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UNIVERSITY OF ESSEX

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LL.M in INTERNATIONAL TRADE AND MARITIME LAW

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Supervisor: Dr Durand M Cupido

DISSERTATION

“SISTER SHIP ARRESTS AND THE PROBLEM OF THE ONE-SHIP COMPANY”

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INTRODUCTION

Within the Admiralty jurisdiction in England, a claim in *rem* may be brought under Senior Courts Act 1981. Certain claims which may be brought are not only against the ship in connection with which the claim arises, also known as the 'guilty ship' but also against other ships, commonly referred to as 'sister ships' if the conditions under section 21(4) SCA 1981 are satisfied.¹ In the legal context, the term 'sister ships' 'refers to two or more ships which are, or are deemed to be, in common registered ownership as distinct from ownership companies with a common parent or ultimate beneficial owner.'² "While in civil law all assets of the debtor and thus all ships owned by him could be arrested as security for any debt, whether maritime or not, in common law a ship could be arrested only in respect of a maritime claim and only the ship in respect of which the maritime claim arose could be arrested, but no other ship."³ Therefore, a difference can be seen between civil law countries in which the purpose of ship arrest is to 'obtain security' and, in common law jurisdictions, 'as means to found admiralty jurisdiction'.⁴

Nonetheless, the nexus between the defendant and the 'sister ship' is found in Article 3 of the International Convention Relating to the Arrest of Sea-Going Ships 1952 which allows for the arrest of a sister ship as an alternative, that is, the claimant may 'arrest either the particular ship in respect of which the maritime claim arose, or any other ship.'⁵ It also provides that ships shall be deemed to be in the same ownership when all the shares therein are owned by the same person or persons.⁶ The introduction of the 1952 and 1999 Arrest Conventions, aimed at "striking a balance between the diametrically opposite interests of maritime claimants and shipowners, bearing in mind the different approaches adopted by various legal

¹ Nigel Meeson and J. A. Kimbell, "*Admiralty Jurisdiction and Practice*", (Informa Law, from Routledge, 5th edn., 2018), at Page 102;

² Watson, Farley & Williams, "*Sister Ship Arrest*", Online Article, Maritime Briefing, April 2013 (wfw.com)

³ Francesco Berlingieri, *Berlingieri on Arrest of Ships Volume I: A commentary on the 1952 Arrest Convention*, (6th edn., Informa law from Routledge, 2017), at Page 282.

⁴ *Ibid.*

⁵ F. Berlingieri, *Berlingieri on Arrest of Ships A Commentary on the 1952 and 1999 Arrest Conventions* (3 Ed, 2000) 97. At Page 113.

⁶ Article 3, 1952 Arrest Convention; see also Francesco Berlingieri, *Berlingieri on Arrest of Ships Volume I: A commentary on the 1952 Arrest Convention*, (6th edn., Informa law from Routledge, 2017), at Page 284.

systems.”⁷ However, in response to the introduction of the ‘sister ship’ provision in the 1952 International Convention Relating to the Arrest of Sea-Going Ships, shipowners were ‘quick to limit the exposure of their fleets by re-financing their ships into one-ship companies.’⁸ This is to say, companies owning one ship can in fact avoid the Convention because there will be no ‘sister ship’ to be arrested because the sister ship rule does not apply where the other ship is not fully owned by the same person or persons owning the ship in respect of which the claim arose.

Sister ship arrest and one-ship group companies have always been a controversial issue in the domain of Admiralty Law. The main reason which created the conflict of interest of the maritime claimants and shipowners has been that of not being able to find the beneficial ownership of the ship in connection with which the claim arises because, around the world, over half of the ship-owning companies are incorporated as “one-ship company” by the way of splitting up the vessels into each different company⁹ so that it would be difficult, almost impossible in some cases to find the owner of all the shares in the ship.¹⁰ With recent English case law highlighting the ease with which a defendant shipowner can defeat the principle of ‘sister ship’ arrest by creating a one-ship company, the legal question then becomes, to what extent the court may look behind the registered owner of a ship in order to find the beneficial owner in cases of one-ship companies and sister-ship arrest. And moreover, how neither the 1956 Arrest Convention nor the 1999 Ship Arrest Convention were not able to solve the controversies created by the practice of establishing one-ship companies.

⁷ Tetley, William Q.C.: Arrest, Attachment, and Related Maritime Law Procedures, Tulane Law Review, May / June, 1999, 73 Tul. L. Rev. 1895 at page 1965

⁸ John Hare, [Revisions to Chapter 2] *Shipping Law & Admiralty Jurisdiction in South Africa* (1999) 16 at Pag 37

⁹ Phutita Luksilakul , “*Arrest of Associated Ship: The possibility to apply South African Approach to Thai Law*”, Master’s Thesis, Thammasat University, 2014.

¹⁰ Francesco Berlingieri, *Berlingieri on Arrest of Ships Volume I: A commentary on the 1952 Arrest Convention*, (6th edn, Informa law from Routledge, 2017), at Page 284.

METHODOLOGY

In the light of these problems, the aim of this paper is consisted of four parts. First, this paper will reflect the introduction of the admiralty action *in rem* in England which was extended by ship arrest and sister ship-arrests, taking into consideration its origins and applicability within the English Admiralty Law, as well as the concept and nature of maritime liens. It is necessary to look more generally at the nature of an action in rem in common law in order to observe how that is affected by the concept of 'sister-ship' arrest and introduction of one-ship companies and to further assess the differences that arise in other jurisdictions on this matter. Notwithstanding, as research methodology, a doctrinal approach will be used in the second part in order to focus on the complex legal issue of arrest of 'sister ship' in England and to understand how the English courts are dealing with finding the beneficial ownership. Moreover, the doctrinal approach will be used in order to show how the creation of a one-ship company can limit the liability of ship-owners as means of illustrating the basis for maritime plaintiffs to claim against the res. It will rely on the interpretation and application of the English case law concerning sister ship arrest and finding the beneficial ownership with reference to the Senior Courts Act 1981 and Ship Arrest Conventions 1952 and 1999.¹¹

Thirdly, the paper will then explore the concept of ownership of the *res* and the approach to the general problem of one-ship companies and piercing the corporate veil in England where, in the absence of evidence of fraud, it is not permissible to lift the corporate veil in order to look behind the "one-ship company" structure for the purposes of identifying the beneficial owner of the company.¹² Moreover, the paper will demonstrate through recent case law, the limitation of the action in rem when considering 'sister ship' arrest and finding the beneficial ownership in England. Nonetheless, it will be argued that the current law is not sufficient within the English jurisdiction where lifting the corporate veil is not enough. Having identified the

¹¹ *International Convention Relating to the Arrest of Sea-Going Ships* 1952 and *The International Convention on the Arrest of Ships* 1999.

¹² *Supra* note 1, at Page 106.

possibilities of sister ship arrest and finding the beneficial owner under the Senior Courts Act 1981, the paper will then principally describe how the 1999 International Ship Arrest Convention tried to resolve the disputes and issues which were not enough under 1952 Convention but, however it ended up being more vague and narrow, having no mention whatsoever about beneficial ownership. The paper will provide an analysis and evaluation of the problems the English courts are facing when dealing with sister ship arrest and one-ship companies which will include further policy issues caused by the enactments of the 1952 Arrest Convention and 1999 Convention.

Lastly, by using a comparative approach, the paper will then compare and contrast the 'associated ship' arrest and the problem of one-ship companies in South Africa, where the provisions of the Admiralty Jurisdiction Regulation Act 1983 establish an association through common control that have no parallel in other maritime jurisdictions.¹³ The reason of choosing to contrast the problem of one-ship company and sister ship arrests in England with that in South Africa is because South African Admiralty law has a stricter approach in resolving the issues created by using one-ship companies and finding the beneficial ownership, being more pro-maritime claimants and "exercising a jurisdiction to arrest vessels in actions in rem on a different basis and more extensive than any jurisdiction exercised by any court sitting in maritime matters anywhere else in the world."¹⁴ The paper will focus on distinguishing the South African associated ship arrest provisions from 'sister ship' arrest provisions in the United Kingdom¹⁵ and further, it will focus on the analysis of how different the case of the statutory veil piercing provisions of the Admiralty Jurisdiction Regulation Act, are in contrast with England where a court will disregard the corporate veil where the corporate structure is a mere façade involving an element of fraud or improper conduct whereas in South Africa these grounds are simply presumed.¹⁶ This follows from the fact that the separate identity of the ship-

¹³ Graham Bradfield, *Guilt by association in South African admiralty law*, Lloyd's Maritime and Commercial Law Quarterly 2005 , Informa UK PLC. At Pag 236.

¹⁴ M. J. David Wallis, "*The Associated Ship & South African Admiralty Jurisdiction*", 2010 Siber Ink, at Pag. 5.

¹⁵ *MV Heavy Metal: Belfry Marine Ltd v. Palm Base Maritime SDN BHD* 1999 (3) SALR 1083 (SCA), 1096J–1097A, [43]. See also Supra note 13.

¹⁶ Graham Bradfield, 'Guilt by association in South African maritime law' [2005] *LMCLQ* 234, 240.

owning companies is to be disregarded as a matter of course once common control is established. Moreover, having described the principal differences within the jurisdictions, this paper will then apply the South African laws to the facts of the English Courts case decisions as means of assessing the disadvantages a maritime claimant is facing under English law.

Having considered the legal problems and issues which United Kingdom is facing when it comes to sister ship arrest and the creation of a one-ship company, and having considered the jurisdictional differences between the English Admiralty law and South African law, it will then be concluded that the law relating to sister ship arrest and one-ship companies is insufficient in England and that the provisions of the International Ship Arrest Conventions are not as radical as it might have wanted to be and both have failed to fulfil the objective of enabling the maritime claimants to obtain security against shipowners.¹⁷ Therefore, it would be more convenient for the United Kingdom to introduce the concept of associated-ship arrest modelled on the South African provisions.

¹⁷ Md. Rizwanul Islam, *The Arrest of Ship Conventions 1952 and 1999: Disappointment for Maritime Claimants*, *Journal of Maritime Law & Commerce*, Vol. 38, No. 1., January 2007. At Pag. 81.

CHAPTER 1

ADMIRALTY ACTION IN REM IN ENGLAND

“The action in rem, once considered the lifeboat of Admiralty jurisdiction, has evolved through the long, colourful and at times tortuous history of Admiralty law, representing the core of Admiralty jurisdiction.”¹⁸ The current relevant English Admiralty legislation is the Senior Courts Act 1981, ss. 20-24, which replaced the old Administration of Justice Act 1956, ss. 1-8.¹⁹ Admiralty Court, as well as The Patents and Commercial Courts, are to be constituted as part of the Queen’s Bench Division²⁰ and Admiralty claims are subject to Civil Procedure Rules Part 61 and its associated Practice Direction.²¹ The Admiralty Court had been given the means by which it was to develop the foundation of the modern Admiralty Law which is the proceeding on a maritime lien by way of an action *in rem*.²² The action *in rem*, originally founded on the notion of maritime liens, was confined to the right enforce a maritime lien against the ship by which the damage was caused, or in relation to which the maritime lien arose.²³ However, only the Admiralty Court may exercise jurisdiction *in rem* by way of an Admiralty claim *in rem* and in such cases, it is a necessary, but not a sufficient, prerequisite that the court has subject-matter jurisdiction.²⁴ Originally, a suit in Admiralty was commenced by the arrest either of the defendant or of his goods, whether or not the ship or the goods in question constituted the subject matter of the offence²⁵ but, this procedure ended as a result of the conflict between the common law and the Admiralty courts and therefore Admiralty succeeded in establishing a

¹⁸ Peter Glover, *Sister Ship Arrest and the Application of the Doctrine of Attachment in Australia: A Jurisdictional Comparative Analysis in the Wake of the 1952 Arrest Convention*, 22 Austl. & N.Z. Mar. L.J. 99 (2008) at Pag. 99.

¹⁹ ACTA JURIDICA, *Current English Admiralty Jurisdiction and Practice* (Bluebook 20th ed., OSCOLA 4th ed., Chicago 7th ed.), at Pag. 5

²⁰ Senior Courts Act 1981, Section 6(1).

²¹ CPR rule 61.1(3) and PD 61.1.1; <https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part61>

²² Ryan, E. F., “Admiralty Jurisdiction and Maritime Lien: An Historical Perspective”, 7 W. Ontario Law Rev. (1963) at 185

²³ Aleka Mandaraka-Sheppard, *Modern Maritime Law, Volume 1: Jurisdiction and Risks*, (3rd edn., Informa law from Routledge, 2013) at Pag. 9

²⁴ Nigel Meeson, J. A. Kimbell, *Admiralty Jurisdiction and Practice*, (5th Edn., Informa Law from Routledge 2018, Lloyd’s Shipping Law Library) at Pag. 27.

²⁵ *Supra* note 23.

procedure for the arrest of the property that was the subject matter of the claim.²⁶ In our case, the subject matter is the *res* which is the ship or ships of named or unnamed defendants.²⁷

Before dealing with the arrest of ships and addressing the problem of ownership and one-ship company, one must first look generally at the nature of an action *in rem* in England and then see how that is affected by the concept of an action *in rem* against sister ship arrests.²⁸ This chapter aims to analyse the concept of the action *in rem* within the Admiralty jurisdiction in England, the evolution of the concept, together with the notion of maritime lien, in order to be able to understand further the procedure of arrest of ships.

1.01. THE CONCEPT OF AN ACTION *IN REM* AND THE ENFORCEMENT OF MARITIME CLAIMS

In the United Kingdom there are two procedures of enforcement of maritime claims available under the Admiralty jurisdiction of the High Court:²⁹ the action *in personam*, the ordinary action against a named defendant³⁰ or the action *in rem*.³¹ The Senior Courts Act 1981 provides only the means of enforcement of maritime claims against the relevant ship.³² The "distinguishing"³³ feature of admiralty practice is said to be the action *in rem*, which having been regarded as entirely independent from the action *in personam*, is directed at the *res* and is the action against the ship, or, more appropriately against other properties such as cargo and freight but most

²⁶ ²⁶ *Halsbury's Laws*, para 83, and *The Banco* [1971] P 137 at 150, *The Monica S* [1968] P 741 at 749–750 per Brandon J.

²⁷ Corcione C., "Bring the vessel to court: The unique feature of the action *in rem* in the admiralty law proceedings" (Research Article, International Review of Law 2013:7 <http://dx.doi.org/10.5339/irl.2013.7>) at Pag. 1.

²⁸ M. J. David Wallis, "The Associated Ship and South African Admiralty Jurisdiction", (Thesis, Faculty of Law, University of KwaZulu-Natal 2010) B Com, LL B *cum laude* (Natal), SC, Judge of the High Court of South Africa, Supervised by H. Stainland. At Pag. 431.

²⁹ Senior Courts Act 1981, Section 21(1) action *in personam*; Section 21(2)-(8) action *in rem*

³⁰ Yvonne Baatz, A. C. Velasco, C. Debattista, O. Gurses, J. Hjalmarsson, A. Lista, F. Lorenzon, A. Serdy and Michael Tsimplis, *Maritime Law*, (4th Edn., Informa law from Routledge, 2018) Ch. 12, Pag. 500-01.

