestic and international regimes in France, the legal procedure for the attachment of ships are those of the 1967 Decree.'[189].

The 1967 Decree regulates very simply this legal procedure.

The Saisie conservatoire is authorised by an ordonnance (ordinance) of the president of the Tribunal de commerce, or if not available, by a judge of the Cour d'Instance (a lower court)[190]. Legal texts however do not indicate the judge as being territorially competent for the authorisation of the Saisie conservatoire. In practice, the judge of the port in which the vessel is situated is considered to be competent. This was supported by the article 48 of the Civil Procedure Code. But in 1992 the Decree, in its article 211, provided that: 'The judge competent to authorise a conservatory measure would be the executive judge of the place where the debtor is located.'.

Even if the 1992 Decree reversed the old practice, it appears that the principle of the competence of the Tribunal de commerce of the place where the vessel is berthed shall be maintained[191] in order to respect the article 5 of the1952 Arrest provision ([...] in which the arrest is made .) and to respect the foundation of the 1967 Law[192].

Once the authorisation of Saisie is obtained, the creditor must notify the master of the ship and the port administrative structure of this decision, who would then refuse the departure of the attached vessel (article 26 of the 1967 Decree)[193].

The president of the Tribunal de commerce will be able to reject the demand of Saisie if he considers that the creditor does not have a claim which appears to be founded in its principle.

'French law provides two modes of lifting the Saisie conservatoire.'[194]. On one hand, the ship-owner or the charterer of the attached vessel may seek release of the ship by motion to the Tribunal de Grande instance[195]. If the judge considers that the Saisie was not appropriate, the release is granted and the vessel is free to leave the port where she was berthed. The creditor still has the right to appeal the decision but the appeal will not 'freeze' the vessel which will then be able to continue her voyage. On

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[189] Tetley 1999 Tulane Law Review

[190] Personal translation of facts summarised from Bonassies. P and Scalpel. C *Traité de droit maritime* at p 405 and Tetley 1999 Tulane Law Review

[191] Personal translation of Bonassies. P and Scalpel. C *Traité de droit maritime* at p 405

[192] Idem

[193] Idem

[194] Tetley 1999 Tulane Law Review

[195] Personal translation of facts resumed from Bonassies. P and Scalpel. C *Traité de droit maritime* at p 407 and Tetley 1999 Tulane Law Review

the other hand, the Saisie can be lifted by a motion to the Tribunal de Grande instance seeking 'an order authorising the vessel to leave the port of attachment for one or more determined voyages, in return for the giving of adequate security. The president must set a deadline for the vessel's return to the port of seizure. Should the deadline be missed, the creditors are entitled to the security. The security generally takes the form of a letter of undertaking from the ship-owners P&I club [...] The security is regarded as taking place of the vessel.'[196]

In all instances where release from attachment was not given, the applicant (the creditor) has the right to obtain a Court's judgement validating the debt, in order for him (the applicant) to obtain a legal title giving him the right to either seek a guarantee fund or proceed to the sale of the vessel[197]. French law refused this competence to the judge of the execution. Indeed the judge of the execution (forum arresti) is not competent to decide upon the validity of debt. A 1979 case however changed this approach, and the Cour de Cassation in a 1986 case confirmed that the judge of the execution ordering a Saisie conservatoire would be competent to decide upon the validity of the debt, unless another Court had already been attributed an exclusive jurisdiction upon the matter. But in 1995[198], the Cour de Cassation went again its own approach by excluding the competence of the judge of the execution deciding upon the validity of the debt, with exception made to instances which are accepted by the 1952 Arrest Convention. This decision has been strongly criticised by French judges and legal scholars as it does not seem to satisfy the expectations of the contemporary law, balancing economic interests within the international legal practice with effective access to justice[199] (indeed a creditor would have to initiate two legal procedures instead of one: the first to obtain the arrest of the vessel and the second to obtain the validity of its debt.).

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[196] Tetley 1999 Tulane Law Review

[197] Personal translation of Bonassies. P and Scalpel. C *Traité de droit maritime* at p 408

[198] Cour de Cassation , *Navire Ganvié*, Semaine juridique 1995.II.22430, note H. Muir Watt; DMF 1996.815

[199] Personal translation of Bonassies. P and Scalpel. C *Traité de droit maritime* at p 409

Chapter 5: Summary

In the previous pages, whether going through historical aspects or legal concepts, it clearly appears that South Africa and France are not only geographically distanced. Regarding the procedure of enforcement of maritime claims, France and South Africa vary as greatly as the physical distances separating them.
However, South Africa and France share some similarities around the question of enforcement procedure that might justify the French saying: ' il n'y a que les montagnes qui ne se rencontrent pas' (Only mountains never meet, anything is possible.)

First of all, in their respective histories, the roots of South African and French admiralty law are very different. The colonial past of South Africa, an expression of a common law monarchy (England), contrasts greatly with the old civil law approach of France. French codifications of maritime law started early whereas South African maritime law was established as a perfect replica of the British Maritime law of those times. These historical differences may justify the variations between legal concepts in South Africa and France, but it might also link these two countries. Indeed, South African and French maritime law suffers from the same contradictory legal symptoms: South Africa because of its colonial past, France due to its monist approach to the hierarchy of legal norms[200].

When South African admiralty law and its bizarre (if not unorthodox) approach to the definition of the applicable law relating to maritime claims is often criticised[201], French maritime law, by incorporating international conventions into its domestic legal system, finds itself facing considerable legal challenges in harmonically combining international concepts and domestic principles (e.g. the ratification by France of the 1952 Arrest Convention which confronted French law with the Common law concept of action in rem, a concept totally at odds with its Civil law approach)[202].

