CHAPTER IV

THE ACTION *IN REM*[1]

> The right to arrest a ship is an ancient and often a necessary right. Not only may there be difficulty otherwise in establishing jurisdiction in an appropriate case, but the arrest gives the arrester what may be a very necessary security – Lord Reid in *The Atlantic Star* [1973] 2 Lloyd's Rep 197 (HL) at 201.

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[1] This heading should more accurately refer to 'Proceedings *In Rem*' given that in regard to proceedings *in rem* in the Republic, such proceedings, although almost invariably brought by action, may be brought on motion. See the definition of 'admiralty action' in s 1(1) of the Act. Because the Act refers to the 'action *in rem*' and this is the phrase used by lawyers in common parlance, the phrase is used in this book to include proceedings brought on motion.

I INTRODUCTION

I.1 The origin of the action *in rem* appears to be shrouded in mystery.[2] It is beyond the scope of this book to investigate the early origins of the action and it is sufficient to note as a starting point that admiralty actions were originally commenced by the arrest of the defendant or the defendant's goods, whether or not the ship or goods in question constituted the subject matter of the claim. The purpose of the arrest was to make the defendant provide bail (security), and this procedure appears not to have originally constituted a specific or distinct form of action.[3] It appears, however, that this procedure did not survive the onslaught of the common law[4] and that the Admiralty Court ultimately had to be content with the more limited right of arresting the maritime property in respect of which the claim arose on the basis that the claimant had a maritime lien over the property to the extent of the claim.[5] This right of arrest became known as the action *in rem* and became recognised as a form of action distinct from proceedings *in personam*.

I.2 It is clear that before the passing of the Admiralty Court Acts of 1840 and 1861 the maritime liens known to the admiralty were enforced by an action *in rem* and it appears, moreover, that certain other claims (which it was subsequently accepted did not enjoy lien status) were similarly capable of enforcement by proceedings *in rem.*[6] The Admiralty Court Acts of

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[2] Wiswall *The Development of Admiralty Jurisdiction and Practice Since 1800* 165–6. Wiswall at 155 states that the action appears to have been employed before the Elizabethan era but that it was only in the nineteenth century that it became the dominant admiralty procedure. Jonsson 'The Nature of the Action *in Rem*' (2001) 75 *AJL* 105 at 106 points to the Roman law in terms of which the owner of a ship was answerable for certain breaches of duty committed by the master or crew rendering the ship liable to a process of arrest, and suggests that this appears to have provided the genesis of the action *in rem*. See further the suggestion in Shaw *Admiralty Jurisdiction and Practice* 31 that the action derives from the hypothecary action and the *actio de pauperie* of Roman law. See further as to the role of Roman law, Staniland 'Roman Law as the Origin of the Maritime Lien and the Action *in Rem* in the South African Admiralty Court' (1993) 5 *Merc LJ* 276. As to the evolution of the action in the English admiralty court see Wallis *The Associated Ship* 20–8. Historically there have been two main competing theories in relation to the action *in rem*, the personification theory and the procedural theory. The personification theory personifies the *res* so that the *res* and not its owner becomes the defendant. The procedural theory on the other hand treats the action *in rem* as a procedural device designed to compel the owner to appear personally, thereby rendering the owner liable. The procedural theory has prevailed in English law, but for the reasons set out in § III below, it is submitted that there has been a significant departure from the general application of the procedural theory in South African admiralty law. In regard to the related question of the theories governing the maritime lien and the emphasis recently placed on the procedural aspects of the lien, see chapter IX § II and § IV.

[3] *The Ripon City* [1897] P 226 at 240 citing the judgment of Jeune J in *The Dictator* [1892] P 304.

[4] Chapter 1 § III.

[5] Halsbury 4 ed Vol 1(1) para 305 cited with approval in *Euromarine International of Mauren v The Berg* 1984 (4) SA 647 (N) at 653D–H and in *Shipping Corporation of India v Evdomon Corporation* 1994 (1) SA 550 (A) at 560E–G.

[6] Price 'Statutory Rights *in Rem* in English Admiralty Law' (1945) *JCL & IL* (3rd SER) 23; Price *The Law of Maritime Liens* 91–2.

1840 and 1861 extended the jurisdiction of the Admiralty Court to the causes set out therein, and it was accepted that a claimant could proceed either *in rem* or *in personam* in relation to such causes although the 1840 Act, unlike the 1861 Act,[7] did not specifically so provide.[8] Those claims which previously enjoyed lien status retained their lien status in respect of the increased jurisdiction conferred by these statutes. This was the law inherited in this country under the Colonial Courts of Admiralty Act of 1890.

II THE PROVISIONS OF THE ACT AND THE ADMIRALTY RULES

II.1 The Act specifically preserves the dual remedies referred to above[9] which were part of South African admiralty law before the commencement of the Act. Thus each of the maritime claims listed in s 1(1) of the Act may be enforced either by proceedings *in rem* or *in personam* or by both these remedies in the same[10] or separate proceedings.

II.2 Section 3(4) provides that a maritime claim may be enforced by an action *in rem* if the claimant has a maritime lien over the property to be arrested or if the owner of the property to be arrested would be liable to the claimant in an action *in personam* in respect of the cause of action.[11] Section 3(5) enumerates the categories of property against or in respect of which the claim lies which can be subject to an action *in rem*.[12] Section 3(6) and (7) provides for the arrest of an associated ship[13] and s 5(3) provides for the making of a security arrest[14] – a procedure which although not constituting an action *in rem* nevertheless constitutes an arrest *in rem*.[15] The associated ship and security arrests were not part of the law applied in the Republic before the commencement of the Act. Finally, s 1(3) provides that for the purposes of an action *in rem*, a

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[7] Section 35.

[8] The right to proceed *in rem* in relation to the causes specified in these Acts is frequently referred to in English law as a 'statutory right *in rem*'. The phrase 'statutory lien' sometimes used to describe these rights, although it serves to emphasise the element of security, may give rise to confusion. See Thomas *Maritime Liens* para 45.

[9] Section 3(1) and (4); *Owners of the Maritime Prosperity v Owner of the Lash Atlantico* 1996 (1) SA 22 (A) at 29H–I. In each case the cause of action remains the same; it is only the means by which the cause of action is enforced which differs – *Euromarine International of Mauren v The Berg* 1984 (4) SA 647 (N) at 653B–D.

[10] As pointed out above the Act and the Admiralty Rules provide two procedures by which the same maritime claim can be enforced. There is nothing in the act or the Rules to suggest that these procedures cannot both be enforced simultaneously in the same action. Admiralty Rule 22(5) and Form 1 of the First Schedule to the Admiralty Rules contemplate the simultaneous institution of proceedings *in rem* and *in personam*.

[11] See § V.12ff below.

[12] See § V.1ff below.

[13] See § IX below.

[14] See chapter V.

[15] See chapter V n 11.

charterer by demise[16] shall be deemed to be, or to have been, the owner of the ship for the period of the charter by demise.[17]

II.3 The Admiralty Rules moreover contain provisions regulating certain procedural aspects of the action *in rem* relevant to the scope of the action *in rem* in the Republic.[18]

II.4 By reason of the provisions of s 6(1) of the Act, English law as at 1 November 1983 (the date of the commencement of the Act) must be looked to in order to determine the underlying nature and scope of proceedings *in rem*, to the extent that this is not regulated by the Act or the Admiralty Rules.

III THE NATURE OF THE ACTION *IN REM*

English law

III.1 In the hands of the early Civilians,[19] the ship was personified and the action *in rem* was directed against the ship herself. The action became the distinctive and dominant feature of admiralty practice.[20] The fundamental characteristic of the action was that it was a proceeding against the *res* itself. Its essential utility was that the claimant could proceed without having to establish the whereabouts of the owner. The jurisdictional problems associated with proceedings *in personam* were avoided. The *res* was arrested and the *res* or the bail (security) provided was thereby made available to satisfy the judgment.

III.2 Given this perception of the action *in rem*, it is not surprising that it was held that where there was no entry of appearance by the *res* owner, the owner incurred no personal liability and the *res* itself represented the limit of liability.[21] Notwithstanding certain *dicta* in *The Conoco Britannia*[22] to the effect that the correctness or otherwise of this principle had not been finally decided, the rule that the *res* represented the limit of liability became firmly established in English admiralty law.[23] In practice the *res* owner would generally furnish bail to secure the release of the *res* and would enter appearance to defend the proceedings. The early English cases also held that even where the *res* owner entered appearance the owner did not become personally

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[16] See chapter II § III.37 for a description of the demise charter.
[17] See § V.18 below.
[18] The more important of these provisions are dealt with in § III and § X below.
[19] For the role played by the Civilians see chapter I n 13 above.
[20] Wiswall *The Development of Admiralty Jurisdiction and Practice Since 1800* 155.
[21] Thomas *Maritime Liens* paras 90–1 and authorities cited.
[22] [1972] 1 Lloyd's Rep 342.
[23] Thomas *Maritime Liens* para 91; Teare 'The Admiralty Action *in Rem* and the House of Lords' (1998) *LMCLQ* 33 at 36 n 27; see the discussion in *Euromarine International of Mauren v The Berg* 1984 (4) SA 647 (N) at 654G–I.

liable except for the payment of costs.[24] In regard to the subsequent evolution of the action *in rem* in English law two decisions in particular must be noted. These are discussed below.

III.3 Change came with the dissolution of Doctors Commons in 1860, the coming to an end of the monopoly held by the Civilian practitioners in admiralty matters, and the appointment of common-law judges to the Admiralty Court.[25] The admission of the common-law lawyers to admiralty practice appears to have strongly influenced the development of a procedural theory of the action *in rem*, namely, that the action *in rem* was a procedural device designed to bring the owner of the *res* before the court.

III.4 The procedural theory received its classic exposition in the judgment of Sir Francis Jeune – a common-law lawyer – in *The Dictator*.[26] In that case it was held, in effect, that once the owner entered appearance, the action proceeded as a hybrid – both *in rem* and *in personam* – and the owner became personally liable so that the owner's assets, in addition to the arrested *res*, became liable to execution in satisfaction of the judgment. Despite trenchant criticism[27] of the decision in the *Dictator*, the approach adopted in that decision was affirmed by subsequent decisions and became entrenched in English law.[28]

III.5 The procedural theory received a further boost in the decision of the House of Lords in *The Indian Grace (No 2)*.[29] Whereas it was held in *The Dictator* that it was the owner's entry of appearance (or, in modern English procedure, acknowledgement of issue of the writ) that rendered the owner personally liable, it was held in *The Indian Grace (No 2)* that, for the purposes of s 34 of the Civil Jurisdiction and Judgments Act of 1982, an action *in rem* is an action against the owner from the moment that the Admiralty Court is seized with jurisdiction. It was further held that the jurisdiction of the Admiralty Court is invoked by the service of a writ, or where the writ is deemed to be served, as a result of the acknowledgement of the issue of the writ by the defendant before service, and that from that moment the owner is party to the proceedings *in rem*.[30] The decision has been criticised; at the very least it has created uncertainty as to its consequences in relation to other aspects of the action *in rem*.[31]

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[24] Thomas *Maritime Liens* para 91 and authorities cited by the author in n 39.
[25] See Wiswall *The Development of Admiralty Jurisdiction and Practice Since 1800* chapters 3–5.
[26] [1892] P 304.
[27] See Williams and Bruce *Admiralty Practice* 3 ed 18–26; Mayers *Admiralty Law and Practice* 11ff; Wiswall *The Development of Admiralty Jurisdiction and Practice Since 1800* chapter 6. See also the comments on the procedural theory by Teare 'The Admiralty Action *in Rem* and the House of Lords' (1998) *LMCLQ* 33 at 37–9.
[28] Thomas *Maritime Liens* para 8*(a)*.
[29] [1998] 1 Lloyd's Rep 1 (HL).
[30] At 10.
[31] See Teare 'The Admiralty Action *in Rem* and the House of Lords' (1998) *LMCLQ* 33–42; *Mandaraka-Sheppard Modern Admiralty Law* 2 ed 83–6; Derrington and Turner *The Law and Practice of Admiralty Matters* para 2.35ff. The main criticism of the judgment has been that it ignores, without adequate reasons, the long line of cases since

South African law

III.6 In attempting to describe the nature of the action *in rem* in South African law there is a preliminary observation to be made. Discussions as to the nature of the action are frequently accompanied by an analysis of the procedural and personification theories of the action. Broadly speaking, the personification theory proceeds on the basis of the fiction that the *res* is a juridical entity capable of being sued independently of its owner. The procedural theory, on the other hand, holds that the proceedings against the *res* constitute a procedural device to bring the owner before the court, so as to render the owner personally liable in respect of the claim.[32] These theories have served to influence the development of the action to varied extents at different times in its development, but it is submitted that attempts to marry the action to one or other theory can never serve to exclude anomalies which arise in the adoption of either theory and can never be decisive in determining the nature of the action and its consequences. The distinction between procedure and substance is blurred and, as pointed out, both theories have played their part. While the action is unquestionably a procedure, its results are in some respects undoubtedly substantive.[33] Moreover, other circumstances, such as the admiralty's attempts to avoid

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The Dictator which have held that it is the act of intervention by the owner in entering appearance that renders the owner personally liable; personal liability is not inherent in the action – it is introduced by the owner when the owner chooses to appear personally. Teare has suggested that the uncertainty created by the decision can best be met by regarding the case as a decision only on the ambit of s 34 of the Civil Jurisdiction and Judgments Act of 1982 and not as a decision on the true nature of an admiralty action *in rem*, although he states that, given the broad extent of the reasoning, this may be a forlorn hope. Mandaraka-Sheppard at 83 suggests that the House could have decided the case without overhauling the action *in rem* and at 93 also expresses the view that the judgment has a limited application. Meeson *Admiralty Jurisdiction and Practice* 3 ed §§ 3.2 and 3.3 suggests that there are two categories of *in rem* claims, claims truly *in rem* and what the author describes as *quasi in rem* claims. The first category are claims brought against a *res* irrespective of its present ownership and irrespective of any link with liability *in personam* on the part of the owner at the time the claim is brought – where the claim is in substance a claim to the whole or part of the *res* (maritime liens, mortgages, forfeiture, droits of admiralty and claims relating to ownership or possession). The second category comprises claims which may be brought *in rem*, but which depend upon establishing a link with liability *in personam*. Meeson expresses the view that if this distinction is borne in mind many of the difficulties which have arisen in connection with *The Indian Grace (No 2)*, and the corresponding criticism of the judgment, fall away because that case was not concerned with claims truly *in rem* (§§ 3.2 and 3.3 read with § 3.14). Note the review of the decision by Rose (1998) *LMCLQ* 27–32. As pointed out by Cremean *Admiralty Jurisdiction in Australia, New Zealand, Singapore and Hong Kong* 26–7 the decision has been criticised on another level in Australia and New Zealand. It appears that in both these jurisdictions the approach in *The Rena K* [1978] 1 Lloyd's Rep 545 at 560 that '[a] cause of action *in rem*, being of a different character from a cause of action *in personam*, does not merge in a judgment *in personam*' remains good law. Lord Steyn's decision is criticised because it denies the legitimacy of treating judgments *in rem* and *in personam* as separate. See *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45 at 78–9; *Rankura Moana Fisheries Ltd v Ship Irina Zharkikh* [2001] 2 NZLR 801.

[32] See Chapter IX § II.2 and § II.3.

[33] Compare Derrington and Turner *The Law and Practice of Admiralty Matters* para 2.48. The traditional enquiry into the nature of the action *in rem* relates to the purposes and consequences of the action which determine its

prohibition and preserve its jurisdiction, were influential. But more important, the Act and the Admiralty Rules, to the extent that they legislate in respect of the action, are the decisive indicators to which regard must be had in determining the nature of the action in our law rather than any particular theory. Moreover, in comparing the nature of the action in South African law and English law, and the effect of the English cases, the differences between the Act and the Admiralty Rules and their English counterparts must be noted.

III.7 In terms of s 6(1) of the Act English law applies to proceedings *in rem* except to the extent that the Act and the Admiralty Rules provide otherwise.[34] In the first edition of this book

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essential nature and which, in South African law, are for the most part determined by the Act and the Admiralty Rules.

[34] See *Great River Shipping Inc v Sunny Face Marine Ltd* 1994 (1) SA 65 (C) at 68G–69B. In *Oriental Commercial and Shipping Co Ltd v The Fidias* 1986 (1) SA 714 (O) Nienaber J had to deal with the question of whether a claim for necessaries enjoyed lien status. It was held (at 717I–J) that because the expression 'maritime lien' was not defined in the Act, that could only mean that the legislature was content to leave it to English law to determine the scope of the expression. This decision was referred to with approval by Corbett JA in *Transol Bunker BV v The Andrico Unity* 1989 (4) SA 325 (A) at 335C–E. In this case Corbett JA commented that the Act did not define the expression 'maritime lien' (at 331A–B) and held that, in deciding what was meant by the expression, the court was, in terms of s 6(1) of the Act, required to look to English admiralty law for the answer. The argument advanced by Wallis SC (as he then was) in that case and repeated in *The Associated Ship* 312–15 is that this approach is erroneous because the scope of the lien and the action *in rem* are matters to be determined by a process of construction of the Act, and not by recourse to English law in terms of s 6(1) of the Act. Moreover, so the argument goes, the question of whether an arrest can be made under the Act is not a matter in respect of which a South African admiralty court would have had jurisdiction immediately before the commencement of the Act in terms of s 6(1) and English law is accordingly not applicable. This aspect has relevance to the question discussed below, namely, whether or not the action *in rem* can constitute a vehicle for the enforcement of personal liability and whether, to the extent that this aspect is not covered by the Act and the Admiralty Rules, English or South African law must be resorted to in terms of s 6(1). The view of Corbett JA in the Appellate Division as to the approach to be adopted represents the law as it currently exists. Moreover, it is submitted that the Act and the Admiralty Rules do regulate the question of whether the action *in rem* can constitute a vehicle for the enforcement of personal liability and there is therefore no room for recourse to the general law, whether English or Roman-Dutch. It does not, therefore, become necessary to examine more closely the criticism of *The Transol Bunker* case. It may, however, be helpful to point out the following. It is clearly correct, as Wallis points out, that the meaning to be given to an expression in a South African statute must ordinarily be determined by a process of construction of that statute. It does not appear, however, that either Corbett JA or Nienaber J held otherwise. Both judges pointed out that the expression 'maritime lien' was not defined in the Act. Neither judge expressly proceeded to explore whether a meaning could, nevertheless, on a proper construction of the Act, be given to the expression, thus precluding reference to s 6(1) of the Act and English law. However, Nienaber J did consider the question of construction to the extent that he concluded that, because the Act did not define the expression, the legislature intended that it should be left to English law to determine the meaning of the expression. In regard to Corbett JA's reference to the absence of a definition in the Act it is not clear whether the judge was of the view that this meant that the legislature intended this aspect to be regulated by English law or whether he was of the view that reference to s 6(1) was justified on the basis that the Act did not, on a proper construction, provide an answer. It is, however, submitted that Corbett JA's judgment is not in conflict with the proposition that, in determining the meaning of words in a South African statute, the statute itself is the first port of call and the meaning of the words in the statute must, in the first instance, be determined as a matter of construction of the statute, and that recourse to s 6(1) is only justified where the statute provides no answer. (Nor

it was submitted that the Act and the Admiralty Rules have provided otherwise. The first edition supported what may for convenience be described as the conventional view of the nature of proceedings *in rem*. This view is that in South African law the logic of the early English admiralty law under the Civilians before the decision in *The Dictator* has been restored. This is so, it is said, because proceedings *in rem* in South African law are directed against the *res* and do not mutate into proceedings *in personam* if the owner intervenes by taking steps to defend the action. The owner is neither cited nor served, the judgment is one against the *res* and not the owner, and the *res* represents the limit of liability.[35] This view was based on the provisions of the Act and the Admiralty Rules and the view taken in the decided cases in this country. In particular, the provisions of Admiralty Rule 8(3), previously Admiralty Rule 6(3),[36] were emphasised.

III.8 While this view enjoys the support of other academic writers[37] it has since been challenged.[38] The essence of this challenge is that, properly construed, the Rule does not mean that the owner who is personally liable and who defends an action *in rem* (as opposed to merely giving notice of intention to defend) escapes becoming personally liable because, by doing so, the owner submits to the *in personam* jurisdiction of the court, and judgment can be taken against the owner personally. Moreover, so it is contended, the result of the conventional view is highly unsatisfactory because this view has the result that if the *in rem* claim exceeds the value of the *res*, the creditor is compelled to proceed separately *in personam* in a further action in order to recover the balance of its claim, as opposed to simply executing on a judgment against the owner.

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has the judgment been so interpreted: see *The Stella Tingas* 2003 (2) SA 473 SCA at 479I–480A.) This does not, however, deal with the further point made by Wallis, namely, that what is being sought is the meaning of expressions under the Act which is not a matter in respect of which an admiralty court could have had jurisdiction before the commencement of the Act, and thus English law is not applicable in terms of s 6(1). The view taken by the Appellate Division in *Transol Bunker* with regard to the application of English law was presumably based on either one of two grounds. First, that the failure to define or prescribe the scope of concepts such as the maritime lien or the action *in rem* is because the legislature, quite apart from anything else, intended that English law should determine the scope of these concepts. Second, that once it is decided that the Act does not provide an answer, one is not dealing with the meaning of these concepts determined as a matter of construction of the Act, but their meaning under the general law. This would constitute a matter in respect of which an admiralty court would have had jurisdiction immediately prior to the commencement of the Act and hence English law would, in terms of s 6(1), have to be resorted to. However, if this attempt to reconcile the conflicting approaches cannot be sustained, further debate – at least for the present – is academic in view of the approach taken in the Appellate Division.

[35] Thus it was said that the statement made in respect of American law that 'the value of the *res* is the limit of liability in actions *in rem*, that personification, while patently a fiction, none the less gives rise to an action which is truly against the ship rather than the owner, and that arrest is the foundation of the action *in rem*' (Wiswall *The Development of Admiralty Jurisdiction and Practice since 1800*) is true of South African law.