³¹ *Supra note 27*, at Pag. 2.

³² Aleka Mandaraka-Sheppard, *Modern Maritime Law, Volume 1: Jurisdiction and Risks*, (3rd edn., Informa law from Routledge, 2013) Pag. 23

³³ EL. WISWALL, JR., DEVELOPMENT OF ADMIRALTY JURISDICTION AND PRACTICE SINCE 1800, at 155 (1970).

significantly not against its owner.³⁴ From the early 19th Century, the English Courts drew a clear distinction between an action *in rem* and an action *in personam*.³⁵ As it was defined by F. Moulton LJ in *The Burns*³⁶, “an action in rem is an action against the ship itself...an action in which the owners may take part, [...] in defence of their property.”³⁷ The action aim was to counter any attempts from the defendant to deny the appearance in a court where there is a claim to be settled against him.³⁸ Therefore, in English law the action in rem is used as a securing tool for the claimant’s right against the defendant³⁹ and to obtain the appearance of the defendant who has to lodge security in order to have his *res* freed from arrest.⁴⁰ Consequently, the judgement is executed only against the *res* and it is binding against anyone in the world who has an interest in the *res*, even if he is not personally subject to the court’s jurisdiction and has taken no part in the proceedings.⁴¹ In addition, it requires the relevant ship to be within the jurisdiction for it to be arrested, unless the defendant submits to jurisdiction and provides security in lieu of arrest.⁴² In *The Beldis*,⁴³ the English Court of Appeal was asked to allow the arrest of any personal property of the relevant person, the defendant within the realm.⁴⁴ As Scott LJ suggested, “there is little doubt that historically the jurisdiction of the Admiralty Court was originally exercised by employing either of two methods of procedure for bringing the defendant before the Court: (i) the arrest of his person; (ii) the seizure of his goods.”⁴⁵ Nevertheless, “unless the defendant appears to an action in rem, satisfaction of the judgment is limited to the value of the res, but if the defendant

³⁴ Christopher Hill, *Lloyd’s Practical Shipping Guides*, Maritime Law 100 (6th ed., Informa Law, 2003).

³⁵ *The Hope* 1W. Rob 154, 166 ER 531; *The Volant* 1W. Rob 383 388, 166 ER 618; see also M. J. David Wallis, “*The Associated Ship and South African Admiralty Jurisdiction*”, (Thesis, Faculty of Law, University of KwaZulu-Natal 2010) B Com, LL B cum laude (Natal), SC, Judge of the High Court of South Africa, Supervised by H. Stainland at Pag. 437.

³⁶ *The Burns* [1907]

³⁷ *The Burns* [1907] Per Lord Justice Fletcher Moulton at 149.

³⁸ Tetley, William, *Arrest, Attachment, and Related Maritime Law Procedures*, *Tulane Law Review* 1999, Vol. 73:1895, p 1900-1901.

³⁹ Omar Mohammed Faraj, *The Arrest of Ships: Comprehensive View on the English Law*, Faculty of Law Lund University (2012, Master thesis)

⁴⁰ Hilton Stainland, *Roman Law as the Origin of the Maritime Lien and the Action in Rem in the South African Admiralty Court*, (1996) 2 *Fundamina* at Pag. 288.

⁴¹ Trevor Hartley, *The effect of the 1968 Brussels Judgments Convention on admiralty actions in rem* 105 L. Q. R. 640, 641 (1989).

⁴² Aleka Mandaraka-Sheppard, *Modern Maritime Law, Volume 1: Jurisdiction and Risks*, (3rd edn., Informa law from Routledge, 2013) at Pag. 99.

⁴³ [1935] All ER Rep 760 at 765.

⁴⁴ Peter Glover, *Sister Ship Arrest and the Application of the Doctrine of Attachment in Australia: A Jurisdictional Comparative Analysis in the Wake of the 1952 Arrest Convention*, 22 *Austl. & N.Z. Mar. L.J.* 99 (2008) at Pag. 100.

⁴⁵ [1935] All ER Rep 760 at 84–85

appears, the action proceeds *in personam*, as well as *in rem* [...]"⁴⁶ Moreover, the consistency of the nature *in rem* and of the effect of an appearance by owners has been magnified⁴⁷ in *The Banco*⁴⁸ where Megaw LJ thought that the jurisdiction was invoked when the writ was served on the ship chosen, and not at its issue.⁴⁹

Notwithstanding, it is important to take into consideration the types of *in rem* claims that can be brought. Briefly, there is the truly *in rem* claim which attracts maritime liens and can be brought against the relevant ship without considerations of who would be liable *in personam* for the claim and, by contrast, there is the non-truly *in rem* claim which is brought against the relevant ship and also against its sister-ships taking into account the ownership and liability *in personam*.⁵⁰ For a claimant to arrest a ship for a non-truly *in rem* claim two conditions are required: (a) that there has to be a personal liability link⁵¹ and (b) ownership link between the person liable and the relevant ship.⁵²

It is of great significance to note that an Admiralty claim *in rem* must be served through a claim form.⁵³ In the case of a claim within paragraphs (e) to (r) of section 20(2) of the Senior Courts Act 1981, it is only permissible to serve one *in rem* claim form and serve one ship in respect of a claim,⁵⁴ even though more than one *in rem* claim form against different ships may be issued in respect of the same claim, or a claim form naming more than one ship.⁵⁵ However, although the proceedings are commenced by the issue of an Admiralty *in rem* claim form, the court cannot invoke the *in rem* jurisdiction until the service of that claim form upon the 'res' or arrest, takes place before the formal service.⁵⁶ In other words, the claim form *in rem* may serve only one ship despite the fact that more than one ship can be listed, only one ship will

⁴⁶ *The Beldis* [1935] All ER Rep 760 at pp 75–76 per Sir Boyd Merriman

⁴⁷ *The Banco* [1971] at 151 per Lord Denning; See also Corcione C., "Bring the vessel to court: The unique feature of the action *in rem* in the admiralty law proceedings" (Research Article, International Review of Law 2013:7 <http://dx.doi.org/10.5339/irl.2013.7>) at Pag. 6.

⁴⁸ *Monte Ulia v. Banco and Others (The Banco)* [1971] at 137.

⁴⁹ *Ibid.* at 137; see also *Supra note 42* at Pag. 105.

⁵⁰ *Supra note 42*, at Pag. 98.

⁵¹ Senior Courts Act 1981, s. 21(4)(b);

⁵² Senior Courts Act 1981, s. 21(4)(b)(i)(ii).

⁵³ The "claim form" is a creation of the Civil Procedure Rules (CPR) which came into force on 26 April 1999.

⁵⁴ SCA 1982, s. 21(8) and see *The "Banco"* [1971] P 137.

⁵⁵ Nigel Meeson, J. A. Kimbell, *Admiralty Jurisdiction and Practice*, (5th Edn., Informa Law from Routledge 2018, Lloyd's Shipping Law Library) at Pag. 141.

⁵⁶ *Ibid.* at Pag. 223.

remain served.⁵⁷ The point of the matter is that the action *in rem* will not be effective until the writ is served upon the ship or 'res'⁵⁸ and the prompt issue of an *in rem* claim is of utmost importance in a case where the claimant's claim is liable to be defeated by a change of ownership.⁵⁹ If the ship is sold before the issuance of the claim *in rem* form, the claimant will be deprived of the right to arrest the ship and an action against a sister ship may then be available, an option not available with a maritime lien.⁶⁰ This aspect will be analysed further in Chapter 2 which focuses on ship arrest and whether after the issue of the *in rem* claim form, the claimant's statutory right to claim *in rem* to arrest the vessel can be defeated by a subsequent change in ownership.⁶¹

1.02. MARITIME LIENS

Probably the most disputed and debated concept of all in Admiralty law is the maritime lien.⁶² At common law, a lien is the right to hold or retain property belonging to another person as security for the performance of an obligation or the payment of a debt.⁶³ In *The Bold Buccleugh*,⁶⁴ the Privy Council declared that maritime liens and actions in rem were interdependent in that one cannot exist without the other.⁶⁵ One viewed the action *in rem* as being purely against the *res* and developed from the concept of maritime liens the 'personification theory' having the *res* considered to be the 'personified' defendant.⁶⁶ It has also been said that

⁵⁷ Tetley, William, *Maritime Liens and Claims*, Second Edition, International Shipping Publications, Canada 1998, p 59-60.

⁵⁸ Per Sheen J in *The "Tuyuti"* [1984] 2 Lloyd's Rep 51 at 53; *The "Banco"* [1971] P 137 at 153, 158; *The "Berny"* [1979] QB 80, at 99; *The "Freccia del Nord"* [1989] 1 Lloyd's Rep 388.

⁵⁹ Nigel Meeson, J. A. Kimbell, *Admiralty Jurisdiction and Practice*, (5th Edn., Informa Law from Routledge 2018, Lloyd's Shipping Law Library) at Pag. 144.

⁶⁰ Yvonne Baatz, A. C. Velasco, C. Debattista, O. Gurses, J. Hjalmarsson, A. Lista, F. Lorenzon, A. Serdy and Michael Tsimplis, *Maritime Law*, (4th Edn., Informa law from Routledge, 2018) at Pag. 515.

⁶¹ *Supra* note 59, See also: *The "Monica S"* [1967] 2 Lloyd's Rep 113 (Brandon J).

⁶² Marsden, "Two Points of Admiralty Law" (1886) 2LQR357; Mayers, "Maritime Liens" (1928)6(7) Can Bar Rev 516; Hebert, "The Origin and Nature of Maritime Liens" (1930) 4 Tulane LR 381.

⁶³ **G.E. DAL PONT ET AL.**, **EQUITY AND TRUSTS COMMENTARY AND MATERIALS** 33 (2d ed. 2000).

⁶⁴ See *The Bold Buccleugh*, [1843-60] Eng. Rep. 125, 128 (PC. 1852) (appeal taken from Eng.) (opinion by Jervis, C.J.).

⁶⁵ Neill Hutton, 'The Origin, Development, and Future of Maritime Liens and the Action in Rem' (2003) 28 TUL MAR LJ 81 at Pag. 89.

⁶⁶ Aleka Mandaraka-Sheppard, *Modern Maritime Law, Volume 1: Jurisdiction and Risks*, (3rd edn., Informa law from Routledge, 2013) Pag. 106.

“first and foremost, the maritime lien is a species of maritime claims enjoying priority ranking as against other claims which are not recognised as maritime liens.”⁶⁷

The expression ‘maritime lien’ used to describe the rights attaching to certain forms of claims seems to have its origin in judicial usage in the judgement of Sir Jervis Jay in *The Bold Buccleugh*⁶⁸ where the definition of a maritime lien was established.⁶⁹ “A maritime lien is well defined to mean a claim or privilege upon a thing to be carried into effect by legal process..., that process to be a proceeding in rem.... This claim or privilege travels with the thing into whosoever's possession it may come. It is inchoate from the moment the claim or privilege attaches, and, when carried into effect by legal process by a proceeding in rem, relates back to the period when it first attached.”⁷⁰ In other words, a maritime lien “does not include or require possession” and it is “used in Maritime Law not in the strict legal sense [...] but to express the nature of claims which neither presuppose nor originate in possession.”⁷¹ As a matter of English law, in *The Two Ellens*,⁷² a maritime lien “adheres to the ship from the time that the facts happened which gave the maritime lien, and then continues binding on the ship until it is discharged, whether by being satisfied or from the laches of the owner, or in any other way which, by law, may be discharged.”⁷³ Therefore, a maritime lien attaches on the ship in connection with which the claim arose and it follows the vessel even into the hands of a bona fide purchaser for value.⁷⁴ Under English law, four categories of claims were listed as giving rise to a maritime lien: (i) damage done by a ship, (ii) salvage, (iii) seamen’s wages and (iv) bottomry and respondentia.⁷⁵ In consequence, it might be affirmed that a traditional maritime lien is a secured right in the “res” which travels with the vessel, surviving its conventional sale, remaining inchoate until it is enforced by an action *in rem* which,

⁶⁷ Mukherjee, *The law of maritime liens and conflict of laws and customs* (2003) 9(6) JIML 545 quoted by McKerracher J in *The Ship “Sam Hawk”* [2015] FCA 1005; [2016] 1 Lloyd’s Law Reports 253 at [90].

⁶⁸ *Harmer v Bell: The Bold Buccleugh* 7 Moo. PCC 267, 13 ER 884 (PC).

⁶⁹ M. J. David Wallis, “*The Associated Ship and South African Admiralty Jurisdiction*”, (Thesis, Faculty of Law, University of KwaZulu-Natal 2010) B Com, LL B *cum laude* (Natal), SC, Judge of the High Court of South Africa, Supervised by H. Stainland at Pag. 439.

⁷⁰ Daniel Harmer v William Errington Bell and Others (“In Rem Jurisdiction of English Admiralty Courts”) 13 E.R. 884 (1851);

⁷¹ *Ibid.* at pp. 284-285 per Sir John Jervis.

⁷² *The “Two Ellens”* (1872) LR 4 PC 161

⁷³ *Ibid.* Per Mellish LJ at 169.

⁷⁴ *Supra* note 66.

⁷⁵ Tetly, *International Conflicts of Law: Common, Civil & Maritime*, International Shipping Publications, Montreal, 1994 at p.539

when enforced, gives the claimant priority in ranking over most other claims.⁷⁶

Moreover, in *The Banco*⁷⁷ it has been suggested that the arrest of the ship was 'conterminous with the maritime lien'.⁷⁸

To sum up, "a maritime lien is a privileged charge on maritime property which arises by operation of law and does not require possession [...] and, it accrues from the moment of the event that gives rise to a cause of action, and travels with the property surviving even into the hands of a bona fide purchaser for value without notice, being enforceable by an *in rem* claim in accordance with the provisions of the Senior Courts Act 1981."⁷⁹

CHAPTER 2

THE LAW OF SHIP ARREST AND SISTER SHIP ARREST IN ENGLAND

The right to arrest a ship is the single most valuable tool from a maritime claimant's perspective in enforcing his maritime claims and recovering debts against shipowners, as well as from the viewpoint of shipowners, it is equally essential that a wrongful arrest, attachment or injunction against a ship does not interrupt the legitimate trading of that ship.⁸⁰ "*The right to arrest a ship is part of the law of England and is recognised by international convention. It is a valuable weapon in the hands of any Court exercising Admiralty jurisdiction and all shipowners are, or should be, aware of it.*"⁸¹

In order to understand how sister ship arrest works, it is of great importance to analyse the law of ship arrest, its functions and the requirements that needs to be fulfilled for a successful arrest.

⁷⁶ Tetly, "Maritime Liens in the Conflict of Laws", Essays in Honour of Arthur T. von Mehren, Transnational Publishers Inc., Ardsley, N.Y. 2002 at pp. 439-457. See also: Stanley O. Okoli, *Arrest of Ships: Impact of the Law in Maritime Claimants*, (Lund University, Master thesis 2010) at Pag. 48.

⁷⁷ [1971] 1 All ER 524

⁷⁸ Ibid. at 531

⁷⁹ *Supra* note 66, at Pag. 25

⁸⁰ Md. Rizwanul Islam, *The Arrest of Ship Conventions 1952 and 1999: Disappointment for Maritime Claimants*, Journal of Maritime Law & Commerce, Vol. 38, No. 1., January 2007. At Pag. 75.

