MARITIME MORTGAGES

A Question of Priority

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1. INTRODUCTION

1.1 History

The use of a ship, her cargo and appurtenances as a means of securing a debt in relation to that ship, incurred by her master or owner, has a history that can be traced back to Roman law.

Early references to the practice may be found in the Digest of Justinian Book 42 dealing with privileges over property, where Paulus is quoted as saying:

> "Anyone who has lent money for the purposes of building, equipping or even purchasing a ship, is entitled to this privilege"[1]

or where Marcian; states:

> "A claim for money advanced for the building, purchase, fitting out, or equipping of a ship in any way, or one in respect of the sale of a ship takes precedence after a claim by the imperial treasury."[2]

Both today would in all likelihood constitute a mortgage.

In seeking to trace the origins of the maritime mortgage the 'Rolls of Oleron' present an early definitive recording of what may be described as

1 S.P. Scot : The Civil Law : Vol 9-11 : Pg 261

2 Momson : The Digest Justinian : Vol 4 : Pg 555

being a 'pledge' of a ship's equipment by the master if he required money for the expenses of the ship in a foreign port.[3] This process is likely to have given rise to what later become known as a 'bottomry' bond, believed to be the early forerunner of the maritime mortgage bond, and described by Lord Stowel in the [Atlas][4] 1827 as:

> "The hypothecation or bottomry bond known to the civil law, and acted upon with a undoubted authority by this Court."

This form of bond, which had a similar form over cargo known as the 'respondentia' bond, allowed the master who was short of cash or credit, to acquire money to effect repairs to his ship and her equipment so as to complete her journey. Lord Stowell opined[5] that this process was well known in Roman law, known as the *usura maritima* or *foenus nauticum.* It allowed the lender, whose security was contingent upon the safe arrival of the vessel at her determined port, to value his risk. This was so because the loss would be his entirely if the vessel came to grief along the way. The lendor therefore set his interest accordingly, with that eventuality in mind.

However, Tetley in discussing these early forms of 'bonds and privileges', concludes that "the true origin of the ship mortgage is unknown."[6] In an effort to shed some light on this obscurity, the origins of the maritime lien as distinct from the maritime mortgage, is looked at. Indeed, a study of maritime mortgages would be incomplete without reference to the maritime

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3 W. Tetley : Maritime Liens and Claims : Pg 9 : his own translation

4 [The Atlas] 2 Hagg Pg 48 at 57-8 : 166 English Reports Pg 162

5 Ibid

6 Tetley, opcit : Fnt 1 : Pg 205

lien. Not that the two are synonymous or analogous, rather they co-exist in today's commercial world as separate entities, perhaps sharing a common developmental experience. Herbert,[7] when discussing the origins of maritime liens in the US context, ascribes the obscurity that surrounds these origins to the jurisdictional battle between the Common Law Courts and the Admiralty Courts during the 17th Century in England.

Thomas[8] in a similar discussion on the origins of maritime liens refers to this conflict between the Courts as one of three other possible theories that describe the origin of the maritime lien. The other two being the Historical/Personification and the Procedural theory.

The Historical/Personification theory has its foundation in the personification of the ship as a juristic entity, which Herbert[9] says explains how it was that the Roman law concept of hypothecation, liens arising *'ex contractu'* and *'quasi contractu'*, made their entry into maritime law.[10]

The theory has three basic premises:

1. The lien attaches to the ship irrespective of the shipowner's personal obligations.

2. The holder has an action *in rem* limited in value to ship's value.

7 P.M. Herbert : Tulane Law Review : 1930 : Vol 4 : Pg 381 ff at 382

8 Thomas : Maritime Liens

9 Herbert, opcit : Pg 388

10 Herbert, opcit : Pg 385

3. The lien clings to the ship notwithstanding changes in ownership.

The Procedural theory, attributed to Marsden, also has 3 basic premises:

1. A right to proceed *in rem* is not exclusive to a lien holder.

2. An *in rem* action based upon a lien is an action against the shipowner and contingent upon his personal liability.

3. If the shipowner defends the action the value of claim is not then limited to value of the ship.[11]

The Conflict theory finally, has its basis in the jurisdictional conflict that is said to have raged between the Common Law Courts and the High Courts of Admiralty in England. The jurisdiction of the latter was curtailed by Royal statutes and prohibitory writs against proceedings *in personam*. As a result this left open the area, of the *in rem* action, which was extended by the High Court of Admiralty; and, innovative use was made of Civil law concepts already present in the Admiralty Jurisdiction[12] [personification and hypothecation] ultimately being expressed in two British cases [The Bold Buccleugh][13] and [The Two Ellens][14], which not only described the maritime lien, but also determined the distinction between a maritime lien and a maritime mortgage, as follows:

[11] Herbert, opcit : Pg 385

[12] See fnt 1&2 and 9&10 above

[13] 1851 & Moore PC Pg 267 at 284

[14] 1872 LR 4 PC 161

> "The res, the ship does not become chargeable with the debt for necessaries until the suit is actually instituted, and all valid charges on the ship to which any person other than the owner of the ship, who is liable for the necessaries is entitled, must take precedence."[15]

The jurisdiction of the High Court of Admiralty was extended by statute in 1840[16] and again in 1861[17] to enable claimants to proceed *in rem* or *in personam* in areas formally beyond the Admiralty Court's jurisdiction. But in so doing, it did not confer lien status to these particular claimants. Two questions were thus answered in terms of the English system:

1. An action *in rem* could be brought without the claimant necessarily having lien status.

2. These extensions of jurisdiction did not constitute liens in themselves.

The jurisprudence of the United States (US) took a different view, affording lien status to most claimants because coupled to that status, was the ability to proceed *in rem* against the vessel,

> "the lien and proceeding *in rem* are correlative .... where one exists, the other may be taken, and not otherwise"[18]

[15] Quoted by Herbert, opcit Pg 388

[16] 3&4 Vict in 65

[17] 24 Vict C10

[18] [The Rock Island Bridge], 6. Wall US 215 1867 533 (1897); Herbert, opcit Pg 386

1.2 Development

The maritime mortgage (now identified), as a right in property a 'privilege', a 'pledge' (of sorts) started out as a bottomry bond which afforded the lendor scant security, being dependant as he was on the successful completion of the maritime adventure. Lien status was granted to the lendor, who could as a result proceed against the property of the ship to satisfy his claim. These forms of security were *sui generis* and different from the standard forms of security because they did not allow for the retention of possession, hence distinguishable from pledge or pawn. They, were as has been discussed, more akin to a lien, in that they also constituted a charge against the property in question, constituting a right in the thing,[19] a *ius in re aliena.*[20] Being a proprietary interest in the ship, they carried with them the risks of ownership; but the ability to take possession and execute, was the security.

But liens and mortgages are different, Thomas[21] says, 'quite distinct and unrelated.' In Tetley's view, maritime liens and claims are the great the antagonists of the mortgage.[22] This is as a result of the development of commercial shipping practise, with financial institutions, the lendors of capital to shipowners, increasingly requiring greater security for their loans. Recourse was thus had to statutory protection.

19 [The Young Mechanic] : Fed Cas 877 (D. Me. 1845) : Herbert, opcit Pg 405 fnt 172

20 [The Ripon City] 1897 Pg 226 at 242

21 Thomas, opcit Pg 3

22 Tetley, opcit Pg 206

In the United Kingdom (UK) this took the form of the Maritime Shipping Acts (MSA) 1840 where before, the jurisdiction over mortgages lay with the Courts of Equity and Common Law, now the mortgagee needed to be in possession to be able to enforce his rights in Admiralty, but couldn't get it for want of jurisdiction to arrest.[23]

The jurisdiction to arrest for claims on mortgages over ships (foreign and British) was extended to mortgagees by incremental steps through statutory amendments to the MSA in 1854, 1861, the Admiralty Court Act in 1861,[24] and substantively to the MSA in 1894 and finally in 1993.[25]

Initially, under the earlier MSA mortgages being transfers in property, were made by Bill of Sale, which the Common Law Courts and the Courts of Equity only recognised if registered.[26]

Statutory amendments mentioned earlier changed this Bill of Sale form of registration and introduced statutory forms of mortgage without a requirement to be registered. At the same time, statutory protection was afforded the hitherto unsecured 'equitable mortgagee'. By these amendments, except against registered mortgagees, the equitable mortgagee had an enforceable claim against all others.[27]

The mortgagee has thus ownership in the vessel to the extent necessary to

[23] Pritchard, Admiralty & Maritime Liens 3rd Edition Pg 1132 : Section 2 : Para 42 : Tetley, opcit Pg 207

[24] Meeson, Ship and Aircraft Mortgages - Pg 4-5 where he questions [Keith & Burrows]1876 (1) CPD 722, suitably adapted to reflect the changes as at 1894 : Pritchard, opcit : Section 3 Para 44-53

[25] Merchant Shipping (registration etc) Act 1993, Chapter 22

[26] [Keith ANO v Burrows ano] 1876 CPD - ASPMLC 280

[27] Opcit, Section 25&26 Vict. C63 : Section 3, 43 & 59 of MSA of 1854

secure his debt, subject to the owners right of redemption upon satisfaction of the debt. With this ownership comes the right to take possession.