[36] The argument that the Rule is *ultra vires* was rejected by Farlam J in *Bouygues Offshore v Owners of The Tigr* 1995 (4) SA 49 (C) at 67E–J. The wording of Rules 6(3) and 8(3) does not differ.

[37] See Hare *Shipping Law and Admiralty Jurisdiction* 2 ed 35, 94; Derrington and Turner *The Law and Practice of Admiralty Matters* 12 n 7.

[38] By Wallis *The Associated Ship* 345–58.

III.9 It thus becomes necessary to examine the language of the Rule and the relevant context. The Rule provides as follows:

> A person giving notice of intention to defend an action *in rem* shall not merely by reason thereof incur any liability and shall, in particular not become liable *in personam*, save as to costs, merely by reason of having given such notice and having defended the action *in rem*.

The first thing to note about the Rule is that it does not merely regulate the results of giving notice of intention to defend the action, but also regulates the results of defending the action.[39] Had the intention been that the Rule should apply only to the giving of a notice of intention to defend, and not to a person who pursuant to that notice continues to intervene in the action by taking steps to defend it, the concluding words of the Rule 'and having defended the action *in rem*' would not have been included. There is another aspect flowing from this. The framers of the Rule were clearly dealing with the situation which had arisen in *The Dictator*, namely, the intervention in proceedings *in rem* by the owner of the *res*. The view taken by the Civilians was that neither the entry of appearance nor the defence of the action resulted in the defending owner incurring personal liability. The decision in *The Dictator* likewise did not attribute different consequences to an entry of appearance and the defence of the action. It is thus not surprising that the Rule, in dealing with the results of the decision in *The Dictator*, similarly does not seek to distinguish between the consequences which flow from these two events. Given this background, had the Rule intended to distinguish between the consequences of the furnishing of a notice of intention to defend on the one hand, and the defence of the action on the other, one would have expected this to have been made plain. It is only the argument challenging the conventional view which suggests that different consequences flow from furnishing a notice of intention to defend to those which flow from the defence of the action.[40]

III.10 The second thing to note about the Rule is that it is not qualified in any specific respect. In particular it does not state that although a person defending an action *in rem* will not incur personal liability, personal liability will attach where the person defending the action is personally liable in respect of the claim. The effect of such a qualification to the Rule would be far-reaching in that it would radically change the effect of the Rule. The Rule would then have the result that the action could constitute a vehicle for the enforcement of liability *in personam*. The nature of the action determined by the Rule with this qualification would be fundamentally different. Had it been envisaged that a qualification of this kind should be applicable, the Rule – which serves to define the action in an important respect – would surely have dealt with this specifically.

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[39] Furnishing a notice of intention to defend and defending the action are, of course, not the same thing.

[40] This is premised on the application of the doctrine of submission in South African law. As to whether this doctrine can be invoked at all, see n 66 and n 74 below.

III.11 In the challenge to the conventional view it is said that the use of the word 'merely' in the Rule does serve to facilitate its qualification in this respect.[41] This, it is said, is so because by indicating that the defence of the action on its own does not have the effect that the person defending the action incurs personal liability, the Rule leaves open the possibility of other circumstances having that result. This, it is argued, leaves room for the application of the ordinary principles of our law relating to the doctrine of submission, so that a defendant who is personally liable and who defends the action submits to the *in personam* jurisdiction of the court. In other words, the action *in rem* can, in these circumstances, be used as a procedure to enforce an existing personal liability, so that judgment can be given against the defendant personally and not merely against the *res*. It is of course so that the word 'merely' (which qualifies both the furnishing of notice to defend and the defence of the action) may mean that circumstances other than the giving of a notice of intention to defend or the defence of the action may give rise to personal liability. This may occur, for example, where the furnishing of security by the owner is accompanied by an express undertaking to be personally liable in respect of the claim. Such circumstances do not impinge on the Rule at all. However, the suggestion that the defence of the action by a defendant who is personally liable in respect of the claim results in the defendant incurring personal liability serves to qualify the Rule itself in relation to the consequences of the defence of the action. It cannot be supposed that the framers of the Rule would state the Rule in the form in which it appears intending, but not expressing, the significant qualification that it would have no application in the usual situation where the defendant is personally liable in respect of the claim and defends the claim. It seems most unlikely that they would have been content to rely on the word 'merely' to achieve this result, particularly as the use of this word is otherwise explicable. There is a further aspect. Even if the word 'merely' does have the far-reaching effect contended for, so that recourse *de hors* the Rule construed in its context can be resorted to in order to determine situations not covered by the Rule, the general law which would be applicable in determining the scope of the action *in rem* in terms of the decision in *The Transol Bunker* case (discussed in 34 above) would be English law and not South African law. That law did not distinguish between the consequences of the owner's entry of appearance in the action *in rem* and the consequences of the owner's subsequent defence of the action – whether before or after the stage of *litis contestatio* had been reached. The owner's intervention – in whatever form – rendered it personally liable. There is thus in any event no room for the contention that different consequences flow from the owner's entry of appearance to those flowing from the owner's defence of the action or that different consequences flow depending on whether or not the stage of *litis contestatio* has been reached in the defence of the action. Rule 8(3) and the other Admiralty Rules discussed below were, it is submitted, intended to reverse the situation in English law (and were not concerned with the principles of submission to jurisdiction in South African law) so that neither the owner's entry of appearance nor its defence of the action at any stage would result in the action *in rem* constituting a vehicle to enforce personal liability.

[41] Wallis *The Associated Ship* 347.

It is submitted that the scheme of the Act and the Admiralty Rules, which preserve a strict separation between the action *in rem* and the action *in personam*, and the context discussed below, militate against the use of the word 'merely' having the result contended for in the criticism of the conventional view and strongly support that view.

III.12 The first aspect in this regard which merits attention is that Rule 8(3) was clearly designed to deal with the situation which was introduced into English law as a result of the decision in *The Dictator*. This decision had been the subject of trenchant criticism. It resulted in the action *in rem* mutating into an action *in rem* and *in personam* in a way not known to the Civilians, undermining the fundamental basis of the action as an action directed against a *res* and not a person, and obscuring the clear distinction between proceedings *in rem* and proceedings *in personam* which had hitherto existed. In the challenge to the conventional view it is said that the rule in *The Dictator* relating to the effects of intervention in the action has only been reversed in part by Rule 8(3). First, the furnishing of a notice of intention to defend will no longer result in the defendant incurring personal liability. Second, it is only once *litis contestatio* has occurred without challenge to the jurisdiction that the action can be regarded as a vehicle for holding the owner personally liable. It is submitted that there are no sufficient indications to support the view that this qualified reversal was intended. Before the decision in *The Dictator* the rule was a simple one. The defence of the action did not result in the defendant becoming personally liable. This too is the result of the Rule in the absence of the suggested qualification. After the decision in *The Dictator* the rule was equally simple – from the moment the owner entered appearance the action proceeded as one *in rem* and *in personam*.[42] In these circumstances, if the framers of the Rule, who were clearly dealing with the position in English law flowing from the decision in *The Dictator*, had intended the suggested qualified reversal, this would have been made clear in the Rule.

III.13 It is, however, the more immediate context which provides the strongest support for the conventional view of the nature of the action in South African law. Section 3(5) of the Act provides that an action *in rem* shall be instituted by the arrest of property against or in respect of which the claim lies. This focus on property rather than the person – which underpinned the action before the decision in *The Dictator* – is further reflected in Admiralty Rule 2(4) which provides that in an action *in rem* the property in respect of which the claim lies must be described

[42] Both the rules before and after *The Dictator* were concerned only with the situation where the owner was personally liable, because where the person who intervened was not personally liable, but simply intervened to protect its limited interest in the *res*, no question of personal liability would exist. It cannot realistically be argued that the Rule was intended only to provide that persons not personally liable in respect of the cause of action who enter appearance and defend the action do not as a result of doing so incur personal liability. There is no legal mechanism – short of a contractual undertaking to accept liability – by which such persons could become liable in respect of an indebtedness which is not theirs. A construction of the Rule that its purpose is to regulate this situation, which clearly requires no such regulation and which makes the Rule so obviously superfluous cannot, it is submitted, prevail.

as the defendant. Had it been contemplated that the defence of the action by the owner would, in the ordinary case where the owner is personally liable, result in the action mutating into a claim *in personam* as it does in English law, the English procedure in terms of which the owner is cited as the defendant, so that judgment can be given against the owner personally, would have been adopted.[43] Moreover, the Admiralty Rules provide that the summons in an action *in rem* must be served on the property itself.[44] The owner is thus neither cited nor served. Finally, a defendant in an action *in rem* who wishes to obtain the release of the *res* from arrest is only required to provide security to the value of the *res*.[45] This is in contradistinction to the case where property is attached *in personam*, in which case security to the value of the claim must be put up to obtain the release of the property, even where this exceeds the value of the property.[46] This is entirely consistent with the view that the action *in rem* in South African law comprehends only a claim against the *res* and, importantly, that the *res* represents the limit of liability. Indeed it seems possible to state that the view that the action can constitute a vehicle for the enforcement of personal liability where it is defended cannot be reconciled with Rule 8(3) read in particular with Admiralty Rules 2(4) and 4(7)*(a)*(ii).

III.14 A further contextual aspect merits consideration. If the development of the English law reflected in the decision in *The Dictator* was in legal theory unsatisfactory, it nevertheless met an important need in that system. This need was that if the action did not result in the owner becoming personally liable, the creditor would, in the event of its claim exceeding the value of the *res*, have to proceed in a separate action *in personam* in order to recover the balance of its claim. Moreover, proceeding *in personam* against a foreign defendant was beset with difficulty. Furthermore, if the defendant decided to proceed *in personam* because its claim exceeded the value of the *res* it would not have the comfort of security for its claim. There was thus a clear need in English law to ameliorate this situation. It is submitted, however, that because of the provisions of the Act which provide a new dispensation not found in English law (and hence in our law before the commencement of the Act), this need has been met so that the creditor will not be disadvantaged in the same way as creditors were disadvantaged before the decision in *The Dictator*. The Act has provided a new and additional remedy and the creditor can proceed *in*

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[43] In South African law, because the owner is not cited as a defendant, if the action *in rem* has the result that the owner becomes personally liable, the pleadings would have to be amended so as to enable judgment to be given against the person personally liable. Even before the decision in *The Dictator*, and under the influence of the English common-law lawyers who became entitled to practise in the Admiralty Court, the writ no longer omitted reference to the owner as had originally been the case (see *The Indian Grace* (No 2) [1998] 1 Lloyd's Rep 1 (HL) at 6.) In current English procedure the writ (now the admiralty claim form) must *inter alia* describe the defendant as 'the owners and/or the demise charterers of the ship.' This is consistent with the English view that the action *in rem* is essentially an action against the owner from the inception of the action or at least from the time when the owner intervenes in the action. (As to the prevailing uncertainty in English law in this regard see § III.5 above).

[44] Admiralty Rule 6(2) and (3).

[45] Admiralty Rule 4(7)*(a)* (ii).

[46] Admiralty Rule 5(4)*(a)*.

personam and attach the debtor's property. In this way the creditor can achieve a similar result to that achieved by proceeding *in rem*, namely, by obtaining jurisdiction and security in respect of its claim, the relevant difference being that the creditor's claim is not limited to the value of the property. The creditor's need to be armed with effective and practical remedies has been met in a different way to the way in which this need has been met in English law, while at the same time preserving the action *in rem* in its original and uncomplicated form, and in a way which is consistent with the clear separation in the Act and the Admiralty Rules between proceedings *in rem* on the one hand and proceedings *in personam* on the other hand.

III.15 In the criticism of the conventional view, however, it is said that the consequence of this view is startling because the creditor, whose claim is not satisfied as a result of the proceedings *in rem*, will have to seek to recover the balance of its claim in a separate and further action *in personam* as opposed to simply executing on a judgment against the owner given in the proceedings *in rem*.[47] It is contended in the criticism that the owner, because it has defended the action, has not only submitted to the jurisdiction of the court, but has submitted to becoming personally liable in the *in rem* proceedings. It is submitted that the owner's intervention does not have this effect. Furthermore, the criticism fails to sufficiently recognise that it is within the creditor's power to avoid this result by following a procedure appropriate in the circumstances, namely, by proceeding *in rem* and *in personam* in one action,[48] thus eliminating the possibility of having to claim more than once.

III.16 Moreover, so the criticism goes, the result of the conventional view is that where a creditor's claim *in rem* does not result in the satisfaction of its claim in full, and the creditor proceeds *in personam* to recover the balance of its claim, because the defendants in the two actions will not be the same, the doctrine of *res judicata* cannot be invoked.[49] As a result, so the argument goes, the creditor will have to prove its cause of action again in the proceedings *in personam* which in turn gives rise to the possibility of conflicting judgments.

III.17 Before dealing with the contention that the principles of *res judicata* will not apply to the situation outlined in the previous paragraph, it is worth noting that in any event it is unlikely that conflicting judgments will occur in practice.[50]

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[47] Wallis *The Associated Ship* 348–9.

[48] If the creditor's claim is not fully satisfied by proceedings *in rem* the creditor can proceed *in personam* to recover the balance of its claim. Moreover, the creditor can commence both proceedings *in rem* and *in personam* in one action (see n 10 above). The creditor can, in addition, proceed *in rem* and *in personam* separately and then consolidate the actions. With regard to the view that this latter procedure may be prohibited, see chapter VI § III.33ff.

[49] Wallis *The Associated Ship* 349.

[50] If the creditor succeeds in its action *in rem* and if the owner does not appeal against the judgment, the owner is unlikely to oppose any subsequent action *in personam* – a far more expensive way of testing the merits. If the creditor fails in the action *in rem* it is, for the same reason, more likely to test the matter on appeal before embarking

III.18 The real answer to this criticism is, however, that the assumption that the doctrine of *res judicata* is not applicable to the situation referred to in § III.16 above is, it is submitted, not correct and fails to recognise the recent developments in the law relating to that doctrine and its application to the situation under discussion. In terms of the common law, one of the requirements of the defence of *res judicata* is that the previous judgment must have been given in proceedings between the same parties as those in the subsequent proceedings. On the basis of the conventional view, the defendant in proceedings *in rem* is the *res*, whereas in the proceedings *in personam* referred to above it is the person who is liable who is the defendant. Hence the argument that where the creditor proceeds to recover the balance of its claim *in personam*, the doctrine of *res judicata* cannot be invoked, and the creditor must establish its cause of action afresh.

III.19 *In Kommissaris van Binnelands Inkomste v Absa Bank Bpk*[51] it was, however, held by the Appellate Division that the strict common-law requirements for the defence of *res judicata* (*in casu* the requirement that the judgment in question must be given in an action involving the same subject matter and based on the same ground) should not be taken literally and applied as inflexible rules, and that, in the light *inter alia* of the rationale of the doctrine of *res judicata*, there was room for the adaptation and extension of these requirements.[52] The effect of this decision is that these requirements may be relaxed and generously interpreted[53] to achieve an appropriate result consistent with the policy considerations which underpin the doctrine. In *Man Truck & Bus (SA) (Pty) Ltd v Dusbus Leasing CC*[54] this approach was applied by Rabie AJ in considering the requirement that *res judicata* could be invoked only if the litigation was between the same persons. Before the decision in *Kommissaris van Binnelands Inkomste*, the reference to the 'same persons' included various categories of persons considered to be sufficiently identified with the party to the litigation to constitute that person's so-called privies.[55] In *Man Truck & Bus* it was held, applying the more flexible approach sanctioned by the Appellate Division, that the list of privies was not limited. The question of whether a person should be regarded as privy to a party to the litigation depended on the facts of each case and did not apply only to the specific person against whom judgment had been obtained. On the facts of that case it was held that the

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on a further action *in personam*. If the creditor loses the appeal, it is unlikely to proceed further *in personam*. If it succeeds on appeal, the owner is unlikely to oppose any proceedings *in personam*. Similar considerations apply where the owner appeals against a judgment *in rem* in favour of the creditor. It the appeal succeeds, the creditor is unlikely to proceed further *in personam*. If the appeal fails, the owner is unlikely to oppose any subsequent proceedings *in personam*.

[51] 1995 (1) SA 653 (A).

[52] At 669F–H.

[53] *Bafokeng Tribe v Impala Platinum Ltd* 1999 (3) SA 517 (BHC) at 557H–I.

[54] 2004 (1) SA 454 (W).

[55] That is, persons deemed to be the same person as a party to the proceedings: *Ferreira v The Minister of Social Welfare* 1958 (1) SA 93 (E) at 95H.

sole members of the close corporations in question were sufficiently closely identified with the corporations to constitute them privies of the corporations. The reasons furnished by Rabie JA for this decision are instructive in considering the relationship between an owner who defends an action *in rem* and its ship against which the action is brought. The judge held *inter alia* that the members were the controlling minds of their respective corporations and were empowered to act on their behalf. In addition, reference was made to American authority and the statement that:

> a condition recognised by many cases applying the rule under which one not a party to an action may be bound by the judgment because of his or her participation in the case is that (a) the privy sought to be held bound by the previous decision '*had the control or a right of control over the litigation*' and (b) the non-party to the first litigation participated in the first litigation in order to '*promote or protect some interest of his own which would otherwise be prejudicially affected.*' (emphasis supplied)

III.20 These considerations apply with no less force to the relationship between an owner and the *res* in an action *in rem*. Where the owner defends an action *in rem* it controls the litigation and intervenes to protect its own interests which would otherwise be prejudicially affected. If the action succeeds it is the owner's patrimony which is adversely affected. The owner's interest in and identification with the *res* and the action could hardly be more complete.[56] In these circumstances, to disregard this identity would be to cling to what Botha AJ in *Kommissaris van Binnelandse Inkomste* described as 'letterknegtige formalisme'[57] and to ignore the public policy considerations underpinning the doctrine of *res judicata*, namely, to prevent the re-litigating of matters already finally decided, on the one hand, and to avoid conflicting judgments, on the other hand.[58]

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[56] It is submitted that this applies also to others who have *locus standi* to intervene in an action *in rem* because of their interest in a ship such as a mortgagee or charterer. They will intervene to protect their interests in the ship and they (and not the inanimate ship) will control the litigation. If their intervention is unsuccessful, their patrimony stands to be diminished.

[57] At 669H.

[58] The matter may be approached from a slightly different angle. It is an accepted principle of our law, which is related to the question of *res judicata* and finds expression in the law relating to joinder, that, if a person who has a real and substantial interest in any order a court might make is not cited and served or subsequently joined in the proceedings, that person will not, in the absence of its consent to be bound, be bound by any judgment in those proceedings. (Compare *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A).) The rationale for this principle is that a person who has not been afforded the opportunity of participating in the proceedings giving rise to the judgment should not be held to be bound by the judgment. Where the person concerned is cited or joined it is afforded that opportunity and, whether or not it avails itself of the opportunity to participate, the judgment will be binding on it. Where such person actually participates in the proceedings flowing from its citation, joinder or intervention, there is even less reason why it should not be bound by the judgment given in the proceedings and precluded from re-litigating the subject matter of the judgment. Thus, where an owner intervenes and disputes the validity of the cause of action on which the proceedings *in rem* are based, the owner is, it is submitted, on the basis of the above, bound by the judgment and cannot in any subsequent proceedings *in personam*, based on the same cause of action, seek to go behind the judgment.

III.21 To the extent that any risk of conflicting judgments remains,[59] that risk is, given the international nature of shipping business and its associated litigation, 'part of the territory'. Because of the creditor's need to secure jurisdiction and obtain security for its claim (in the absence of which the creditor's prospects of recovery may be dismal or even non-existent) courts exercising admiralty jurisdiction in this country are frequently asked to entertain proceedings where the court is not the natural forum for the litigation and thus where further litigation in the natural or other forum in regard to the same cause of action may occur or indeed may already have commenced. While the courts will, as far as possible, endeavour to avoid the occurrence of conflicting judgments, neither the risk nor indeed the certainty of conflicting judgments will deter an admiralty court from exercising its jurisdiction if this is in the interests of justice,[60] which might often be the case. The decisive answer to the criticism that the conventional view of the action *in rem* may give rise to conflicting judgments is that, to the extent that this risk exists, there is no reason to conclude that the legislature and the framers of the Admiralty Rules did not weigh this and any other disadvantages attached to the conventional view of the action *in rem* adopted for the law in this country against the disadvantages of the mixed action *in rem* adopted in English law as a result of the decision in *The Dictator*.[61] Clearly, this risk, such as it is, cannot be resorted to in order to give a meaning to the Act and the Admiralty Rules which is not otherwise justified.

III.22 Finally, the case law constitutes strong support for the view that the effect of Rule 8(3), interpreted in context, is to re-establish the action *in rem* as it existed before the decision in *The Dictator*.

III.23 In *SA Boatyards CC v The Lady Rose*[62] Scott J interpreted Rule 6(3), now Rule 8(3), as follows:[63]

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[59] On the basis of the submissions made above in relation to the application of the doctrine of *res judicata* very little risk of conflicting judgments remains. On the assumption that the owner only becomes privy and bound by the judgment where it intervenes in the action, this risk would occur where there is no intervention in the proceedings *in rem* and the creditor obtains a default judgment. If that judgment does not satisfy the claim and the creditor thereafter proceeds *in personam* to recover the balance of its claim against the owner, *res judicata* could not be raised as a defence and a conflict could thus arise between the default judgment and the judgment in the proceedings *in personam*. But the owner who has or who thinks it has a good defence to the claim is unlikely not to intervene and defend the proceedings *in rem*. Moreover, the general undesirability of conflicting judgments is largely diminished where the first judgment is a default judgment pursuant to a cause of action not fully litigated. If this is the only circumstance which can give rise to conflicting judgments, the reference thereto in the criticism of the conventional view has hardly any significance.

[60] See Chapter II § IV, § V and § VII.