⁸¹ The Helene Roth [1980] 1 Lloyd's Rep 477 per Sheen J. at 481.

2.01. BRIEF HISTORY OF SHIP ARREST AND SISTER SHIP ARREST

The view of the associations of the civil law countries was that arrest should be permissible in respect of any claim whereas, in common law countries, as in England, the view was that arrest should be permitted only in respect of specific claims of a maritime nature.⁸² As mentioned in the previous chapter, the *in rem* procedure applied only to the offending ship and, by 1935, the Court of Appeal was able to hold that the *in rem* to arrest a ship applied only to the particular ship to which the cause of action related.⁸³ Therefore, it was not possible to arrest another ship owned by the owner of the offending ship, the sister-ship, if that other ship was unconnected with the circumstances that gave rise to the maritime lien.⁸⁴ The issue came before the Court of Appeal in *The Beldis* where a sister ship of an offending vessel was arrested in an action *in rem* and the Court of Appeal refused to sanction the collateral arrest of “a ship or other property belonging to a person who was a party to the cause of action, but in respect of which cause of action the ship or other property sought to be made liable was in no way involved.”⁸⁵ Furthermore, at that time, Sir Boyd Merriman P⁸⁶ held that “*arrest, either of person or property, has long since ceased, therefore, to be necessary in order to found jurisdiction. Nor is arrest of property, other than the thing in relation to which the claim arises, necessary in order to obtain security that the judgment shall be satisfied.*”⁸⁷ Notwithstanding, at common law, the arrest of ships has three possible functions: a) obtaining security for the claim⁸⁸, b) establishing jurisdiction on the merits and c) securing the position of statutory maritime claimants as preferred creditors over unsecured ones by the issue of the proceedings *in rem*.⁸⁹ By contrast, in civil law countries, at that time, the arrest of

⁸² See Pasanisi, “Il Progetto di Convenzione Internazionale per la Unificazione delle Regole in Materia di Sequestro di Navi” (1952) *Dir Mar* 316, at p. 318.

⁸³ *The Banco* [1971] 1 All ER 524 at 531.

⁸⁴ *The Beldis* [1935] All ER Rep 760 at 768.

⁸⁵ *The Beldis*, [1936] P. 51, 89 (Eng. C.A.). AT 89 Swift J concurring; See also: Neill Hutton, ‘The Origin, Development, and Future of Maritime Liens and the Action in Rem’ (2003) 28 *TUL MAR LJ* 81 at Pag. 100;

⁸⁶ *The Beldis* [1935] All ER Rep 760 at 768

⁸⁷ *Ibid.* at 768.

⁸⁸ *The Banco* [1971] 1 All ER 524 at 531.

⁸⁹ *Supra note* 66, at Pag. 8.

ships had the same functions as in common law even though the ship or any other property of the defendant was not connected to the cause of action.

English courts refused to sanction sister ship arrests until the 1952 Convention on the Arrest of Seagoing Ships was signed.⁹⁰ As M.J. David Wallis suggested, the Arrest Convention 1952 “evolved into an endeavour to achieve a compromise between the civil law jurisdictions that recognised a procedure for pre-judgement arrest as a general remedy not confined to maritime claims, under which any property of a debtor was susceptible to arrest to secure a claim, and the common law countries that permitted the arrest of a vessel in admiralty proceedings *in rem*, but beyond that did not recognised any similar procedure.”⁹¹

It is well known that the Arrest Convention 1952 itself was a compromise between common law and civilian traditions.⁹² However, following the reconciliation of practice of Admiralty Court with civil law courts, Lord Denning MR explained that the compromise embodied in the Arrest Convention was between the English rule that only-one ship could be arrested and the European approach that more than one-ship could be arrested.⁹³ He went further and made clear that “*some countries, like England, did not permit the arrest of any ship except the offending ship herself; whereas many continental countries permitted the arrest, not only of the offending ship, but also of any other ship belonging to the same owner. In the result a middle was found, and it was agreed that one-ship might be arrested, but only one. It might be either the offending ship herself or any other ship belonging to the same owner; but no more.*”⁹⁴ Accordingly, in *The Banco*⁹⁵ it was expressed that the words “any other ship” were to be construed in the singular, so that if more than one ship were

⁹⁰ International Convention Relating to the Arrest of Seagoing Ships, May 10, 1952, 439 U.N.T.S. 195.

⁹¹ M. J. David Wallis, “*The Associated Ship and South African Admiralty Jurisdiction*”, (Thesis, Faculty of Law, University of KwaZulu-Natal 2010) B Com, LL B *cum laude* (Natal), SC, Judge of the High Court of South Africa, Supervised by H. Stainland at Pag. 82.

⁹² F. Berlingieri, *Berlingieri on Arrest of Ships*, 2nd edn (1996), 4.

⁹³ *The Banco* [1971] 1 All ER 524 (PDA and CA) 531; [1971] 1 Ll. L. Rep. 49; See also M. J. David Wallis, “*The Associated Ship and South African Admiralty Jurisdiction*”, (Thesis, Faculty of Law, University of KwaZulu-Natal 2010) B Com, LL B *cum laude* (Natal), SC, Judge of the High Court of South Africa, Supervised by H. Stainland. At Pag. 242.

⁹⁴ *The Banco: Owners of the motor vessel Monte Ulia v Owners of the ships Banco and others* [1971] 1 All ER 524 (PDA and CA) 532a-c.

⁹⁵ [1971] 1 Lloyd’s Rep 49 (CA).

liable to arrest, the claimant could select only one of them.⁹⁶ The same view was expressed in *The Bery*,⁹⁷ where it was held that the claimants were entitled to institute proceedings *in rem* against more than one ship, provided they served the *in rem* proceeding on, or arrested only one of such ships.⁹⁸

It is important to note that the service of the *in rem* claim form on the ship does not constitute arrest and that a separate application for the issue of a warrant of arrest must be made in the Admiralty and Commercial Registry by filing the relevant form containing an undertaking to pay the Marshal's fees.⁹⁹

2.02. THE INTERNATIONAL SHIP ARREST CONVENTIONS 1952 AND 1999 - DEFINITION OF ARREST AND INTRODUCTION OF SISTER-SHIP ARREST

The arrest of ships is a legal mechanism that prohibits anyone from moving the vessel in order that it can serve as security for a claim.¹⁰⁰ Detaining the ship is in practice the best option for the claimant in order to bring the owner before the courts and obtain compensation for the damage suffered.¹⁰¹ However, as mentioned earlier, arrest of ships has different rules depending on different jurisdiction.¹⁰² In those maritime common law countries, the arrest of ships in an action *in rem* is the basic procedure on which maritime creditors rely for the security of their claim.¹⁰³

Presently, two international conventions provide the international framework for ship arrest, the International Convention Relating to the Arrest of Sea-Going Ships, Brussels, 1952 and the International Convention on the Arrest of Ships 1999.¹⁰⁴ However, United Kingdom did not ratify the provisions of the 1999 Convention. The first attempt to enact the 1952 Convention into English law was made in the

⁹⁶ Francesco Berlingieri, "Berlingieri On Arrest Of Ships Volume 1 – A Commentary on the 1952 Arrest Convention", (Sixth Edition 2017, Informa Law from Routledge) Lloyd's Shipping Law Library, at Pag. 286.

⁹⁷ *The Bery* [1977] 2 Lloyd's Rep 533.

⁹⁸ Aleka Mandaraka-Sheppard, *Modern Maritime Law, Volume 1: Jurisdiction and Risks*, (3rd edn., Informa law from Routledge, 2013) at Pag. 153.

⁹⁹ *Ibid.* at Pag. 154.

¹⁰⁰ NJJ Gaskell, C Debattista, & RJ Swatton. *Chorley & Giles' Shipping Law 7* (8th ed., Pearson Education Ltd. 1987).

¹⁰¹ Yvonne Baatz, A. C. Velasco, C. Debattista, O. Gurses, J. Hjalmarsson, A. Lista, F. Lorenzon, A. Serdy and Michael Tsimplis, *Maritime Law*, (4th Edn., Informa law from Routledge, 2018) at Pag. 498

¹⁰² Corcione C., "Bring the vessel to court: The unique feature of the action *in rem* in the admiralty law proceedings" (Research Article, International Review of Law 2013:7 <http://dx.doi.org/10.5339/irl.2013.7>) at Pag. 2.

¹⁰³ William Tetly, Arrest, Attachment and Related Maritime Law Procedures 73 Tul. L. Rev., 1895–1985 (1999).

¹⁰⁴ *Supra note 101*, at Pag. 499.

Administration of Justice Act 1956 and subsequently, it has rewritten the text of the Convention within the rules related to the Admiralty Jurisdiction of the High Court¹⁰⁵ which was integrated into the Supreme Court Act 1981, now being set out in the Senior Courts Act 1981. However, the 1956 Act did not adopt the precise wording of the 1952 Convention and there was a “clear intention” by Parliament, for example, not to give effect to some of the provisions.¹⁰⁶

Nonetheless, the definition of arrest can be found in Article 1 of the 1952 Convention which states that “ *‘arrest’ means the detention of a ship by judicial process to secure a maritime claim but does not include the seizure of a ship in execution or satisfaction of a judgment.*”¹⁰⁷ Whereas the 1981 Act does not provide a statutory definition of arrest in English law.¹⁰⁸ From the definition of arrest in both the 1952 and the 1999 Conventions it appears that the maritime claim in respect of which a ship is arrested must be enforceable on the ship the arrest of which is applied for.¹⁰⁹ In addition, under Article 1 of the 1952 Convention, a defendant’s ship could only be arrested for a fixed and limited list of maritime claims, this approach being familiar also to English common lawyers.¹¹⁰ Therefore, the drafters of the Arrest Convention 1952 were faced with two extremes: one approach which allowed arrest very widely, but gave protection to the person whose ship was arrested, and the other approach which only allowed arrest for specified maritime claims because very little protection was given to shipowners if there was an arrest for an unjustified claim.¹¹¹ In English law, the claims for which arrest is available largely corresponding to those listed in the Arrest Convention, are specified in section 20 of the Senior Courts Act 1981 and it

¹⁰⁵ See D.C. Jackson, *Enforcement of Maritime Claims* (4th edn, LLP 2005) (hereinafter “Jackson”) for a detailed analysis of the Admiralty jurisdiction. See also A. Mandaraka-Sheppard, *Modern Maritime Law Volume 1: Jurisdiction and Risks* (3rd edn, Informa 2013), ch 1.

¹⁰⁶ International Convention Relating to the Arrest of Sea-Going Ships (Brussels, May, 1952) Article 3(4), See also *The I Congreso* [1977] 1 Lloyd’s Rep 536 at 563 and *The Maritime Trader* [1981] 2 Lloyd’s Rep 153 at 155.

¹⁰⁷ International Convention Relating to the Arrest of Sea-Going Ships (Brussels, May, 1952) Article 1(2).

¹⁰⁸ Francesco Berlingieri, “*Berlingieri On Arrest Of Ships Volume 1 – A Commentary on the 1952 Arrest Convention*”, (Sixth Edition 2017, Informa Law from Routledge) Lloyd’s Shipping Law Library at Pag. 65.

¹⁰⁹ Francesco Berlingieri, *Berlingieri on Arrest of Ships VOLUME II: A Commentary on the 1999 Arrest Convention*, 6th edn., Informa Law from Routledge 2017, Lloyd’s Shipping Law Library. At Pag 87.

¹¹⁰ Nicholas Gaskell and Richard Shaw, *The Arrest Convention 1999*, pp. 470 – 490, Informa UK plc., Lloyd’s Maritime and Commercial Law Quarterly. At Pag. 472.

¹¹¹ *Ibid.* at Pag. 471.

expressly provides that an action may be brought no matter where the claim arose and no matter what the nationality of the ship is.¹¹²

Following the introduction of the 1952 Arrest Convention, the action *in rem* against the wrongdoing ship was extended to include an action against what has come to be known as the 'sister ship'.¹¹³ The basic concept of sister ship arrest lies in Article 3 of the Arrest Convention 1952 which provides that a claimant may arrest not only the particular ship in respect of which a maritime claim arose but also "...any other ship which is owned by the person who was, at the time when the maritime claim arose, the owner of the particular ship..."¹¹⁴ In England, the arrest of sister ships is regulated in section 21(4)(b)(ii) of the Senior Courts Act 1981 which provides that "an action *in rem* may (whether or not the claim gives rise to a maritime lien on that ship) be brought in the High Court against – [...] (ii) any other ship of which, at the time when the action is brought, the relevant person is the beneficial owner as respects all the shares in it."¹¹⁵ England introduced statutory provisions that permitted the arrest of sister ships which constituted a significant break from the past when the availability of an action *in rem* had been confined to instances where the property to be arrested was only that in respect of which the cause of action had arisen.¹¹⁶ Therefore, sister ship provisions permitted an arrest *in rem* of a ship that had no immediate connection with the cause of action in an effort to assist maritime creditors.¹¹⁷ There is instead at present a significant difference between the Convention and the Senior Courts Act 1981.¹¹⁸ "While in fact article 3(1) of the Convention permits the arrest of any other ship owned by the person who was, at the time when the maritime claim arose, the owner of the ship in respect of which that claim had arisen, under section 21(4) of the SCA 1981 the link of such person with

¹¹² SCA 1981, Section 20(7) See also ACTA JURIDICA, *Current English Admiralty Jurisdiction and Practice* (Bluebook 20th ed., OSCOLA 4th ed., Chicago 7th ed.), at Pag. 7.

¹¹³ Peter Glover, *Sister Ship Arrest and the Application of the Doctrine of Attachment in Australia: A Jurisdictional Comparative Analysis in the Wake of the 1952 Arrest Convention*, 22 Austl. & N.Z. Mar. L.J. 99 (2008) at Pag. 99

¹¹⁴ International Convention Relating to the Arrest of Sea-Going Ships (Brussels, May, 1952) Article 3(1). See also Watson, Farley & Williams, "Sister Ship Arrest", Online Article, Maritime Briefing, April 2013 (wfw.com) at Pag. 2.

¹¹⁵ Senior Courts Act 1981, Section 21(4)(b)(ii)

¹¹⁶ Dr Sarah C Derrington, "Ship arrest and the admiralty jurisdiction of Australia and South Africa: too far or not far enough?", *Journal of International Maritime Law*, JIML 11 (2005) 6, 409–416, 1 December 2005 at Pag. 411.

¹¹⁷ See generally Graham Bradfield, 'Guilt by association in South African maritime law' [2005] *LMCLQ* 234 and ALRC 33, Ch 8.

¹¹⁸ Francesco Berlingieri, "Berlingieri On Arrest Of Ships Volume 1 – A Commentary on the 1952 Arrest Convention", (Sixth Edition 2017, Informa Law from Routledge) Lloyd's Shipping Law Library, At Pag 286.

that ship is not restricted to ownership, but is extended to any person who was the charterer or was in possession or control of that ship.”¹¹⁹ In other words, although the United Kingdom ratified the 1952 Ship Arrest Convention, it was not fully incorporated into the English law where the consequences for limiting the arrest led to make the sister ship owned beneficially regarding the shares to the defendant which to be considered liable.¹²⁰ This leads to the next point which examines the conditions that must be met for the arrest of the offending ship, as well as the arrest of sister ships.