The difference between liens and mortgages is further borne out by the changes that took place the US Admiralty jurisdiction in the same area.

A paradox is painted by Smith[28] acknowledging the earlier recognition of the rights of those who lent money to masters and shipowners, when he says it took centuries "before such lenders could safely assume that the loan was secured by a preferred lien on the vessel."

The US having taken the view that rights *in rem* were correlative to lien status,[29] failed to afforded the mortgagee protection in Admiralty, because of the jurisdictional conflict inherited from the UK did not afford the mortgagee rights of action in the Admiralty Courts.

As a result up and until 1920, a mortgagee in the US was required in the main to proceed against the owner and ship outside of the Admiralty jurisdiction,[30] in the context of a ship mortgage being compared to:

> "A contract without any of the characteristics or attendants of a maritime loan and is entered into by the parties to it, without reference to navigation or perils of the sea ....."[31]

[28] Smith : Ship Mortgages, Tulane Law Review 47 (1973) : Pg 608

[29] Fnt 18 above

[30] G. Fontenot TMLJ : Pg 213 and 214 and the discussion there, as to how the conflict between Federal and State jurisdictions in the US Courts has been addressed

[31] Smith, opcit Fnt 8 : Pg 609 quoting [Bogart v The Steamboat John Jay] 1854

Thus in 1920, a Ship Mortgages Act was passed in the US with the avowed policy of attracting post World War 1 tonnage to remain in the US and to give mortgagees protection under Admiralty jurisdiction. The Act was further amended in 1954, again influenced by surplus post war tonnage. A 'preferred mortgage' was created which included all forms of 'mortgage, hypothecation and charge created as security',[32] on both local and foreign vessels. If validly constituted the 'preferred mortgage' gave rise to a maritime lien and hence the mortgagee was able to proceed both *in rem* against the vessel or *in personam*, in the Admiralty Court against the owner.[33]

1.3 Today

The maritime mortgage can be seen today as the "corner stone upon which lenders build a ship finance transaction."[34]

Its essential feature is that it remains a security transaction. In the Common Law jurisdictions property may pass from the mortgagor to the mortgagee, this right to property is redeemable by the mortgagor upon repayment of the loan secured.

The mortgage is more than a lien in the sense of a *'ius retentionis'*, which implies merely a right to possession, it is a transfer of property by way of security[35] and hence more akin to the maritime lien, whose holder has the

[32] Ibid

[33] 46 USC Chapter 951-4 (1970)

[34] Shipping Finance : 2nd Edition : Stephanson Harwood : Pg 105

[35] [Keith v Burrows] 1876 1 CPD 722 (Aspinal R Vol 3)

right to proceed against the property to recover the interest secured.

Civil law countries tend not to adopt the personification of the property, the *in rem* action, but tend to proceed to recover the interest secured by attachment in an action *in personam* against the owner.[36] Stemming as it does from the civil law concept of hypothecation where no absolute right to possession exists until perfected by Court action, the right is translated into a right to participate in the proceeds of the property sold.. Whether these differences between common law countries and civil law (codified) jurisdictions effect the prioritisation of mortgage claims with respect to other maritime liens or claims, remains to be seen.

The South African Admiralty jurisdiction being largely common law based, has inherited the English system and process of the mortgage, as it existed under the jurisdiction of the Colonial Courts of Admiralty in 1890, as interpreted by the British Courts as at November of 1983.[37]

Largely a creature of statute, the South African mortgage would be dealt with under the jurisdiction of the Admiralty Jurisdiction Regulation Act (AJRA).[38]

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36 Tetley : Pg 17 & 206 : ascribes this phenomenon when discussing France, which unlike the UK was not affected by the 'conflict' jurisdiction struggle between Common Law and Admiralty Courts, and hence the *lex maritima* - codified in the Rolls of Oleron, that UK had also absorbed, where in France left largely untouched by jurisdiction battles and merely modified by later ordinances and Codes de Commerce

37 Section 6 of Admiralty Jurisdiction Regulation Act (AJRA) 105/1983, which would have reference to British law as it was applied in November 1983, being the law as set out under the MSA of 1840-1854 and 1860 - discussed earlier. Meeson, opcit : Pg 4-5

38 [Section 6 of AJRA is not without problems when dealing with the existance or otherwise of the equitable mortgage : [Keith v Burrows] opcit and AJRA Act 105 of 1983

Because it is the cornerstone of ship finance transactions the rank and priority of a maritime mortgage bond over other maritime liens and claims, upon the forced sale of the bonded ship, is of utmost importance, both to the mortgagor and the mortgagee. This is particularly so, when the proceeds realised by the sale are insufficient to meet the claims of all the creditors.

The principle of comity amongst the nations of the world, was expressed by Hewson J in the ['Acrux'][39] as follows "This court recognises proper sales by competent Courts of Admiralty or Prize aboard - it is part of the comity of nations as well as a contribution to the general well being of international trade." Together with the authorities quoted therein,[40] the principle demands that the Court's of one jurisdiction recognise the legitimate procedures and pronouncements of others. It is in this way the doctrine of 'clean title' acquired by a purchaser of a ship at a judicial sale, has been developed and followed. This means that creditors, claimants, lien holders and mortgagees must achieve satisfaction out of the proceeds of the sale, for their claims (liens or otherwise) are thereby extinguished as against the ship. Small wonder that the issue of ranking and priority assumes such importance for a financier, when contemplating securing a loan by means of a mortgage over a ship.

This is made all the more desperate because there exists a singular lack of uniformity amongst the maritime nations of the world, when dealing with the issue of rank and priority afforded maritime claimants, lien holders and mortgagees. Despite three attempts by the international community of

39 LLR (1) 1962 : Pg 405 and 409

40 [The Tremont] (1841) 1 W Rob. Pg 163 at 164
[Louis Castrique v William Imrie] (1869) LR. 4 HL 414 at 429

nations,[41] to strike a balance between all creditors with an interest in a ship, there remains an inability to predict the priority a mortgagee claimant will receive when ranked against a fund realised by the proceeds of the mortgaged ship. Different orders of rank and priority coupled with different rules governing the choice of law to be used to determine the claim are at the root of this uncertainty.[42]

The problem for the mortgagee is thus twofold:

1. The jurisdiction of the Court in which the mortgagee seeks to enforce his claim and,

2. The fact that the ship over which the mortgage is registered, may have attracted claims of varied descriptions, all enjoying different ranks and priorities, which in turn will change from jurisdiction to jurisdiction. Hence, the statement by Meeson[43] 'a mortgagee is best advised to seek local advice appropriate to the jurisdiction concerned before taking any particular course of action'. Often however, the choice is precipitated by another creditor's action and the mortgagee is thus left to the cope with the vagaries of the jurisdiction within which he finds himself forced to participate.

A comparative look at the various jurisdictions and the International Conventions may reveal a solution to this particularly ineligant

41 The 3 International Conventions on Maritime Liens and Mortgages of 1926, 1969 and 1993.

42 Filho, The Maritime Lawyer : Vol 9 : 1984 : Pg 246 and the discussion there on comparative liens rank and priority

43 Meeson, opcit Pg 127

situation. But first a look at the nature, form and content of the mortgage itself.

2. CREATION & FORMALISATION OF THE MARITIME MORTGAGE

2.1 Common Law Based Jurisdiction

In the UK as discussed earlier, the mortgage bond is understood to have developed out of the bottomry bond, which has largely become abrogated by disuse.[44] Legislative intervention secured the rights of the mortgagee first in 1825, and finally in 1993,[45] by way of introduction of an refinement to the statutory mortgage.

The Statutory forms are briefly confined in the main to the ships particulars, the identification of the parties and the quantum and nature of the debt. In respect of the latter, two forms have developed the "Principal Sum and Interest"[46] and the "Current Account."[47] Coupled with these forms, a practise has developed whereby the shipowner and the lendor enter into a separate agreement, "Deed of Covenants" which underpins the mortgage form, setting out in some detail the nature of the loan, the attendant terms and conditions. In the UK, the Deed of Covenants will not be registered with the mortgage.[48] The mortgage form must be executed as a deed by the mortgagor and then may be tendered for registration at the Registry of Shipping and Seaman. Thereafter, it may not be changed without re-

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44 Shipping Finance : 2nd Edition : Pg 105

45 S6 of Schedule 1 : Paragraph 7 (2) : MSA 1995 will consolidate the changes made in MSA (Registration ect) Act of 1993

46 Ros 30 1/94

47 Ros 25 1/94

48 Shipping Finance : Pg 106 : Whereas it would appear in Cyprus and in S.A. the Deed of Covenant forms part of the registered documentation

constituting the Deed. The mortgage will rank in priority according to the date of registration inter se with others registered after it. The mortgagee's rights are subject to prior encumbrances and maritime liens.[49] Execution of the Deed of Mortgage constitutes efficacy against the world, not registration; the latter provides evidentary notice of time and existence to third parties.