[61] The current confusion as to the nature and effects of the action *in rem* in English law (see § III.5 above) suggests that a preferable direction has been adopted for our law.

[62] 1991 (3) SA 711 (C).

[63] At 715E–H.

> The effect of the Rule would seem to be to re-establish the position which prevailed in England prior to *The Dictator* (cf Thomas *Maritime Liens* para 92) and the Rule is probably the result of criticism levelled at the extension of the owner's liability which has occurred since the last decade of the previous century (cf Jackson *Enforcement of Maritime Claims* at 59; op cit at 31). It does not follow, however, that merely *because the owner defending the action in rem does not incur personal liability (save for costs)* he is necessarily to be regarded as a stranger to the suit …. (emphasis supplied).

This passage is important for two main reasons. First, it confirms the relevance of the contextual scene referred to above, namely, the change brought about by the decision in *The Dictator* and the criticism which this change has evoked. Second, the judge was clearly of the view that the effect of the Rule was that an owner defending an action *in rem* does not incur personal liability except for costs and that this amounted to the re-establishment of the rule which prevailed before the decision in *The Dictator*. That rule was that the defence of the action – irrespective of whether or not the defendant was personally liable in respect of the claim – did not give rise to personal liability. Although Scott J's statement is *obiter*, it constitutes a statement as to the rationale for the Rule and its effect by a judge steeped in admiralty.

III.24 In *Bouygues Offshore v The Tigr*[64] the confirmation of an attachment was opposed *inter alia* on the grounds that the owner had previously entered appearance to defend an action *in rem* brought by Bouygues Offshore, and had brought a counter-application for leave to participate in the taking of evidence on commission by an examiner by cross-examining the witnesses called. The owner contended that this constituted a submission to the court's *in personam* jurisdiction, with the result that the attachment was not competent. Farlam J responded to this contention as follows:[65]

> It follows from what I have said that Rule 6(3) applies to an owner who enters an appearance in an action *in rem*. By our procedure as set forth in the Rule, such an owner is not regarded as having submitted to the *in personam* jurisdiction of the court. It follows further that first respondent did not, by taking the steps to which I have referred, submit to the court's *in personam* jurisdiction.

The steps to which Farlam J referred in this passage were the proceedings for leave to cross-examine witnesses referred to above. The judge was dealing with the effect of both an entry of appearance and the subsequent conduct of the owner in the action *in rem.* The judge made it clear that because of the Rule neither of these events could form the basis of submission to jurisdiction in the action *in personam* in South African procedure. If Farlam J had envisaged that the intervention of the owner in the action *in rem* relating to the defence of the action, namely, the counter-application referred to above, was, despite the Rule, capable of constituting a submission to the court's *in personam* jurisdiction, it is inconceivable that he would not have discussed this

[64] 1995 (4) SA 49 (C).
[65] At 67J–68B.

aspect further. Moreover, it is clear from Farlam J's statement (at 67H) in connection with the action *in rem* that:

> 'if applicant were not to obtain satisfaction from the proceeds of the *res* it could sue first respondent *in personam* for the balance'

that the judge did not consider that the action *in rem* could serve as a vehicle for the enforcement of personal liability. It is important to note that this was a case where the owner was alleged to be personally liable.[66]

III.25 It is no doubt these decisions which led Conradie J in *The Zlatnie Piasatzi: Frozen Foods International v Kudu Holdings*[67] to state that:

> 'the security arrest, like the arrest under section 3(5) is a device for bringing a *res* – and not a person – before the court.'

This is a clear statement that an arrest *in rem* in South African law is not a device to bring a person before the court to answer the claim. The statement is inconsistent with the view in English law after the decision in *The Dictator* that the action *in rem* is a procedural device to bring the owner before the court so that it could be held personally liable in that action. The judge went further and stated that in proceedings *in rem*:

> 'unlike the law of England … only the value of the *res* which has been arrested is available for the satisfaction of the claim'.

The judge specifically referred in this regard to Admiralty Rule 6(3), now Admiralty Rule 8(3). The judge was not, however, dealing with an argument that the defence of the action could, by

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[66] The view in the challenge to the conventional view is that this case is distinguishable because, so it is contended, a submission to the *in personam* jurisdiction occurs only once *litis contestatio* has taken place, and this had not yet occurred in the proceedings *in rem* in question. Therefore, so it is contended, the decision does not militate against the view that once *litis contestatio* has taken place without objection to the jurisdiction the defendant has submitted to liability. This would be on the premise that the South African law of submission is applicable. In the light of the decisions referred to in n 34 above, English law and not South African law would apply to the extent that the Act and the Admiralty Rules do not legislate. The challenge to the conventional view is premised on the view that the use of the word 'merely' in the Rule leaves open other possibilities not dealt with – hence the application of the South African doctrine of submission. However, as pointed out in § III.11 above, any such other possibilities fall to be dealt with, not by South African law, but by English law. It is the intervention by the owner in proceedings *in rem* which in English law was said to give rise to the owner's personal liability. (If the decision in the *Indian Grace (No. 2)* [1998] 1 Lloyd's Rep 1 (HL) is taken to be of general application the position may now be that the personal liability of the owner attaches from an even earlier date.) Hence in the passage quoted above Farlam J is making it clear that in our procedure, because of the Rule, English law does not apply, and the owner's intervention in seeking to cross-examine witnesses does not give rise to personal liability.

[67] 1997 (2) SA 569 (C) at 575B–C.

reason of the application of the South African law relating to submission, result in the action becoming one *in personam*. It is not, however, without significance that Conradie J contrasted South African law with English law where the intervention of the owner did amount to a submission to personal liability in the action. The judge's statement that only the value of the *res* is available for the satisfaction of the claim appears to negate any suggestion that the owner becomes personally liable. Finally, the judge made the essential point that a party could not seek to top up security obtained by an arrest in terms of s 5(3) where the value of that security was less than the value of the claim. This, said the judge, was because the defendant would, regardless of the value of the property, be compelled to provide security for the full amount of the claim. It is submitted that the judge was correct in equating in this regard proceedings *in rem* under s 3(4) of the Act and proceedings *in rem* in terms of s 5(3) of the Act, and in holding that in an arrest *in rem* the *res* constitutes the limit of liability so that the party defending the action cannot be compelled to provide security in excess of its value.

III.26 Farlam JA had occasion to again comment on the Rule in his judgment in the Supreme Court of Appeal in *The Argun*.[68] The main issue in the appeal was whether the actions *in rem* under consideration had lapsed when the arrests by which they were instituted lapsed. It was held that they did not. After citing the English law reflected in *The August 8*[69] the judge said:[70]

> If the present case had been heard in England therefore, on the lapsing of the arrest of the vessel the actions would at the very least have continued as actions *in personam* against the vessel's owner. That that is not our law is clear from Rule 8(3).

In regard to the costs of the appeal the judge stated:[71]

> As has been pointed out earlier … in terms of Rule 8(3) … a costs order may be made against an owner who has defended an action *in rem* brought against his ship. The bringing of an appeal against an order made in such an action against a ship must be regarded as an extension of the defending of the action.

A costs order was accordingly made. In the challenge to the conventional view it is said that on the facts of the case the owner was not personally liable in respect of the claim and had not submitted to the jurisdiction and that the case was therefore not inconsistent with the view that an owner personally liable who defends an action *in rem* submits to the jurisdiction of the court and incurs personal liability.[72] Nevertheless, the approach taken by Farlam JA is instructive. The

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[68] 2004 (1) SA 1 (SCA).

[69] [1983] 2 AC (PC) at 456. The passage quoted reads as follows 'by the law of England, once a defendant in an admiralty action *in rem* has entered appearance in such action, he has submitted himself personally to the jurisdiction of the English Admiralty court … from then on, the action continues against him not only as an action *in rem* but also as an action *in personam*.'

[70] At 10C–D.

[71] At 15C–E.

[72] Wallis *The Associated Ship* 355–6.

judge was clearly dealing with the conventional view flowing from Rule 8(3). He was, in the light of that view, explaining that it was competent for the court to grant a costs order against the defendant. The judge emphasised that the prosecution of the appeal was part of the defence of the action. Had he considered that the defence of the action could give rise to personal liability, that in itself would have constituted an explanation for making the costs order. However, in the light of the conventional view that the defence of the action did not give rise to personal liability, and in the light of the judge's own understanding of the effect of the Rule reflected in his decision in *The Tigr*, the import of what the judge was saying was that, notwithstanding this, where the action was defended, a costs order could be made. In short, the judge was invoking the exception to the rule – which he clearly regarded as part of South African law – that the defence of the action did not give rise to personal liability.

III.27 On the basis that the conventional view of the nature of the action *in rem* continues to prevail, it does not become necessary to discuss in any detail whether there is scope for recourse to the doctrine of submission as that doctrine is applied in South African law,[73] or whether the application of that doctrine would support the view that a person who is personally liable and who continues to defend an action *in rem* after *litis contestatio* submits to personal liability in that action.[74] It is however submitted, for reasons furnished and referred to in the footnotes to this section, that both these questions fall to be answered in the negative.

III.28 If the view taken in the criticism of the conventional view of the nature of the action *in rem* were to prevail, the strict separation adhered to between proceedings *in rem* and *in personam* in the Act and in the Admiralty Rules would be qualified. Following upon the intervention of the owner in the circumstances described in the criticism, the action would mutate into a mixed action *in rem* and *in personam*. However, despite the action's mutation into one *in personam*, a plaintiff who invokes the action *in rem* would not be able to insist that a defendant seeking to

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[73] See n 34 and n 66 above.

[74] It is by no means clear that this would be the case. Where submission by conduct is relied upon, the conduct must be such that it can be concluded that the conduct is consistent only with the alleged submission (*Hlatshwayo v Mare and Deas* 1912 AD 242 referred to in *Du Preez v Philip-King* 1963 (1) SA 801 (W) at 803). A distinction must be drawn in the context under consideration between a submission to jurisdiction and an acceptance of liability (compare Shaw *Admiralty Jurisdiction and Practice* 31). A person who intervenes and defends the action – whether personally liable in respect of the claim or not – submits to the jurisdiction of the court to make orders relating to that defence, such as orders as to costs. The action is not directed against such person, and it is quite another thing to infer that such person has agreed that it can be held personally liable in that action. The only inference is not that the defendant who intervenes accepts liability in the action directed against the *res*. The competing and the more acceptable inference is that the defendant has simply intervened in order to protect the property owned by it or in which it has an interest. The conduct of the defendant would be inconsistent with a claim that it is not liable in respect of an incidental aspect of that defence, such as the potential liability for costs. On the other hand, there is nothing inconsistent in the defendant intervening to protect the *res* and claiming that this conduct was not intended to constitute an acceptance of liability in the action which was not directed against it in the first place (compare *Hlatswayo*'s case at 247).

obtain its release must put up security in excess of its value. Where the amount of the claim exceeds that value, the plaintiff would in any event have to attach the *res* already arrested or some other property (if available) in order to compel the defendant seeking the release of the property to put up security for the full value of the claim. Thus, if the view taken in the criticism of the conventional view were to be adopted, it would be necessary, in order to avoid this result and to provide for the sensible implementation of this view, to amend the Admiralty Rules in at least one respect, namely, to provide that once the action becomes in addition an action *in personam*, a defendant seeking to obtain the release of the property must provide security to the value of the claim.

III.29 If, however, the submissions made above are well founded and the conventional view continues to prevail, namely, that the action *in rem* in South African law does not serve as a vehicle for enforcing personal liability and has, since the promulgation of the Act and the Admiralty Rules, been restored to its erstwhile form, existing together with an extended form of procedure *in personam* which serves to complement the action, the nature of the action in South African law may be summarised as set out in § III.30 below.

III.30 The action *in rem* is the distinctive feature of South African admiralty jurisprudence and is peculiar[75] to admiralty practice generally. The fundamental characteristic of the action is that it is a form of proceeding directed against the *res* and not against the owner. The *res* is arrested and the *res* itself or the security furnished is thereby made available to satisfy the judgment. If the claim is not met and if security has not been furnished the *res* is sold, the proceeds are lodged with the court and the claim is – subject to any preferrent rights – paid out.[76] Thus the *res* can be sued, arrested, held liable and sold in execution, all without the involvement of the owner at any stage.[77] The distinctive characteristic of the action under the Civilians, namely, that it constituted a claim against the *res* itself is, as submitted above, recognised by the Admiralty Rules, which provide that the *res* must be cited as the defendant and the summons must be served on the *res* or the person in charge of the *res* and not the owner in the owner's capacity as such. The *res* owner is thus neither cited nor served and is only indirectly impleaded in the sense that it may, if it so wishes, enter appearance and defend the action. Not only the owner but anyone having a sufficient interest in the *res* may defend the action. The judgment is a judgment against the *res* itself[78] and the owner incurs no personal liability except that, where the owner defends the action, the owner incurs a potential liability for costs. The purpose of the action is twofold, namely, to establish the court's jurisdiction in respect of the property and to provide the claimant

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[75] *Continental Illinois National Bank and Trust Co. of Chicago v Greek Seamen's Pension Fund* 1989 (2) SA 515 (D) at 525G–H.

[76] *Beaver Marine (Pty) Ltd v Wuest* 1978 (4) SA 263 (A) at 275A–C; *Euromarine International of Mauren v The Berg* 1984 (4) SA 647 (N) at 653G–I.

[77] Compare Healy and Sharpe *Admiralty* 28.

[78] Thomas *Maritime Liens* para 62; Mayers *Admiralty Law and Practice in Canada* 6.

with security in respect of the claim.[79] While the *res* represents the limit of the claimant's right to recover *in rem*, the claimant can recover any balance of its claim remaining unsatisfied in an action *in personam*.[80]

III.31 Although the Admiralty Rules serve to undermine the unqualified recognition of the procedural theory of the action *in rem* in South African admiralty practice and establish unequivocally that the action is brought against the *res* and not the owner, and that the *res* alone may be looked to in order to satisfy the claim, the owner's interest in the *res* and, if the owner so elects, its participation in the proceedings, cannot be ignored. Even if the *Indian Grace (No 2)* cannot be regarded as a decision only on s 34 of the Civil Jurisdiction and Judgment Act of 1982, and the finding that the owner becomes a party to the proceedings from the time that the writ is served must be considered to be of general application to proceedings *in rem*, that cannot detract from the fact that in South African admiralty practice (1) the *res* and not the owner is cited as the defendant and (2) the *res* and not the owner is looked to in order to satisfy the claim. In these circumstances it seems, notwithstanding the provisions of s 6(1) of the Act, that the decision in *The Indian Grace (No 2)* can have little influence on any attempt to categorise the role of the owner in South African admiralty practice.

III.32 Given that in South African admiralty practice the owner is not cited as a defendant nor served in its capacity as owner, it is difficult to see how the owner can be considered to be a party at any stage before its intervention in the proceedings. But what if the owner does intervene and enters an appearance to defend?

III.33 In *SA Boatyards CC v The Lady Rose*[81] the ship was arrested *in rem*. There was an entry of appearance and it was common cause that this was done on behalf of the owner. A plea and counterclaim were filed. Exception was taken to the counterclaim on the ground that the owner had no *locus standi* to bring the counterclaim. The gravamen of the exception was that Admiralty Rule 8 (now Admiralty Rule 10) then provided that a counterclaim had to be brought by the defendant and that as the action was one *in rem*, the owner was not the defendant and could accordingly not bring the counterclaim. Scott J referred to Admiralty Rule 6(3) (now Admiralty Rule 8(3)) and observed that this seemed to re-establish the position which prevailed in England prior to the decision in *The Dictator*, but pointed out that the fact that the owner does not incur personal liability (save for costs) does not mean that the owner must be regarded as a stranger to the proceedings and not entitled to counterclaim. The judge referred to the debate as to whether the action was one against a *res* or a person having an interest in the *res*, and expressed the view

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[79] *Continental Illinois National Bank and Trust Co. of Chicago v Greek Seamen's Pension Fund* 1989 (2) SA 515 (N) at 537H–I.

[80] *Bouygues Offshore v Owners of The Tigr* 1995 (4) SA 49 (C) at 67H–I. Compare Thomas *Maritime Liens* para 91; Gilmore and Black *The Law of Admiralty* 801.

[81] 1991 (3) SA 711 (C).

that it was probably an over-simplification to regard the action merely as a procedural device. It was pointed out that, in terms of s 3(5) of the Act, the action focuses on a maritime *res* 'against or in respect of which a claim lies' but that the Act does not totally ignore those who may have an interest in the *res*, and reference was made to s 3(6) and s 3(7). While approving the statement that the action has a 'curious hybrid nature', the judge found it unnecessary to determine the true nature of the action *in rem* but expressed the view that the action cannot be regarded 'as simply an action against a *res* without reference to the owner or person having an interest therein'. It was held that to regard the owner, *for the purposes of Admiralty Rule 8* (emphasis supplied), as being someone entirely different from the defendant and therefore unable to counterclaim, was unnecessarily technical. The owner could have first applied to be joined as a defendant and then counterclaimed. The judge held that to require the owner to do so would serve no purpose other than to increase the costs, and the exception was dismissed.

III.34 The *ratio* of the decision is that the reference to the 'defendant' in the then Admiralty Rule 8 must be interpreted to include the owner, and the decision did not answer the question whether the owner must, as a general rule, be regarded as a party to the proceedings once the owner has entered an appearance to defend the action. (Admiralty Rule 10 now provides that a defendant and any person giving notice of intention to defend in an action *in rem* may claim in reconvention against the plaintiff either alone or with any other person.) It is submitted that once the owner has intervened it would be artificial not to treat the owner as a party, at least for certain purposes. After all, a party having a sufficient interest in the subject matter of a dispute may apply to join in the proceedings notwithstanding that such party will not incur any personal liability to the claimant. Recognition of this common-sense approach is reflected in Admiralty Rule 8(2), as amended in 1997,[82] which now provides that a person giving notice of intention to defend may defend the action as a party. It is submitted that this does not detract from the fact that the action remains fundamentally one against the *res* in South African admiralty practice, because the owner or other person defending the action does not incur personal liability and execution can be levied only against the *res*.

IV THE ADVANTAGES AND DISADVANTAGES OF THE ACTION *IN REM*

IV.1 The action *in rem* affords the arresting creditor a number of important advantages. Firstly, the creditor may sue the *res* without having to be concerned with the identity or whereabouts of the *res* owner. Secondly, the action *in rem* is not subject to the usual jurisdictional limitations, territorial or otherwise.[83] Thirdly, the creditor obtains security for the claim,[84] which is

[82] Government Notice No 17926 *Government Gazette* No 5907 of 18 April 1997, Vol 382.

[83] However, once a ship is sold pursuant to an action *in rem* and is situated in a foreign port, while the court retains jurisdiction to set aside the sale, it does not have jurisdiction to make orders in proceedings between *peregrini* in relation to the ship. See *The Dubysa (No 1)* 1999 SCOSA A7 (D).

unaffected by the occurrence of events before judgment which would otherwise defeat the claim or make the judgment a *brutum fulmen*, although the arresting creditor's rights are subject to the rights of other creditors who may prove claims and enjoy a preferential ranking in terms of the Act. Subject to this limitation, however, the *res* itself serves to satisfy the judgment. Fourthly, while the property of an *incola* may not be attached in an action *in personam*,[85] the property of an *incola* can be arrested *in rem*. Fifthly, in terms of South African procedural rules, an action *in rem*, unlike an action *in personam* commenced by attachment, can be brought summarily without the necessity of a court appearance.[86]

IV.2 Because of the advantages of the action *in rem*, this form of procedure has in the past been far more frequently resorted to than the action *in personam*. The utility of the latter procedure has, however, been considerably enhanced by the jurisdiction to attach *in personam* conferred by the Act,[87] and the action *in personam* is now far more frequently resorted to in the enforcement of maritime claims.

IV.3 The main disadvantage to a claimant who proceeds *in rem* is that the owner, in order to secure the release of the *res*, need only provide security to the value of the *res* or the claim, whichever is the lesser.[88] In the case of an attachment *in personam*, however, the property will be released only if the owner puts up security to the value of the claim, even where this exceeds the value of the *res*.[89] Moreover, the *res* is the defendant and execution pursuant to a favourable judgment can be levied only against the *res*, regardless of whether or not the owner enters

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[84] This has been held to be the primary purpose of an arrest *in rem*: *The Jute Express* 1992 (3) SA 9 (A) at 17J–18A. The second and third advantages apply equally where an attachment to found jurisdiction is made. In regard to the accrual of the security in an action *in rem* see § VI below.

[85] Section 28(1) of the Supreme Court Act 59 of 1959.

[86] The registrar may issue an order for arrest in terms of Admiralty Rule 4. See § X.1ff below.

[87] Sections 3(2)*(b)* and 4(4)*(a)*. The clear distinction between attachment to found or confirm jurisdiction in an action *in personam* and an arrest *in rem* nonetheless remains. Compare *Ex parte Government of USA in re The Union Carrier* 1950 (1) SA 880 (C) at 885. The Afrikaans text (the Act was signed in Afrikaans) distinguishes between 'beslagneming' (arrest) and 'beslaglegging' (attachment), although this distinction is not consistently maintained – compare ss 3(2)*(b)*, 3(5), 3(6), 3(8), 3(10)*(a)*, 4(4)*(a)*,*(b)* and *(c)*, 5(2)*(c)* and *(d)*, 5(3)*(a)*, 8, 9(1) and 10. Perhaps the most significant distinction between an arrest *in rem* and an attachment *in personam* is that in the latter case any property belonging to the defendant may be attached, whereas in the former case only specific categories of property can be arrested *in rem* and then only if the property in question is property against which or in respect of which the claim lies. See s 3(5).

[88] See § X.20 and § X.25 below.

[89] Admiralty Rule 5(4). As previously pointed out (see § II.1 above) a creditor may elect to proceed both *in rem* and *in personam*. In such a case the owner will have to put up security to the full value of the claim where the claim exceeds the value of the *res*. If, however, the creditor obtains only a judgment *in rem* it seems that the creditor can execute against the security only to the extent of the value of the *res*.

appearance.[90] In an action *in personam* execution can be levied against any property belonging to the owner and is not limited to the property attached.