2.03. REQUIREMENTS FOR THE ARREST OF OFFENDING SHIP AND THE ARREST OF SISTER SHIP

By virtue of section 21(4) of the SCA 1981, there are three requirements that must be met for the arrest of the offending ship. First, at the time of the action that created the claim, the maritime claim must arise in connection with a ship (“the relevant ship”).¹²¹ Second, the person who would be personally liable *in personam* (“the relevant person”) under the claim must, at the time the action arose, be either the legal owner or charterer or in possession or control of the relevant ship.¹²² At the time the action *in rem* is initiated, the third requirement is that the relevant person is either the owner in respect of all shares or the demise charterer of the relevant ship.

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However, certain claims may be brought not only against the ship in connection with which the claim arises but also against other ships, commonly referred to as “sister ships”,¹²⁴ if the first and second requirements mentioned above in respect of the offending ship are satisfied and, in addition, the third condition being different which requires at the time the action *in rem* is initiated, the relevant person to be the

¹¹⁹ Ibid.

¹²⁰ Omar Mohammed Faraj, *The Arrest of Ships: Comprehensive View on the English Law*, Faculty of Law Lund University (2012, Master thesis) at Pag. 33.

¹²¹ Senior Courts Act 1981, Section 21(4)(a)

¹²² Ibid. Section 21(4)(b)

¹²³ Senior Courts Act 1981, Section 21(4)(b)(i); See also Yvonne Baatz, A. C. Velasco, C. Debattista, O. Gurses, J. Hjalmarsson, A. Lista, F. Lorenzon, A. Serdy and Michael Tsimplis, *Maritime Law*, (4th Edn., Informa law from Routledge, 2018) at Pag. 504.

¹²⁴ Nigel Meeson, J. A. Kimbell, *Admiralty Jurisdiction and Practice*, (5th Edn., Informa Law from Routledge 2018, Lloyd’s Shipping Law Library) at Pag. 101.

beneficial owner of all the shares in it.¹²⁵ In the *Helene Roth*¹²⁶ it was established that “the Admiralty jurisdiction of the High Court may be invoked by an action *in rem* against any ship which at the time when the action is brought is beneficially owned as respects all the shares therein by that person”¹²⁷ and that “it cannot be invoked by an action *in rem* against a ship if at the time when the action is brought the ship is not in the beneficial ownership of the person liable *in personam*.”¹²⁸

The importance of the immediate issue of an *in rem* claim form has been briefly mentioned in the previous chapter where it has been suggested that a claimant’s action *in rem* is liable to be defeated by a change in ownership.¹²⁹ Once a ship is sold, a claimant will not be able to arrest the guilty or sister ship in the hands of the purchaser, unless its claim may be classified as a ‘maritime lien’.¹³⁰ As it was held by Sheen J., “if a writ *in rem* is issued before any change in the ownership of a ship has occurred, a subsequent change of ownership would provide good cause for renewing the writ unless those who have the conduct of the action have obviously not pursued it with diligence.”¹³¹ In other words, “if the ownership of the ship named in the writ has been changed before an application to renew the writ [...] the plaintiff can no longer successfully invoke the jurisdiction of the High Court by issuing another writ *in rem*.”¹³² Therefore, it is of great importance for the writ to be issued without delay after the cause of action has arisen so there would not be a subsequent change in ownership invalidating the claimant’s action *in rem* and evading the arrest of the ship. However, in *The Monica S*¹³³ it was held that the security interest afforded to a claimant by the statutory right to arrest the vessel in an action *in rem* accrues on the issue of the writ and continues to exist notwithstanding the passing of ownership of the vessel to a new owner in the period before the vessel is arrested.¹³⁴ Mr. Justice

¹²⁵ Senior Courts Act 1981, Section 21(4)(b)(ii)

¹²⁶ *The Helene Roth* [1980] 1 Lloyd’s Rep. 477

¹²⁷ *Ibid.* Per Sheen J. at 479.

¹²⁸ *Ibid.* at 480.

¹²⁹ *Supra* note 60. Nigel Meeson, J. A. Kimbell, *Admiralty Jurisdiction and Practice*, (5th Edn., Informa Law from Routledge 2018, Lloyd’s Shipping Law Library) at Pag. 144.

¹³⁰ Watson, Farley & Williams, “*Sister Ship Arrest*”, Online Article, Maritime Briefing, April 2013 (wfw.com) at Pag. 3

¹³¹ *The Helene Roth* [1980] 1 Lloyd’s Rep. 477 per Sheen J. at 480.

¹³² *Ibid.*

¹³³ *The Monica S* [1967] 3 All ER 740 (QBD).

¹³⁴ M. J. David Wallis, “*The Associated Ship and South African Admiralty Jurisdiction*”, (Thesis, Faculty of Law, University of KwaZulu-Natal 2010) B Com, LL B *cum laude* (Natal), SC, Judge of the High Court of South Africa, Supervised by H. Stainland. At Pag. 223.

Brandon suggested that “a would-be purchaser of a ship would have to reckon with the possibility of numerous claims having already attached to the ship without him having notice of them.”¹³⁵

It is also important to note that where the maritime claim is in respect of title, ownership or possession of a ship, or mortgage, sister ship arrest is not permissible under either of the conventions¹³⁶ nor under section 21(4) of the SCA 1981 which clearly mentions that there is no arrest of sister ship for “ownership or possession” types of disputes concerning the particular ship.¹³⁷

2.04. MEANING OF RELEVANT PERSON AND RELEVANT CHARTERER UNDER SECTION 21(4)

As mentioned earlier, in order to arrest a ship in respect of a claim under Sections 20(2)(e)-(r) of the Senior Courts Act 1981, the ship must be in the same beneficial ownership at the time of the arrest as it was when the claim arose.¹³⁸ “If the beneficial owner of the vessel proceeded against *in rem* is not the same person as the “relevant person” having the required connection with the vessel which is the subject-matter of the claim, the proceedings *in rem* cannot be pursued.”¹³⁹ In the words of Colman J. in *The Kommunar No. 2*, “if the person who owned the vessel to be proceeded against was a different legal person who was the owner or the charterer of the vessel at the time when its claim arose or who was in possession or control of it at that time, the proceedings could not be brought.”¹⁴⁰ The necessity for the court to identify the beneficial owner of all the shares in the ship which is sought to be proceeded against *in rem* is important in order to determine whether the claim

¹³⁵ Mr. Justice Brandon in *The Monica S*, [1967] 2 Lloyd's Rep. 113; [1968] P. 74, at pp. 130 and 769

¹³⁶ Md. Rizwanul Islam, *The Arrest of Ship Conventions 1952 and 1999: Disappointment for Maritime Claimants*, Journal of Maritime Law & Commerce, Vol. 38, No. 1., January 2007. At Pag. 78.

¹³⁷ Senior Courts Act 1981, section 21(4) – See also section 20(2)

¹³⁸ David Osborne, Graeme Bowtle and Charles Buss, “*Law of Ship Mortgages*” 2nd edn, 2016, Source: I-law, Chapter 2;

¹³⁹ *The Kommunar No.2* [1977] 1 Lloyd's Rep. 8 per Colman J. at 11.

¹⁴⁰ *The Kommunar No.2* [1977] 1 Lloyd's Rep. 8 Held, by Q.B. (Com. Ct.) (Colman, J.),

may be brought against that ship.¹⁴¹ In *The Evpo Agnic*¹⁴² it was held that “owner” in section 21(4) means registered owner and in *The Tychy*¹⁴³ it is accepted that a ship can have two registered owners as, for example, where A and B each own 32 out of the 64 shares in the ship.¹⁴⁴

However, the question that arises next is who will be liable *in personam* under section 21(4) of the SCA 1981 within the context of a charterparty. It is now established that the reference to a ‘charterer’ can include either a charterer by demise, a time charterer and even a voyage charterer.¹⁴⁵ Also, it is clear from the Court of Appeal’s decision in *The Tychy*¹⁴⁶ that a ‘slot’ charterer can be included in the meaning of a charterer. A slot charterer is a person who is entitled to “use a specified part of the cargo carrying capacity of a vessel on a particular voyage and often issues his own bills of lading.”¹⁴⁷ As Clarke LJ explained, “[...] *the purpose of the 1981 Act was to ensure that, before a person’s ship could be arrested in respect of a maritime claim, that person had some relationship with the ship in connection with which the maritime claim arose; there was no reason, in principle, why a time or a voyage charterer of the ship should not have been regarded as having a sufficient relationship and no reason to narrow the scope of that relationship by giving the words of section 21(4) other than their ordinary and natural meaning; and, in the case of a sister ship, the ship being arrested must be wholly beneficially owned by the person liable in personam.*”¹⁴⁸

All the things considered, the 1952 Arrest Convention and the Senior Courts Act 1981 defines that ships shall be deemed to be in the same ownership when all the shares therein are owned by the same person or persons and thus, one cannot arrest a sister-ship of the offending ship if the shares in the ownership of one vessel are not,

¹⁴¹ Nigel Meeson, J. A. Kimbell, *Admiralty Jurisdiction and Practice*, (5th Edn., Informa Law from Routledge 2018, Lloyd’s Shipping Law Library) at Pag. 104.

¹⁴² *The Evpo Agnic* [1988] 3 All ER 810; See judgment of CA in *The Tychy* [1999] 2 Lloyd’s Rep. 11 at 19.

¹⁴³ *The Tychy* [1999] 2 Lloyd’s Rep. 11

¹⁴⁴ *Ibid.* at 22.

¹⁴⁵ Aleka Mandaraka-Sheppard, *Modern Maritime Law, Volume 1: Jurisdiction and Risks*, (3rd edn., Informa law from Routledge, 2013) at Pag. 120.

¹⁴⁶ [1999] 2 Lloyd’s Rep 11, at 20 (CA).

¹⁴⁷ Griggs and Williams, *Limitation of Maritime Claims* cited with approval in *The Tychy* [1999] 2 Lloyd’s Rep. 11 at 21.

¹⁴⁸ *The Tychy* [1999] 2 Lloyd’s Rep 11, at 20 per Clarke LJ.

all of them, in the same hands as owned the other vessel.¹⁴⁹ Therefore, the response of the ship-owning community to this particular provisions relating to arrest of sister ships was to create one-ship companies¹⁵⁰, companies owning only one-ship with the purpose of avoiding sister ship arrest. This topic will be thoroughly discussed in the next chapter which focuses on sister ship arrests and the creation of one-ship companies, having taken in consideration the beneficial ownership of a ship and assessing how the English Courts are dealing with the problem of shipowners limiting their liability by having each of their vessel under different companies.

CHAPTER 3

THE PROBLEM OF ONE-SHIP COMPANY

As a direct result of the “sister ship” provisions introduced by the Brussels Convention and section 21(4) of the Senior Courts Act 1981, the practice of shipowners registering “one-ship” companies to circumvent their effect emerged.¹⁵¹ Nowadays, the practice still continues and each ship in fleet might be registered in the name of a separate company so that the requirement that the “sister” ship had to have been owned at the time of commencement of the action by the party who owned the offending ship at the time when the maritime claim arose, could never be satisfied.¹⁵² This chapter will examine how English law deals with situations where the shipowners operate fleets of separately owned one-ship companies as means of limiting liability and then transferring that limited liability to a particular company within a group of companies,¹⁵³ being able to avoid sister ship arrest. Further, the registered

¹⁴⁹ Jose M. Alcantara, *Some Reflections over the Brussels Convention of 1952 Relating to Arrest of Sea-going Vessels and it's Amending Process*, (Georgia Journal of International and Comparative Law, Vol. 26, Number 3, 1997) at Pag. 554.

¹⁵⁰ *Ibid.*

¹⁵¹ South African Law Commission 32, Report on the Review of the Law Admiralty, 1982, para 7.3; See also *MV Heavy Metal: Belfry Marine Ltd v. Palm Base Maritime SDN BHD* 1999 (3) SALR 1083 (SCA), 1096I–J, [42].

¹⁵² Graham Bradfield, *Guilt by association in South African admiralty law*, Lloyd's Maritime and Commercial Law Quarterly 2005, Informa UK PLC at Pag. 238. See also: *Supra note* 116, at Pag. 411.

¹⁵³ *The Tjaskemolen* [1997] 2 Lloyd's Rep 465 at 471.

ownership and beneficial ownership of a ship will be discussed together with the notion of lifting the corporate veil and, in addition, it will demonstrate through recent case law, the limitation of the action *in rem* when considering 'sister ship' arrest and finding the beneficial ownership in England.

3.01. REQUIREMENTS OF SISTER-SHIP ARREST LEADING TO THE PROBLEM OF ONE-SHIP COMPANY

In response to the "sister ship" provision in the 1952 Arrest Convention, shipowners were "quick to limit the exposure of their fleets by re-financing their ships into one-ship companies."¹⁵⁴ As a consequence, a "proliferation of "single-ship" companies, occasionally described as "asset-poor" or "brass-plate" identities emerged to replace the traditional liner fleets.¹⁵⁵ Under English law, the organisation of a fleet into a group of one-ship sister companies successfully avoids the provisions of section 21(4) of the Senior Courts Act 1981.¹⁵⁶ The common practice in shipping to arrange ownership of ships in the fleet by a series of one-ship companies, which may be sister companies or a parent company, are regarded as a legitimate legal structures for the purpose of limiting liability up to the assets of the company.¹⁵⁷ Therefore, the creation of a one-ship company and a genuine transfer of a ship from one sister company to another, before a suspected claim has arisen, is regarded as a legitimate business¹⁵⁸ as long as it does not – in itself- amount to a real indication of a sham, fraud or a façade.¹⁵⁹ This is because one-ship companies are distinct legal entities, which have separate legal personalities from the beneficial owner of the company and, as a general rule, a ship owned by one company is not liable to be

¹⁵⁴ John Hare, [Revisions to Chapter 2] *Shipping Law & Admiralty Jurisdiction in South Africa* (1999) 16 at Pag 37

¹⁵⁵ Staniland, H. and McLennan, J S, 'The Arrest of an Associated Ship' (1985) 102 *South African Law Journal* 148, 148. See also H Staniland 'The Implementation of the Admiralty Jurisdiction Regulation Act in South Africa' 1985 LCMLQ 462 468

¹⁵⁶ Yvonne Baatz, A. C. Velasco, C. Debattista, O. Gurses, J. Hjalmarsson, A. Lista, F. Lorenzon, A. Serdy and Michael Tsimplis, *Maritime Law*, (4th Edn., Informa law from Routledge, 2018) at Pag. 505.

¹⁵⁷ Aleka Mandaraka-Sheppard, *Modern Maritime Law, Volume 1: Jurisdiction and Risks*, (3rd edn., Informa law from Routledge, 2013) at Pag. 130. See also *Bakri Bunker Trading Co. Ltd v The Owners of Neptune* [1986] HK LR 345; *The Evpo Agnic* (supra) fn 133; Single-ship companies and legal consequences have been examined by Christodoulou, D, *The Single-Ship Company*, 2000, Sakkoulas,

¹⁵⁸ *Supra* note 157, at Pag. 145.