The mortgagee has the power by statute to sell his mortgaged share of the ship or the ship itself,[50] if his debt is unsatisfied. At common law he may take possession if mortgagor is in default or otherwise endangers the security that is provided by the mortgage. Foreclosure and receivership are available, but rarely in the UK and like jurisdictions, are they resorted to.

If a mortgage is not registered, it is understood nevertheless to have created a valid charge or security over the vessel, enforceable against others,[51] even a subsequent purchaser without knowledge thereof.[52] Other jurisdictions may well not recognise this 'equitable mortgage' with the same rank or priority, indeed some may deny the putative mortgagee an action *in rem.*[53] The equitable mortgage is dealt with further below.

2.1.1 South Africa

Following largely the format described above the mortgage in South African law is also a creature of Statute - the Merchant

[49] Of the kind recognised by Admiralty Act in UK ie: wages lien, damage lien, salvage lien, etc.

[50] Section 6 : Schedule 1 : Paragraph 9 of MSA (Registration etc) Act 1993

[51] [Keith v Burrows], opcit

[52] [Shizelle] 1992 (2) LR 444

[53] Shipping Finance, opcit : Pg 106

Shipping Act (MSA) 57 of 1951, which similarly contains the two forms recognised by its English equivalent:

> Section 47 provides that a "South African ship or share therein may be mortgaged as security for a loan or other debt, and the instrument creating the mortgage shall be called a deed of mortgage and shall be in the prescribed form."[54]

This would indicate that proper execution of the statutory form[55] leads to the effective creation of the mortgage. Thereafter in Section 47 (2) the proper officer is enjoined to register only those mortgages that are presented to him for that purpose, in the order in which they are presented. As with the practise in the UK, the South Africa forms are brief, and the customary practise is to conclude separately a 'Collateral Deed' incorporating the mortgage and providing the terms and conditions of the loan giving rise to it. It is normally annexed to the prescribed mortgage form upon registration, but is not required to be. There is an express provision against registration of the mortgage in the Registrar of Deeds' office,[56] Section 49 provides that the sequence of registration will determine the order of priority of mortgages inter se. As to the question of priority, it is not the execution of the mortgage that is determinant, it is the registration thereof.

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54 Section 54 and 56 MSA provide for the mortgage of a South African ship or share therein to be executed outside South Africa, upon a prescribed certificate, but require registration in South Africa to gain priority 56 (e)

55 TV19/TV20 - signed by the mortgagor only

56 Section 46 : MSA

Section 49 makes it clear that date and timing of registration has priority over date and time of execution of the statutory form. There is no obligation to seek registration.

Of significant difference to the system in the UK[57] is that, as of right in the mortgage, the S.A. mortgagee can not sell the ship or the mortgaged share.[58] The Court must be approached for relief first and and then only the Court may grant that right to satisfy the debt.[59] A registered mortgage may be transferred by deed of cession in the prescribed form.

A South African ship's mortgage does not fall to be defined by Section 2, as a 'special mortgage' in the Insolvency Act.[60] Therefore in the hands of the liquidator of an insolvent shipowner's estate, his ship over which a mortgage has been passed, falls into the common liquidated estate and the mortgagee must compete, without preference, with the other concurrent creditors. Only arrest of the vessel prior to it vesting with the liquidator upon the mortgagor's insolvency, will save the vessel from this fate.[61] What little preference is afforded the mortgagee by Section 11 of the AJRA, is in no way bolstered by what can only be described as the toothless provisions of Section 51 of the MSA.

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57 [Fletcher & Campbell v City Marine Finance] 1968 2 LR 520 : Section 35 of MSA 1894 as amended by MSA 1988

58 Section 50 (2) of MSA

59 Ibid

60 Act 24 of 1936

61 Section 10 of AJRA

The section states that the preference afforded a mortgagee, by virtue of the fact that he has a registered mortgage over a South African ship or share thereof, shall not be affected by acts of insolvency on the part of the mortgagor. Exactly what preference the provision refers to is not readily ascertainable. As has been stated above the preference is limited to that afforded by Section 11 of the AJRA, or by registration in time prior to others.

An anomaly arises in this area, in that it appears that only 'S.A. ships' or shares therein may have a mortgage registered over them, and only ships duly registered in terms of the MSA are classified as S.A. ships.[62]

The existence of an 'equitable mortgage' as recognised in the UK is something of a mystery in the South African context. Execution creates the mortgage not registration, but what of an unregistered duly executed mortgage in respect of a ship that is not necessarily defined as a South African ship in terms of the MSA - a vessel less than 25 tons for example? This question will be dealt with again briefly below.

2.1.2 USA

Without going into detail, it is suffice for purposes of this paper to note that notwithstanding the common origins of the ship

[62] See Section 11 & 13 of the MSA as read with Section 68, dealing with 'small vessels' < 25 tons for which licenses are issued; cf: Section 47 of the MSA; Registration is determined by Section 13 - provided the ownership is correct and the ship in question is >25 tons and is not already registered elsewhere, application for registration shall be made to the Registrar

mortgage shared with the process in the UK, the formalistic procedure for creation and registration of mortgages in the US is quite dissimilar.

Statutory intervention, initially in the form of Ship Mortgage Act 1920[63] created a set of formal requirements that had to be complied with before recognition as a 'preferred mortgage' in the Admiralty Act would be granted and with it lien status.[64] These provisions have since undergone substantial amendments[65] so that the formalistic requirements relate to the vessel; that it be a vessel of the US; that the mortgage covers the whole vessel; [66] the extent of the mortgagor's interest mortgaged, and that the citizenship of the mortgagee be American, for US documented ships but not necessarily on foreign registered ships.[67] The 1988 amendments are silent as to what constitutes a valid mortgage.[68]

A mortgage deed must state the extent of the mortgage's interest mortgaged and disclosure of pre-existing liens must be made.[69] Both need to be filed with the Secretary of Transport of the port of documentation of the vessel[70] who will endorse the ships documents with the mortgage details. Recording and

63 46 USC 911 - 984 as it then was codified into - See Benedict on Admiralty §67

64 46 USC 922 : Benedict §72 at 6-121

65 46 USC 313 - See amendments from House Report 100-918 100th Congress 2nd session HR 310.5 - effective January 1990 - Public law 100-710 of 1989 - Benedict opcit at § 69e ; 6-34

66 Tetley, opcit : Pg 218 ; 46 USC : 313.22

67 Tetley, Pg 221 - See 46 USC 313.21 & 31322 : Benedict, opcit § 70d - 6-47

68 Tetley, opcit : Pg 222 - Tetley feels that State Law should be referred to. See Benedict §67 6-4/5 and his discussion of this dilemma faced by the US Courts and the authorities there cited

69 46 USC 313.21 - 2 & 3

70 Ibid

endorsement are absolute requirements for effective "preferred status." Failure to comply will reduce the mortgage to the status of a common law non maritime mortgage suffering the ignominy of a last rank.[71]

2.2 Civil Law Based Jurisdictions

Having its origins in much the same way as common law mortgage, but without the conflict over admiralty jurisdiction that befell the English Courts, the bottomry bond in Civil law jurisdictions, similarly proved to be inefficient within a developing commercial shipping world, and statutory intervention was again necessary for example, to established the French maritime hypothec.[72] However, in nature and form it is quite unlike its common law cousin the maritime mortgage, in that it does not attach to the freight earned by the mortgaged ship nor does it confer upon the holder of a right to possession, nor to sell the ship to satisfy the security. The holder must first seek recourse to the Courts in respect of the right of preference, and upon arrest, apply for the judicial sale of the ship.[73]

Unlike its civil law peers, in French law the hypothec did not need to be notarised, though reduced to writing and is unusually passed over a movable[74]

Beside a ship and her appurtenances, a ship under construction may be

[71] J. Bond-Smith Pg 619 - *Quare* - is this a equitable mortgage?

[72] Law 67 - 5 January 1967 and Decree No. 67 -967 October 27/67 - Art. 43

[73] Unctad Paper on Maritime Liens & Mortgages : 1984, at Paragraph 43

[74] Normally only immovables could be hypothecated; for purposes of 'retention' and 'notice' to 3rd parties

hypothecated and must be registered in the port of registry or place of construction of the ship in question.