V THE REQUIREMENTS FOR THE ACTION *IN REM*

The property must be subject to arrest and the general rule is that the property must constitute the property against or in respect of which the claim lies

V.1 Section 3(5) of the Act provides for the institution of an action *in rem* by the arrest of one or more of the following categories of property against or in respect of which the claim lies: *(a)* the ship,[91] with or without its equipment, furniture, stores or bunkers; *(b)* the whole or any part of the equipment, furniture, stores or bunkers; *(c)* the whole or any part of the cargo; *(d)* the freight; *(e)* any container,[92] if the claim arises out of or relates to the use of that container in or on a ship or the carriage of goods by sea or by water otherwise in that container; *(f)* a fund.

V.2 The limiting words 'against or in respect of which the claim lies' make it clear that the section does not contemplate that any property falling within the above categories can be arrested. Property can be arrested only where such property constitutes the property against or in respect of which the claim lies. The legislature has thus in this respect adopted the view as to the scope of the action *in rem* which prevailed before the commencement of the Act.[93] There is, however, an exception. Once it is established that a maritime claim giving rise to an action *in rem* has arisen in respect of the ship in regard to which the claim arose[94] (the ship concerned), an action *in rem* may be brought against an associated ship instead of the ship concerned.

V.3 The Act thus provides for the institution of an action *in rem* by the arrest of the property referred to in s 3(5) and by the arrest of an associated ship in terms of s 3(6). The question whether, in addition, all property subject to salvage in terms of the Wreck and Salvage Act of 1996[95] can be proceeded against *in rem* is discussed below.[96]

V.4 In terms of s 3(8) of the Act, property may not be arrested and security therefor may not be given more than once in respect of the same maritime claim by the same claimant. The prohibition against re-arrest is clearly a prohibition against the re-arrest of the same property. It has been held that s 3(8) applies not only to local but also to foreign arrests. The section does not

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[90] See the view expressed § III.6ff above.
[91] 'Ship' is defined in s 1(1).
[92] 'Container' is likewise defined in s 1(1).
[93] *Shipping Corporation of India Ltd v Evdomon Corporation* 1994 (1) SA 550 (A) at 561E–562C.
[94] Section 3(6) and (7). This topic is dealt with in § IX below.
[95] Act 94 of 1996.
[96] Chapter IX § 9.3.

countenance a second arrest of property in the Republic which has already been arrested and replaced by security in a foreign jurisdiction.[97] Two jurisdictional facts must, however, be present before the section can be invoked. There must be an actual arrest, or deemed arrest in terms of s 3(10)*(a)*, and security must have been furnished. Moreover, the arrest must be a legally valid and competent arrest and not an arrest which has been set aside for want of legal validity.[98] The section refers to property arrested ('in beslag geneem' in the Afrikaans text) and does not refer to attachments. Thus, notwithstanding that property has been arrested and security has been furnished, the section does not prevent the subsequent attachment of that property.[99] However, s 5(2)*(d)* provides that a court may, notwithstanding the provisions of s 3(8), order that, in addition to property already arrested or attached, further property be arrested or attached in order to provide additional security for any claim. This section is clearly dealing with property other than

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[97] *The Fortune 22* 1999 (1) SA 162 (C) at 166G–H. See however the criticism of this view by Wallis SC (as he then was) (2000) *LMCLQ* 132 at 138–9 and in *The Associated Ship* 241–6. See the discussion in §§ IX.27–IX.36 below.

[98] *Great River Shipping Inc v Sunnyface Marine Ltd* 1992 (2) SA 87 (C). See also *The La Pampa* 2006 (3) SA 441 (D) at 451G. Section 3(8) links the arrest with the furnishing of security. A second arrest, effected before security is lodged in respect of the first arrest, will thus not be prohibited by s 3(8): *The Aven* 2002 SCOSA B165 (D). With regard to the question whether a judgment flowing from an arrest *in rem* constitutes, for the purposes of s 3(8), the same claim as the cause of action giving rise to the judgment, see *The Ivory Tirupati* 2003 (3) SA 104 (SCA) and § IX.38 below.

[99] The question arises whether the word 'arrest' in s 3(8) must be read to include an attachment. It may be contended that the introductory words to s 5(2)(d) 'notwithstanding the provisions of s 3(8)', together with the fact that that section refers not only to property arrested, but also to property attached, is an indication that the legislature intended the prohibition in s 3(8) to extend to attachments. Further, it may be argued that the rationale for prohibiting further arrests when security has been provided applies equally to attachments, and there is no reason why the legislature should not have intended the prohibition to apply to attachments. On the other hand, the Act maintains a strict separation between an arrest *in rem* and an attachment *in personam* (as pointed out in n 87 above the Afrikaans text of the Act distinguishes between 'beslagneming' (arrest) and 'beslaglegging' (attachment) and, although the Afrikaans text does not always maintain this distinction in terminology, in s 3(8) the words used are 'in beslag geneem'). Moreover where the Act intends the provision in question to refer to both an arrest and an attachment reference is consistently made to an 'arrest or attachment'. There is, furthermore, no real link between s 3(8) and s 5(2)*(d)*. They are dealing with different things. The former is dealing with the prohibition of a further arrest of the *same property* in the circumstances provided for in the section. The latter is dealing with the arrest or attachment of *further property* in addition to any property already arrested or attached (emphasis supplied). The introductory words to s 5(2)*(d)*, accordingly, are strictly redundant. Furthermore, in so far as it can be said that the introductory words in question refer back to s 3(8), they can be explained on the basis that they do so only in relation to arrests and not to the further provision in s 5(2)*(d)* relating to the attachment of further property in addition to property already attached. Moreover, the application of s 3(8) and s 5(2)*(d)* in accordance with their literal meaning does not seem to lead to absurdity (compare *Summit Industrial Corporation v The Jade Transporter* 1987 (2) SA 538(A) at 596G–597B). In these circumstances the courts may well hold that there is insufficient justification for giving the word 'arrest' in s 3(8) a meaning it does not have elsewhere in the Act, or for reading into the section the words 'or attachment' after the word arrest. The contention that there can be no reason why the legislature should not have intended the prohibition in s 3(8) to apply equally to attachments is no doubt correct. But even if this constitutes a *lacuna* giving rise to an anomaly, because ss 3(8) and s 5(2)*(d)* can be applied without giving rise to absurdity (compare *The Bavarian Trader* 2010 (4) SA 369 (KZD) paras [16] and [17]), there is much to be said for the view that this *lacuna* cannot be remedied by a process of construction and can be remedied only by the legislature.

the property dealt with in s 3(8). This appears from the expression 'further property' appearing in s 5(2)*(d)*. Section 5(2)*(d)* provides further that the court may order that any security given be increased, reduced, or discharged subject to such conditions as to the court appears just. Where property has been arrested and security has been given, the property may be arrested again by a different creditor or the same creditor pursuant to a different claim.

V.5 Section 8(1) of the Act provides that where property has been attached to found or to confirm jurisdiction at common law, that property may nevertheless be arrested in connection with a maritime claim, subject to such directions as the court thinks fit.

V.6 Cases may arise where, before an arrest, a previous application for arrest, either locally or in a foreign jurisdiction, has been dismissed. The question whether the defence of *res judicata* can successfully be raised depends on whether or not the previous decision amounts to a decision on the merits. If it does not, and merely amounts to a judgment of absolution from the instance, the defence will not succeed. The effect of the previous judgment falls to be determined by the *lex fori*.[100]

There must be an arrest or deemed arrest of the property

V.7 The arrest of the *res* is the basis of the action *in rem.* This is recognised by s 3(5) of the Act which provides that an action *in rem* shall be instituted by arrest, although this basic principle is qualified by s 3(10)*(a)*(i). The effect of this latter section is that, if security is furnished, the plaintiff is relieved of the need to secure an arrest and the property concerned is deemed to have been arrested.[101]

V.8 As the action is against the *res* itself, it follows that if the *res* has been lost or destroyed, the plaintiff cannot institute an action *in rem*. Partial destruction or loss does not, however, preclude the bringing of the action and the action can, in such circumstances, be brought against that portion of the property which remains.[102] Where the owner furnishes security or an undertaking to prevent an arrest or to secure the release of the property from arrest, the security takes the place of the property,[103] and loss or destruction of the property would, in these

[100] *The Wisdom C* 2008 (3) SA 585 (SCA) at 588H–589C, confirming the decision of the court *a quo* reported at 2008 (1) SA 665 (C). In the former case Farlam JA pointed out that what was decisive was not the form of the order, but the substantive question of whether or not there had been a decision on the merits.

[101] *The Jute Express* 1992 (3) SA 9 (A) at 18C–D; *The La Pampa* 2006 (3) SA 441 (D) at 451H–I. In *Great River Shipping Inc v Sunnyface Marine Ltd* 1992 (2) SA 87 (C) at 88I–J King J pointed out that s 3(10)*(a)* is presumably intended to forestall the arrest of a ship which would otherwise be a necessary prerequisite to an action *in rem* in terms of s 3(5).

[102] Thomas *Maritime Liens* para 88.

[103] *Great River Shipping Inc v Sunnyface Marine Ltd* 1992 (2) SA 87 (C) at 89A–B. Section 3(10)*(a)* provides that property shall be deemed to have been arrested and to be under arrest if at any time, whether before or after the

circumstances, be immaterial. In *The Argun*[104] Farlam JA held that the civil-law principle that once jurisdiction is established it continues to exist until the end of the action even if the ground upon which the jurisdiction was established ceases to exist is applicable to an action *in rem* where the arrest of a ship had lapsed in terms of a court order. It was accordingly held that the lapsing of the arrest did not result in the lapsing of the action.[105] The ship in question was still in existence and still in the jurisdiction and the court held, in addition, that the judgments *in rem* against the ship which had been obtained were enforceable against the ship. It may, however, be suggested that, where security has not been furnished and where the property in question is irretrievably lost or destroyed after the action has commenced, different considerations apply because, not only is there no longer a defendant in existence, but there is no property against which execution can be levied, making the continuation of the action purposeless. However, if there has been an entry of appearance, a successful judgment would enable the plaintiff to recover costs from the person who enters appearance and defends the action.

Subject to the exceptions provided for in s 4(4)(c) *of the Act, the property must be within the area of jurisdiction of the court*

V.9 The Act affirms the general rule that the *res* can be arrested only when within the territorial jurisdiction of the court seized with the matter.[106] For the purposes of the Act, the area of jurisdiction of a provincial or local division of the High Court is deemed to include that portion of the territorial waters of the Republic adjacent to the coastline of its area of jurisdiction.[107]

V.10 Before the passing of the Act it was held that, according to the admiralty law then applicable in this country, a writ of arrest could not be served until the *res* was within the jurisdiction, although the writ could be issued while the *res* was not yet within the jurisdiction.[108] The Act has extended this approach to attachments. Section 4(4)*(b)* of the Act provides that a court may make an order for the attachment of property not within the area of jurisdiction of the court at the time of the application or of the order, and provides that the order may be carried into effect when the property comes within the area of jurisdiction of the court.[109] Section 4(4)*(c)*(i)

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arrest, security or an undertaking has been given to prevent the arrest of the property or to obtain its release from arrest.

[104] 2004 (1) SA 1 (SCA).

[105] In terms of s 6 of the Act English law applies to the action *in rem* (and may apply even if the aspect under discussion falls to be classified as procedural – compare *Great River Shipping Inc v Sunnyface Marine Ltd* 1994 (1) SA 65 (C) at 68H–69B). Thus the correctness or otherwise of the decision in *The Argun* would, on this basis, depend on whether the civil law principle in question has survived in English law.

[106] Section 3(5).

[107] Section 2(2).

[108] *Ex parte Government of USA in re The Union Carrier* 1950 (1) SA 880 (C).

[109] Before the Act the court would not make such an order: *The Petunia* (1882) 2 EDC 271; *Ex parte Rance* 1921 EDL 3. No similar provision is made in respect of an arrest and it seems that the legislature assumed this to be

provides that, subject to the provisions of s 3(3),[110] a court may make an order for the arrest or attachment, to found jurisdiction, of property not within the area of jurisdiction of the court if that property is in the Republic or is likely to come into the Republic after the making of the order and no court in the Republic otherwise has jurisdiction in connection with the claim, or can otherwise acquire such jurisdiction by an arrest or attachment to found jurisdiction, or other property within the area of jurisdiction of the court has been or is about to be arrested or attached to found jurisdiction in connection with the same claim. Section 4(4)*(c)*(ii) provides that any such order may be executed and any arrest or attachment pursuant thereto effected at any place in the Republic as contemplated in s 26(1) of the Supreme Court Act of 1959.[111] Section 4(4)*(c)*(iii) provides that the arrest or attachment of any such property pursuant to any such order shall be an arrest or attachment which shall found the relevant jurisdiction of the court ordering the arrest or attachment.

V.11 The purpose of s 4(4)*(c)*(i)*(bb)* appears to be to enable a court which is about to order, or which has ordered, an arrest or attachment for jurisdictional purposes to order the arrest or attachment of property not within its jurisdiction for the purpose of 'topping up' the security to be obtained or obtained by reason of the arrest or attachment to be made or made within the jurisdiction.[112]

Subject to certain exceptions, the claimant must have a maritime lien over the property or the owner must be personally liable to the claimant

V.12 Section 3(4) of the Act provides that, without prejudice to any other remedy that may be available to a claimant or to the rules relating to the joinder of causes of action, a maritime claim may be enforced by an action *in rem*: *(a)* if the claimant has a maritime lien over the property to

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unnecessary on the basis that English law, which permitted the issue of a writ *in rem* while the *res* was not yet within the jurisdiction, continued to exist by reason of the provisions of s 6 of the Act.

[110] This section limits the circumstances in which an action *in personam* may be instituted in a court exercising jurisdiction not adjacent to the territorial waters of the Republic.

[111] Act 59 of 1959.

[112] The section is far from clear. The position of the commas in s 4(4)*(c)*(i) suggests that the words 'to found jurisdiction' qualify both the arrest and the attachment, although it seems clear that they must qualify only the attachment. Apart from this s 4(4)*(c)*(i) is appropriately worded as a preamble to s 4(4)*(c)*(i)*(aa)* but not as a preamble to s 4(4)*(c)*(i)*(bb)*. To reconcile this preamble with the latter the words 'to found jurisdiction' should not appear if the purpose of the section is that which it is suggested to be in the text. If these words are ignored for the purposes of s 4(4)*(c)*(i)*(bb)* the 'topping up' referred to could take the form of a security arrest. It is furthermore not clear why the section refers only to attachment to found jurisdiction and not to attachment to confirm jurisdiction. Compare in this regard the comment of Scott JA with reference to the same omission in s 1(2)*(a)*(ii) of the Act, referred to in Chapter VI § IV.58. In *The Gina* 2011 (2) SA 547 (KZD) Wallis J referred to 'the difficult questions of interpretation' which existed in regard to s 4(4)*(c)*(i) – the reference to s 4(3)*(c)*(i) in the judgment is an error. The section clearly needs redrafting.

be arrested; or *(b)* if the owner of the property to be arrested would be liable to the claimant in an action *in personam* in respect of the cause of action concerned.

V.13 The section adopts the general principle which existed in English admiralty law as at 1890, and hence in this country before the commencement of the Act, namely, that in the absence of the existence of a maritime lien, the claimant had to establish that the *res* owner would be personally liable to the claimant in respect of the claim.[113] The word 'liable' does not only connote that something has to be paid and that payment is enforceable by action. An owner can be said to be 'liable' *in personam* in respect of the 'cause of action' where the claimant has a *jus retentionis*, although the claimant merely has the right to retain the property until compensated. The words 'cause of action', moreover, encompass the right to maintain and have protected by law a *jus retentionis* until payment is made.[114] Similarly, a plaintiff who has a claim for *restitutio in integrum* against the owner will be able to proceed *in rem*.[115]

V.14 It must be remembered that in some instances no lien arises unless personal liability on the part of the owner can be established. It is clear that in the case of the damage lien and the master's lien for disbursements, no lien arises in the absence of personal liability except, in the former case, where the vessel is chartered by demise and, in the latter case, on the basis of estoppel. It seems that the remaining liens, namely, the bottomry and *respondentia* liens, the salvage lien and the wages lien all arise despite the absence of personal liability on the part of the owner.[116]

V.15 There are, however, exceptions to the application of s 3(4) of the Act.

V.16 Where an owner seeks to recover a ship and arrests it *in rem* claiming ownership, the owner does not enjoy a maritime lien and, inasmuch as the owner is asserting ownership, the owner cannot contend that the defendant is the owner of the ship and would be liable *in personam* in terms of s 3(4)*(b)* of the Act. It has, however, been held that, because an owner could, before the commencement of the Act, bring a vindicatory action *in rem* in these circumstances, and because s 3(4) does not contain a *numerus clausus* of the circumstances under which an action *in rem* can be brought, an owner seeking to vindicate a ship can, by reason of the

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[113] The fact that the applicable foreign law recognises that a claim lies against the ship will not entitle an applicant to arrest that ship *in rem* in the South African jurisdiction in the absence of the existence of a maritime lien or the personal liability of the owner of the ship to the claimant: *The Valea Alba* 1996 SCOSA B103 (SE).

[114] *Lenribprom v Kudu Holdings (Pty) Ltd* 1994 (2) SA 688 (C).

[115] *The Tao Men* 1996 (1) SA 559 (C) at 564I–565C.

[116] See Thomas *Maritime Liens* para 14 and see further Chapter IX.

provisions of s 6 of the Act, proceed *in rem*.[117] This exception to the requirements of s 3(4) has been held not to extend to property other than a ship, such as equipment on board a ship.[118]

V.17 Moreover, in the case of an associated ship, an action *in rem* can be brought in appropriate circumstances, notwithstanding the absence of a lien and notwithstanding that the owner of the associated ship is not personally liable to the claimant.[119]

V.18 Finally, a ship in the hands of a charterer by demise[120] can be subject to proceedings *in rem* notwithstanding the absence of a maritime lien or the owner's personal liability. Section 1(3) of the Act provides that for the purposes of an action *in rem*, a charterer by demise shall be deemed to be, or to have been, the owner of the ship for the period of the charter by demise. [121] Construed literally, the effect of the section would appear to be that, because the charterer is deemed to be the owner for the period of the charter by demise, the true owner must, for the period of the charter, be considered not to be the owner. On this literal construction of the section, a creditor who would otherwise have been able to institute an action *in rem* against the ship on the grounds of the owner's personal liability would not be able to do so during the existence of the charter. This approach would, moreover, have far-reaching results when applied to s 3(6) and (7) of the Act.[122] In the first edition of this work it was suggested that all that was intended is that, with regard to claims against the ship in respect of which the charterer was personally liable, the charterer is deemed to be the owner, so that the ship, in the hands of the charterer, can be arrested in respect of such claims and that it seemed unlikely that it was intended to give the real owner a moratorium in respect of claims *in rem* against the ship in regard to which the owner was personally liable.[123] This passage was quoted and endorsed in *The Chenebourg*.[124]

V.19 It would appear from the wording of s 3(4) that the date to which regard must be had in determining whether the owner would be personally liable is the date when the action is brought.

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[117] *Dias Compania Naviera SA v The Al Kaziemah* 1994 (1) SA 570 (D); *Great River Shipping Inc v Sunnyface Marine Ltd* 1994 (1) SA 65 (C); *The Tao Men* 1996 (1) SA 559 (C) at 565C–F.

[118] *The Atlantic Pride* 2003 SCOSA B224 (C). In *The New Market* 2006 (5) SA 114 (C) it was argued that it was possible for an owner to vindicate moveable property, other than the ship itself, in an action *in rem* against that property. The court found it unnecessary to consider this argument.

[119] This would occur where the owner of the ship concerned is not also the owner of the associated ship. The limitations contained in s 3(4) are clearly subject to the provisions of s 3(6) and s 3(7); *Euromarine International of Mauren v The Berg* 1984 (4) SA 647 (N) at 654E–F.

[120] See chapter II § III.37 above for a description of the nature of a charter by demise.

[121] This section was introduced into the Act by s 10 of the Sea Transport Documents Act 65 of 2000.

[122] See § IX.40 below.

[123] Section 21(4) of the English Supreme Court Act of 1981 provides that an action *in rem* may be brought against an owner or demise charterer of a ship.

[124] 2009 SCOSA C183 (KZD) para [15].

It is clear that the personal liability contemplated includes vicarious liability. The section refers to the person who 'would be liable'. The English courts, in construing a similarly worded section, have held that the words 'would be liable' mean the person who would be liable on the assumption that the action succeeds,[125] and this is clearly the interpretation which must be given to the section.

The applicant for arrest must establish a prima facie *case on the merits*

V.20 A *prima facie* case is established if evidence is adduced which, if accepted, will establish a cause of action. The mere fact that such evidence is contradicted does not mean that the plaintiff does not enjoy a *prima facie* case. In deciding whether a *prima facie* case exists the court will be careful not to enter into the merits of the case or attempt to adjudicate on credibility, probabilities or the prospects of success. Even where the probabilities are against the plaintiff, the requirement of a *prima facie* case is not negated. It is only where it is quite clear that the plaintiff has no action or cannot succeed that the arrest will be refused or set aside on the grounds that the plaintiff does not enjoy a *prima facie* case.[126]

V.21 It is clear that, generally speaking, the court will not, in considering whether or not a *prima facie* case has been established, have regard to the weight of the evidence tendered in support of the alleged *prima facie* case. Where, however, the evidence tendered is hearsay evidence the court will, if it admits such evidence,[127] determine, when it considers the evidence in its totality, whether such evidence carries sufficient weight to justify a finding that a *prima facie* case has been made out. A decision to exclude hearsay statements should normally be taken only when there is some cogent reason for doing so.[128] Contentions, submissions and conjecture as opposed to allegations of fact, do not, however, constitute evidence,[129] nor do averments in the form of conclusions.[130] It is only when an assertion amounts to an inference which may

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[125] See Thomas *Maritime Liens* para 77 n 85.