¹⁵⁹ *The Maritime Trader* [1981] 2 Lloyd's Rep 153 at 157.

arrested in respect of a claim against another company.¹⁶⁰ In England, the mere fact that a number of separate ship owning companies pool their assets under a single system of management in order to secure benefits of scale, does not justify treating the assets as being in common ownership.¹⁶¹ In *The Kommunar No. 2*, Colman J. held that “if corporation A was the owner of the vessel at the time when the cause of action arose and, at that time, the person who would have been liable for the claim if sued in personam, and if, subsequently, the debts of corporation A are transferred by law to corporation B, so that it alone can now be sued in personam for the claim in question, an action in rem cannot be brought against a vessel owned by corporation B unless it is possible to identify corporation B as the same legal person as corporation A.”¹⁶²

Clearly, the perception was that the tendency towards registering vessels in one-ship companies was “driven in some substantial measure by a desire to avoid the sister ship provisions.”¹⁶³ The use of single ship owning companies increased as the shipowners had in mind to avoid sister ship arrests by using such a group structure.¹⁶⁴ As the analysis of the jurisprudence and the present status of the law in England has shown, even in cases where one-ship companies are created for justifiable reasons, they are quite often created in order to build up an additional and illegitimate shield to the owner’s responsibility.¹⁶⁵ The fact of the matter is that a decision to register vessels on the basis of a one-ship company is a decision entirely justified by the commercial advantages that can flow therefrom.¹⁶⁶ The globalisation of fleet of ships registered in the ownership of one-ship companies incorporated on

¹⁶⁰ Hilton Staniland, 'The Arrest of Associated Ships in South Africa: Lifting the Corporate Veil Too High' (1997) 9 U S F MAR L J 405 at Pag. 406.

¹⁶¹ M. J. David Wallis, “*The Associated Ship and South African Admiralty Jurisdiction*”, (Thesis, Faculty of Law, University of KwaZulu-Natal 2010) B Com, LL B *cum laude* (Natal), SC, Judge of the High Court of South Africa, Supervised by H. Stainland at Pag. 101. See also: *Wambach v Maizecor Industries (Edms) Bpk* 1993 (2) SA 669 (A) 675B-E where the court approved of those passages in the decision in *Adams and Others v Cape Industries plc and Another* [1990] Ch 433 at 544.

¹⁶² *The Kommunar No. 2* [1997] 1 Lloyd’s Rep 8 at 11.

¹⁶³ *Supra note* 161, at Pag 95.

¹⁶⁴ *The Evpo Agnic* [1988] 1 WLR 1090

¹⁶⁵ Francesco Berlingieri, *Berlingieri on Arrest of Ships VOLUME II: A Commentary on the 1999 Arrest Convention*, 6th edn., Informa Law from Routledge 2017, Lloyd’s Shipping Law Library. At Pag. 104.

¹⁶⁶ *The ‘Maritime Trader’* [1981] 2 Lloyd’s Rep 153 (QB (Adm Ct)). See the comment on that decision by A M Tetterborn, ‘*The Time Charterer, the One-Ship Company and the Sister-Ship action in rem*’ [1981] LMCLQ 507 509; See also: *Supra note* 161, at Pag. 102.

flag of convenience registries can be a good example.¹⁶⁷ As M.J. David Wallis explained, “from an operational viewpoint, shipowners are highly mobile and in a position to take advantage of fiscal benefits and cost savings that arise if they move their base of operations in another jurisdictions as there is no reason why their vessels should remain registered in a high-cost, high-tax jurisdiction when they can, with equal ease and no disadvantage, be registered in a low-cost and low-tax jurisdiction.”¹⁶⁸

3.02. COMBATING THE PROBLEM?

International Conventions regarding the arrest of ships only permit the ships under common ownership to be susceptible to arrest, thus, they are not providing sufficient measure to cope with the problem of one-ship companies.¹⁶⁹ The fact that the Conventions permit sister ship arrest only of ships in the same legal ownership, and not of ships in the same beneficial ownership, fail to take account of the reality of ship owning in today’s maritime commerce and is a substantial impediment to the full realisation of the maritime claimants’ claim.¹⁷⁰ With regard to the arrest of ships, each owned by a distinct company in a group, the 1952 Convention is a lethal blow to the satisfaction of maritime claims as its provisions restrict the sister ship arrest to ships in the same legal ownership as the “offending ship”, rather than extending the right of arrest to all sister ships legally or beneficially owned at the time of the arrest by the owner of the “offending ship” who is personally liable on the maritime claim concerned.¹⁷¹ Therefore, what is apparent is that the international framework within such arrests is inadequate to deal with the phenomenon of the one-ship company.¹⁷²

¹⁶⁷ M. J. David Wallis, “*The Associated Ship and South African Admiralty Jurisdiction*”, (Thesis, Faculty of Law, University of KwaZulu-Natal 2010) B Com, LL B *cum laude* (Natal), SC, Judge of the High Court of South Africa, Supervised by H. Stainland. At Pag. 102

¹⁶⁸ *Ibid.*

¹⁶⁹ Phutita Luksilakul , “*Arrest of Associated Ship: The possibility to apply South African Approach to Thai Law*”, Master’s Thesis, Thammasat University, 2014

¹⁷⁰ Md. Rizwanul Islam, *The Arrest of Ship Conventions 1952 and 1999: Disappointment for Maritime Claimants*, *Journal of Maritime Law & Commerce*, Vol. 38, No. 1., January 2007 at Pag. 79.

¹⁷¹ *Supra note* 170, at Pag. 79.

¹⁷² M. J. David Wallis, “*The Associated Ship and South African Admiralty Jurisdiction*”, (Thesis, Faculty of Law, University of KwaZulu-Natal 2010) B Com, LL B *cum laude* (Natal), SC, Judge of the High Court of South Africa, Supervised by H. Stainland. At Pag. 117.

During the negotiations leading to the 1999 Arrest Convention, the United Kingdom delegation made a far-reaching proposal, suggesting that express provisions be included in the Convention which allows arrest to be permissible of a ship not owned by the person against whom the claim has arisen when it is “controlled” by such person and for a ship owned by one-ship company to be arrested in connection with a claim against an offending ship owned by another company.¹⁷³ However, the proposal failed as the notion of extending liability beyond the corporate entity of the principal debtor was a step too far for most delegations, as the majority were not ready to adopt a radical solution, even though it was widely recognised that a problem created by one-ship companies existed.¹⁷⁴ Even the 1999 Convention, though latter in point of time, is not a clear step forward from its predecessor but some step forwards and some steps backwards.¹⁷⁵ Although it is not as radical as it might have been, especially concerning the problem of one-ship companies, the Arrest Convention 1999 was better drafted than the 1952 Arrest Convention and contains sufficient improvements.¹⁷⁶

Accordingly, in England, it was held that neither the 1956 Administration of Justice Act nor the Senior Courts Act 1981 intended to go so far as to give the claimant the right to arrest the ship of a “sister company” of the company owning the offending ship.¹⁷⁷

Nevertheless, under English law, “it is occasionally possible to pierce the corporate veil so that the common parent or shareholder of the different registered owners of both offending ships and sister ships is treated as liable for a claim against the ship to be arrested.”¹⁷⁸

¹⁷³ Francesco Berlingieri, *Berlingieri on Arrest of Ships VOLUME II: A Commentary on the 1999 Arrest Convention*, 6th edn., Informa Law from Routledge 2017, Lloyd’s Shipping Law Library. At Pag. 103. See also: Document 188/3/Add.2, paras. 9–17, in Appendix IV, p. 274)

¹⁷⁴ Nicholas Gaskell and Richard Shaw, *The Arrest Convention 1999*, pp. 470 – 490, Informa UK plc., Lloyd’s Maritime and Commercial Law Quarterly at Pag. 479.

¹⁷⁵ Tetley, William Q.C.: Arrest, Attachment, and Related Maritime Law Procedures, *Tulane Law Review*, May / June, 1999, 73 Tul. L. Rev. 1895 at Page 1974.

¹⁷⁶ *Supra* note 174, at Pag. 485.

¹⁷⁷ *The Evpo Agnic* [1988] 3 All ER 810 at 815.

¹⁷⁸ Watson, Farley & Williams, “*Sister Ship Arrest*”, Online Article, *Maritime Briefing*, April 2013 (wfw.com) at Pag. 3.

3.03. REGISTERED OWNERSHIP, BENEFICIAL OWNERSHIP AND LIFTING THE CORPORATE VEIL

At common law, for the corporate veil to be lifted, one has to establish that the corporate structure is a 'mere façade, involving an element of fraud or improper conduct, or that there is a failure to maintain the separate identity of the company from that of its shareholders.¹⁷⁹ As Lord Keith of Kinkel suggested, "[...] *it is appropriate to pierce the corporate veil only where special circumstances exist indicating that it is a mere façade concealing the true facts.*"¹⁸⁰ One-ship companies in the same group having the same ultimate holding company are not in the same beneficial ownership¹⁸¹ and the court will not lift the corporate veil except in cases where it is clear that legal ownership has been transferred to avoid legal liability.¹⁸² Following an action *in rem* which may arise in respect of the arrest of either the offending ship or a sister ship under section 21(4)(i) or (ii) of the SCA 1981, the courts have had to consider whether to go behind the registered legal ownership and "lift" the corporate veil in order to determine the true beneficial ownership of the shares of a ship under section 3(4) of the SCA 1981.

For the purposes of this section, it is important to understand what is meant by "owner" in Section 21(4)(b) of the Senior Courts Act 1981. "Does it refer to the registered owner, who necessarily is the legal owner, or to someone who has only an equitable property in the ship?"¹⁸³ In maritime law, "beneficial ownership" of ships normally refers to the ownership of a party who is not the legal or registered owner of the vessel, but who stands behind that legal owner and has rights over the vessel.¹⁸⁴ In *The I Congreso del Partido*,¹⁸⁵ Robert Goff J. held that the words "*beneficially owned*" [...] referred only to cases of equitable ownership, whether or not

¹⁷⁹ Bradfield, G, 'Guilt by Association in South African Admiralty Law' [2005] *Lloyd's Maritime and Commercial Law Quarterly* 234, at 240.

¹⁸⁰ *Woolfson v Strathclyde Regional Council* 1978 SLT 159 161, quoted in *Adams and Others v Cape Industries plc and Another* [1991] 1 All ER 929 (CA) 1022

¹⁸¹ *The Maritime Trader* [1981] 2 Lloyd's Rep 153 (Adm) and *The Northern Valley* (unreported) July 1985.

¹⁸² David Osborne, Graeme Bowtle and Charles Buss, "*Law of Ship Mortgages*" 2nd edn, 2016, Source: I-law, Chapter 2

¹⁸³ *The Evpo Agnic* [1988] 2 Lloyd's Rep. 411 per Lord Donaldson, M.R. at 414

¹⁸⁴ Tetley, William Q.C.: Arrest, Attachment, and Related Maritime Law Procedures, *Tulane Law Review*, May / June, 1999, 73 Tul. L. Rev. 1895 at Page 1970.

¹⁸⁵ [1978] QB 500

*accompanied by legal ownership, and were not wide enough to include cases of possession or control without such ownership, however full and complete such possession and control may be.*¹⁸⁶ In *The Evpo Agnic*¹⁸⁷, a case where the same shipowner held the shares of several one-ship owning companies, the Court of Appeal rejected the claim and held that the right of arrest under section 21(4)(ii) did not extend to a ship owned by a sister company of the company owning the ship in connection with which the claim arose.¹⁸⁸ They interpreted the term “owner” in section 21(4) as referring to the registered owner alone, thus actions *in rem* against the other companies owned by the same shipowner were not permitted and the corporate structure chosen by the shipowner was respected.¹⁸⁹ Lord Donaldson explained that “*in real commercial life, [...] registered owners, even when one-ship companies, are not bare legal owners. They are both legal and beneficial owners of all the shares in the ship and any division between legal and equitable interests occurs in relation to the registered owner itself, which is almost always a juridical person.*”¹⁹⁰ Conversely, it was held that the purpose of section 21(4) of the 1981 Act is “*to give rights of arrest in respect of “the particular ship”, ships in the ownership of the owners of the “particular ship” and those who have been spirited into different legal, i.e. registered ownership, the owners of “the particular ship” retaining beneficial ownership of the shares in that ship.*”¹⁹¹

Following the principle of *Salomon v Salomon*¹⁹², it is not permitted to seek an order from the court to lift or pierce the corporate veil of the company in order to find the real (beneficial) owner of the assets unless there is evidence of a sham transfer of the legal ownership of the ship.¹⁹³ It is clear that the sister ship arrest provisions represent a departure from the principle of the separate legal entity upheld in this

¹⁸⁶ Nigel Meeson, J. A. Kimbell, *Admiralty Jurisdiction and Practice*, (5th Edn., Informa Law from Routledge 2018, Lloyd’s Shipping Law Library) at Pag. 104.

¹⁸⁷ *The Evpo Agnic* [1988] 2 Lloyd’s Rep 411 (CA).

¹⁸⁸ *Supra note 186*, at Pag. 107.

¹⁸⁹ Yvonne Baatz, A. C. Velasco, C. Debattista, O. Gurses, J. Hjalmarsson, A. Lista, F. Lorenzon, A. Serdy and Michael Tsimplis, *Maritime Law*, (4th Edn., Informa law from Routledge, 2018) at Pag. 506.

¹⁹⁰ *The Evpo Agnic* [1988] 2 Lloyd’s Rep 411 at 411.

¹⁹¹ *Ibid.* at 415.

¹⁹² *Salomon v Salomon and Company* [1897] AC 22 (HL)

¹⁹³ Aleka Mandaraka-Sheppard, *Modern Maritime Law, Volume 1: Jurisdiction and Risks*, (3rd edn., Informa law from Routledge, 2013) at Pag. 130.

case¹⁹⁴ and, for the most part, it undermines the “perfectly legitimate use of the corporate form to limit risk in commercial undertakings generally and in shipping particularly.”¹⁹⁵ Nevertheless, the English courts exercise their inherent discretion to “lift the corporate veil” and identify the beneficial owner only where the corporate structure is changed for the purpose of avoiding the satisfaction of a claim, or where the corporate structure is illegal.¹⁹⁶ On various occasions, the courts have had to consider in certain situations to permit to “look at the beneficial ownership”.¹⁹⁷ This statement was made in *The Aventicum*¹⁹⁸ where there was a dispute as to who owned the ship when the cause of action arose, and whether that person was also the beneficial owner of all the shares in the ship when the writ was issued.¹⁹⁹ The defendants requested for the proceedings to be set aside and urged the court not to lift the corporate veil. However, Slynn J. disagreed and he held that: “*where damages are claimed by cargo owners and there is a dispute as to the beneficial ownership of the ship, the Court in all cases can and in some cases should look behind the registered owner to determine the true beneficial ownership.*”²⁰⁰ Accordingly, it was permitted to look behind the corporate veil and, on the evidence, it was shown that the persons who beneficially owned the shares in *Aventicum* were not the persons who were the owners at the time the cause of the action arose, the person liable *in personam*, so therefore, the defendants application to set aside the proceedings was granted and the vessel was released from arrest.²⁰¹ The dictum was endorsed by Mr. Justice Sheen in *The Maritime Trader*²⁰² where he affirmed that he “*would not hesitate to lift that veil if the evidence suggested that it obscured from view a mask of fraud rather than the true face of the corporation.*”²⁰³ Moreover, it has been suggested that there is nothing wrong with using the company structure to limit liability unless it

¹⁹⁴ Peter Glover, *Sister Ship Arrest and the Application of the Doctrine of Attachment in Australia: A Jurisdictional Comparative Analysis in the Wake of the 1952 Arrest Convention*, 22 Austl. & N.Z. Mar. L.J. 99 (2008) at Pag. 112.