Civil law based jurisdictions tend not to prescribe a statutory form for the mortgage, rather they tend to allow the parties to determine their own form of mortgage, provided it contains basic prescribed requirements, that identify the parties, the vessel, the amount secured, interest rates payable, dates of payment and the like. Examples of these jurisdictions are Croatia, Greece, Liberia and Panama. As a result, these mortgages tend to be longer in form, more akin to an extended Deed of Covenants.[75]

Most jurisdictions if not all, require the 'mortgage' or 'hypothec' to be registered somewhere, normally the port of registry, in order for the mortgagee to claim a preferred status or 'priority', certainly over other 'mortgages' and hypothec's registered over the ship after it, and also with regard to other maritime liens and claims in some instances.[76]

2.3 Equitable Mortgages

The law in the UK governing mortgages and that in South Africa provides only for the passing of mortgages over registered ships in or shares in those ships within the context of their Merchant Shipping legislation. What then of a mortgage duly executed but:

1. Not registered.

[75] Shipping Finance, opcit : Pg 106 - and examples such as Panama and Liberia; Mexico Brazil are other jurisdictions where this form of mortgage is customary ; Filho - Comparative Maritime Liens

[76] Unctad Paper, opcit : Paragraph 44

2. Executed in relation to a ship under construction? or
3. A ship that is not a registered ship, i.e. a foreign ship?

What is created is referred to as an 'equitable mortgage' - "that which a mortgagee has if he has merely received an equitable interest"[77]

The equitable mortgagee does have a preferential right or 'charge' over the ship at common law, however he looses priority in respect of registered mortgages, both before and after his equitable mortgage was executed. Indeed "the validity of an unregistered mortgage as against all persons except registered transferee's or mortgagees can hardly now be disputed"[78] Deposit of the Deed of Covenants with the lendor will suffice to create an equitable charge.[79]

It is unlikely that.the US Courts will deviate from the view expressed in ["Detroit Trust Co. vs The Thomas Barlum,"][80] which distinguished between a 'preferred' mortgage and a 'non maritime, non preferred mortgage' based on the judgement in [Bogart v John Jay], which held that a loan to cover a purchase of a vessel secured against a ship, was not a "maritime transaction" as it did not related to the 'use of the ship in navigation, or the perils of the sea.'[81] As a result the putative mortgagee may have no *locus standi* in the Federal Admiralty Court, nor reference to general maritime law, his reference is Federal or State statutory law only. A position less preferent than that of an equitable mortgagee in the UK, and

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77 Hill - Maritime Law - Pg 26

78 [Keith v Burrows], opcit

79 [Lacon v Liffen] 1862 4 Giff 75, 66ER Pg 626 at 629

80 Benedict, opcit , fnt 8 §67/6-3 - 293 US 21, 55 Section Ct. 31

81 Benedict, opcit at fnt 1 § 67 / 6-2

less preferent than his fellow maritime lien holders.

The situation in South Africa is unclear. Likely to follow the English Courts (because of Section 6 of the AJRA), the South African Admiralty Courts will be obliged to take conginsance of this equitable charge. Efficacy is created by execution. If it is notice that is required, then why would notice in the form required by Section 127 of the Companies Act (where encumberances over company assets are required to be registered) not suffice?

It is not within the scope of this paper, but it is argued here that the equitable mortgage does exist within the South African Admiralty Jurisdiction, and needs to be tested.

3. PRIORITIES ACCORDED TO MARITIME MORTGAGES HYPOTHECS OR PREFERRED MORTGAGE LIENS UPON THE FORCED OR JUDICIAL SALE OF A MORTGAGED SHIP, IN COMMON LAW AND CIVIL LAW BASED JURISDICTIONS

A maritime mortgage bond or hypothec over a ship as security for a loan made to the shipowner, is only good security if the mortgagee is assured of a preferred position in respect of others with maritime claims against the ship.

This becomes an issue when either the mortgagor defaults on the loan or the mortgaged vessel is seized by another creditor.

General maritime practice results in a creditor arresting the errant ship in an *in rem* action or attaching the vessel in an *in personam* proceeding, both with a view to selling the vessel to realise a fund, out of which the claim may be paid. It is "when that fund is insufficient to satisfy all valid liens and claims [and mortgages] that ranking and priority becomes fundamental to the mortgagee.[82]

As discussed above, maritime liens both statutory and common law type, the maritime mortgage bond and hypothec, have one thing in common and that is, they provide the holder with a proprietary interest in the bonded property[83] to varying degrees. Who should rank first or have highest

[82] G.L. Varian - Rank & Priority of Maritime Liens : Tulane Law Review : Vol 47, 1973 : Pg 751

[83] [The Bold Buccleugh], opcit

priority amongst those with these proprietary rights, has vexed the Courts in all jurisdictions since recording these events began. The law of priorities among maritime liens is confused and uncertain.[84] In the US it has been said "each Court is a law unto itself";[85] this may have been so because of the application by the Admiralty Courts of equitable principles to the cases before them in the absence of a clear statutory guidelines.

Rank and time have played a dominant role in the theory of prioritising maritime liens and mortgage claims. Rank relates to the 'beneficial service' idea, that the services rendered in respect of the claim or lien conferred a greater benefit to the vessel than others. Time, and the idea that those liens arising last in time within the same rank have first priority, is linked to the 'proprietary interest' theory,[86] that the holder has the risk of ownership which includes its diminution over time. It has been argued that this latter theory is commercially unfeasible as the prudent lien holder would arrest or attach the ship immediately the lien came to exist, for fear of the denuding effects of other lien holders to follow.[87]

Priorities are important for other reasons besides personal satisfaction. The effect of judicial sales or forced sales are held by Courts the world over, as a principle of comity amongst nations, to have effected transfer of clean title to the purchaser, free of all liens and encumbrances. The lien holder or mortgagee is confined, with a degree of certainty, to one attempt at satisfaction. It is therefore critical to him to have the same degree of

84 Priorities of Maritime Liens : Harvard Law Review, 1956 Pgs 525 and 527

85 Ibid

86 Varian, opcit and his discussion and criticism of this theory on Pg 760

87 Filho, opcit Pg 247

certainty in respect of the priority or rank that the claim will enjoy.

Unfortunately, there is no such certainty in the international Admiralty Court arena. Filho is of the view that "different jurisdictions use the laws of the forum, the law of the place where the claim arose and the law of the flag," to determine where a specific claim will rank.[88] That the claim itself is a 'maritime lien' or 'preferred mortgage lien' or likely to be held as such, is the issue that creates this uncertainty, because the Admiralty Courts too often shy away from recognising or enforcing what they might regard as a foreign maritime lien.[89] The difference for a maritime mortgagee and a hypothec holder between satisfaction (or realisation of the security) and total loss (in the absence of collateral security) can be one ranking position - it is therefore critical that the order of ranking and priority be ascertainable in the jurisdiction seized with the matter of determining the relative positions of the competing claims.

It would appear that there is broad agreement in the international community of Courts in general (not necessarily just the Admiralty Courts) that the question of ranking and prioritising competing claims is not a matter of substance, but a matter of procedure; and as such international law and particularly the rules regarding the conflict of laws in the international arena, dictate that matters of procedure are to be decided according to the law of the forum sized with the matter.[90]

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88 Filho, opcit Pg 246

89 [Transol Bunker BV v MV Andrico Unity] 1989 (4) S.A. 325 (A) and the [Bankers Trust International Ltd v Todd Shipyard Corporation]; [The Halcyon Isle] 1980 3 All ER 197 (PC) : [The Ship Betty Ott v General Balls Limited] 1992 1 NSZLR 655 (CA)

90 Dicey and Morris, The Conflict of Laws : Vol 1 : Pg 182-3 and the authorities their cited: Naschitz JML & C ; Vol 23 ; No. 1 ; Jan. 1992 : Pg 123 : Filho opcit Pgs 268-9 : Meeson opcit Pgs 126-134

However, the categorisation of the claim is the issue that causes the uncertainty. Conflicting decisions in this area litter the Admiralty Courts when dealing with maritime liens and the inevitable mortgagee. The decisions in the main fall into two camps, those favouring the principle that sees a maritime lien as a procedural remedy[91] and those which favour the principle that holds a maritime lien to be a substantive issue.[92]

Before looking at the various jurisdictions separately, where the *lex fori* as it affects the ranking of claims will be set out, it is interesting to note the distinction highlighted by Filho.[93] He draws a comparison between civil and common law jurisdictions and opines that the 'rights - remedy' test of the common law courts is equivalent to the 'substance - procedure' test adopted by the civil law jurisdictions; but holds, that the apparent congruence is shattered by the fact that the 'remedy' does not equate to the 'procedure', where in civil law jurisdictions, priority is a matter of substance and not procedure.[94]