[126] *Cargo Laden on Board The Thalassini v The Dimitris* 1989 (3) SA 820 (A) at 831F–832B; *Weissglass NO v Savonnerie Establishment* 1992 (3) SA 928 (A) at 938G–H; *The Tigr* 1998 (3) SA 861 (A) at 868B–H; *Simon NO v Air Operations of Europe* AB 1999 (1) SA 217 (SCA) at 228C–E. This paragraph was cited with approval in *The Fairmount Fuji* (unreported).

[127] See chapter VIII § VIII.

[128] *Cargo Laden on Board The Thalassini Avgi v The Dimitris* 1989 (3) SA 820 (A) at 842G–H read with 843I.

[129] *Great River Shipping Inc v Sunnyface Marine Ltd* 1994 (1) SA 65 (C) at 75I; *Hulse-Reutter v Godde* 2001 (4) SA1336 (SCA) at 1344C; *The Maritime Valour* 2003 SCOSA B 293 (D) at B 296H–I. In the latter case Hurt J held that where the applicant seeks to make out a *prima facie* case and relies on inferences drawn from the facts, the court must be satisfied that those inferences follow as a matter of probability. It is submitted that the judge erred in this respect. All that is required to establish a *prima facie* case is that the inference is one which may reasonably be drawn from the facts alleged. See *Hulse-Reutter* at 1344 E–F. See further *The Tigr* 2001 SCOSA E97 (C) at E105F–H.

[130] *The Logan Ora* 1999 (4) SA 1081 (SE) at 1091H.

reasonably be drawn from the facts alleged that it can have any relevance. Although some latitude may be allowed, the ordinary principles involved in reasoning by inference cannot be ignored in assessing whether or not a *prima facie* case has been established. In the ordinary course in a civil case the court will consider the probabilities and will enquire whether the inference sought to be drawn from the facts is one which, by balancing probabilities, is the one which is the most natural or acceptable one. While there need not be rigid compliance with this standard, the inference sought to be drawn must at least be one which may reasonably be drawn from the facts alleged. If the position were otherwise, the requirement of a *prima facie* case would be rendered all but nugatory.[131]

V.22 Where the facts are peculiarly within the knowledge of the opposite party, less evidence will suffice to establish a *prima facie* case than would under other circumstances be required. When the party having knowledge of the facts and in a position to rebut them, if they are capable of rebuttal, chooses not to do so, that in itself is a factor that reinforces the *prima facie* case already before the court.[132]

V.23 While it is unquestionably so that an applicant is generally speaking obliged to adduce evidence in order to establish a *prima facie* case against the party whose property is sought to be arrested (or attached), this requirement may in exceptional circumstances be relaxed. The requirement was relaxed in *The Tigr*[133] and in *The Summit One.*[134] In both cases the nature of the application was such that the *prima facie* case sought to be established and other allegations made by the applicant were of necessity mutually destructive. In the former case the court was concerned with the establishment of a *prima facie* case against a joint wrongdoer in terms of the Apportionment of Damages Act of 1956;[135] in the latter case with claims in the alternative. In both cases, because of the special circumstances, the court was prepared to have regard to the allegations in the pleadings in determining that a *prima facie* case had been made out.

V.24 Where the claim is one sounding in money, based for example on the breach of a contractual or delictual duty, it is submitted that the standard of proof with regard to the alleged breach of duty and whether or not this resulted in a loss and, if so, in what amount is the same,

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[131] *Hulse-Reutter v Godde* 2001 (4) SA 1336 (SCA) at 1344C–G. Compare *The Fairmount Fuji* (unreported). In *The Sylvia* 2008 (5) SA 562 (N) at 570A–B Levinsohn DJP warned against seeking to draw inferences from speculative theories rather than objective facts. It is submitted that the reference to objective facts requires qualification. For the purpose of determining whether a *prima facie* case exists, the court will have regard to the facts alleged by the plaintiff together with any facts which are common cause. If these give rise to an inference, that inference will not, for the purposes of determining whether a *prima facie* case exists, be defeated by facts alleged by the defendant and not admitted by the plaintiff which negate that inference.

[132] *The Gina* 2011 (2) SA 547 (KZD).

[133] 1998 (3) SA 861 (SCA) at 868C–871B. See chapter VIII § II.6.

[134] 2005 (1) SA 428 (SCA) at 437D–438C. See chapter VIII § II.6.

[135] Act 34 of 1956.

namely, proof on a *prima facie* basis. The existence of a loss and the quantum of the claim are essential ingredients of the plaintiff's cause of action. The *dictum* of Friedman J in *Zygos Corporation v Salen Rederierna AB*[136] suggests that the question of whether or not the claim is a maritime claim also falls to be determined on a *prima facie* basis. On the other hand, the question of whether or not the claim is a maritime claim is, in terms of s 7(2) of the Act, not provisionally but finally decided if the issue arises. To the extent that this is not simply a question of law, this would support the view that the usual standard of proof, namely, proof on a balance of probabilities, should prevail.

V.25 In *Dabelstein v Lane & Fey*[137] Hefer ADCJ emphasised that attachment is an extraordinary remedy which should be applied with care and caution. Consequently, said the judge, in assessing the evidence relating to the existence or otherwise of a *prima facie* case, the accepted approach might require reconsideration to the extent that regard may, in addition, be had to allegations in the defendant's affidavit which the plaintiff cannot contradict. These observations are equally germane to an action *in rem* which, like attachment, may be described as an extraordinary remedy with far-reaching consequences. In *Hulse-Reutter v Godde*[138] this approach was adverted to by Scott JA who, however, found it unnecessary to decide whether the traditional test for the existence of a *prima facie* case should be refined as suggested by Hefer ADCJ. It seems necessary to distinguish two situations. Where the plaintiff cannot contradict the evidence adduced by the defendant because it has no knowledge of such evidence that evidence cannot, it is submitted, be adverted to in deciding whether or not a *prima facie* case exists. Where, however, the evidence is admitted by the plaintiff, it is submitted that different considerations apply. It has always been the case that if it is clear that the plaintiff has no case, the attachment or arrest will be refused or set aside. It can hardly matter whether this flows from the evidence adduced by the plaintiff or whether it appears from the evidence adduced by the defendant which the plaintiff admits. To allow the case to proceed in either of these circumstances would be equally absurd. Nor would this detract from the accepted law that the court will not at the arrest or attachment stage evaluate probabilities or otherwise enter into the merits.

V.26 In *The Silvia*[139] it was held that where a point of law is in issue it is not correct for the court to adopt the attitude that rulings on matters of law must be left for decision by the tribunal which will ultimately hear the matter without itself applying its mind to the issue. This is clearly correct. If the applicant's case is bad in law the applicant should be non-suited there and then. The same holds good where the issue is the proper construction of a contract. If the applicant's

[136] 1984 (4) SA 444 (C) at 450G–H.
[137] 2001 (1) SA 1222 (SCA) at 1227H–1228A.
[138] 2001 (4) SA 1336 (SCA) at 1343E–1344C.
[139] 2008 (5) SA 562 (N) at 574A–C.

case depends upon a particular meaning of the contract, and the contract is clearly incapable of bearing the meaning, the applicant should likewise be non-suited.[140]

VI THE COMMENCEMENT OF THE ACTION IN REM AND THE ACCRUAL OF THE SECURITY

VI.1 Section 1(2)*(a)*(iii) and (iv) of the Act provides that an admiralty action shall for any relevant purpose commence, *inter alia*, by the issue of any process for the institution of an action *in rem*[141] or by the giving of security or an undertaking as contemplated in s 3(10)*(a)*. Section 3(5), which provides that an action *in rem* shall be instituted by arrest, is not intended to regulate the question of when the action commences – it merely makes it clear that an arrest is an essential requirement of the action *in rem*.[142]

VI.2 The action *in rem* creates a valuable security in the hands of the creditor, but the accrual of this security may not coincide with the date upon which the action commences. Thus the issue of process commencing an action *in rem* will not serve to vest the creditor with a security interest in the *res* protecting the creditor against the effects of the owner's insolvency or the intervention of business rescue proceedings. It is only once an arrest (or attachment) has occurred or security has been furnished that the creditor will be protected, with the result that the *res* will not thereafter, in the event of the owner's insolvency or the intervention of business rescue proceedings, vest in a trustee or form part of the assets to be administered by a liquidator or practitioner.[143]

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[140] Provided that it is clear that the possibility of admissible extrinsic evidence effecting the construction of the contract can be excluded. In *Geyser v Nedbank* Ltd 2006 (5) SA 355 (W) Van Oosten J dealt with the proper approach to be adopted to questions of law arising in interlocutory proceedings. After dealing with the controversy existing in this regard, the judge held that it was undesirable for a judge at the interlocutory stage to express *prima facie* views in regard to legal issues and that he or she should decide such issues only where such decision would dispose of the matter as a whole or would dispose of any aspect of the matter. It is submitted that this view is correct and is applicable in respect of questions of law arising at the stage when the court is determining whether or not a *prima facie* case exists.

[141] In terms of the definition of an 'admiralty action' in s 1(1) of the Act, the reference to an 'action *in rem*' in s 1(2)*(a)*(iii) includes proceedings *in rem* instituted other than by way of action. Proceedings *in rem* are almost invariably commenced by the issue of summons but may be brought on motion. See § X.9 below. For the purpose of deciding whether proceedings were commenced before or after the commencement of the Act s 16(3) provides that proceedings shall be deemed to have commenced upon service of the summons and makes no provision for the commencement of proceedings on motion. Presumably when proceedings are commenced otherwise than by summons the word 'summons' must be interpreted to include the process by which such proceedings are commenced.

[142] *The Jute Express* 1992 (3) SA 9 (A). This case, decided before the amendment of the section in terms of Act 87 of 1992, applies equally to the amended section in its present form.

[143] See s 10 read with s 8 of the Act. With regard to the continued application of liquidation proceedings in terms of Act 61 of 1973 see chapter II n 263 and with regard to the functions of the practitioner see Act 91 of 2008.

VI.3 In English law the traditional view of the action *in rem* was that if the *res* against which the claim lies is sold to a *bona fide* purchaser before the accrual of the 'charge' or the 'security interest', it cannot be arrested in respect of such claim in the hands of the purchaser. If, on the other hand, the *res* is sold after the accrual of the charge, the security obtained attaches irrevocably to the *res* and is not affected by subsequent changes of ownership and the action *in rem* against the *res* can proceed.[144] It seems that, despite divergent views in the earlier cases, the accepted view in English law since the decision in *The Monica S*[145] has been that the charge accrues when the writ (now the admiralty claim form *in rem*) is issued – the commencement of the action. The extent to which Lord Steyn's decision in *The Indian Grace (No 2)*[146] may have undermined the pre-existing law in this regard is not clear. The suggestion is that if carried to its logical conclusion the action, as viewed by the House of Lords, makes the original owner personally liable from the time the writ is served, and the action being in substance an action *in personam*, there is no room for the existence of a continuing liability which cleaves to the *res* and remains unaffected by changes in ownership.[147]

VI.4 Lord Steyn did not refer to *The Monica S* in his judgment. That case dealt with the date from which a security interest attaches to the *res* in relation to the sale of the *res* and the continuation of liability attaching to the *res*. The *Indian Grace (No 2)* dealt with the altogether different question of whether the claimants were precluded from proceeding *in rem* in terms of s 34 of the Civil Jurisdiction and Judgments Act of 1982, having regard to the action *in personam* in India because the parties were the same in both actions. Lord Steyn specifically stated that his finding that the action was one against the owners from the time of service was 'for the purposes of s 34.' There would accordingly appear to be scope for the argument that *The Indian Grace (No 2)* does not serve to undermine the decision in *The Monica S*. The argument has, however, one obvious weakness. In arriving at his conclusion that the owner in an action *in rem* is personally liable from the inception of the action, Lord Steyn analysed the action and the relevant authorities in considerable detail. In these circumstances it is not easy to see how, having determined generally the role of the owner in the action, it can be said that Lord Steyn's findings must be limited to the application of s 34 and not to other circumstances where the question of the role of the owner arises. Can the action *in rem* realistically be one thing for the purposes of s 34 and another thing for other purposes?

VI.5 In the discussion which follows it will be assumed that *The Indian Grace (No 2)* has not undermined the decision in *The Monica S* and that that decision reflects the current English law as to when the security interest accrues pursuant to the action *in rem*. In *The Monica S* Brandon J

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[144] Thomas *Maritime Liens* para 50 nn 36, 37; Meeson *Admiralty Jurisdiction and Practice* 3 ed § 3.74.
[145] [1968] P 741. The decision has not since been dissented from.
[146] [1998] 1 Lloyd's Rep 1 (HL).
[147] Compare Teare (1998) *LMCLQ* 33 at 41; Mandaraka-Sheppard *Modern Maritime Law* 2 ed 89.

considered the conflicting *dicta* in the previous English cases as to whether the charge accrues pursuant to an action *in rem* when the writ is issued and the action if commenced, or only when the arrest is made.[148] Brandon J concluded that the preponderance of authority favoured the former view. Mandaraka-Sheppard[149] casts doubt on whether these cases reveal any clear preponderance in favour of the view that the charge accrues when the writ is issued, rather than when the arrest is made. Moreover, in coming to this conclusion, Brandon J relied *inter alia* on the particular provisions of s 3(4) of the English Administration of Justice Act of 1956.

VI.6 It is submitted that there are good reasons why – at least in this country – the security interest does not accrue before an arrest is made. The issue of process for the institution of proceedings *in rem* will not serve to protect the creditor from the effects of the owner's sequestration or liquidation or the intervention of business rescue proceedings. That protection will accrue only when the creditor secures its position by making an arrest.[150] The notion that the security interest or charge accruing pursuant to an action *in rem* attaches to the *res* at different times depending on whether or not insolvency or business rescue proceedings has intervened is, from a jurisprudential point of view, less than satisfactory. Moreover, the purposes of arrest are to obtain jurisdiction over the *res* and to provide security for the claim. Neither result is achieved unless an arrest is made. Pending arrest jurisdiction is not obtained and the security interest can be no more than a contingent one. In these circumstances it seems artificial to regard the *res* as being burdened with the charge before arrest. Admittedly the charge created by the maritime lien is also contingent on arrest, but the maritime lien is an exceptional legal phenomenon and has always been treated as *sui generis*.

VI.7 There are two general conflicting policy considerations. If the relevant date is the issue of process, this will assist the creditor in obtaining security for its claim against a debtor who seeks to avoid the claim by disposing of the *res* to a third party. On the other hand, our law has always sought to protect the rights of the *bona fide* purchaser. Admittedly, the purchaser may acquire a *res* burdened with liens of which it is unaware and in respect of which it has received no notice. This is an exceptional situation and there seems to be every reason why this exception should not be extended with the result that the purchaser is, in addition, burdened with other claims of which it is unaware[151] and which, moreover, may not even be known to the seller of the

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[148] The judge at 130 drew attention to the surprising fact that before 1956 there had been no decision in English law directly deciding whether a change of ownership after the issue of process, but before arrest, defeated a statutory right of action *in rem*.

[149] *Modern Maritime Law* 2 ed 74–5.

[150] Section 10 of the Act.

[151] The number of claims having lien status is limited compared with the wide category of claims which can be brought *in rem*. Thus the extension of the exception will impinge more radically on the position of the *bona fide* purchaser of the *res*. This serves to detract from Brandon J's view that the fact that the purchaser had in any event to reckon with maritime liens of which the purchaser might be unaware constituted a reason for not accepting the argument favouring innocent purchasers. Moreover, the fact that the purchaser is disadvantaged in one exceptional

res. Finally, it has been pointed out that the notion of a security interest creating a real right accruing without notice or some public act is unknown to our law. Until the ship is arrested there is no such public act.[152] It is accordingly submitted that there are cogent policy reasons why the secret and indelible features of the maritime lien should not extend to a statutory claim *in rem* to the detriment of innocent purchasers.

VI.8 By reason of s 6(1) of the Act a court in the Republic exercising admiralty jurisdiction is, in regard to certain matters, obliged to follow English law[153] unless, of course, that law is inconsistent with the Act or the Rules. The question of the accrual of the security under the action *in rem* is one of those matters. The enquiry is thus whether it can be argued successfully that, on a proper interpretation of the Act, the security interest accrues on arrest.

VI. 9 There is much to be said for the argument that this view finds support in the Act. Section 3(5) of the Act makes it clear that an arrest constitutes an essential requirement for an action *in rem*. Until this requirement is met the action is inchoate, its essential purposes will not have been achieved, and the action cannot be enforced. In these circumstances it cannot readily be assumed that the legislature intended the security interest to accrue prior to arrest. Moreover, the view that the relevant date is the arrest would avoid a situation where, depending on the circumstances, the accrual of the security interest could occur at different times. In addition, it has been suggested that s 3(4) of the Act requires the owner of the *res* to be arrested to be personally liable at the time of the arrest, so that if the owner (the purchaser) is not liable, the *res* cannot be arrested.[154]

VI.10 Finally, the constitutionality of interpreting the Act in a way that permits an owner's property to be detained by a claim in respect of which the owner is not liable and of which the owner has received no notice has, correctly it is submitted, been questioned.[155]

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respect does not justify the view that the purchaser must be disadvantaged in other respects. Brandon J stated further that it was possible for a purchaser to enquire at the registry whether a writ had been issued or to seek protection by seeking indemnities from the seller. However, such indemnities, as conceded by the judge, might turn out to be no protection because of the intervention of insolvency. Moreover, the purchaser can hardly be expected, from a practical point of view, to scour registries around the world.

[152] Wallis *The Associated Ship* 340.

[153] See chapter III above.

[154] Wallis *The Associated Ship* 341.

[155] Wallis *The Associated Ship* 341. Although the effect of a maritime lien may be to make an owner liable without notice for a debt in respect of which the owner is not liable, the author points out that the maritime lien exists only in respect of a limited category of claims, is an internationally accepted feature of maritime commerce, and should thus survive constitutional scrutiny.

VI.11 It is accordingly submitted that in South African law the security interest created by an action *in rem* attaches to the *res* from the moment the *res* is arrested and that the decision in *The Monica S* is not applicable in this country.[156]

VII THE LAPSING OF THE ACTION *IN REM*

VII.1 Section 1(2)*(b)*(iii) and (iv) of the Act provides that an action *in rem* will lapse if the process issued to commence the action is not served within 12 months of such issue or, in the case of a deemed arrest, if the property concerned is deemed in terms of s 3(10)*(a)*(ii) of the Act to have been released and discharged because of the failure to take a further step in the proceedings within one year of the furnishing of security or an undertaking.[157] Section 5(2)*(d*A*)* of the Act provides, however, that a court, on application made before the expiry of any period contemplated in s 1(2)*(b)*, or s 3(10)*(a)*(ii) or any extension thereof, may from time to time grant an extension of such period.[158] Complementary to s 1(2)*(b)*(iii) and s 5(2)*(d*A*)* of the Act, Admiralty Rule 6(1)*(a)* provides that no summons *in rem* or warrant of arrest shall be served if more than one year has expired since the date when it was issued, unless the court has, before the expiry of the period of one year, on application, granted leave for the summons or warrant to be served within such further period as the court may deem fit. Rule 6(1)*(b)* provides that it shall not be necessary to give notice of any such application to any person who is not on record with the registrar as a party to the matter concerned, provided that any person to whom notice of the application has not been given, and who may be affected by an order granted pursuant thereto, may apply to the court, on notice to the party to whom the order in question has been granted, for the revocation or amendment of the order granted in the absence of that party.

VII.2 The rationale behind s 3(10)*(a)*(ii) of the Act is to penalise inaction. A party cannot obtain security for its claim and thereafter remain supine to the detriment of the party which has to continue to bear the costs of maintaining the security. The service of a summons is clearly a

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[156] The position in comparable jurisdictions is not clear. Cremean *Admiralty Jurisdiction in Australia, New Zealand, Singapore and Hong Kong* 189 states that if *The Monica S* is followed a statutory lien arises in Singapore, Hong Kong and New Zealand when proceedings *in rem* are issued, but suggests that this is doubtful in Australia because of the provisions of the Australian Admiralty Act of 1988. The author, however, states that 'it is difficult to see how a security interest is created merely by filing a writ without also serving it.' For the reasons given above, it is equally difficult to see how a security interest is created by anything other than arrest. Indeed, the author cites a decision in Singapore *Dauphin Offshore Engineering and Trading Pte Ltd Inc v The Capricorn* [1999] 2 SLR 390 at 398 in which it was specifically held that in that case it was the arrest of the ship which created the statutory lien. This case took a different view from the earlier decision in *The Bolbina* [1994] 1 SLR 554 at 560.

[157] See § X.34 below.

[158] In *The Evelyn* 2001 SCOSA E107 (D) Hugo J held that extensions of time should not be granted willy nilly but that attention should be given to the prejudice that would accrue to either party if the extension were to be either granted or refused, and that there should also be an indication that the ship in question was likely to enter ports within the jurisdiction in the foreseeable future. It was further held that in the case of an associated ship an extension should be granted only if there was no appreciable prejudice to the associated ship concerned.

further step in the proceedings. In *The Alexandra*[159] the plaintiff's attorneys caused the registrar to issue a summons and on the same day delivered the summons and particulars of claim under cover of a letter enclosing these documents for 'urgent service today' on the defendant, furnishing the defendant's address. The plaintiff thus complied with the procedure for service prescribed by Admiralty Rule 7 and Uniform Rule 4. Hurt J held that the meaning of the phrase 'no further step in the proceedings' in the section fell to be ascertained without reference to the decisions on Uniform Rule 30(2)*(a)* or Magistrate's Court Rule 10; that in order for there to have been a 'further step' as contemplated in s 3(10)*(a)*(ii) there must at least have been a step which 'puts the ball in the defendant's court' thereby giving the defendant the opportunity of bringing the action nearer to its conclusion; that the plaintiff had completed every act required of it preparatory to service; and that the fact that the service which followed was not strictly in compliance with the Rules did not detract from the fact that the plaintiff had taken a 'further step' within the meaning of s 3(10)*(a)*(ii).