¹⁹⁵ Bradfield, G, 'Guilt by Association in South African Admiralty Law' [2005] *Lloyd's Maritime and Commercial Law Quarterly* 234, at 239.

¹⁹⁶ Yvonne Baatz, A. C. Velasco, C. Debattista, O. Gurses, J. Hjalmarsson, A. Lista, F. Lorenzon, A. Serdy and Michael Tsimplis, *Maritime Law*, (4th Edn., Informa law from Routledge, 2018) at Pag. 506.

¹⁹⁷ The “*Aventicum*” [1978] 1 Lloyd's Rep 184, at p. 187.

¹⁹⁸ [1978] 1 Lloyd's Rep 184.

¹⁹⁹ *Supra note* 193, at Pag. 133.

²⁰⁰ [1978] 1 Lloyd's Rep 184. At 187, col. 1.

²⁰¹ *Ibid.* at 190, col. 2.

²⁰² [1981] 2 Lloyd's Rep. 153

²⁰³ Hilton Staniland, 'The Arrest of Associated Ships in South Africa: Lifting the Corporate Veil Too High' (1997) 9 U S F MAR L J 405 at 421.

is a sham.²⁰⁴ Yet, even in the case of one-ship companies, there may be grounds for an investigation as a result of Mr. Justice Clarke in *The Tjaskemolen*,²⁰⁵ a case where an alleged transfer of a vessel was a sham or façade and the Court held that the original owners retained the beneficial ownership in the vessel.²⁰⁶ On the evidence, it was clear that the express purpose of the arrangement was to ensure the vessel could not be arrested and it was shown that the transfer was not a genuine commercial transaction.²⁰⁷

Notwithstanding the general legitimacy of one-ship companies, it is therefore possible that the transfer of a ship from one company to another may be a sham, a fraud or a mere façade.²⁰⁸ In the *Helene Roth*²⁰⁹, it was submitted that “*the fact that the change of ownership was a change between companies in the same group is irrelevant unless the sale was made with the intention of evading arrest of the ship and there may be many reasons for the sale of a ship, some good commercial reasons, others provoked by a wish to avoid the possibility of the ship being arrested by a Court exercising Admiralty jurisdiction. The Court is not concerned with the motive for a change of ownership but is concerned with the fact of such change.*”²¹⁰ The “*Saudi Prince*”²¹¹ is a good case example of an investigation into the beneficial ownership of a sister ship where Sheen J investigated the purported transfer of ownership of a ship before the claim form was issued in order to see if there had in truth been a change in the beneficial ownership.²¹² In this case, the cargo owners suffered damage in respect of cargo carried in the *Al Dhahran* and a writ in rem was issued against *Saudi Prince* as a sister ship.²¹³ On the facts, the defendant sought to have the writ set aside claiming that he was not the beneficial owner as respects all the shares therein *Saudi Prince*, yet, he had not satisfied the Court that the ownership

²⁰⁴ *The Maritime Trader* [1981] 2 Lloyd's Rep 153 at 157.

²⁰⁵ *The Tjaskemolen* [1997] 2 Lloyd's Rep 465 at p. 471.

²⁰⁶ *The Tjaskemolen* [1997] 2 Lloyd's Rep 465 at p. 471.

²⁰⁷ *Ibid.* at 465.

²⁰⁸ Bradfield, G, 'Guilt by Association in South African Admiralty Law' [2005] *Lloyd's Maritime and Commercial Law Quarterly* 234, at 240

²⁰⁹ *The Helene Roth* [1980] 1 Lloyd's Rep 477

²¹⁰ *Ibid.* Per Sheen J. at 480.

²¹¹ *The "Saudi Prince"* [1982] 2 Lloyd's Rep 255.

²¹² Nigel Meeson, J. A. Kimbell, *Admiralty Jurisdiction and Practice*, (5th Edn., Informa Law from Routledge 2018, Lloyd's Shipping Law Library) at Pag. 106.

²¹³ [1982] 2 Lloyd's Rep 255

had ever been transferred.²¹⁴ He alleged that before the issue of the writ the sister ship had been transferred to a company in which he owned 80% of the shares and that his son and daughter owned the remaining 20% but, on the evidence, the Court had not been convinced that his children paid cash for the shares and an investigation into the true beneficial ownership of *Saudi Prince* could lead only to one owner, the defendant, which was at the material time the true beneficial owner of that vessel.²¹⁵

From these facts one may conclude that the creation of one-ship companies has been a source of irritation to cargo interests and others who consider that they are thereby deprived of the benefit of the sister ship provisions of the 1981 Act.²¹⁶ Hence, a ship owned by a one-ship company is immune from arrest in respect of a claim against another company.²¹⁷ It is considered that one-ship companies are generally deemed to legitimately limit shipowners liability and also limit the possibility of arresting other ships, but only the particular ship which is the ship in respect of which the maritime claim arose.²¹⁸ As it has been discussed in this chapter, piercing the corporate veil is an unusual approach for English courts to take and they have, so far, permitted it, in very exceptional cases, when fraudulent and dishonest means were used by a debtor to defeat the enforcement of a judgement against it.²¹⁹ Thus, after a maritime claim has arisen and a shipowner sells the guilty ship or a sister ship in order to avoid the claim, a court may treat the sale as a 'sham' that is intended to defraud creditors and set the transfer of shares aside and proceed as if it had not occurred.²²⁰ This is the relevant principle that allows piercing the corporate veil only where special circumstances exist indicating that it is a mere façade concealing the

²¹⁴ Ibid. See p. 258, col. 2; p. 259.

²¹⁵ Ibid. at 255; see p. 260, cols. 1 and 2.

²¹⁶ Nigel Meeson, J. A. Kimbell, *Admiralty Jurisdiction and Practice*, (5th Edn., Informa Law from Routledge 2018, Lloyd's Shipping Law Library) at Pag. 106

²¹⁷ Hilton Staniland, 'The Arrest of Associated Ships in South Africa: Lifting the Corporate Veil Too High' (1997) 9 U S F MAR L J 405 at Pag. 424.

²¹⁸ Phutita Luksilakul, "*Arrest of Associated Ship: The possibility to apply South African Approach to Thai Law*", Master's Thesis, Thammasat University, 2014.

²¹⁹ Aleka Mandaraka-Sheppard, *Modern Maritime Law, Volume 1: Jurisdiction and Risks*, (3rd edn., Informa law from Routledge, 2013) at pag. 135.

²²⁰ Watson, Farley & Williams, "*Sister Ship Arrest*", Online Article, Maritime Briefing, April 2013 (wfw.com) at Pag. 4. See also *The WD Fairway* (No. 3) [2009] 2 Lloyd's Rep. 420.

true facts.²²¹ However, in order to address the perceived inadequacies of the 1952 Convention and the 1981 Act, “as a mechanism to assist creditors in the enforcement of claims arisen in respect of ships owned by one-ship companies, one needs not an extension of the Arrest Convention but a fundamentally altered legal regime directed at overcoming the problems of one-ship companies that are not addressed by the Convention”²²² nor the 1981 Act.

This has been provided by the true associated ship arrest jurisdiction in South Africa where the link between the ships could also be established through common control rather than being restricted to common ownership, as was the case with the sister ship provisions.²²³

CHAPTER 4

‘ASSOCIATED SHIP’ ARREST IN SOUTH AFRICA

4.01. INTRODUCTION OF THE “ASSOCIATED SHIP” ARREST IN SOUTH AFRICA

The phenomenon of forming a one-ship company attracted the attention of the law commission of South Africa, leading to a new approach to cope with the proliferation of one-ship companies, by introducing the new regime of “associated ship” arrest.²²⁴ It is over twenty years since South Africa introduced its “associated ship” arrest provisions in the Admiralty Jurisdiction Regulation Act 1983 (AJRA) which implemented these, at the time, “*novel, unusual and at times far-reaching provisions*”,²²⁵ and earned South Africa a reputation in shipping industry as an “arrest

²²¹ Francesco Berlingieri, “*Berlingieri On Arrest Of Ships Volume 1 – A Commentary on the 1952 Arrest Convention*”, (Sixth Edition 2017, Informa Law from Routledge) Lloyd’s Shipping Law Library, at Pag. 306.

²²² M. J. David Wallis, “*The Associated Ship and South African Admiralty Jurisdiction*”, (Thesis, Faculty of Law, University of KwaZulu-Natal 2010) B Com, LL B *cum laude* (Natal), SC, Judge of the High Court of South Africa, Supervised by H. Stainland. At Pag. 118.

²²³ Graham Bradfield, *Guilt by association in South African admiralty law*, Lloyd’s Maritime and Commercial Law Quarterly 2005, Informa UK PLC. At Pag. 238.

²²⁴ Phutita Luksilakul, “*Arrest of Associated Ship: The possibility to apply South African Approach to Thai Law*”, Master’s Thesis, Thammasat University, 2014.

²²⁵ *Katagum Wholesale Commodities Co Ltd v. The MV Paz* 1984 (3) SALR 261 (N), [263B]. See *National Iranian Tanker Co v. MV Pericles* GC 1995 (1) SALR 475 (A), [479]; H. Stainland, “The Implementation of the Admiralty

friendly” jurisdiction.²²⁶ According to Hare, the 1983 Act sought to extend the jurisdiction of the (then) Supreme Court in Admiralty to all maritime disputes.²²⁷ The main reason for choosing South Africa as a jurisdiction of comparison was because it is the only jurisdiction which chose to confront the consequences of the one-ship companies in an attempt to provide a solution by adopting the concept of an “associated ship” which, in contrast from sister ship provisions, the link between the ships can be established by common control rather than merely by common ownership.²²⁸ Moreover, South Africa has stood alone for more than twenty years in exercising a jurisdiction to arrest vessels in actions *in rem* on a basis different from and more extensive than any other jurisdiction exercised by any court sitting in maritime matters anywhere else in the world.²²⁹ In addition, the effect of the “associated ship” provisions is that the corporate veil of a company ownership of ships is disregarded as a matter of course whereas, at common law, a court will not pierce the corporate veil unless it is proved that the corporate structure is a mere façade involving an element of fraud or improper conduct.²³⁰ What is unquestionable is that from its inception, the Admiralty Jurisdiction Regulation Act 1983 (AJRA) went well beyond the Arrest Conventions in establishing and defining the scope of the associated ship jurisdiction and it also went further than the provisions of the Senior Courts Act 1981.²³¹ Nevertheless, at the time the 1983 Act was enacted, a claimant was restricted to proceeding against only the “guilty ship” due to the separate legal entity of one-ship companies.²³² However, it was clear that the AJRA 1983 was designed to remedy the problems brought by the 1952 Arrest Convention “sister ship”

Jurisdiction Regulation Act in South Africa” [1985] LMCLQ 462; D.B. Friedman, “Maritime Law in the Courts after 1 November 1983” (1983) 100 SALJ 678.

²²⁶ H. Staniland, “*Ex Africa semper aliquid novi*: Associated ship arrest in South Africa” [1995] LMCLQ 561; J. Dyason, “South African Maritime Law—An Overview of Some Developments” (2001) 32 JMLC 475, 482; M. Wallace, “The Associated Ship Jurisdiction in South Africa: Choice assorted or only one bite at the cherry?” [2000] LMCLQ 132.

²²⁷ John Hare, *Shipping Law & Admiralty Jurisdiction in South Africa* (1999) 77. At 16.

²²⁸ Dr Sarah C Derrington, “*Ship arrest and the admiralty jurisdiction of Australia and South Africa: too far or not far enough?*”, *Journal of International Maritime Law*, JIML 11 (2005) 6, 409–416, 1 December 2005. At Pag. 411.

²²⁹ Malcom John David Wallis, “*The Associated Ship & South African Admiralty Jurisdiction*”, 2010 Siber Ink at Pag. 5.

²³⁰ Graham Bradfield, ‘Guilt by association in South African maritime law’ [2005] LMCLQ 234, 240.

²³¹ M. J. David Wallis, “*The Associated Ship and South African Admiralty Jurisdiction*”, (Thesis, Faculty of Law, University of KwaZulu-Natal 2010) B Com, LL B *cum laude* (Natal), SC, Judge of the High Court of South Africa, Supervised by H. Staniland.

²³² Peter Glover, *Sister Ship Arrest and the Application of the Doctrine of Attachment in Australia: A Jurisdictional Comparative Analysis in the Wake of the 1952 Arrest Convention*, 22 *Austl. & N.Z. Mar. L.J.* 99 (2008) at Pag. 110.

provisions²³³ by disregarding the separate legal status of companies in a group, permitting the ship under the common control of the debtor susceptible for arrest, notwithstanding any sham or fraudulent operations, and also allowing the claimant more options providing him possible pre-trial security, a powerful tool to enforce future maritime judgement.²³⁴ An explanation for the introduction of associated ship arrests can be found in the South African Law Commission Report where it was suggested that “*provision has also been made for the bringing of an action in rem against an ‘associated ship’. The International Convention with regard to the Arrest of Sea-Going Ships, to which reference has been made above, makes provision for the arrest to find an action in rem of a sister ship, that is to say, a ship in the same ownership as the guilty ship. The provisions of the Bill are an extension of this notion based on the fact that since the conclusion of the Convention its provisions have been defeated by the proliferation of ‘one-ship companies’, that is to say companies owning only one-ship and therefore avoiding the Convention. The extension is, it is thought, a logical extension of the Convention, but the broad notions upon which the Convention is founded have been preserved.*”²³⁵ Therefore, the arrest of an associated ship in terms of the AJRA 1983 casts the net of liability so much wider than the sister ship concept and accordingly, South Africa acquired the reputation for being the most favourable jurisdiction in the world for the arrest of a ship.²³⁶

4.02. DEFINITION OF ASSOCIATED SHIPS

As Friedman J. suggested, the long-awaited AJRA 1983, contains a number of sections ‘*with novel, unusual and at times far-reaching provisions.*’²³⁷ Section 3(6) of the Act appears to be an unprecedented extension of the notion of the arrest of a sister ship unique to South Africa and it provides that an action *in rem* may be brought by

²³³ Staniland, H. and McLennan, J S, 'The Arrest of an Associated Ship' (1985) 102 *South African Journal* 148, 148

²³⁴ Phutita Luksilakul , “*Arrest of Associated Ship: The possibility to apply South African Approach to Thai Law*”, Master’s Thesis, Thammasat University, 2014.

²³⁵ South African Law Commission Report para. 7.3; See also M. J. David Wallis, “*The Associated Ship and South African Admiralty Jurisdiction*”, (Thesis, Faculty of Law, University of KwaZulu-Natal 2010) B Com, LL B *cum laude* (Natal), SC, Judge of the High Court of South Africa, Supervised by H. Stainland. At Pag. 81.