In comparing the various jurisdictions listed below, the South African Admiralty Jurisdiction Regulation Act 105 of 1983 [the AJRA], more particularly Section 11 thereof, has been used as the control against which other jurisdictions have been measured. Particular reference has been made to the position of the "necessaries man"[95] relative to the mortgagee, the

91 [Halcyon Isle], opcit UK : [mv Andrico Unity], opcit S.A. - [Betty Ott], opcit NZ

92 [Halcyon Isle], opcit : minority judgement by Lords Scarman and Solomon supported by [Ioannis Daskalelis] 1974 SCR 1248 : [Har Rai] 1984 AMC 1649 CA ; Israel - The Nadjas [Griffin Corp v Koor Sachar] 44 (3) PD 45 (1990) [The Colorado] 1923 Pg 102 CA

93 Filho, opcit Pg 268

94 Ibid, Pg 269

95 "A claim in respect of the repair of a ship or the supply of goods or the rendereing of services to or in relation to a ship for the employment, maintenance, protection or preservation thereof" Section 11 (4) (c) (v) of the AJRA

significance of which will be explained below, where reference will also be made to the international law and conventions applicable and their effect on these rankings. The AJRA recognises 13 (thirteen) potential categories of claims, the mortgagee ranks 11th along with claimants in respect of hypothecation, rights of retention or any other charges on the ship, and also with claimants who have liens in respect of "payments or disbursements made by the master, shipper, charterer, agent or any other person for or on behalf of or an account of a ship or the owner or charterer of a ship."[96] The necessaries claimant as defined above, ranks 7th.[97]

This comparison is summarised together with a reference to the 'conflict of laws' route likely to be applied by the forum concerned.[98]

[96] Section 1 (1) (iv) (o) of the AJRA, definition of Maritime Claims

[97] There is a provision that the necessaries claim must have arisen within 1 year of the claim being enforced or before proof is submitted in proceedings to recover the claim

[98] The data contained below is extracted from various sources: Tetley, opcit Part XI Pg 556-625 : Filho, opcit : Meeson opcit : Naschitz opcit : Benedict opcit : Dicey & Morris opcit

COUNTRY	MARITIME MORTGAGE/HYPOTHEC RANKED	NECESSARIES RANKED	CONFLICT OF LAWS; NATURE OF RIGHT DETERMINED BY	CONFLICT OF LAWS; RANK DETERMINED BY
Argentina	7th	8th	Law of the Flag	Lex fori
Australia	7th	8th	Law of the Flag[99]	*Lex Fori*
Belgium	6th → 7th	5th[100]	Law of the Flag	*Lex Fori*
Brazil	6th → 7th	5th	Law of the Flag	*Lex Fori*
Canada	9th	10th[101]	Lex loci contractus	*Lex Fori*
Chile	6th	7th	*Lex Fori*	*Lex Fori*
Columbia	7th	8th & 9th	Law of the Flag	*Lex Fori*
Croatia[102]	7th	5th	Law of the Flag	*Lex Fori*
Denmark	7th	8th[103]	*Lex Fori*	If foreign - Law of the Flag Otherwise - *Lex Fori*
Finland	8th	9th	Law of the Flag	*Lex Fori*
France	7th	6th	Law of the Flag[104]	*Lex Fori*

99 "It is an open question whether Australian Admiralty Courts will apply forum law or the law of the place of creation to determine whether to accord recognition to a foreign Maritime lien .... " M.J. Calder JML&C Vol 20, No. 20, April 1989 : Part 69 at Pg187, fnt 33

100 Contracts of the master as determined in the 1926 Brussels Convention on Maritime Liens & Mortgages - Article 2 (5)

101 Provided that necessaries incurred after arrest, come before the claim of the mortgagee

102 Formely Czechoslovakia - see Tetley, opcit Pg 570, and Shipping Finance, opcit Pg 124

103 Unless in possession, then necessaries man will rank higher

104 Tetley, opcit : Pg 578

Germany (FDR)	6th	7th	Lex rei sitae (Place claim arose)	*Lex Fori* (if the claims are mixed) or if all the same (lex rae sitae)
Germany (GDR)	7th	8th	Law of the Flag	*Lex Fori*
Greece	5th	6th	Law of the Flag	*Lex Fori*
India	7th	8th	Law of the Flag	Law of the Flag
Israel	9th	8th	Lex rae sitae / Flag[105]	*Lex Fori*
Italy	7th	6th	Law of the Flag or 1926 Convention	Law of the Flag
Japan	9th	8th	Probably "Law of the Flag"	Probably "Law of the Flag"
Korea	7th	5th → 6th[106]	Law of the Flag	*Lex Fori*
Liberia	7th	8th	Law of the Flag	*Lex Fori*
Mexico	8th	6th	*Lex Fori* / Law of the Flag[107]	*Lex Fori*
Netherlands	6th	7th	Law of the Flag	*Lex Fori*
Norway	6th	7th	*Lex Fori*	*Lex Fori*
Panama	7th or 9th (if freight or cargo only)[108]	8th	Law of the Flag	*Lex Fori*

[105] Naschitz, opcit : Pg 126

[106] 6th if related to voyage costs : 5th if to preservation costs

[107] Filho, opcit : Pg 257 : fnt 114

[108] Mortgages given lien status - Filho, opcit : Pg 258

Peru	9th	8th	Law of the Flag	*Lex Fori*
Philippines	7th	8th	Lex loci Contractus	*Lex Fori*
Poland	7th	5th	Lex loci Contractus	*Lex Fori*
Portugal	6th	5th or 7th[109]	Law of the Flag	*Lex Fori*
Spain	6th	5th	Law of the Flag	*Lex Fori*
Sweden	7th	8th	Law of the Flag	*Lex Fori*
Switzerland	7th	8th	Substantive - to be decided (Open)	Procedural *Lex Fori*
USSR[110]	8th	5th	*Lex Fori*	*Lex Fori*
United Kingdom	9th	10th[111]	*Lex Fori*	*Lex Fori*
United States	7th	8th[112]	Lex loci Contractus	*Lex Fori*
Venezuela	6th	7th	Law of the Flag	Law of the Flag
Yugoslavia[113]	6th	5th	Law of the Flag	Law of the Flag

[109] If non contractual 7th otherwise 5th, if 1926 Convention type - "Contracts of the Master"

[110] Former USSR : Tetley, opcit Pg 615

[111] Unless his claim is based on possession, then ranked 4th

[112] 46USC 313 as amended, provides that in respect of a foreign ship, local US necessaries men will have their liens preferred to the mortgagee - Maritime Lien Act; Contract necessaries prior to mortgage are preferred

[113] Former Republic - Tetley, opcit Pg 625

Statistically this information reveals that 29% of the jurisdictions listed rank the mortgagees claim at 6th position, and 50% at 7th position, the balance at 8th i.e about 6%, and at 9th about 9%, and below that only 3%. To say therefore, that South Africa at 11th rank is out of line with international practise is unequivocal.

What appears equivocal however, is the relative position of the necessaries man. This position is equally spread, normally just prior to or after the mortgagee, amongst the jurisdictions sampled. Similarly, the distinction between civil law based jurisdictions and common law jurisdictions does not produce or evidence a consistent pattern or treatment of the issue of prioritising maritime liens and mortgages.

Suffice would be to say that those jurisdictions which base their law on the common law system tend not to recognise as maritime liens, claims other than those restricted to the generally accepted common law category of:-[114]

- Salvage
- Seamans Wages
- Collision Damage
- Masters Wages and Disbursements
- Personal Injury

The Australian Admiralty Act of 1988[115] for example, lists the common law liens but does not go so far as to list the established priorities.

[114] Hilton Staniland - 'Should Foreign Maritime Liens be recognised'? SALJ Vol 108 : Pg 293 at 305, where he argues that there may be more maritime liens in South African law than those set out by Munnich J in the [Khalij Sky] 1986 (1) S.A. 485 (c) Pg 491 J. : Tetley - Liens for Towage - JMLC: Vol 15, 1984 Pgs 205-209 and the authorities there cited

[115] Section 15 of Act 34 of 1988 (Commonwealth of Australia)

Whereas, the civil law codes, as well as the US tend to have a well defined and established list of claims, to which they accord maritime lien status. These claims are similarly prioritised by statutory enactments

The question as to how liens, maritime claims and mortgages are prioritised within their ranks is also a factor that can effect the relative position of the mortgagee,[116] as does the doctrine of 'lashes' (delay coupled with prejudice).[117] The 'voyage rule' is also used to regulate priorities of liens i.e. those relating to the same voyage are ranked against each other in inverse priority in time, to those attaching to the vessel in voyages past (even if by nature of a higher rank).

What international law has done to try and bring order into this somewhat chaotic world of priorities and ranking in relation to the maritime mortgage will be examined below.