VII.3 In *The Ionian Mariner*[160] it was contended that the defendant had waived its right to assert that the action had lapsed because of a failure by the plaintiff to take a further step in the proceedings in terms of s 3(10)*(a)*(ii) because, with full knowledge of its rights, it failed to object to the plaintiff's notice of intention to amend its particulars of claim and filed a plea which did not allege that the action had lapsed. It was held that neither circumstance was inconsistent with the contention that the action had lapsed, and it was pointed out that the application under s 3(10)*(a)*(ii) and the plea were filed and served in tandem. It was further emphasised that the section covered both a curial and non-curial arrangement for the release of a ship.

VII.4 Where the action lapses in terms of the Act, the arrest similarly lapses. Where, however, the arrest lapses for other reasons, this will not necessarily put an end to the action. The rule of the civil law that once jurisdiction has been established at the commencement of the action, such jurisdiction continues to exist to the end of the action, even where the ground upon which the jurisdiction was originally established ceases to exist, may be invoked in certain circumstances.[161] Moreover, where the arrest of a particular ship has lapsed, but a judgment *in rem* is obtained by the plaintiff in a court in the Republic, the plaintiff may execute that judgment against that ship if within the jurisdiction.[162]

VII.5 The mere fact that a plaintiff has been barred from delivering particulars of claim will not result in the lapsing of its action. The summons stands until set aside. The plaintiff is entitled to seek condonation of its default and an extension of time to deliver its particulars of claim.

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[159] 2002 SCOSA E114 (D).
[160] 2001 SCOSA E110 (D).
[161] See *Thermoradiant Oven Sales Ltd v Nelspruit Bakeries* 1969 (2) SA 295 (A) at 301C–F; 310C–E; *The Argun* 2004 (1) SA 1 (SCA) at 11B–I.
[162] *The Argun* 2004 (1) SA 1 (SCA) at 12A–F.

Only if the court were to refuse such condonation and extension of time, and were, as a corollary of that refusal, to dismiss the action, could its action be said to have lapsed.[163]

VIII EXTINCTIVE PRESCRIPTION AND PROCEEDINGS *IN REM*

VIII.1 The effect of s 16(1) of the Prescription Act of 1969[164] is that the provisions of that Act apply except to the extent that they are inconsistent with the provisions of any other Act which prescribes a specific period within which a claim is to be made or an action is to be instituted. Thus the provisions of the Prescription Act apply to proceedings *in rem* except where other statutes enact specific periods of extinctive prescription which conflict with that Act. Section 344(1) of the Merchant Shipping Act of 1951[165] provides that the period of extinctive prescription in respect of legal proceedings to enforce any claim or lien against a ship or its owners in respect of any damage to or loss of another ship, its cargo or freight, or any goods on board such other ship, or damages for loss of life or personal injury suffered by any person on board such other ship, caused by the fault of the former ship, whether such ship be wholly or partly at fault, shall be two years. The section further provides that this period begins to run on the date when the damage or loss or injury was caused. The effect of the above legislation is that the period of prescription in regard to these claims is two years.

VIII.2 Whereas s 344(1) applies to both actions *in rem* and *in personam*, s 344(3) applies only to actions *in rem*.[166] Section 344(3) provides that a court having jurisdiction to try proceedings referred to in s 344(1) shall, before or after the expiry of the two-year period referred to in s 344(1), if it is satisfied that owing to the absence of the defendant ship from the Republic and its territorial waters and from the country to which the plaintiff ship belongs or in which the plaintiff resides or carries on business and its territorial waters, the plaintiff has not during such period had a reasonable opportunity of arresting the defendant ship, extend such period sufficiently to give the plaintiff such opportunity.

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[163] *The Baha Karahasan* 2003 SCOSA B231 (D).

[164] Act 68 of 1969.

[165] Act 57 of 1951.

[166] *Owner of The Maritime Prosperity v Owner of The Lash Atlantico* 1996 (1) SA 22 (A) at 32F–G read with 33F–G disallowing an appeal from the decision reported in 1994 (3) SA 157 (D). Counsel argued that s 13(1)*(b)* of the Prescription Act was inconsistent with s 344(3) read with s 344(1) and that accordingly reliance thereon was precluded by s 16(1) of the Prescription Act. The contrary argument was that s 344(3) applied only to actions *in rem* and that since the counterclaim would be *in personam*, there would be no scope for any inconsistency; alternatively, even if s 344(3) applied to both actions *in rem* and *in personam* there is no inconsistency between s 343(3) and s 13(1)*(b)*. The argument that s 343(3) applies only to actions *in rem* was upheld and it was not necessary for the Appellate Division to decide whether, assuming s 343(3) applies to actions *in personam* as well, an inconsistency exists between s 13(1)*(b)* and s 344(3), and this question was specifically left open. The court *a quo* at 165C–D held that such an inconsistency did exist.

VIII.3 Article III(6) of the Rules incorporated in the Carriage of Goods by Sea Act of 1986[167] provides that the carrier and the ship shall be discharged from all liability in respect of the goods unless suit is brought within one year of the date when they were delivered or should have been delivered. The Rule further provides that this period may be extended if the parties so agree after the cause of action has arisen.[168] The one-year period does not apply to an action for an indemnity which is governed by the provisions of Article III(6) *bis*.

VIII.4 Section 15 of the Prescription Act provides that the running of prescription is *inter alia* interrupted by the service of process. Section 1(2) of the Act deals with the commencement of an admiralty action. In terms of the Prescription Act it is, however, not the commencement of proceedings but the service of process which serves to interrupt the running of prescription.

IX THE ASSOCIATED SHIP

IX.1 Before the commencement of the Act, a creditor proceeding *in rem* could look only to the ship in respect of which the cause of action arose and could not arrest other ships owned by the person who would have been liable to the creditor *in personam*[169] nor, of course, could the creditor look to other ships owned by a person not liable to the creditor *in personam*. This, together with the creation of one-ship companies, which enabled fleet owners to limit their risk exposure, and other stratagems, served to limit the creditor's prospects of obtaining satisfaction in respect of its claim.[170] The Act, building on the example of the Arrest Convention and English law,[171] remedied this situation by providing in certain circumstances for the arrest, instead of the ship in respect of which the cause of action lay, of any other ship owned by the debtor and, in the case of ship-owning companies, made control the decisive factor. The Act has, in this latter respect, to a large extent lifted the corporate veil so as to prevent shipowners from limiting liability by the creation of one-ship companies under their control.[172] In short, the purpose of the

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[167] Act 1 of 1986.

[168] Note that the Rule requires in addition that notice must be given to the carrier in certain circumstances.

[169] This was the position in England until 1956 when the 'sister ship' provisions were introduced by the Administration of Justice Act of 1956, now s 21(4) of the Supreme Court Act of 1981. Compare *Euromarine International of Mauren v The Berg* 1984 (4) SA 647 (N) at 659B–H.

[170] See Hare *Shipping Law and Admiralty Jurisdiction* 2 ed § 2-2.6.1 and see generally Staniland 'The Arrest of an Associated Ship' (1985) 102 *SALJ* at 148; 'Ex Africa Semper Aliquid Novi: Associated Ship Arrests in South Africa' (1995) 4 *LMCLQ* 561.

[171] Compare *Euromarine International of Mauren v The Berg* 1986 (2) SA 700 (A) at 711I–712A; *The Heavy Metal* 1999 (3) SA 1083 (SCA) at 1096A–1098E. The Act introduces a more expansive remedy than the 'sister ship' provisions of English law and the Arrest Convention.

[172] *The Heavy Metal* 1999 (3) SA 1083 (SCA) at 1096I–J; 1998 (4) SA 479 (C) at 490I–491A.

Act was to make the loss fall where it belonged by reason of ownership or control,[173] and to benefit a party applying for arrest by providing a method of recovery against an alternative defendant.[174] In so doing, the Act provided an extended procedure to claimants to enforce maritime claims.

IX.2 Section 3(6) of the Act provides that, subject to the provisions of s 3(9) relating to exempted ships,[175] an action *in rem*, other than such an action in respect of a maritime claim contemplated in s 1(1)*(d)*,[176] may be brought by the arrest of an associated ship instead of the ship in respect of which the maritime claim arose (the 'ship concerned'). Section 3(7)*(a)* of the Act defines an associated ship as a ship, other than the ship in respect of which the maritime claim arose (i) 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 (ii) owned, at the time when the action is commenced, by a person who controlled the company which owned the ship concerned when the maritime claim arose; or (iii) 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.

IX.3 Subparagraphs (ii) and (iii) of s 3(7)*(a)* both contemplate a situation where either the ship concerned or the ship which it is sought to arrest as an associated ship, or both, are owned by a company or companies controlled by a particular person.[177]

IX.4 In 1992 the Act was amended[178] to provide that an associated ship could, in addition to being arrested, be attached *in personam*. The Act now provides that the court may make an order for the arrest or attachment, to found jurisdiction, of any ship which, if the action concerned had been an action *in rem*, would be an associated ship with regard to the ship in respect of which the

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[173] Compare *Euromarine International of Mauren v The Berg* 1986 (2) SA 700 (A) at 712A–B. This *dictum* falls to be read in the light of the fact that the 1992 amendment of the Act made the control of the company rather than the control of the shares the criterion.

[174] *The Heavy Metal* 1999 (3) SA 1083 (SCA) at 1105G–H. See further the discussion in § IX.29ff below.

[175] Section 3(9) provides that the Minister of Justice may, by notice in the Gazette and subject to such conditions as he may prescribe, exclude from the provisions of s 3(6) any ship owned by a company named in the notice or by a company in which the shares are owned or controlled by a company so named.

[176] Namely claims for, arising out of or relating to mortgages, hypothecations, rights of retention, pledges or other charges on or of a ship, and bottomry or *respondentia* bonds. The logic of this exclusion is presumably that these claims relate particularly to the ship concerned. Hare *Shipping Law and Admiralty Jurisdiction* 2 ed § 2-2.6.2 n 230 suggests that the application of this logic should have resulted in the exclusion of claims for the possession of a ship. Similar considerations would seem to apply to claims for ownership of a ship even where such claims do not involve claims for possession. (See s 1(1)*(c)*.) The doctrine of sovereign immunity may, moreover, preclude recourse against the associated ship. See chapter II § IX.

[177] *The Heavy Metal* 1999 (3) SA 1083 (SCA) at 1105H–I.

[178] By s 3 of Act 87 of 1992.

maritime claim concerned arose.[179] Thus if the claimant had, at the time when the claim arose, an action *in rem* against the ship concerned, the claimant is no longer restricted to arresting the associated ship in an action *in rem* but can attach the associated ship in an action *in personam*.

IX.5 In order to qualify as an associated ship the ship must, at the time when the action against the associated ship is commenced,[180] be owned: (i) by a person who owned the ship concerned; or (ii) by a person who controlled the company which owned the ship concerned; or (iii) by a company controlled by a person who owned the ship concerned or controlled the company which owned the ship concerned, when the maritime claim arose. In *October International Navigation Inc v The Fayroux IV*[181] it was held that it is not necessary that the ship concerned should still be owned by such person or company at the date of the commencement of the action because s 3(6) and (7) provides an extension and alternative to the remedy provided in s 3(5). Thus if X owned ship A, the ship concerned, at the time the claim arose, the right to arrest ship B, owned by X at the time of the commencement of the action, is not affected by the fact that X, at the latter date, no longer owned ship A (for example because it had been disposed of to a third party or because the creditor had himself acquired it) and it is no longer possible to bring an action *in rem* against ship A. Nor need ship B, the associated ship, be owned by X at the time when the claim arose against ship A, the ship concerned.

IX.6 In *The Heavy Metal*[182] it was argued in the court *a quo* that the decision in *October International Navigation Inc* (*supra*) was incorrect because before an action *in rem* can form the basis of an arrest of an associated ship in terms of s 3(6), it must be an action *in rem* complying with the requirement of s 3(4), namely, it must be and have been an action *in rem* against the ship in respect of which the cause of action arose. The effect of Thring J's findings on the facts was that at the time when the cause of action arose an action *in rem* lay against the ship concerned. It was, however, clear that at the time of the arrest of the associated ship no such action lay because the plaintiff had itself acquired ownership of the ship. Despite this the argument was rejected on the basis that s 3(6) and (7) provides the creditor with an alternative remedy which lies independently of the provisions of s 3(4). The court held that this section is not exhaustive of the circumstances in which an action *in rem* may be instituted; that it was consequently not necessary for the creditor to bring the claim within the purview of s 3(4); and that this conclusion was not

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[179] Section 4(4)*(d)*. It is not clear why the section refers only to attachments to found jurisdiction and not to attachments to confirm jurisdiction. See the note to § V.11 above. It seems further that the comma after the word 'attachment' is in the wrong place and should appear after the word 'arrest'. The words 'to found jurisdiction' apply to the word 'attachment' and are not appropriate to be applied to the word 'arrest'. The reference to 'the arrest of a ship' was, it seems, to provide for the application of the associated ship provisions to a security arrest under s 5(3) of the Act.

[180] Compare *Transgroup Shipping (Pty) Ltd v Owners of the Kyoju Maru* 1984 (4) SA 210 (D) at 214H–I, which was concerned with the section in its previous unamended form.

[181] 1988 (4) SA 675 (N).

[182] 1998 (4) SA 479 (C) at 484G–485D.

affected by the amendment to s 5(3) of the Act brought about by Act 87 of 1992.[183] In the appeal to the Supreme Court of Appeal[184] the argument was that s 3(6) should be restrictively interpreted so that a claimant had to have a claim currently enforceable *in rem* in terms of s 3(4) against the ship concerned before the associated ship provisions in s 3(6) and (7) can come into play. This argument was rejected on the basis that an important indication of Parliament's intention is to be found in s 3(7)*(a)*(i), which provides that an associated ship is a ship, other than the ship concerned, owned at the time the action is commenced, by the person who *was* the owner of the ship concerned at the time when the maritime claim arose. It was held that all that was required for ships to be associated in terms of s 3(7)*(a)*(i) is that they should have a common owner (1) who *was* the owner of the ship concerned when the claim arose and (2) who *is* the owner of the associated ship when the action is commenced by the arrest of the associated ship. With reference to the argument based on the Afrikaans text of s 3(6), it was held that the text is capable of being interpreted to cover a case where an arrest of an associated ship takes place where the ship concerned can no longer be arrested at all because she has sunk, or is no longer in the hands of her owner at the time the claimant's right of action arose (in cases falling under s 3(4)*(b)*) because she has since been disposed of. In such cases, so it was held, it can be said that the associated ship was arrested 'in plaas van' the ship concerned.[185]

IX.7 In *The Cape Courage*[186] the meaning of the phrase 'when the maritime claim arose' in s 3(7)*(a)* came before the court. It was common cause that this had to be decided according to South African law.[187] For the appellant it was argued that the phrase referred to the time when the wrong giving rise to the maritime claims occurred or was committed, and not to the time when the cause of action was completed. Thus a maritime claim arises, so it was argued, when a contract is breached or a delict committed, even if damage is only suffered thereafter. For the respondents it was argued that the phrase refers at the earliest to the time when the claims come into existence, and that the claims in question cannot have come into existence until at least some part of the damages claimed had been suffered. Farlam JA[188] referred with approval to the *dicta*

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[183] At 486B–487J.
[184] 1999 (3) SA 1083 (SCA).
[185] At 1098E–1099A; 1109G–1110A. See also *The Ivory Tirupati* 2003 (3) SA 104 (SCA) at 117J–118B.
[186] 2010 (1) SA 53 (SCA).
[187] See also *The Stella Tingas* 2003 (2) SA 473 (SCA) at 479J; *The Aristides* 2008 SCOSA C 149 (D) at C156H (overruled on another point by the decision in *The Cape Courage* 2010 (1) SA 53 (SCA)).
[188] The judge first disposed of two matters. First, with regard to the reliance by counsel on the decision in *The Forum Victory* 2001 (3) SA 529 (SCA) in which the expression 'a claim which arose' in s 11(4)*(c)* of the Act was held to mean a claim which came into existence, the judge approved the *dictum* of Scott JA at 534G–J of that case that the phrase 'when the maritime claim arose' in s 3(7) and the phrase 'claim which arose' in s 11(4)*(c)* were both ambiguous and that 'there would seem little to be gained by interpreting the one, in its different contextual setting, in order to serve as an aid to the interpretation of the other'. Second, the judge held that the decision in *The Heavy Metal* 1999 (3) SA 1083 (SCA) did not involve a decision on the issue before him, and that the question of the meaning of the phrase 'when the maritime claim arose' would have to be treated as *res nova*.

of Foxcroft J in an unreported case dealing with when a claim could be said to have 'arisen' for the purposes of s 3(7)*(a)*, to the effect that the idea of origin is paramount in the dictionary meanings of the word 'arise'. The judge went on to point out that, leaving aside claims based on a maritime lien, for a maritime claim to be enforced *in rem* the owner of the property arrested must be liable to the claimant in an action *in personam*. Accordingly, it was held by the judge that it is not the offending ship that must be looked at, it is the offending owner or controller who must be looked at, because property owned or controlled by it, in the form of another ship, becomes liable to be arrested when the associated ship provisions are utilised; that it accordingly makes sense, when a claim has 'originated' and enough factors are present to indicate that the owner or controller of the ship concerned has 'offended', that another ship owned or controlled by that person (when the claim is enforced) may be arrested in respect of the claim; that damage resulting from the offending actions or omissions by the owner or controller (or for which it is liable) may not yet have been suffered, but if it is clear that it will in due course be suffered, the claim has 'arisen'. [189] Farlam JA thus held in effect that a claim could be said to have 'arisen' notwithstanding that an element forming part of a complete cause of action had not occurred, provided that the wrong itself had occurred and provided that it was clear that the missing element would in due course occur. While it might be said that the language used by the judge postulates inevitability rather than probability, it is arguable that, on the basis of this judgment, a party seeking to establish an association need only prove that the missing element will, on a balance of probabilities, occur.[190]

IX.8 This decision has been the subject of criticism[191] which has two main facets. First, it is said that the court made no attempt to identify the reasons why the legislature should have intended the phrase 'the claim arose' in s 3(7)*(a)* to bear a different meaning to that ascribed to the phrase where it appears in s 11(4)*(c)* in *The Forum Victory*.[192] Second, it is said that a claim cannot be said to have arisen until it comes into existence, that is, until all its constituent elements have arisen. Until then its existence depends on events which may or may not occur.

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[189] The decision thus overruled the decision of the court *a quo* reported as *The Cape Courage* 2008 SCOSA C124 (D) and overruled the decisions in *The Silver Constellation* 2007 SCOSA C141 (D) and *The Aristides* 2008 SCOSA C149 (D) in regard to the meaning of the words 'claim arose'.

[190] Inevitability may be impossible to establish and runs counter to the accepted standard of proof required to prove an association (see *Bocimar NV v Kotor Overseas Shipping Ltd* 1994 (2) SA 563 (A) at 581B–C) and it may be suggested that the judge would not have intended to alter the accepted standard of proof. In regard to the facts, when the wrongs were committed it would not have been clear how the cause of action would have been completed. The purchaser of the ship concerned could have accepted delivery and claimed damages (as it subsequently did) or it could have repudiated and claimed repayment of the purchase price with or without damages. Thus the judgment appears to contemplate that it will not matter that the exact manner in which the cause of action will be completed is not clear when the wrong is committed as long as it is clear that it will (presumably as a matter of probability) be completed.

[191] See Wallis *The Associated Ship* 173–84.

[192] 2001 (3) SA 529 (SCA). In this case Scott JA held that the phrase 'a claim which arose' in s 11(4)*(c)* of the Act must be construed to mean a claim which came into existence, and not a claim which became enforceable.

IX.9 The decision does represent a substantial departure from a purely literal approach to the construction of s 3(7)*(a)*. The question is whether a departure of this kind can be justified. The proposition that a legal claim comes into existence only when all the elements making up that claim have come into existence is unquestionably correct. The meaning of the word 'claim' does not, however, fall to be considered *in vacuo*. It is the phrase 'when the claim arose' which must be interpreted. The notion of the origin of the claim is, as has been pointed out, closely connected with the concept of a claim arising. Thus if the origin of the claim can be said to be the wrong, the claim may be said to have arisen when that wrong occurred. Fundamental to this reasoning is the validity of equating the origin of the claim with the wrong. The notion of the origin of the claim is an elastic and uncertain concept. For example, it may be said that the origin of the claim is the underlying obligation rather than the wrong constituting the breach of that obligation.[193] It may, however, also be said that philosophical arguments of this kind are, in the context of the section, academic. It is clearly the wrong which is the immediate and crucial originating fact which gives rise to the claim in respect of the ship concerned and thus the associated ship, and in this sense it may be said that the claim arises when the wrong occurs.[194] This interpretation would give effect to the underlying purpose of the Act and the associated ship provisions in particular, which are intended to assist the maritime creditor to obtain payment of its claim.[195] The phrase 'when the claim arose' is at least ambiguous.[196] This makes room for the argument that there is no reason to favour an interpretation that makes recourse against an associated ship dependant upon a complete cause of action having accrued against the ship concerned so that the fact that the cause of action is at that stage incomplete might serve to prevent any recovery by the creditor.

IX.10 The crucial question, however, is whether there is sufficient justification to adopt a construction which involves a departure from the ordinary meaning of the word 'claim' and the meaning attributed to the phrase 'a claim which arose' in s 11(4)*(c)* of the Act.[197] While the

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[193] See Wallis *The Associated Ship* 176–7.