²³⁶ Hilton Staniland, Admiralty Law, 1998 Ann. Surv. S. African L. 722 (1998) at Pag. 726.

²³⁷ Friedman J in *Katagum Wholesale Commodities Co Ltd v The MV Paz* 1984 (3) SA 261 (N) at 263A-B)

the arrest of an 'associated ship' instead of the ship in respect of which the claim arose.²³⁸ Associated ship is a term only used in South African maritime law.²³⁹ Section 3(7)(a) defines an 'associated ship' as a ship "other than the ship in respect of which the maritime claim arose" that is "owned, at the time when the action is commenced, by the person who was the owner of the ship concerned at the time when the maritime claim arose;" or "owned, at the time when the action commenced, by a person who controlled the company which owned the ship concerned when the maritime claim arose"²⁴⁰; or "owned, at the time when the action is commenced, by a company which is controlled by a person who owned the ship concerned, or controlled the company which owned the ship concerned, when the maritime claim arose."²⁴¹ It is these provisions that establish an association through common control that have no parallel in other maritime jurisdictions and that distinguishes the South African associated ship arrest provisions from sister ship arrest.²⁴² The first reported case to deal with the arrest of an associated ship was *E E Sharp & Sons Ltd v MV Nefeli*²⁴³ a case where maritime claims were brought in respect of goods supplied to the vessel and also to certain other vessels alleged to be associated or sister ships.²⁴⁴ The question was whether orders could be granted to enforce claims against *MV Nefeli's* associated ships in terms of section 3(6).²⁴⁵ However, the vessel *Nefeli* was owned by a different company to the vessel to which the goods had been supplied and both vessels were operated by the same managing agents, and the same individual was the director of both companies concerned.²⁴⁶ As King AJ observed, "*this is precisely the situation which the section is intended to cater for, namely a series of "one ship" companies, all controlled by the same interests, but previously because of their separate legal personalities immune their separate legal*

²³⁸ Admiralty Jurisdiction Regulation Act 1983, Section 3(6) <http://www.justice.gov.za/legislation/acts/1983-105.pdf>
See also: Hilton Staniland and J S McLennan, 'The Arrest of an Associated Ship' (1985) 102 S AFRICAN LJ 148 at Pag. 148.

²³⁹ Phutita Luksilakul , "*Arrest of Associated Ship: The possibility to apply South African Approach to Thai Law*", Master's Thesis, Thammasat University, 2014.

²⁴⁰ Admiralty Jurisdiction Regulation Act 1983, Section 3(7)(a)(ii)

²⁴¹ Admiralty Jurisdiction Regulation Act 1983, Section 3(7)(a)(iii)

²⁴² Graham Bradfield, *Guilt by association in South African admiralty law*, Lloyd's Maritime and Commercial Law Quarterly 2005 , Informa UK PLC. At Pag. 236.

²⁴³ *E E Sharp & Sons Ltd v MV Nefeli* 1984 (3) SA 325 (C) - Cape Provincial Division (King A.J.)

²⁴⁴ Hilton Staniland and J S McLennan, 'The Arrest of an Associated Ship' (1985) 102 S AFRICAN LJ 148 at 149.

²⁴⁵ *ibid.*

²⁴⁶ *E E Sharp & Sons Ltd v MV Nefeli* 1984 (3) SA 325 (C) - Cape Provincial Division

personalities immune from attachment in respect of debts incurred in respect of the sister ship."²⁴⁷ Therefore, the court had to decide whether the alleged sister ship fell within the definition of associated ships underlined in section 3(7)(a) of the 1983 Act.²⁴⁸ In the absence of common ownership, the applicant has to rely on common control and on the evidence, it was held that the power to control the companies was vested in the same person and as a result, the ships were considered to be associated ships.²⁴⁹ However, the concept of common control will be discussed further in great detail with reference to section 3(7)(b) of the AJRA 1983, taking in consideration the decision of the Supreme Court of Appeal of South Africa in *The "Heavy Metal"*.²⁵⁰

4.03. BENEFICIAL OWNERSHIP, ONE-SHIP COMPANY AND LIFTING THE CORPORATE VEIL

It has been noticed that the action *in rem* from English Admiralty proceedings was retained in South Africa and it was applied to a greater range of claims whilst extending the availability of sister ship arrests yet, it was not clear whether the reference to beneficial ownership was intended to bear the same meaning in South Africa as it did in England.²⁵¹ Under company owned associated ship basis, there are two form of association: on one hand when the associated ship is owned by the company, and that company is controlled by the beneficial owner who owned the particular ship; and, on the other hand, when the associated ship is owned by the company that is controlled by the beneficial owner, and that owner controls the company that owns the particular ship.²⁵² Notwithstanding, to qualify as an associated ship, an ownership test is insufficient and the claimant is required to identify the person who has ultimately benefited from the operation of ships in the fleet owned by

²⁴⁷ Ibid. Per King AJ at 326H.

²⁴⁸ Hilton Staniland and J S McLennan, 'The Arrest of an Associated Ship' (1985) 102 S AFRICAN LJ 148 at 149.

²⁴⁹ Ibid.

²⁵⁰ Belfry Marine Limited v Palm Base Maritime SDN BHD (The "Heavy Metal") 1999 (3) SA 1083 (SCA)

²⁵¹ M. J. David Wallis, *"The Associated Ship and South African Admiralty Jurisdiction"*, (Thesis, Faculty of Law, University of KwaZulu-Natal 2010) B Com, LL B *cum laude* (Natal), SC, Judge of the High Court of South Africa, Supervised by H. Stainland.at Pag. 71 and Pag. 77.

²⁵² Phutita Luksilakul , *"Arrest of Associated Ship: The possibility to apply South African Approach to Thai Law"*, Master's Thesis, Thammasat University, 2014

different one-ship companies.²⁵³ It is submitted that in the provisions of section 3(7)(a) of the AJRA 1983, ownership means legal ownership that is possession of the legal rights that ownership confers upon a person.²⁵⁴ However, the distinction that may be drawn in English Admiralty law between beneficial or equitable ownership on the one hand, and legal ownership on the other, is not one that is recognised in South African law.²⁵⁵ In South Africa there is no distinction between legal and equitable ownership as opposed to English law where it was held by Lord Donaldson in *The Evpo Agnic*²⁵⁶ that the reference to 'owner' was a reference to the registered owner.²⁵⁷ Moreover, in *The Maritime Trader*,²⁵⁸ the arrest of the ship of the subsidiary was not permitted under English law²⁵⁹, thus, following section 3(7)(a)(ii) of the AJRA 1983, an action *in rem* may be brought against a ship owned "at the time when the action is commenced, by a company which is controlled by a person who owned the ship concerned, or controlled the company which owned the ship concerned, when the maritime claim arose."²⁶⁰ The proliferation of one-ship companies "*is thereby inhibited because any ship bought after the claim arose is liable to be arrested as an associated ship provided it is still owned by the company at the time the action is commenced.*"²⁶¹ Further, the applicability in South Africa of the judgment given by the English Courts in *The Monica S*²⁶² cannot be accepted as good law.²⁶³ The principle in *The Monica S* does not apply to an associated ship arrest to commence an action *in rem* against the associated ship, the reason simply being that in the case of an

²⁵³ Ibid.

²⁵⁴ M. J. David Wallis, "*The Associated Ship and South African Admiralty Jurisdiction*", (Thesis, Faculty of Law, University of KwaZulu-Natal 2010) B Com, LL B *cum laude* (Natal), SC, Judge of the High Court of South Africa, Supervised by H. Stainland at Pag. 219.

²⁵⁵ D J Shaw, *Admiralty Jurisdiction and Practice in South Africa*, pp 35-42

²⁵⁶ *The Evpo Agnic* [1988] 3 All ER 810 (CA); [1988] 2 Lloyd's Rep 411 (CA)

²⁵⁷ *The Evpo Agnic* [1988] 2 Lloyd's Rep 411 at 411; See also: M. J. David Wallis, "*The Associated Ship and South African Admiralty Jurisdiction*", (Thesis, Faculty of Law, University of KwaZulu-Natal 2010) B Com, LL B *cum laude* (Natal), SC, Judge of the High Court of South Africa, Supervised by H. Stainland at Pag. 219.

²⁵⁸ [1981] 2 Lloyd's Rep 153

²⁵⁹ Aleka Mandaraka-Sheppard, *Modern Maritime Law, Volume 1: Jurisdiction and Risks*, (3rd edn., Informa law from Routledge, 2013) at Pag. 148.

²⁶⁰ Admiralty Jurisdiction Regulation Act 1983, Section 3(7)(a)(ii)

²⁶¹ Hilton Staniland, 'The Arrest of Associated Ships in South Africa: Lifting the Corporate Veil Too High' (1997) 9 U S F MAR L J 405 at Pag. 415. See also: Admiralty Jurisdiction Regulation Act 1983, Section 3(7)(a)(iii)

²⁶² *The Monica S* [1967] 3 All ER 740 (QBD)

²⁶³ M. J. David Wallis, "*The Associated Ship and South African Admiralty Jurisdiction*", (Thesis, Faculty of Law, University of KwaZulu-Natal 2010) B Com, LL B *cum laude* (Natal), SC, Judge of the High Court of South Africa, Supervised by H. Stainland. At Pag. 468.

associated ship one is already dealing with a situation where the vessel being arrested is not owned by the owner of the ship concerned.²⁶⁴

At this point, it is relevant and useful to compare the English law approach to piercing the corporate veil with the approach the South African courts have taken in relation to associated ship arrest under the AJRA 1983.²⁶⁵ In *The Cape Courage*,²⁶⁶ the Supreme Court of Appeal confirmed that the South African legislation goes beyond a sister ship arrest “by widening the net and providing for a statutory piercing of the veil to combat the practice frequently adopted by shipowners seeking to evade the sister ship provision by setting up a series of one-ship companies.”²⁶⁷ As Professor H. Staniland has observed, the associated ship provisions in South Africa are not content to lift the corporate veil only if a company is formed as a device, stratagem or sham in order to mask the effective carrying on of a business as is the case in the United Kingdom.²⁶⁸ Rather, the associated ship provisions lift the veil in all cases and, for once the association is established in respect of one claim, that association is exposed in court and may well render other ships owned by the associated companies liable to be arrested for different claims.²⁶⁹ Unlike South Africa which is a flexible jurisdiction on arrest of ships, under English law and those jurisdictions that follow it, the controlling shareholders of two sister companies, each owning one ship, will not be sufficient evidence to lift the corporate veil of a legitimate one-ship company for the purpose of arresting the asset belonging to the other sister company, unless there is evidence of fraud.²⁷⁰ This is because of the principle of the sanctity of a separate corporate personality of a company distinct from its members enshrined in *Salomon v Salomon*²⁷¹, a fundamental principle applicable in most

²⁶⁴ Ibid. At Pag. 470.

²⁶⁵ Hare, J (Professor), *Shipping Law and Admiralty Jurisdiction in South Africa*, Part I, ‘Admiralty Jurisdiction and Practice’ at paras 2–2.6.2–2–2.6.3, 2nd edn (2009) JUTA & Co. Ltd.

²⁶⁶ *Bulkship Union SA v Qannas Shipping Co., Ltd (The Cape Courage)* 2009 ZASCA 74; 2009 778 LMKN 2 (SCA - SA); see also *Pancoast Trading SA v Orient Shipping (The Bavarian Trader)* 2010 (4) SA 369 (KZD): a ship cannot be an associated ship of itself.

²⁶⁷ (*The Cape Courage*) 2009 ZASCA 74; 2009 778 LMKN 2 (SCA -SA) per Farlam JA at para. 22.

²⁶⁸ Hilton Staniland, ‘Associated **Ship Arrest** in South Africa’, paper delivered at the Institute of Maritime Law, University of Southampton, 11 September 1995.

²⁶⁹ Ibid. See also: Dr Sarah C Derrington, ‘*Ship arrest and the admiralty jurisdiction of Australia and South Africa: too far or not far enough?*’, *Journal of International Maritime Law*, JIML 11 (2005) 6, 409–416, 1 December 2005. At 416.

²⁷⁰ Aleka Mandaraka-Sheppard, *Modern Maritime Law, Volume 1: Jurisdiction and Risks*, (3rd edn., Informa law from Routledge, 2013) at Pag. 131.

²⁷¹ *Salomon v Salomon and Company* [1897] AC 22 (HL),

jurisdictions, but entirely disregarded in the AJRA 1983 of South Africa.²⁷² The South African courts decided that they “should brush aside the veil of corporate identity time and time again where fraudulent use is made of the fiction of legal personality.”²⁷³ Therefore, the effect of allowing a maritime creditor to arrest an associated ship instead of the guilty ship is to permit, as a matter of course, to look past the separate corporate entity that owns the vessel to the entity’s controller, the provision being described as a ‘statutory mode of piercing the corporate veil.’²⁷⁴ As discussed in the previous chapter, at common law, even if one of the grounds for disregarding the corporation’s separate existence can be established, the remedy of piercing the corporate veil is nevertheless discretionary and it is an exceptional remedy requiring exceptional circumstances.²⁷⁵ Whereas under the ‘associated ship’ arrest provisions, veil piercing is available as a matter of course and not as an exceptional remedy.²⁷⁶ This being said, under AJRA 1983 statutory piercing provisions, the grounds of ‘mere façade’ or sham are presumed and therefore, it follows that the separate identity of the ship owning companies is disregarded once common control is established.²⁷⁷

4.04. THE CONCEPT OF CONTROL - MV HEAVY METAL: BELFRY MARINE LTD v. PALM BASE MARITIME SDN BDN [1999]

As explained above, section 3(7)(a)(ii) and (iii) of the AJRA 1983 requires proof of control of the companies concerned and it provides that a person may control a company without controlling all the shares in the company.²⁷⁸ Moreover, control over a company can be exercised even without majority shareholding.²⁷⁹ In contrast to Article 3(2) of the 1952 Convention, which deems ships to be in the same ownership

²⁷² Hilton Staniland, 'The Arrest of Associated Ships in South Africa: Lifting the Corporate Veil Too High' (1997) 9 U S F MAR L J 405 at Pag. 406.

²⁷³ *Lategan & another v NNO v Boyes & another* 1980 (4) SA 191 (T) ; See Also: Acta Juridica, Vol. 1982, pp. 30-50;

²⁷⁴ *MV Heavy Metal: Belfry Marine Ltd v. Palm Base Maritime SDN BHD* 1999 (3) SALR 1083 (SCA), 1096I, [43]; Staniland [1995] LMCLQ 561, 571.

²⁷⁵ Graham Bradfield, *Guilt by association in South African Admiralty Law*, Lloyd's Maritime and Commercial Law Quarterly 2005 , Informa UK PLC. At Pag. 240.

²⁷⁶ *Ibid.* at Pag. 248.

²⁷⁷ *Ibid.* at 240.

²⁷⁸ Aleka Mandaraka-Sheppard, *Modern Maritime Law, Volume 1: Jurisdiction and Risks*, (3rd edn., Informa law from Routledge, 2013) at 149.