Secondly, it appears that the most striking difference between South African and French admiralty law remains within the notion of action in rem. Where Civil law

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[200] See section 2.2.1 of this study
[201] See section 2.1.2 of this study
[202] See section 4.2.4 b) of this study,

countries such as France or Belgium are estranged from this concept[203], Common law countries such as South Africa use it as a dreaded tool allowing creditors to satisfy and secure their maritime claims[204]. The strictly French approach to the personification theory of patrimony justified the French refusal to recognise the action in rem[205]. However, in order to adapt to the international approach to enforcement procedure for maritime claims (e.g. The 1952 Arrest Convention and 1999 Arrest Convention) and to link shipping business realities with law, certain noted French authors, such as Rossi. A or Chauveau. P[206], advised French jurisprudence to head towards a more liberal acceptance of the action in rem, by the application of the legal theory of patrimoine de mer (theory of sea patrimony)[207]. The theory of sea patrimony, acknowledging the specific realities of the shipping business and the particular role of the vessel in the maritime venture, will envisage ships as being a specific patrimony for maritime claimants, who would then benefit from specific rights if they possess a maritime claim. This theory would then allow French law to recognise the validity of an action in rem, a validity limited to maritime creditors who posses maritime claims and in doing so connect a Civil law country to the South African common law practice. Moreover, the link between the concept of the action in rem and the French Saisie conservatoire might not only be drawn with the use of the theory of sea patrimony: indeed when going back to the history of the concept of action in rem, it clearly appears that the objective of this concept was to bring the real defendant, the owner of the ship, before the Admiralty court. Even if legal developments diverted the action in rem from its original goal, the South African statutory action in rem laid out in the section 4(b) of the Admiralty Act linking the owner of the vessel to the action, is still connected to the original goal of the action in rem. And this South African provision might be seen as being a reflection of the French concept which affirms that any enforcement procedures must proceed against the real defendant, the person of the debtor. This provision might just be intangible proof that France and South Africa, civil law country and common law country were indeed once part of the same family, before being estranged by historical events.

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[203] See Peters. J *Arrest of ships : a comparative analysis of Belgian and South African law* 1995 at p 3
[204] See section 4.1.4 of this study
[205] See section 4.2.4 a) of this study
[206] See Traité de Droit Maritime, *Traité de Droit Maritime* (1958) p 113
[207] See Rossi. A *La saisie conservatoire de navire* at p 145 to 154

Third of all, when South African law relating to the arrest of an associated ship carefully defines the notion of control (see p 33 of this study), French jurisprudence frenetically agrees to lift the corporate veil, almost ignoring the legality of the single-ship company[208]. The intervention of the Cour de Cassation, with the Fictitious theory, returned the jurisprudence closer to the meaning of the wording of the 1952 Arrest Convention, and in a sense connected with South African's jurisprudence intention to carefully frame the notion of control in the procedure for arresting associated ships.

Finally, while in South Africa the judge's role plays an important part in the examination of the prerequisite conditions relating to an arrest or an attachment, and the validity of the debt, French judges of execution have the limited role of examining only the presence and not the validity (the merits) of a debt founded in its principle. However, the precision of South African procedure shows similarities to French procedure only when the French jurisprudence defines the competence in loci of its judges facing a maritime claim.

[208] See in this study the *Osiris I and Kareliya* cases

Chapter 6: Conclusion

In this study, the main features of the enforcement procedure rules applicable in France and South Africa have been reviewed.

Noticeable procedural differences between the common law country, South Africa and the civil law country France resulted, as one would reasonably think, in various consequences for maritime debtors or creditors.

Although these differences strike one as being multiple, similarities within French and South African admiralty law are also present.

Furthermore it often appeared that in various aspects, French maritime law had a tendency to harmonise its legal approach with the common law example, South Africa.

While this tendency could be seen as being surprising, as France has often been considered to be the symbol of legal originalities and strong values ([...] France, with its noble tradition of concern for fundamental rights and freedoms[...][209]), it however confirms a simple reality that South African law understood earlier. In order to be effective, law not only has to create a framework for the actions of citizens, but has to be in touch with the reality of its time, the reality of commercial practice and needs. Shipping law cannot be seen as being an exception to this important fact. South African law, with the action in rem understands this principle: the arrest procedure provides a quick security for maritime creditors whose claims are in danger of being jeopardised. The possibility to arrest a vessel quickly, without being overwhelmed by technical points of legislation, can be considered as being an important advantage for maritime creditors. South African admiralty law is particularly appealing in this matter. France, in order to be considered similarly attractive and in order to be connected with the 'demands of international shipping in the twentieth century'[210] may have to refine its old texts and legal concepts, in order to appropriately welcomed the notion of action in rem. However it also has to be underlined that in our modern world, shipowners trying to satisfy a considerable number of demanding customers, a vessel arrested is money lost. A vessel arrested means a carrier losing demurrage and reputation and a client losing patience, and turning to the competition. This is a very negative equation which can repel shipping

[209] Tetley 1999 Tulane Law Review
[210] Idem

investors or simply shipping activities from a country. Therefore, French law, in its more defined approach to maritime debts, offers relative stability for debtors. South Africa should be aware of pitfalls which can affect its economy, should the shipping industry see South Africa as being a paradise for the arrest of ships.

As it seems that each country can learn from the others experience, it would appear that the procedure for enforcement of maritime claims is, in both domestic regimes, trying to balance two divergent interests: those of the creditors and those of the debtors within the maritime venture[211].

Attempts to provide a solution to this dilemma may interfere with the efficiency of various domestic legislations. It remains to be hoped that South Africa and France will focus on the protection of their shipping industries and not lose themselves in legal and theoretical mazes.

[211] Peters. J *Arrest of ships : a comparative analysis of Belgian and South African law* (1995) at p 52

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