[194] However, in *The Cape Courage* it was held that the claim had arisen because of the occurrence of two circumstances, the commission of the wrong and, in addition, that it was 'clear' that the missing component of the cause of action (*in casu* the existence of damage) would occur. It is submitted that the latter requirement introduces an uncertainty which the legislature is unlikely to have intended. It is submitted that if a broader construction departing from a narrower more literal construction is justified, the construction suggested in the text is the correct one. This construction involves acknowledging that it is possible that the claim may never come into existence and that the ship other than the ship concerned becomes an associated ship in terms of s 3(7)*(a)* before the cause of action against the ship concerned has accrued. But is this fatal to the broader construction? One would think not. If the cause of action is bad in law the claim against the associated ship will not succeed. Similarly, if the action against the associated ship is defective because a component of the cause of action has not occurred, the result will be the same.

[195] See chapter I § VII.4.

[196] See the *dictum* of Scott JA in *The Forum Victory* 2001 (3) SA 599 (SCA) at 534I–J.

[197] It is significant that Scott JA in *The Forum Victory* 2001 (3) SA 529 (SCA) at 535A–E found that a reading of s 11(4)*(c)* together with s 10A(4)*(a)* strongly suggested that the phrase 'a claim which arose' in s 11(4)*(c)* must be

result of the judgment can be supported on the basis suggested in § IX.9 above, it must be acknowledged that the argument that a claim can only be said to arise in terms of s 3 (7)*(a)* once it has come into existence is not without force.

IX.11 In *The F Elephant*[198] the meaning of the phrase 'the claim arose' in s 3(7)*(a)* was considered by Blignault J in a different context. The facts of the case may be summarised as follows. GSSL arrested *The F Elephant*, a ship owned by FEC, as security for a claim it had against GEC on the basis that it was an associated ship of *The Gulf Sheba*. GSSL had chartered the *The Gulf Sheba* to GEC which was, by reason of s 3 (7)*(c)*, deemed to be the owner of *The Gulf Sheba*. GSSL's claims arose out of the charterparty. In terms of an agreement contained in a side letter and entered into by the parties on 28 October 2009, the charterparty was deemed to terminate on the payment of freight to GSSL by a third party. Thereafter, GSSL was to present GEC with a statement of account. In order to succeed in its application and establish that *The Gulf Sheba* and *The F Elephant* were associated ships, GSSL had to prove that its claim arose before the termination of the charterparty and while GEC was still a charterer. Freight was paid on 3 November 2009, on which date, in terms of the agreement, the charterparty terminated. On 29 July 2010 GSSL presented a statement of account to GEC and alleged that GEC owed it an amount in excess of four million US dollars which represented its claim against GEC. GSSL contended that this claim arose no later than the date of the termination of the charterparty. GEC contended that the claim arose only subsequent to the termination and after the accounting had been completed. Blignault J held that the claim in question arose when the agreement was concluded. At that stage the claim was conditional upon payment of the freight and, moreover, the claim would at that stage not have been quantified and could have been met by counterclaims. Blignault J held that the claim came into existence when the agreement was concluded, and that the claim arose at that date[199] notwithstanding that it was conditional. The judge held further that the fact that the claim had not yet at that date been quantified and was potentially subject to set-off, did not destroy its existence in the meantime.[200] Blignault J found, in addition, that even if GSSL's claim against GEC arose after the termination of the charterparty, it was nevertheless subject to the provisions of s 3(7)*(c)* of the Act having regard to

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understood as a claim which came into existence and not as a claim which became enforceable. Those internal contextual features in the form of s 11(4)*(c)* and s 10A(4)*(a)* are of no application in relation to the meaning of the phrase 'when the claim arose' in s 3(7)*(a)*. Thus the rule of construction that where the same words are used more than once in the same statue they are presumed to have the same meaning can have little or no application in the interpretation of the word 'arose' in s 3(7)*(a)*.

[198] Not yet reported.

[199] The judge relied on the decision in *The Forum Victory* 2001 (3) SA 529 (SCA) that a claim can be said to have arisen notwithstanding that it is not yet due.

[200] In this regard the judge referred to the judgment of Farlam JA in *The Cape Courage* 2010 (1) SA 53 (SCA) and stated that Farlam JA's analysis was helpful.

the words 'if at any time' at the beginning of that section.[201] In *The Cape Courage* the Supreme Court of Appeal emphasised the relevance of the notion of the origin of the claim in relation to determining when a claim could be said to have arisen. It may be contended that the origin of the claim was the process of accounting that took place which revealed that a claim did exist. On the other hand, the accounting was no more than a calculation implementing the provisions of the agreement. It can thus be argued, in support of the decision in *The F Elephant*, that the crucial source and origin of the claim was the agreement itself, and the claim thus arose when the agreement was concluded.

IX.12 In *The Bavarian Trader*[202] the contention that a ship can be arrested as an associated ship in terms of s 3(7)*(a)* of the Act where it is also the ship concerned – the ship in respect of which the maritime claim arose – was rejected. It was argued that the ship in question (the ship concerned) was an associated ship in terms of s 3(7)*(a)*(iii) because it was owned by a company controlled by a company which, in terms of the deeming provision in s 3(7)*(c)*, owned the ship concerned when the maritime claim arose. It was held that the words 'instead of' in s 3(6) and the opening words in s 3(7) providing that for the purposes of s 3(6) an associated ship means a ship 'other than the ship concerned' were clear and unambiguous, and while it was in certain circumstances anomalous that the ship concerned could not be arrested as an associated ship, this did not create an absurdity justifying reading words into the Act which were not there. It is submitted that the decision is correct.[203]

IX.13 There are three deeming provisions in the Act giving rise to irrebuttable findings[204] which apply to the associated ship provisions, namely: (i) ships are deemed to be owned by the same persons if the majority in number, 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;[205] (ii) a person is deemed to control a company if he has power, directly or indirectly, to control the company;[206] (iii) a

[201] Counsel for GEC submitted that the sole purpose of the words 'if at any time' in s 3(7)*(c)* is to rebut the suggestion that the deeming provision only applied in cases where the charterparty had been entered into after the amendment of s 3(7)*(c)* in 1992. Reliance was placed on the statement in *The Yu Long Shan* 1998 (1) SA 646 (SCA) at 652I to that effect. Blignault J held that the statement was *obiter* and declined to follow it.
[202] 2010 (4) SA 369 (KZD).
[203] Although not cited by the judge, the general approach adopted is supported by the approach of Corbett JA in *Summit Industrial Corporation v The Jade Transporter* 1987 (2) SA 583 (A) at 596G–597B.
[204] *The Heavy Metal* 1998 (4) SA 479 (C) at 490G–491I; 1999 (3) SA 1083 (SCA) at 1108H–1109A. In this case it was held that s 3(7)*(b)*(ii) of the Act constituted an irrebuttable finding. It is submitted that the reasons furnished for this conclusion apply equally to s 3(7)*(b)*(i) and s 3(7)*(b)*(iii).
[205] Section 3(7)*(b)*(i).
[206] Section 3(7)*(b)*(ii).

company includes any other juristic person and any body of persons, irrespective of whether or not any interest therein consists of shares.[207]

IX.14 In regard to companies, s 3(7)*(b)*(ii) elaborates and refines the concept of control which is expressed in terms of power. If the person concerned has power, directly or indirectly, to control the company, such person is deemed to control the company. 'Power' is not circumscribed in the Act. It could denote the power to manage the operations of the company or the power to determine its direction and fate. Where these two functions happen to vest in different hands, it is the latter which the legislature had in mind when referring to 'power' and hence to control.[208]

IX.15 The reference to 'control' cannot therefore be construed to mean that the day-to-day management or control of a company exercised by directors or other executive officers (as opposed to those controlling the destiny of a company) is the type of control envisaged by the Act.[209] It is not clear whether the decision in *EE Sharp & Sons Ltd v The Nefeli*[210] is compatible with this distinction. The ultimate direct control over a company's affairs is ordinarily exercised by its members by reason of voting rights exercised in general meeting. Although the immediate control may vest in directors they are in the ultimate analysis answerable to the company's members in general meeting.[211] Control of a company may, however, be exercised by persons other than the majority shareholders where the voting rights are not determined by the ownership or control of the majority of the shares.[212] Ships under common management or part of the same fleet are clearly not simply on that account associated ships.[213]

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[207] Section 3(7)*(b)*(iii). Although the word 'deemed' is not used in s 3(7)*(b)*(iii) it has been categorised as a deeming provision; *The Heavy Metal* 1999 (3) SA 1083 (SCA) at 1110C–D.

[208] *The Heavy Metal* 1999 (3) SA 1083 (SCA) at 1105I–1106B; 1112G–H; *The Le Cong* 2005 SCOSA C107 (SCA).

[209] *East Cross Sea Transport Inc v Elgin Brown & Hamer (Pty) Ltd* 1992 (1) SA 102 (D) at 107E–F; *The Sy Sandokan* 2001 (3) SA 824 (D) at 827A–C.

[210] 1984 (3) SA 325 (C). In this case, while it was pointed out that control relates to overall control of the assets or destiny of the company and not to its day-to-day management and administration, the alleged association was held to have been established because the companies concerned had the same president/director who could with his signature bind the companies. The question is not whether an executive officer common to both companies could by his or her signature bind the companies but whether that officer had the power to control the destiny of the companies. It is not clear from the report whether or not this was so.

[211] *The Heavy Metal* 1998 (4) SA 479 (C) at 492D–E.

[212] *Zygos Corporation v Salen Rederierna AB* 1985 (2) SA 486 (C) at 489B–D; *National Iranian Tanker Co v The Pericles* 1995 (1) SA 475 (A) at 485B–C; *Dole Fresh Fruit International Ltd v The Kapetan Leonidas* 1995 (3) SA 112 (A) at 119E–G.

[213] *EE Sharp & Sons Ltd v The Nefeli* 1984 (3) SA 325 (C) at 327B. *Transgroup Shipping v The Kyoju Maru* 1984 (4) SA 210 (D) at 215A–B; 216F–G. See also *The Theokeetor* 1987 SCOSA C82 (D) where it was held that the mere association of ship-owning companies in the pursuit of a common interest does not make the ships they own associated ships.

IX.16 In considering the question of control a court may have to consider the position of a nominee shareholder. A nominee shareholder is a registered shareholder who holds the shares subject to the instructions of the actual or beneficial owner of the shares.[214] In circumstances such as these the question may arise as to who has the power to control a company – either directly or indirectly – for the purposes of s 3(7)*(b)*(ii).

IX.17 The distinction drawn by the legislature between direct and indirect power was considered by the Supreme Court of Appeal in *The Heavy Metal*.[215] Smalberger JA, who delivered the majority judgment, stated that control is expressed in terms of power,[216] and held that the distinction drawn by the legislature between direct and indirect power must be given meaning; that indirect power refers to the person who *de facto* wields power through, and hence over, someone else; that the latter can only be someone who wields direct power vis-à-vis the company and the outside world and who therefore in the eyes of the law (ie *de jure*) controls the shareholding and thus determines the direction and fate of the company; that in given circumstances the same person may exercise both *de facto* and *de jure* control; that direct power therefore refers to *de jure* authority over the company by the person who, according to the register of the company, is entitled to control its destiny; that indirect power refers to the *de facto* position of the person who commands or exerts authority over the person who is recognised to possess *de jure* power (the beneficial 'owner' as opposed to the legal 'owner'); that this extension of *de jure* power to *de facto* power reflects the object of the section, namely, to prevent the true 'owner' from presenting a false picture to the outside world by concealing his assets from his creditors. Thus it was held that if the person who has *de jure* power controls, at the relevant times, the company owning the ship concerned and the company owning the alleged associated ship, the statutory nexus between the two companies will have been established. On the other hand, if *de jure* control of the respective companies vests in different hands, it would still be open to the applicant for arrest to show that the same person was *de facto* (indirectly) in control of both and, in this case too, the required statutory nexus will have been established. The Act, by referring to a direct and indirect power to control, contemplates two possible repositories of power, one *de jure* and one *de facto*.[217]

IX.18 The minority took a different view. Farlam AJA held that the reference to the 'power directly to control' is a reference to real control exercised by the majority shareholder not subject to any outside control while the reference to the 'power indirectly to control' is a reference to real control exercised by a person through the majority shareholder. According to the judge there was only one criterion, namely, power to control and, whether it is directly or indirectly exercised,

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[214] Compare *The Eleftherotria (No 2)* 1995 SCOSA C5 (D) at C9F. This case was concerned with s 3(7)*(a)*(ii) and s 3(7)*(b)*(ii) of the Act before the 1992 amendment of s 3(7).
[215] 1999 (3) SA 1083 (SCA).
[216] At 1105I–J.
[217] At 1106C–1107F.

there can be only one person who has it for the purposes of the subsection.[218] Marais JA took the same view and held that the purpose of the subsection is to allow a claimant to pierce the veil of apparent or ostensible power to control a company and so reveal the identity of the real holder of the power to control the company. The judge held that the inclusion of the words 'directly or indirectly' distinguished two manifestations of real power to control, either of which would suffice to trigger the operation of the deeming provision – the words were intended to emphasise that the true *situs* of the power to control, whether direct or indirect, is what matters for the purposes of the subsection.[219]

IX.19 The view of the majority is far reaching. For example where X, a nominee majority shareholder in company A, required to vote as directed by Y, is also a nominee majority shareholder in company B, required to vote as directed by Z, a ship owned by company B can be arrested as an associated ship in respect of a claim against a ship owned by company A. There is much to be said for the view that in truth X exercises no control over either company. The majority would, however, hold that X exercises *de jure* control as opposed to *de facto* control. It is submitted that this is not, however, the import of the section, which is capable of the perfectly sensible construction – consistent with the underlying purpose of the associated ship provisions – that real control may be direct or indirect.[220]

IX.20 The central theme of the majority judgment is that s 3(7)*(b)*(ii) draws a distinction between direct and indirect power to control a company, that effect must be given to this distinction, and that this is achieved by equating direct power with the person who *de jure* (that is, in the eyes of the law) wields that power, whereas the holder of indirect power refers to the person who *de facto* wields real power through the person who has *de jure* power. On this basis the person having *de jure* power will have only apparent and not real power. There are thus, according to the majority, two repositories of the power to control, either of which can be relied upon in order to establish the existence of an association.

IX.21 There are two immediate responses which the above view of the majority give rise to.

IX.22 The first relates to the literal construction of s 3(7)*(b)*(ii). In terms of the section a person is deemed to control a company only if he or she has the power to control the company (either directly or indirectly). It is the common existence of that power that underpins the existence of an association and which must be found to exist. A person such as the person said to have *de jure* power, where *de facto* (actual) power is exercised by someone else, is not a person having power

[218] At 1104B–G.
[219] At 1112F–1113F.
[220] See Wallis *The Associated Ship* 206–22 for a detailed critique of the decision.

to control the company either directly or indirectly and is thus not a person falling within the scope of the section.

IX.23 The second response may be framed as follows. Why should the legislature, in stipulating the circumstances which will give rise to an association, be concerned with who wields apparent power over a company as opposed to who wields real power?[221] It can surely be assumed that the legislature, in attributing liability to an associated ship, would only do so in circumstances where a meaningful nexus through the exercise of power exists, and not on the basis of persons such as common nominees who hold no power to control at all. A finding that the latter circumstance is sufficient to warrant the conclusion that an association exists could, it is submitted, be arrived at only on the basis that no other more appropriate construction can be attributed to the words 'directly' and 'indirectly.' In addition, the view of the majority leads to results which are far reaching and even unfair. The latter aspect is trenchantly dealt with by Marais JA as follows:[222]

> The purpose of the provision is not to create a fiction which could place innocent third parties in jeopardy of having their ships arrested to secure payment of claims brought against persons or ships of whose existence they were quite oblivious. That would be tantamount to naked confiscation without compensation – a purpose which one shies away from attributing to the Legislature unless that is unmistakenly what it intended.[223]

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[221] Smalberger JA at 1107D–F stated: 'If there can only be one repository of power … it would follow that the person who has *de jure* control could be ignored once it has been established that someone else has *de facto* power. This would appear to be contrary to the clear wording of the subsection. By using the words 'directly or indirectly' the legislature clearly intended to extend and not restrict the expression 'power to control'. With respect, this passage exposes the underlying fallacy in the judgment. The fact that where *de facto* power exists *de jure* power can be ignored is in no way contrary to the wording of the section and the use of the phrase 'directly or indirectly', nor does that phrase restrict the expression 'power to control'. The judgment fails to recognise the fact that there is another construction (that adopted by the minority) in terms of which *de jure* power can be ignored without failing to give meaning to both the words 'directly' and 'indirectly', and that the phrase 'directly or indirectly' can indeed serve to extend the meaning of the power to control so as to embrace two forms of real control.

[222] At 1111F–G.

[223] Smalberger JA at 1107F–H met the argument that the result of his view was bizarre or unfair by stating that if that was so it was the direct and foreseeable consequence of a shipowner electing to operate behind a cloak of secrecy, and that it was precisely for that reason, because the creditor is at such a disadvantage in tracing the assets of the debtor, that the section is worded as it is. The judge was of the view that the result is not as unfair as it may at first blush seem, because it lay within the power of the shipowner to arrange its affairs so as to avoid any prejudicial consequences. Marais JA at 1112I–J pointed out, however, that there is nothing reprehensible in nominee shareholdings, that the reasons they may be resorted to are legion, and that the interpretation to be given to the section cannot be grounded upon an assumption that there must always be some disreputable purpose lurking behind their use. From a practical point of view, moreover, the only way in which a shipowner can avoid the potentially prejudicial results flowing from the majority judgment would be to avoid altogether the creation of nominee shareholdings.

It has, moreover, been pointed out[224] that the construction adopted by the majority could amount to an arbitrary deprivation of the owner's property rights in the associated ship and, consequently, that an interpretation which avoids that result should, on constitutional grounds, be adopted.[225] The fact that the owner of the associated ship can obtain the immediate release of its ship by providing security does not, it is submitted, detract from the fact that the initial arrest constitutes an arbitrary deprivation of property.

IX.24 It is submitted that the minority judgments demonstrate that there is indeed another construction that can be given to the words 'power, directly or indirectly to control the company', and that that other construction is the appropriate one, namely, that real power to control the company can be direct or indirect. It is submitted that there can be little doubt that this construction trumps that adopted by the majority, which fails to give effect to the underlying rationale of the existence of an association, and which leads to results which are difficult to justify and probably also unconstitutional.

IX.25 In *The La Pampa*[226] the court had to deal with a situation where two parties each owned 50 percent of the shareholding of a company. It was argued that both indirectly controlled the company because the company could not do anything of any significance without the concurrence of each of them. Tshabalala JP held, however, that a person holding 50 percent of the shareholding cannot be said to exercise control since no resolution binding the company could be taken by such a person.

IX.26 Where a claimant proceeds against an associated ship *in rem*, the associated ship takes the place of the offending ship as defendant in the action and the action is against a different defendant.[227] It is the associated ship which provides security for the claim and it is the associated ship against which execution will be levied if the claim is successful. Section 3 of the Act must be read as a whole, and the limitations contained in s 3(4) must be read subject to the provisions of s 3(6) and (7).[228] In other words, an action *in rem* may be brought against an associated ship notwithstanding that the claimant enjoys no lien over the ship, and notwithstanding that the owner of the associated ship would not be liable to the claimant *in personam*.

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[224] By Wallis *The Associated Ship* 210–11.
[225] Sections 25(1) and 39 of the Constitution.
[226] 2006 (3) SA 441 (D). See also *The Berg* 2009 SCOSA B416 (C).
[227] *Euromarine International of Mauren v The Berg* 1984 (4) SA 647 (N) at 655H–I. *The Iran Dastghayb* 2010 (6) SA 493 (SCA) at 500A–501E.
[228] *Euromarine International of Mauren v The Berg* 1984 (4) SA 647 (N) at 654E–F.

IX.27 In *The Fortune 22*[229] Thring J held that the use of the words 'instead of' in s 3(6) make it clear that the claimant has an election and can proceed either against the ship concerned or the associated ship; once the claimant proceeds *in rem* against the one, the claimant cannot proceed *in rem* against the other; s 3(6) provides a claimant with an alternative rather than an additional defendant. The judge held that even where the ship concerned is arrested in a foreign jurisdiction, an associated ship may not thereafter be arrested in this jurisdiction.[230] The claimant can, however, still proceed against the owner of the ship concerned *in personam*. Moreover, on the basis of this decision, where proceedings are brought *in rem* against an associated ship, only one associated ship may be proceeded against.[231]

IX.28 This decision has been criticised.[232] Notwithstanding the correctness of the criticism in regard to Thring J's reasoning in certain respects,[233] the question remains, independently of the correctness of the decision, whether Thring J was correct in respect of the two main questions of interpretation which were the subject of his decision. First, if a creditor proceeds against the ship concerned, can it thereafter, in respect of the same cause of action, proceed against an associated ship or, if it proceeds against the associated ship, can it thereafter proceed against the ship concerned? Second, is s 3(6) applicable to foreign arrests?

IX.29 With regard to the first point it is said that Thring J in *The Fortune 22* was wrong in concluding that s 3(6) postulated a choice and that only one ship could be arrested. The thrust of this view is that while the words 'instead of' ('in plaas van' in the signed Afrikaans text) do postulate some kind of alternative, they were not intended to provide for alternative defendants (ships), but were intended to provide for an alternative procedure to that provided for in s 3(5), namely, a different way in which an action *in rem* can be brought. In this regard it is contended that there is an important reason for using the words 'instead of' which has nothing to do with the claimant having to make an election. Rather, those words are used to make it clear that it is only in relation to the arrest of a ship, as opposed to the other categories of property referred to in s 3(5), that the alternative method of proceeding – the claim against the associated ship – is

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[229] 1999 (1) SA 162 (C).

[230] Thring J pointed out that proceedings *in rem* are often international in their operation and effect in the sense that *peregrini* often find themselves litigating with one another in foreign courts and the judge could find no reason why the legislature in enacting s 3(6) would wish to close its eyes to foreign arrests (at 165H–166B).