[116] Varian, opcit, Pgs 760-763, and his discussion of the various rules relating to extinction of the maritime liens and their priority in terms of the vessels last voyage

[117] Varian, opcit Pg 752

4. INTERNATIONAL LAW AND THE TREATMENT OF MARITIME MORTGAGES

There have been 4 important international law conventions affecting the maritime mortgagee and the priority and rank that the claim enjoys.

These are:

- The International Convention for the unification of certain rules relating to maritime liens and mortgages - Brussels, 1926
- The International Convention for the unification of certain rules relating to maritime liens and mortgages - Brussels, 1967
- The International Convention for the unification of certain rules relating to maritime liens and mortgages - Brussels, 1993
- The Convention on Private International Law, 1928 (known as the Bustamante Code)

Dealing with the latter first, it would seem that its aim was to set out two methods for solving conflicts of a jurisdictional nature, one of which concerns the prioritising of maritime mortgages, and that is, that it allows for the application of the law of the flag wherever the ship may be, to determine what privileges and mortgages may be claimed against the ship.[118]

[118] Filho, opcit Pg 262

The procedure for attachment and arrest being determined by the *lex fori*, the existence, form, nature and priority of the claims against the vessel being of a substantive nature, to be determined by the law of the flag of the ship against which the claims lie. The Convention has been in force since 1928 and contains useful provisions for setting acceptable international standards. It however has enjoyed limited support.

Of these international conventions particularly the 1926 and 1967 Conventions, it has been said [119]that they were attempts to introduce a uniform framework setting out a limited number of maritime claims recognised as liens, while at the same time prioritising those claims according to an accepted set of rules.

Although the 1926 Convention is in force, it has not been adopted by the major maritime nations, confined in the main to the civil law jurisdictions. Similarly the 1967 Convention, in an attempt to limit the number of claims recognised as maritime liens and to prioritise claims on a more acceptable basis, has little or no support, and is not in force. A number of states particularly in the South American countries (Argentina for example) have incorporated these priorities into their domestic legislation. South Africa too, as will be seen below, has made use of this convention.

The individual conventions and the listed claims granted lien status and their priorities are dealt with as follows:-

4.1 1926 Convention

[119] World Shipping laws IV : The Ship IV/I Convention 1984 ; Francesco Berlingieri - LMCLQ Vol 1 1995 : Pg 57

Given lien status and ranked in the following order are:

1. State expenses : preservations costs : sale costs : harbour dues
2. Crew wages
3. Salvage and general average claims
4. Collision damages : personally injury : cargo damage
5. 'Necessaries" contracted for by the master away from home port

and then:[120]

Mortgages and hypothecations. Article 6 determines that the 'voyage rule' applies to claims secured by liens; liens of the same rank and voyage are prioritised pro rata. Claims in groups 3 and 5, are ranked in inverse order of the dates upon which they arise. Liens have a life span of one year and 'necessaries,' 6 months. The Convention is framed in such a way that it is subservient to national laws that may provide differently. Furthermore, as between contracting states and ships from contracting states, it is to be applied: but it does not have to be applied, by a contracting state in respect of a non-contracting state vessel.[121] Based essentially on civil law practise, it recognises a great number of claims as maritime liens.[122] As of 1989 the Convention had been ratified by 13 states (including Belgium and France) and acceded to by 14 states. None of the major maritime nations have ratified or acceded to this Convention and those that have, tend to be confined to civil law jurisdictions.

[120] Articles 2 and 3

[121] Articles 5, 14 and 16

[122] Berlingieri, opcit

4.2 1967 Convention

The 1967 revision of the 1926 Convention saw changes in particular to the ranking and priority of the 'necessaries' contracted for by the master, which fell down the order, after mortgages and hypothecs. The number of claims recognised as liens was also reduced as follows:-

Secured by maritime lines are:

1. Wages - seaman and master
2. Port and Pilotage dues
3. Personal injury claims
4. Property damage claims (non-contractual)
5. Salvage - general average and wreck removal[123]

The sale costs, if the vessel is sold by judicial sale are paid first, then liens listed above, in that order (except Salvage or General Average claims which rank prior to those liens that arose before them) are paid thereafter, registered mortgages and hypothec's will follow.[124] Mortgages must be duly executed and registered according to the law of the flag of registry of the vessel and inter se, mortgages will rank in accordance with law of their place of registration, subject to the 'procedure of enforcement' which is to be governed by the law of the forum seized with the matter.[125] Liens granted on the basis of a 'ius retentionis' to ship repairers by contracting states, will rank after liens referred to in Article 4 but before mortgagees

[123] Article 4 : 1967 Convention

[124] Articles 5 and 11 (2)

[125] Articles 1 and 2

and hypothec holders.[126]

This convention has been ratified by only 3 countries, the Nordic 3 (Norway, Sweden and Denmark) and as a result is not yet in force. It was a clear attempt to improve the position of the mortgagee relative to a more restricted number of claims secured by maritime liens and the civil law system of ranking those liens per voyage. Yet it still does not enjoy international favour.

4.3 1993 Convention

The Convention of 1993 agreed at the Geneva conference of that year convened for that purpose, revised the 1967 Convention further as follows:

Claims secured by maritime liens are ranked as follows:

1. Crew and masters wages (social security content included)
2. Personal injury claims
3. Salvage claims
4. Port, Pilotage and other dues
5. Physical damage claims - collision and cargo

(Claims in respect of 2 and 5 that relate to oil and hazardous or radio active

[126] Article 6, Ship repairers in possession may be preferred to mortgagees as opposed to those others who have rights of retention to secure liens or claims not listed in Article 4 and based on possession, whose claims shall not be preferred; Berlingieri opcit Pg 67

substances are excluded)[127]

Claims for sale costs, wreck removal to save the environment and remove navigational hazards, ordered by the State, and claims based on possession all have priority to the mortgagee or a claim based on hypothec.[128]

As with the Convention of 1967, mortgages must be duly executed and registered in accordance with the laws of the State of registration, in order to be recognised. Priorities inter se are determined by the date and time of registration (normally by the law of the place of registration). The salvage lien enjoys preference over those liens attaching to the vessel before the salvage claim arose and inter se the other liens rank *pari passu* - salvage liens in inverse order.[129]

Of significance is the fact that liens other than those enumerated in Article 4 of the Convention, subject to the requirement of Article 6, are recognised and ranked after the convention liens and mortgages.[130] In addition repairers in possession are afforded some protection.[131]

This Convention likewise has enjoyed little or no support from the international community.

4.4 Comparative Analysis

[127] Article 4 of the 1993 Convention

[128] Article 12 (2), (3) and (4)

[129] Article 5

[130] Article 6 & Berlingieri, opcit Pg 68

[131] Article 7 - See Meeson, opcit Pg 114, fnt 26 and the UK cases cited there - affording a repairer who loses possession, protection by dint of arrest or seizure

A comparison of the domestic legislative provisions, common law precedents and the international law treatment of this subject of prioritising maritime mortgages may reveal an insight into what determines the relative positioning of a maritime mortgage or hypothec to other maritime liens and claims.

At the outset it was argued that an answer might lie with the origin and development of the maritime lien itself. What is apparent is that both the mortgage and the maritime lien constitute a 'charge' over the property concerned and in that sense secure the underlying debt.

It would be more practical to concede that before prioritising or ranking liens or claims, those liens or claims must first be categorised.

Two questions arise here:

1. Who does the categorising; and
2. How is the categorising achieved?

The first issue is perhaps simply answered; the forum before which the matter is to be heard must make the categorisation, but how does it achieve this? Does it use its own laws or the "*lex cause* or internationally recognised judicial concepts."[132] It is argued here that Courts sized with these matters should not shy away from the conflict of laws inherent in them, but should acknowledge that they are sitting as international courts. Rarely, in admiralty matters are the claimants confined to local creditors

[132] Joanna Bird : LMCLQ 1996 (1) Pg 57 : Choice of law rules for priority disputes in relation to shares Pg 58

only, and the concept of the global village and the principle of comity amongst nations requires that the Courts use an "enlightened *lex fori*"[133] i.e. one that takes other jurisdictions and their interpretation of these concepts into consideration.