²⁷⁹ *Dole Fresh Fruit International Ltd v MV Kapetan Leonidas* 1995 (3) SA 112, at 119.

when “all the shares therein are owned by the same person, or persons”, section 3(7)(b)(i) of the AJRA 1983 deems ships to be owned by the same person if the “majority in number of, or of voting rights in respect of, or the greater part, in value, of, the shares in the ships are owned by the same persons.”²⁸⁰ It is necessary that as a whole it is the same persons otherwise there is no association.²⁸¹ Notwithstanding, section 3(7)(b)(ii) of the AJRA 1983 introduced the notion of “control” which provides that “a person shall be deemed to control a company if he has power, directly or indirectly, to control the company.”²⁸² This section supplements section 3(7)(a) and it provides assistance in establishing an association through common ownership or control in the form of a deeming provision.²⁸³ Section 3(7)(b) of the AJRA 1983 has also been considered by the Supreme Court of Appeal of South Africa in *The “Heavy Metal”*²⁸⁴ case where Smalberger J.A. stated that: “control is expressed in terms of power; if the person concerned has power, directly or indirectly, to control the company he/she shall be deemed to control the company.”²⁸⁵ The outcome of *The Heavy Metal* has caused a lot of controversy around the world and it’s a good example in order to show the strict application of law in South Africa. The courts considered the following facts to determine whether the association between a particular ship and the ship sought for arrest was established.²⁸⁶ In this case, the vessel *Heavy Metal* was arrested as an ‘associated ship’. The respective owners of the two ships, *MV Sea Sonnet* and *MV Heavy Metal*, which was alleged to be an associated ship of the *MV Sea Sonnet*, had registered offices at the same address in Cyprus each of which had the same sole director, Mr. Lemonaris and the same secretary.²⁸⁷ At the relevant time, Mr. Lemonaris had been the registered majority

²⁸⁰ Francesco Berlingieri, “Berlingieri On Arrest Of Ships Volume 1 – A Commentary on the 1952 Arrest Convention”, (Sixth Edition 2017, Informa Law from Routledge) Lloyd’s Shipping Law Library At Pag. 398. See Also: Admiralty Jurisdiction Regulation Act 1983, Section 3(7)(b)(i)

²⁸¹ M. J. David Wallis, “The Associated Ship and South African Admiralty Jurisdiction”, (Thesis, Faculty of Law, University of KwaZulu-Natal 2010) B Com, LL B cum laude (Natal), SC, Judge of the High Court of South Africa, Supervised by H. Stainland. At Pag. 132.

²⁸² Admiralty Jurisdiction Regulation Act 1983, Section 3(7)(b)(ii)

²⁸³ Graham Bradfield, *Guilt by association in South African admiralty law*, Lloyd’s Maritime and Commercial Law Quarterly 2005 , Informa UK PLC. At Pag. 236.

²⁸⁴ *Belfry Marine Limited v Palm Base Maritime SDN BHD (The “Heavy Metal”)* 1999 (3) SA 1083 (SCA)

²⁸⁵ Ibid. Per Smalberger J.A. paras. [8]-[10]. See Also ²⁸⁵ Francesco Berlingieri, “Berlingieri On Arrest Of Ships Volume 1 – A Commentary on the 1952 Arrest Convention”, (Sixth Edition 2017, Informa Law from Routledge) Lloyd’s Shipping Law Library At Pag. 398

²⁸⁶ Phutita Luksilakul , “Arrest of Associated Ship: The possibility to apply South African Approach to Thai Law”, Master’s Thesis, Thammasat University, 2014.

²⁸⁷ Hilton Staniland, Admiralty Law, 1998 Ann. Surv. S. African L. 722 (1998) at Pag. 727.

shareholder and sole director of the company that owned the 'guilty' ship *MV Sea Sonnet*.²⁸⁸ That in itself would have been sufficient to establish common control had the fact not been complicated by his assertion²⁸⁹ that he was merely the nominee of the beneficial shareholders, that he exercised no control over the companies and had no discretion to represent the companies without instructions from the beneficial shareholders.²⁹⁰ The matter was further complicated in that Mr. Lemonaris contended that the laws of Cyprus precluded him from divulging the identity of the actual or beneficial owners of the share in the respective ship owning companies.²⁹¹ The majority of judges decided to go further and the approach that they adopted to the law and the interpretation of certain provisions of the Act is what renders this decision controversial.²⁹²

The decision of the Court relied on the provisions of sections 3(7)(b)(ii) of the AJRA 1983 where the minority judgments held that the provision envisaged only one power to control, the "real" or "actual" power to control, but recognised that such power might be exercised in two ways: directly, where the registered shareholder exercises the rights under the shares as principal, and, indirectly, where the holder of the rights under the shares is not registered as the shareholder but exercises control over the company through a nominee shareholder, acting under the authority of the principal holder of the rights.²⁹³ Moreover, Thring J, held that, on the basis of section 3(7)(b)(ii), the claimant has to "*establish no more than that the person concerned has the power to control the company concerned, directly or indirectly. Whether or not he in fact exercises that power himself or whether it is exercised through him by others is immaterial. He is deemed to control the company, that is to say he is regarded as*

²⁸⁸ Peter Glover, *Sister Ship Arrest and the Application of the Doctrine of Attachment in Australia: A Jurisdictional Comparative Analysis in the Wake of the 1952 Arrest Convention*, 22 Austl. & N.Z. Mar. L.J. 99 (2008) at Pag. 113.

²⁸⁹ Graham Bradfield, *Guilt by association in South African admiralty law*, Lloyd's Maritime and Commercial Law Quarterly 2005, Informa UK PLC. At Pag. 244.

²⁹⁰ 1999 (3) SALR 1083 (SCA) at 1090B–D, [13]. See also: Hilton Staniland, *Admiralty Law*, 1998 Ann. Surv. S. African L. 722 (1998) at Pag. 727.

²⁹¹ *Ibid.* 1090E [13]. See: Peter Glover, *Sister Ship Arrest and the Application of the Doctrine of Attachment in Australia: A Jurisdictional Comparative Analysis in the Wake of the 1952 Arrest Convention*, 22 Austl. & N.Z. Mar. L.J. 99 (2008) at Pag. 113.

²⁹² M. J. David Wallis, "*The Associated Ship and South African Admiralty Jurisdiction*", (Thesis, Faculty of Law, University of KwaZulu-Natal 2010) B Com, LL B *cum laude* (Natal), SC, Judge of the High Court of South Africa, Supervised by H. Stainland. At Pag. 271.

²⁹³ Francesco Berlingieri, "*Berlingieri On Arrest Of Ships Volume 1 – A Commentary on the 1952 Arrest Convention*", (Sixth Edition 2017, Informa Law from Routledge) Lloyd's Shipping Law Library, at Pag. 309.

*controlling the company, whether he does so in fact or not.*²⁹⁴ Therefore, both Cape Court and the Majority in the Supreme Court of Appeal held that as Mr. Lemonaris was the registered owner of the majority of the shares in both of the companies, he had power directly to control them and the result was that *Heavy Metal* was an associated ship in relation to the *Sea Sonnet*.²⁹⁵

Finally it can be concluded that “it is almost certainly the case that the arrest of a ship in circumstances similar to that of the *MV Heavy Metal* would not be possible under the Admiralty laws, including English law and it seems that most maritime states would find the arrest of *MV Heavy Metal* unacceptable on policy grounds.”²⁹⁶

CONCLUSION

To sum up, both Ship Arrest Conventions and Senior Courts Act 1981 have failed to fulfil the objective of enabling the maritime claimants to obtain security against shipowners and have their claims settled in full.²⁹⁷ With the extension of the action *in rem* to ‘sister ships’ following the introduction of the 1952 Arrest Convention, the reach of admiralty jurisdiction was extended beyond that of an action solely against the wrongdoing ship.²⁹⁸ However, as a comeback, it appears that shipowners were ‘quick to limit the exposure of their fleets by re-financing their ships into one-ship companies’²⁹⁹ therefore, avoiding the Convention and section 21(4) of the Senior Courts Act 1981. The main issue which the courts had to deal with following the creation of one-ship companies was to find the beneficial owners of the ship in connection with which the claim arose as there is no other ship to arrest other than the “offending ship”. This is because of the principle of sanctity of a separate

²⁹⁴ *The MV Heavy Metal Palm Base Maritime SDN BH!D v Dahlia Maritime Ltd & others* 1998 (4) SA 479 (C) at 491C-D per Thring J.

²⁹⁵ M. J. David Wallis, “*The Associated Ship and South African Admiralty Jurisdiction*”, (Thesis, Faculty of Law, University of KwaZulu-Natal 2010) B Com, LL B *cum laude* (Natal), SC, Judge of the High Court of South Africa, Supervised by H. Stainland. At Pag. 273.

²⁹⁶ Hilton Staniland, Admiralty Law, 1998 Ann. Surv. S. African L. 722 (1998) at Pag. 728.

²⁹⁷ Md. Rizwanul Islam, *The Arrest of Ship Conventions 1952 and 1999: Disappointment for Maritime Claimants*, Journal of Maritime Law & Commerce, Vol. 38, No. 1., January 2007. At Pag. 81.

²⁹⁸ Peter Glover, *Sister Ship Arrest and the Application of the Doctrine of Attachment in Australia: A Jurisdictional Comparative Analysis in the Wake of the 1952 Arrest Convention*, 22 Austl. & N.Z. Mar. L.J. 99 (2008) at Pag. 122.

²⁹⁹ John Hare, [Revisions to Chapter 2] *Shipping Law & Admiralty Jurisdiction in South Africa* (1999) 16 at Pag 37.

corporate personality of a company as suggested in *Salomon v Salomon*³⁰⁰ where the courts allowed lifting the veil of corporate identity where fraudulent use is made of the fiction of legal personality.³⁰¹ Therefore, for the corporate veil to be lifted at common law, it has to be established that the corporate structure is a “mere façade, involving an element of fraud or improper conduct, or that there is failure to maintain the separate identity of the company from that of its shareholders.”³⁰²

Internationally, there is a sufficiently widely expressed concern over the widespread use of one-ship companies that it can properly be considered a matter of concern.³⁰³ Though, it can be argued that the current law provided by the Senior Courts Act 1981 and the 1952 and 1999 Ship Arrest Conventions is insufficient as lifting the corporate veil is not enough in order to assist maritime claimants. After assessing the disadvantages of a maritime claimant under the English law in contrast with the South African Admiralty jurisdiction, it can be proved that the concept of an associated ship introduced by South Africa goes considerably further than the sister ship provisions in going behind the separate corporate personality of ship-owning companies to their controlling interests and, on the basis of common control, providing that ships are associated.³⁰⁴ It can be argued that the approach provided by the South African Admiralty jurisdiction, successfully strikes on the said problem arising from operation of single ship companies, by allowing arrest of the ships under control of the debtor.³⁰⁵ In *The Heavy Metal*³⁰⁶, it can be noticed that the courts went too far in the way they have found association. Nevertheless, one might ask whether or not the approach of the South African courts was fair, or whether it inclined to assist maritime claimants more, providing them a safeguard by introducing the notion of direct and indirect control and applying the law in a strict manner disregarding the corporate veil easily and undermining the legitimate use of the corporate form.

³⁰⁰ *Salomon v Salomon and Company* [1897] AC 22 (HL)

³⁰¹ *Lategan & another NNO v Boyes & another* 1980 (4) SA 191 (T)

³⁰² Bradfield, G, 'Guilt by Association in South African Admiralty Law' [2005] *Lloyd's Maritime and Commercial Law Quarterly* 234, at 240.

³⁰³ M. J. David Wallis, “*The Associated Ship and South African Admiralty Jurisdiction*”, (Thesis, Faculty of Law, University of KwaZulu-Natal 2010) B Com, LL B cum laude (Natal), SC, Judge of the High Court of South Africa, Supervised by H. Stainland. At Pag. 118.

³⁰⁴ *Ibid.* at Pag. 1.

³⁰⁵ Phutita Luksilakul, “*Arrest of Associated Ship: The possibility to apply South African Approach to Thai Law*”, Master’s Thesis, Thammasat University, 2014.

³⁰⁶ *Belfry Marine Limited v Palm Base Maritime SDN BHD (The “Heavy Metal”)* 1999 (3) SA 1083 (SCA)

On one hand, it is suggested that South Africa provides a stricter legislation, the provisions of the AJRA 1983 relating specifically to association through common control being radical in that they provide for a statutory disregarding of the corporate veil of company ownership of ships as a matter of course.³⁰⁷ Moreover, in South Africa there is no balance between the interest of maritime claimants and shipowners when it comes to ship arrest as it can be noticed that there is a bias in favour of claimants rather than the defendants.³⁰⁸ Because of this, it is suggested that the South African Admiralty jurisdiction is more in favour of the maritime claimant rather than shipowners and because of the associated ships provisions it earned a reputation as an “arrest friendly” jurisdiction.³⁰⁹ On the other hand, balancing the issues, there is the matter of shipowners bias as it is in their benefit to create one-ship companies as it is legitimate for them to arrange their affairs by running a series of one-ship companies as a group and cause them to use their individual assets to their mutual advantage.³¹⁰ As it was discussed, the tendency towards registering vessels in one-ship companies was driven in some substantial measure by a desire to avoid the sister ship provisions of the Arrest Convention³¹¹ In addition, shipowners are in a position to take advantage of fiscal benefits, registering their vessels in one-ship companies in flag of convenience jurisdictions, usually in a low-cost and low-tax jurisdictions, this being considered legitimate and genuine commercial reasons.³¹²

All the things considered, given that to form a one ship company is generally considered to limit legitimately liability, it is unlikely that the South African associated ship provisions will be followed widely in other states.³¹³ Therefore, it can be suggested that at common law, maritime claimants and also judges are facing with

³⁰⁷ Graham Bradfield, *Guilt by association in South African admiralty law*, Lloyd's Maritime and Commercial Law Quarterly 2005, Informa UK PLC. At Pag. 238.

³⁰⁸ M. J. David Wallis, *The Associated Ship and South African Admiralty Jurisdiction*, (Thesis, Faculty of Law, University of KwaZulu-Natal 2010) B Com, LL B *cum laude* (Natal), SC, Judge of the High Court of South Africa, Supervised by H. Stainland. at Pag. 94.

³⁰⁹ H. Staniland, “*Ex Africa semper aliquid novi*: Associated ship arrest in South Africa” [1995] LMCLQ 561; J. Dyason, “South African Maritime Law—An Overview of Some Developments” (2001) 32 JMLC 475, 482; M. Wallace, “The Associated Ship Jurisdiction in South Africa: Choice assorted or only one bite at the cherry?” [2000] LMCLQ 132.

³¹⁰ Aleka Mandaraka-Sheppard, *Modern Maritime Law, Volume 1: Jurisdiction and Risks*, (3rd edn., Informa law from Routledge, 2013) at Pag. 131.

³¹¹ *Supra* note 308, at Pag. 95.

³¹² *Ibid.* at Pag. 102.

³¹³ Hilton Staniland, 'The Arrest of Associated Ships in South Africa: Lifting the Corporate Veil Too High' (1997) 9 U S F MAR L J 405 at Pag. 425.

the problem of one-ship companies, finding it very difficult to lift the corporate veil in order to find the beneficial owner and arrest a sister ship of the “offending ship” unless there is evidence of fraud, whereas, in South Africa, the shipowners are facing with the problem of the strict application of law by the courts making it harder for them to limit their liability and to avoid sister ship arrest.

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