A recent US decision ["The Ziya S"][134], in the Court of the first instance, took the view that because Congress had the power "to condition access to our ports by foreign owned vessels upon submission" to US law both substantive and procedural,[135] there was no need to resort to a conflicts of law choice, US Admiralty law would predominate. In the same case on appeal, the Court came to the same result, but held that it was indeed a matter of conflict of law/choice of law case and set about affirming the connecting factors and the Restatement (2nd) of conflict of laws policy type consideration, but nevertheless held that US ship mortgage law pre-empted such an analysis of the conflict of laws theory and held 'US law [had] control over all controversies over maritime liens brought in US courts'.[136]These decisions serve only to emphasise the state of play in this arena, that within one jurisdiction dealing with a foreign necessaries man claiming a preference to a Panamanian mortgage, the Court could reach the same decision based on different reasoning. What is concluded is that at least certainty is achieved if the US courts were to be consistent in holding that US law will predominate in matters concerning competing claims in Admiralty.[137] However, there seems no guarantee that the US courts will

[133] Opcit, fnt 9

[134] [Oil Shipping (Bunkering) BV v Sonmez Denizcilik Ve Ticaret AS The Ziya S] 1993 10F. 3d. 1015, cited in LM &CLQ, Part 3, August 1994, Pg 356

[135] Opcit, Pg 357 fnt 3

[136] [Mobile Marine Sale Ltd vs MV Prodomos] (1985) 776 F2d 85 3rd Circuit) - opcit, Pg 357

[137] Opcit, Pg 358

take the same route again, particularly if they decide on the choice of law/conflict of law route.

In order to achieve certainty in this area of the law there is going to have to be a universal acceptance of some internationally accepted standard or practise.

The 1993 Convention was an attempt at just that. Berlingieri [138] argues that the basic format of priorities set out in the 1967 Convention and in the 1993 Convention in Article 4 in both, has its origins in Roman Law and has been adopted in the English law.

The reason for the 1926 Convention's lack of acceptance by the common law based countries was that it allowed for too many liens. The 1967 and 1993 Conventions attempted to reduce that number, particularly the necessaries claims. Of significance is the fact that the civil law based countries who favoured the 1926 Convention, have not come forward to support the 1967 or 1993 Convention. The common law based countries, although perhaps not catered for in the 1926 Convention, have similarly failed to accepted the 1967 and 1993 Conventions, even with the reduced number of liens recognised, and a move away from the civil law priorities 'voyage' rule priority system.

The Courts in England are likely to be bound by the majority views expressed in the [Halycyon Isle][139] which determines that the question as to

[138] Berlingieri, opcit Pg 66, citing [Veritas] 1901 Asp MLC 237, Pg 241

[139] Opcit, 1980 3 All ER 197 (PC)

the nature of the claim before the court, if relative to a maritime lien, is then a remedial question, one of procedure, to be determined by the *lex fori.* Hence, unless the claim in question relates to one of the 5 recognised maritime liens,[140] the English Courts will in all likelihood treat the claimant as having a statutory right *in rem*, an ordinary maritime claim. As amongst themselves these maritime liens recognised by the English Courts, rank and are prioritised in accordance with their nature.

Those arising *ex delicto* (the victims having no choice), policy and equity dictate that they should have priority.[141] "As against a mortgagee or bond holder prior to the period when the damage is done, I think that the successful suiter in a cause of damage has a preferential claim to be indemnified."[142] Those liens arising *quasi contractu* (salvage) and *ex contractu* (wages) rank in inverse order of attachment, on the basis that those arising later in time have preserved a ship in the interest of the existing lien holders, and therefore they should be privileged above those preserved.[143] They rank after the damage lien, but before maritime mortgages. Mortgagees rank inter se in accordance with the date and time of registration. This priority may be lost, particularly in respect of necessaries men (who are claimants with statutory rights *in rem*) if the mortgagees by their conduct allowed services to be rendered to the ship mindful of the owner's state of insolvency.[144]

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[140] Collision damage; crew wages, masters wages and disbursements, salvage claims, personal injury claims

[141] The [Aline] 1W. Rob 112.116 ER Pg 517

[142] Opcit, Pg 119

[143] Herbert, opcit Pgs 405-406 : [The Veritas] opcit, Pg 304

[144] [Pickaninny] Lloyds List Law Reports (1) 1960 Pg 533 at 537 Mr Justice Hewson, adopting argument presented by counsel on behalf of the necessaries men

In South Africa, prior to 1983, Admiralty jurisdiction was determined by the Colonial Courts of Admiralty Acts of 1890 and prioritising and ranking of claims would have followed the decisions of the English Courts. With the introduction of the Admiralty Jurisdiction Regulation Act 105 of 1983 (the AJRA), and in particular Section 6 thereof, the situation was complicated by the application of that section and the interpretation thereof. In short, if the Courts of Admiralty in England had jurisdiction over an issue (here competing maritime claims relative to a maritime mortgage) as at November of 1983, then the South African Admiralty Courts would be obliged to follow the English Admiralty decisions in that regard. If not the Roman Dutch law was to be used.

The potential for a South African Admiralty Court to be faced with a split jurisdiction in the same matter has been argued,[145] where a foreign mortgage claim, would be dealt with by South African law up and until the ship was arrested, at which point the issue would be one that fell within the jurisdiction of the English Court as at November 1983, and would thereafter be dealt with in terms of the English law.

The AJRA however, in terms of Section 11 sets out to establish a prioritised list of creditors with claims against a fund realised by the judicial sale of a ship. The ranking and rules of prioritising categories of claimants are extensively set out in that section.[146] Now statutorily enshrined, the mortgagee has been relegated to a position 11th out of potential 13 maritime claimants. The wages lien (ranked 4th), damage lien (both personal injury

[145] Hare, Prof. J - MLA Conference April 1995
[146] Section 11 (1) - (13) Act 105 1983

and physical damage ranked 6th and 7th respectively) and the salvage lien (ranked 2nd), have some measure of a preferred status.[147] The disbursement claim ranks *pari passu* with the mortgagee in the 11th rank.[148]

The system of priorities as set out in Section 11 can only be the product of successful lobbying of local interest groups, international insurance houses and P&I Clubs. It is unique and peculiar to South Africa, that claims in respect of outstanding insurance premiums and Protection and Indemnity calls are preferred to validly executed mortgages or hypothecs and other maritime liens and claims for disbursements.[149]

Prior to these amendments the section was structured in a format and sequence not that dissimilar to the 1967 Convention[150] (save that the necessaries claims were ranked 7th ahead of the mortgagees claims). The fact that sale costs and claims based on a 'uis retentiounis' are also preferred to the mortgage, is also part of the 1967 Convention.[151] However, the South African common law Admiralty jurisdiction does not afford lien status to all of these claims only to those common law liens referred to above.

Having established that the dissimilarity or deviance from the 1967 Convention is confined to the position of the necessaries man, the mortgagee and the status of these claims, it is of little relevance when seen

147 Section 11 (5) (a) read with (b) which elevates a salavage claim to the 2nd rank

148 Section 11 (4) (d) Act 105 1983

149 Section 11 (4) (c) (vii) and (viii) introduced by the AJRA amendment Act 87 of 1992

150 In both the [Emerald Transporter] 1985 (4) S.A. 133 (N) at 142G : Howard J confirms the reliance on the 1967 Convention, as does Hofmeyr AJ in [Petjalis Engineering Works Pty Ltd v S.A. Transport Services] 1988 (1) S.A. Pg 103 at 108G

151 Articles 6 (2) and 11 (2) of 1967 Convention

against the failure of the international community to accept the 1967 Convention. However, the trend of the legislature to follow international Conventions is there and should not be dismissed.

If the Conventions are assessed as to where the mortgagee/hypothec holder ranks overall, in respect of all potential claimants then it is apparent that:

> In the 1926 Convention the mortgagee and hypothec holders rank (in fact) in the 8th position.[152]
>
> In Convention 1967 the mortgagee and the hypothec holders rank (in fact) in the 8th position.[153]
>
> In the Convention of 1993 the mortgagee and hypothec holders rank (in fact) in the 9th position in a list of potential claimants.[154]

South Africa's rank of 11th for the mortgagee and hypothec holder is therefore significantly out of line with these Conventions, particularly because of the recent introduction of the claims for outstanding insurance premiums and P&I Calls.[155]

When compared with what is applied in the various jurisdictions listed

[152] Article 2 (1) 1926 Convention contains sale costs , preservation costs and pilotage and port dues - 2 separate claims.
Article 2 (4) has both damage for physical and personal injury included which constitute 2 separate claims : these two sub-sections should be read with Article 3

[153] Articles 11 (2) and 6 (2) allow for sale costs and *'ius rentitious'* based claims to be paid before the mortgagees or hypothec holders : these sections to be read with Article 4

[154] Article 12 (2), (3) and (4) to be read with Article 5 (1) and Article 4 (1) : the potential for Article 12 (3) and (4) type claims cannot be discounted

[155] Section 11 (4) (c) (vii) and (viii) of the AJRA

above, it can be clearly seen that South Africa is even further out of line with those jurisdictions. This is particularly so if it is accepted that 'these insurance premiums' and 'P&I Call' claims have been rejected before as 'necessaries type claims' because they are "contracts that inure solely for the benefit of the shipowner"[156]

Even the American law does not readily recognise these claims with lien status, unless the premiums are advanced on the ship's credit as oppossed to the owner's credit.[157] The necessaries encompass those services that inure to the ships benefit, directly influencing the successful conduct of her business.[158] If this is accepted in the context of Howard J's statement in the [Jade Transporter][159] that 'Section 11 (1) (c) was designed to deal with claims secured by maritime liens over the ship whose proceeds comprise the fund' then it should follow that the introduction of these two additional claims, (insurance premiums and P&I Calls) stands in opposition to this principle.

Notwithstanding the statutory provisions of Section 11 (4) (c) of the AJRA its roots should be re-emphasised in an effort to re-align it with those origins, where 'apart from certain limited statutory priorities, claims are ranked by reference to consideration of equity, public policy and commercial expediancy.'[160]

In light of these discussions, the comparisons within the international

[156] [Banque Paribas v Fund of the sale mv Emeral Transporter] 1985 (2) S.A. Pg 452 at 457 B

[157] Benedict, on Admiralty, Vol 2 Chapter III, Paragraph 38 fnt 8

[158] Opcit, Pgs 3 - 38/9

[159] [Jade Transporter] 1985 (4) S.A. Pg 133 at 142 C-D

[160] [The MC Thunder] 1994 (3) S.A. 599 (C) Pg 607 E-F

context, an amendment to Section 11 (4) (c) of the AJRA is set forth below in relation to the current situation in the South Africa.

5. A SOUTH AFRICAN ALTERNATIVE

Section 11 of the AJRA has been amended before[161] introducing amongst other changes, two new categories of claim both ahead of the mortgagee, and it is suggested here that the said section should be amended again, to redress the inbalance that has been created.

The principal amendments proposed relate to:

1. Section 11 (4) (b) - it is respectfully suggested, that this category of claim, while deeply rooted in the historic origins of our law, is already catered for under Section 11 (4) (c) (v) the 'necessaries - repair - man' and that to create a specific and preferred position (3rd rank after salvage)[162] is to avoid, in the face of the weight of the history behind the 'ius retentionis' possessor, the commercial reality that his position is already protected. When read with Section 11 (5) (a) the circumstances of the preferrance being enjoyed are hard to imagine. It has been accepted in English law that a possessor, holder of this right, who losses the possession because of arrest or seizure should be no worse off as a result,[163] the rights are protected and the priority granted to the claim as against all other claims (other than maritime liens accruing before it).[164]

   It is argued here that as a claimant within the 'necessaries' group the

[161] Admiralty Jurisdiction Amendment Act 87 of 1992

[162] Section 11 (5) (a) and (b) of the Act

[163] Meeson, opcit Pg 114 fnt 26, and the cases cited there

[164] Ibid

repairer in possession should benefit from the principle first set out in [The Aline][165] that, because his claim has served to benefit all those who come before, the inverse order of accrual should apply. In the circumstances it is suggested that Section 11 (4) (b) should be deleted, and the repairer in possession dealt with as a necessaries man, in terms of the applicable law.

2. Section 11 (4) (c) be amended to reflect that:

   a. Salvage and General Average claims be elevated to their rightful place at Section 11 (4) (b).[166]
   b. Section 11 (4) (c) (v) the 'necessaries' claims as defined, be removed to a separate category to be dealt with below.
   c. Section 11 (4) (c) (vii) and (viii) be similarly removed to either the same category as the 'necessaries' claims or to the category 'all other maritime claims.' This on the basis that they do not constitute maritime liens as recognised by our Courts,[167] or necessarily by the Courts of Admiralty in other jurisdictions.[168]
   d. that the time frame of 1 year preceeding the date of commencement of proceedings to enforce or prove the claim remain as set out in Section 11 (4) (c).

[165] [The Aline] W. Rob 111, 1839

[166] The net effect of Section 11 (5) (b) in any event

[167] See Wilson J. and his comments in [Emerald Transporter] 1985 (2) Pg 452 at 457 B-C

[168] Benedict, opcit : Tetley, opcit Pgs 556 - 625

3. After the amended Section 11 (4) (c) group now consisting of 4 categories:

   - wages
   - port and pilotage dues, etc
   - personal injury
   - physical damage,

   a redefined Section 11 (4) (d) category consisting as it does of mortgages and hypothecs, rights of retention and other charges on ships, would rank. Inter se the mortgages, hypothec and charges would rank before the disbursement liens that are also mentioned in this category (and not necessarily according to the law of the flag of the ship as is currently stated in this section).[169]

4. Thereafter, in a new Section 11 (e) where the necessaries claims as defined would rank, with an added proviso that in relation to non-South African registered ships, South African based necessaries claimants with claims that have arisen within 6 months prior to commencing proceedings to enforce or prove the claim, should be preferred after Section 11 (4) (c) (iv) (as amended) and before the foreign mortgagee or hypothec holders. Claims older than 6 months and claims in respect of South African ships would rank after Section 11 (4) (d) (as amended).

[169] Section 11 (5) (d) which creates a nonsense if read with the judgement in the [Andrico Unity] 1989 (4) S.A. 325 (A)

As a result of these amendments Section 11 (4) would resemble the following:

(4)

(a) a claim in respect of costs and expenses incurred to preserve the property in question or to procure its sale, and in respect of the distribution of the proceeds of the sale;

(b) claims in respect of the salvage of the ship, removal of any wreck of a ship and any contribution in respect of a general average act or sacrifice in connection with the ship;

(c) a claim which arose not earlier than one year before the commencement of proceedings to enforce it or before the submission of proof thereof and which is a claim

(i) contenplated in paragraph (s) of the definition of a 'maritime claim';

(ii) in respect of port, canal, and other waterways or pilotage dues;

(iii) in respect of loss of life or personal injuy, whether occuring on land or on water, directly resulting from employment of the ship;

(iv) in respect of loss of or damage to property, whether occurring on land or on water, resulting from delict, and not giving rise to a cause of action based on contract, and directly resulting from the operation of the ship;

(d) A claim in respect of any mortgage, hypothecation, or right of

retention of, and other charges on, the ship effected or valid in accordance with the law of the flag of a ship, and in respect of any lien to which any person mentioned in paragraph (o) of the definition of 'maritime claim' is entitled;

(e) a claim which arose not earlier than one year before the commencement of proceedings to enforce it or before the submission of proof thereof and which is a claim in respect of the repair of the ship, or the supply of goods, or the rendering of services to or in relation to the ship for the employment, maintenance, protection or preservation thereof; provided that, a claim of this nature in relation to a South African juristic entity which arose not earlier than six months before commencement of proceedings to enforce it or before submission of proof thereof and which is a claim in relation to a ship that is not a South African ship (as defined in the Merchant Shipping Act (MSA) 57 of 1951) shall rank in preference to those claims referred to in paragraph (d) above;

(f) a claim in respect of any maritime lien on the ship not mentioned in any of the preceding paragraphs;

(g) any other maritime claim.

5. The claims mentioned in paragraphs (b) to (g) of subsection (4) shall rank after any claim referred to in paragraph (a) of that subsection, and in accordance with the following rules, namely:-

(a) a claim of the nature contemplated in paragraph (b) of that subsection shall rank before any other claim;

(b) otherwise any claims in any of the sub-paragraphs of the said paragraph (c) shall rank *pari passu* with any other claims mentioned in the same sub-paragraph, irrespective of when such claims arose;

(c) claims in the nature of mortgages, hypothecs or charges over a ship contemplated in paragraph (d) above shall rank before any other lien claim in the nature contemplated in paragraph (o) of the definition of 'maritime claim' mentioned in paragraph (d) (provided that the other maritime lien claim did not attach prior to the mortgage, hypothec or charge over the ship);

(d) claims mentioned in paragraph (f) of subsection (4) shall amongh themselves, rank in their priority according to law;

(e) claims mentioned in paragraph (g) of subsection (4) shall rank in their order of preference according to the law of insolvency;

(f) save as otherwise provided in this subsection, claims shall rank in the order in which they are set forth in the said subsection (4);

The remainder of Section 11 would then change in accordance with these amendments, particularly these provisions relating to associated ships.[170]

[170] Section 11 (11) (a), (b) and (c) of the AJRA

It is respectfully suggested that these amendments would go a long way to dispell the perception that South Africa's current Admiralty jurisdiction is a mortgagee's nightmare and a wondering 'litigants' paradise. They would also align South Africa's Admiralty jurisdiction with what is currently the general international practise - i.e. a mortgage ranking in the 7th position.

Ultimately, what has to be achieved to give the mortgagee certainty and hence effective security, is to ensure that on an international level, there is developed and universally accepted, a set of rules governing the ranking of maritime mortgages, and hypothecs. Whether consensus will ever be reached on a global scale in this area remains to be seen, in the meantime alignment with generally accepted international standards will have to do and will go some way to improve South Africa's current standing in the international community.

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