[231] Compare Shaw *Admiralty Jurisdiction and Practice* 37. The author states that the use of the singular in the phrase 'an associated ship', despite s 6*(b)* of the Interpretation Act 33 of 1957, is intended to convey the singular and not the plural. The author refers in this regard to the decision in *The Banco* [1971] 1 Lloyd's Rep 49 (CA) where a similar approach was adopted in interpreting s 3(4) of the English Administration of Justice Act 1956.

[232] By Wallis 'The Fortune 22' (2000) *LMCLQ* 132; *The Associated Ship* chapter VIII.

[233] Thring J erroneously thought that he was compelled to apply English law because of the provisions of s 6(1) of the Act. As pointed out by Wallis *The Associated Ship* 255–6, the 'matter' to be decided was the scope of s 3(6) which provided for the arrest *in rem* of an associated ship. That was clearly not a matter in respect of which an admiralty court would have had jurisdiction immediately before the commencement of the Act, and there is thus no room for the application of s 6(1) of the Act.

permitted.[234] This contention cannot be sustained as the words 'instead of' are quite unnecessary for this purpose. In s 3(7), which defines what is meant by an associated ship, the legislature made it clear that an associated ship is one other than, and having a particular association with, another ship, namely the ship concerned, and not any other category of property referred to in s 3(5). Another reason is suggested for the inclusion of the words 'instead of' in s 3(6). It is stated that to omit these words would create an uncomfortable conflict between the peremptory language of s 3(5) ('shall') and the permissive language of s 3(6) ('may').[235] It is submitted that this statement fails to carry conviction as an aid to interpretation. If the words 'instead of' to the end of the sentence were to be omitted, there can be no doubt that a court construing these sections would have no difficulty in interpreting s 3(6) as qualifying s 3(5). Moreover, reference to the Afrikaans text (the signed text) makes this just as clear. The relevant part of this text reads

> Behoudens die bepalings van subartikel (9) *kan* in aksie *in rem* … ingestel word deur die inbeslagneming van 'n geassosieerde skip in plaas van die skip ten opsigte waar van die maritime eis ontstaan het. (emphasis supplied)

In other words, while s 3(5) provides for the arrest in an action *in rem* of the ship concerned, s 3(6) provides that such an action can (is able to) be brought against an associated ship. The qualification of s 3(5) by s 3(6) is self-evident and clear without recourse to the words following the words 'in plaas van' which are not necessary to avoid any conflict. On the other hand, those words are entirely consistent with an intention to provide that either the ship concerned or the associated ship can be proceeded against. Furthermore, had the legislature comprehended the possibility of multiple arrests, the words 'in addition to' would have appeared in the section rather than the words 'instead of'. It is suggested that neither of these reasons provide an explanation for the inclusion of the words 'instead of' in the section and do not serve to supplant the reason for their inclusion furnished by Thring J.

IX.30 The argument that the meaning to be ascribed to s 3(6) depends on the broader context, more particularly that the purpose of the associated ship provisions, and indeed the Act, is to assist the creditor to obtain payment of its claim is at first blush a plausible one. By forcing the creditor to make a choice which is irrevocable, so it is contended, the underlying rationale of the associated ship provisions is thwarted. On the other hand, the interpretation that s 3(6) merely postulates an alternative way of proceeding *in rem*, without holding the creditor to an irrevocable choice, has the result that if the one procedure does not result in the satisfaction of its claim, the creditor can pursue the other in an attempt to obtain satisfaction. This, so it is said, gives effect to the purpose underlying the associated ship provisions.

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[234] Wallis *The Associated Ship* 254.
[235] Wallis *The Associated Ship* 254–5.

IX.31 On the other hand, the frame of s 3(6) fits comfortably with the interpretation adopted by Thring J. The words 'instead of' are used directly in connection with the two categories of ship (the possible defendants) and this interpretation seems to be the natural reading of s 3(6). This no doubt is why Shaw[236] (before the decision in *The Fortune 22*) and Hare[237] (before and after that decision) took the same view as to the meaning of s 3(6) as did Thring J in *The Fortune 22*. This approach finds support in the fact that had the legislature intended that the choice of the one procedure would not preclude the use of the other, the concluding words of s 3(6) 'instead of the ship in respect of which the maritime claim arose' could simply have been omitted. Moreover, had the legislature intended to provide two ways in which an action *in rem* could be brought without putting the creditor to an election, it would have been unnecessary to include words such as 'instead of' or indeed to refer to the ship concerned at all. It would have been sufficient for the relevant part of s 3(6) to have been framed along the following simple lines: 'In addition to s 3(5) an action *in rem* may be brought against an associated ship.' No more would be required. Section 3(7), after all, defines what is meant by an associated ship and the relationship which must exist with the ship concerned in order to result in the necessary association. It is of course so that s 3(5) and s 3(6) must be read together. However, the specific reference to the two categories of ship separated by the words 'instead of' does not seem to constitute a natural way of prescribing two ways in which proceedings *in rem* can be brought, but does constitute a natural way of providing that the action can be brought against the one category of ship or the other category.[238]

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[236] *Admiralty Jurisdiction and Practice* 37.

[237] *Shipping Law and Admiralty Jurisdiction* 2 ed 106. The author states with reference to the wording in s 3(6): 'this wording makes it clear that the associated ship procedure displaces the claimant's alternative rights to proceed by way of maritime lien or statutory right *in rem* against the actual ship in relation to which the claim arose. The claimant must choose either to pursue the 'guilty' ship or to tackle the 'associated' ship. Once proceedings have been commenced against the associated ship, the claimant may not then proceed against the guilty ship. Conversely, where the guilty ship has been arrested, even if in another jurisdiction, an associated ship may not also thereafter be arrested.' The same wording appears in the author's first edition at 79 except that in the later edition the words 'even if in another jurisdiction' are added.

[238] In the same way as the word 'or' separating the two categories of ships referred to in s 3(4) of the English Administration of Justice Act 1956 was held to mean that the admiralty jurisdiction *in rem* may be invoked either against the offending ship or against any other ship in the same ownership (the 'sister ship') but not against both. The claimant had an election. See *The Banco* [1971] I Lloyd's Rep 49 (CA). This approach gave effect to the Arrest Convention (the International Convention for the Unification of Certain Rules Relating o the Arrest of Seagoing Ships 1952). Section 21(8) of the English Supreme Court Act 1981 also provides for only one arrest but, like the Arrest Convention, makes provision for exceptions. It is so that the purpose and the context relating to the Arrest Convention and the English legislation referred to differ from the purpose and context relating to the associated ship provisions in the Act. The Arrest Convention and the English legislation can thus be of little direct help in interpreting the associated ship provisions of the Act. It is, however, also so that the legislature must be taken to have been aware of the Convention and this legislation and the extension of the power of arrest they represented. (Compare *Great River Shipping Inc v Sunnyface Marine Ltd* 1992 (2) SA 87 (C) at 91B–C referred to in *The Fortune 22* at 166B–C.) They clearly represent the background to and inspiration for the more extended powers contained in the associated ship provisions in the Act. It is thus entirely legitimate to have regard to this background

IX.32 The criticism, as pointed out above, emphasises the remedial purpose which underpins the Act and the associated ship provisions, namely, to assist the creditor in securing payment of its claim. Of course this is so. This purpose, it is said, will be achieved if multiple arrests are permitted and thwarted if they are not. Equally, however, that purpose is achieved – admittedly with less far-reaching effect – by providing the creditor with an alternative target in the form of the associated ship. This is important because if the ship concerned is elusive and cannot be arrested, recourse can be had against any other ship which comes into the jurisdiction under the same ownership/control. In this regard it must be remembered that s 3(6) is dealing only with an action *in rem*. The contention that multiple arrests *in rem* are not possible in terms of s 3(6) must be viewed in the light of the fact that there is nothing to prevent the creditor who has arrested an associated ship from thereafter attaching the ship concerned in respect of the balance of its claim in an action *in personam*, or where the ship concerned has been arrested, from attaching other ships or assets owned by the defendant. The creditor's best scenario is, of course, to be able to make multiple arrests *in rem* and to be able to proceed *in personam*. The crucial question, however, is whether s 3(6) falls to be interpreted not only to provide the creditor with an alternative defendant, but also to provide for multiple arrests *in rem*.

IX.33 In *The Multidiamond* it was argued that the view of Thring J with regard to the meaning of s 3(6), namely, that multiple arrests are not permitted, was wrong. The argument was not upheld and Thring J's view was endorsed. While the view that the creditor should not as a matter of policy be limited to a single arrest is appealing,[239] this view is, it is submitted, not sufficiently

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at least to the extent that it can correctly be observed that had the legislature intended to distance itself from this background and provide for multiple arrests, and not for the arrest of either the one ship or the other, it would, as pointed out by Thring J, have sought to make this clear and would not have used the expression 'instead of' in relation to the two categories of ship referred to in the section. There is a further background feature of relevance. One of the fundamental purposes of the action *in rem* is to create a charge against, or security interest in, the *res* in respect of which the cause of action exists. The security interest so created accrues against a particular ship so that the action could, before the commencement of the Act, be brought against one ship only. The effect of the associated ship provisions is to provide a different defendant (ship) as a target for the claim – *Euromarine International of Mauren v The Berg* 1984 (4) SA 647 (N) at 659E–F; 1986 (2) SA 700 (A) at 712C–D – so that the defendant ship becomes subject to the security interest created by the action in the same way as the ship concerned would have been had the action been brought against it. This would appear to provide some support for the view that, in the absence of indications to the contrary, and consistently with the nature of the action before the Act, only one ship can be proceeded against in an action *in rem*, whether the action is brought against the ship concerned or the associated ship.

[239] General policy considerations can be resorted to only in cases where, despite recourse to linguistic and contextual considerations, there remains a real doubt as to the legislature's intention. Moreover, in relying upon a particular policy consideration in seeking to determine the legislature's intention, care must be taken to consider whether or not competing policy considerations exist. Thus while it is so that the aim of the Act and the associated ship provisions are intended to assist the maritime creditor to obtain payment in respect of its claim, when one comes to consider how far that aim should extend, there are other general policy considerations which fall to be considered. The first such consideration is that the arrest of a ship is a serious step with drastic consequences for shipowners, charterers,

supported by the frame and language of the section to prevail, allied to the fact that, had the legislature intended to provide for multiple arrests, it would surely have used very different language and could very easily and simply have made its intention clear. It is accordingly submitted that the current view that multiple arrests are not permitted is likely to continue to prevail.

IX.34 The further question which arises is whether, in considering whether or not a creditor who has made an arrest is prohibited from making a further arrest, it is permissible to have regard to a foreign arrest. As pointed out above, Thring J supported his view by referring to the fact that arrests are often international in their operation and that *peregrini* frequently find themselves litigating with one another in foreign courts. Such litigation, said the judge, by its very nature, is subject to less in the way of territorial restrictions than is municipal litigation. It was thus held that in considering the application of s 3(6), it was legitimate to have regard to the existence of a foreign arrest. Wallis, in criticising this view, recognises the relevance of a foreign arrest in that to ignore it might make it oppressive to grant the arrest sought in this jurisdiction. That situation, he suggests, can be met *inter alia* by staying the local proceedings in terms of s 7(1)*(b)* of the Act.[240] In other words, the rejection of Thring J's view that multiple arrests are not permitted would, so the argument goes, not leave the defendant without any remedy where a further arrest would be inappropriate.

IX.35 For the same reasons as set out in § IX.34 above Thring J held that, in considering s 3(8) of the Act, foreign arrests are not excluded. Wallis's response to this proposition is that it is

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cargo interests and mortgagees (compare the oft-cited passage in *Katagum Wholesale Commodities Co Ltd v The Paz* 1984 (3) SA 261 (N) at 269H–270B.) Furthermore, the provisions of the Act in prescribing a statutory mode of piercing the corporate veil go further in this regard than any other major maritime nation has been prepared to go, in that in our law common control is treated as a sufficient reason to arrest a ship other than the ship concerned. (See the comments of Farlam AJA in *The Heavy Metal* 1999 (3) SA 1083 (SCA) at 1096J.) Thus the category and number of ships that can be subject to arrest is already, and without having regard to the possibility of multiple arrests, extensive. The existence, in addition, of multiple arrests will serve to widen the disparity between our law and that of the other maritime nations. Compare the comments of Farlam AJA in *The Heavy Metal* at 1096–1097D. In that case Farlam AJA accepted that s 3(6) is modelled on article 3(1) of the Arrest Convention although, as the judge pointed out, the section extends the sister ship concept. Farlam AJA had previously referred to the statement in the South African Law Commission's Report on the Review of the Law of Admiralty Project 32 at 13 that it was desirable that there should be as great a degree of consistency as can be achieved with other systems of maritime law. Thus, so it may be argued, our courts should lean against extending the powers of arrest in this regard. On the other hand, Wallis, in criticising the judgment (see *The Associated Ship* 237), has pointed to the dangers of referring to the events and circumstances before the commencement of the Act in order to interpret the provisions of the Act relating to the arrest of associated ships which are designed to introduce a new dispensation and a radical departure from the existing law. What all this seems to add up to is that the immediate linguistic and contextual considerations – which it is submitted, provide support for the view of Thring J – should be resorted to rather than placing emphasis on a particular policy consideration to the exclusion of others which may accordingly be an unsafe guide in seeking to determine the legislature's intention.

[240] Wallis *The Associated Ship* 259–60.

wrong and that there are other remedies available to the defendant under the Act in respect of a further arrest in the jurisdiction which is considered to be inappropriate or oppressive. The defendant can, so it is argued, invoke either s 7(1)*(a)* or s 7(1)*(b)* and request the court either to decline to exercise its jurisdiction or to stay the proceedings, or exercise its powers under s 5(2)*(c)* to order that the local arrest be subject to the condition that the security obtained under the earlier arrest be released or discharged. (What would under the common law constitute the defence of *lis alibi pendens* would in an admiralty case be part of an application that the court decline to exercise its jurisdiction or that the proceedings be stayed). It is contended that it would be preferable in deciding whether the local arrest should be granted or maintained, to allow this to be dealt with under the discretion which the court enjoys under the Act rather than interpreting s 3(8) to comprehend the foreign arrest, so that the local arrest is without more ado simply prohibited by s 3(8).

IX.36 The fact that other remedies are available to a defendant does not mean that s 3(6) and s 3(8) do not comprehend foreign arrests and do not themselves prohibit a second local arrest. The question still remains – is a local arrest prohibited where a previous foreign arrest has been made? The answer to this question in relation to s 3(8) has limited importance. The section only applies to the circumstance where both an arrest has been made and security has been furnished.[241] Moreover, s 3(8) prohibits the arrest only of the same property previously arrested.[242] The section refers only to the arrest of property, and the prohibition does not extend to attachments.[243]

IX.37 While the status of foreign arrests is of little importance in relation to s 3(8), it is of considerable importance in relation to s 3(6). It is submitted that if Thring J was correct in deciding that s 3(6) does not permit multiple arrests, the failure to consider the existence of a foreign arrest for the purposes of the application of the section would seriously undermine the policy considerations underpinning the judge's decision, and his further view that s 3(6) contemplates foreign arrests would, it is submitted, be correct. If, however, the correct view is that s 3(6) contemplates multiple arrests, so that there is no outright prohibition on more than one arrest, the question whether a local arrest should be permitted where there has been a foreign arrest should be dealt with by the court as a matter of discretion under s 7(1) of the Act.

IX.38 In *The Ivory Tirupati*[244] it was argued that a foreign judgment (flowing from an arrest *in rem*) in respect of damage to cargo could not be enforced by the arrest of an associated ship in the Republic because of the prohibition inherent in s 3(6), namely, the prohibition against bringing the same action *in rem* twice, once against the guilty ship and thereafter also against an

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[241] See § V.4 above.
[242] See § V.4 above and Wallis *The Associated Ship* 247.
[243] See n 99 above.
[244] 2003 (3) SA 104 (SCA).

associated ship. The Supreme Court of Appeal held that the finding of the court *a quo*[245] that the arrest of the associated ship did not fall to be set aside because the subsequent arrest of the associated ship (in respect of the enforcement of a judgment) was not in respect of the same maritime claim as the earlier arrest (in respect of damage to cargo) was erroneous. On behalf of the appellant it was argued that the subsequent arrest fell to be set aside because, although based on a judgment, the judgment simply reinforced the original cause of action, the enforceable right remaining the same in respect of both arrests. The same reasoning was relied upon in support of the further argument that the subsequent arrest was in conflict with the prohibition in s 3(8) of the Act (security having been furnished in respect of the earlier arrest). These arguments were rejected on the basis that the judgment not only strengthened the cargo claim but also gave rise to a new cause of action enforceable in another court. The subsequent arrest of the associated ship was thus not in respect of the same cause of action as the earlier arrest and was not prohibited by either s 3(6) or s 3(8). This conclusion rendered it unnecessary for the court to consider the argument that the decision in *The Fortune 22* was incorrect.

IX.39 Section 3(7)*(c)* of the Act provides that if at any time a ship was the subject of a charterparty, the charterer or subcharterer, as the case may be, shall for the purposes of s 3(6) and (7) be deemed to be the owner of the ship concerned in respect of any maritime claim for which the charterer or the subcharterer, and not the owner, is alleged to be liable. Thus, if a ship is owned by A but chartered to B and a creditor has a maritime claim arising in connection with the ship in regard to which B is alleged to be personally liable, then other ships owned or controlled by B and not A will be liable to arrest as associated ships.

IX.40 In regard to demise charters,[246] s 1(3) of the Act provides that for the purposes of an action *in rem*, a charterer by demise shall be deemed to be, or to have been, the owner of the ship for the period of the charter by demise. In the first edition of this book reference was made to the wide wording of the section which could be supportive of the view that the section applied not only to the ship concerned, but also to the issue of association. It was, however, submitted that unless s 1(3) is restrictively construed to apply only to claims *in rem* against the ship concerned in respect of which the charterer is liable, the section would have far-reaching results. Thus, on a literal construction, the real owner of the ship who charters it by demise runs the risk of it being arrested by reason of the charterer at some stage, possibly even before the conclusion of the demise charter, having attracted liability in respect of another ship, either owned or chartered by demise by the demise charterer. It was accordingly submitted that it seemed unlikely that this was contemplated. This passage was quoted with approval by Smit AJ in *The Pacific Yuan Geng*,[247]

[245] 2002 (2) SA 407 (C).
[246] See chapter II § III.37.
[247] 2009 SCOSA C176 (C).

where he held that the deemed ownership provided for in s 1(3) was not applicable to the issue of association. [248]

IX.41 Before the 1992 amendments to the associated ship provisions, it was held that these provisions conferred a right on a claimant which the claimant did not have before the commencement of the Act and provided the claimant with an additional or alternative defendant. It was accordingly held that they created substantive rights and hence were not retrospective.[249] Similarly, the amended provisions of s 3(7) introduced in 1992 cannot be invoked in relation to claims which arose before the amendment took effect.[250]

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[248] The judge rejected the literal approach to the construction of the section and the argument that, because s 1(3) was part of the definition section of the Act, it was applicable to all proceedings *in rem i*ncluding proceedings *in rem* brought in terms of s 3(6) and s 3(7) of the Act. The decision was based on two grounds. First, it was held that, because of the far-reaching results flowing from the adoption of a literal construction which did not limit the scope of the application of the section, such a construction was probably not contemplated by the legislature. Second, it was held that had the legislature intended the deemed ownership provided for in s 1(3) to be applicable to the issue of association it would have said so, the judge apparently adopting the argument that this would have been specifically incorporated in the associated ship provisions. In respect of the latter it may be contended with some force that the legislature did make s 1(3) applicable to s 3(6) and (7) by including s 1(3) in the definition section of the Act. With regard to the former ground, it was not specifically held that the literal construction of the Act resulted in an absurdity justifying its rejection and the adoption of a construction cutting down the scope of the section by excluding its application to the issue of association contained in s 3(6) and (7). It is at least arguable that this result can be achieved only by reading words of limitation into the section (compare *Summit Industrial Corporation v The Jade Transporter* 1987 (2) SA 583 (A) at 596G–597B). While there may thus be some debate as to whether the limitation placed by the court on the scope of the section can be justified, the result is a happy one. The decision may, in addition, be supported on constitutional grounds, having regard to the absence of a meaningful nexus between the owner of the arrested ship and the claim, so that the arrest would constitute an arbitrary deprivation of the owner's property. The decision was followed and applied in *The Chenebourg* 2009 SCOSA C183 (KZD) by Kruger J who emphasised the need to have regard to context in order to arrive at the legislature's intention. Compare *First National Bank of SA v Commissioner SARS* 2002 (4) SA 768 (CC) at 814H–815C. For further discussion of s 1(3) see § V.18 above.

[249] *Euromarine International of Mauren v The Berg* 1986 (2) SA 700 (A). See also the judgment of Milne JP in the court *a quo* reported in 1984 (4) SA 647 (N). The earlier view taken in *Transgroup Shipping SA (Pty) Ltd v The Kyoju Maru* 1984 (4) SA 210 (D) that the provisions of s 3(6) and (7) are procedural and therefore retrospective in their operation has therefore not prevailed.

[250] *National Iranian Tanker Co v The Pericles* 1995 (1) SA 475 (A); *The Yu Long Shan* 1998 (1) SA 646 (SCA) at 648I–649B. In the latter case the court was concerned with a cause of action which arose before the amendment giving rise to an arbitral award delivered after the amendment. When the cause of action arose there was no right to proceed against an associated ship of a charterer other than a demise charterer. Such right was conferred in terms of the 1992 amendment. It was argued, in support of the arrest, that no question of retrospectivity was involved as the arbitral award in question arose after the amendment. The court however held that this argument ignored the derivative nature of an arbitral award or judgment, both of which constituted pronouncements of liability in respect of the cause of action ventilated in the proceedings; that if the cause of action would not have given a right against a ship when it arose, such right was not acquired merely because the cause of action was subsequently upheld at a time when it was recognised that such right did exist.

IX.42 An applicant for arrest or attachment, apart from proving a *prima facie* case on the merits, must establish the other requisites for the relief claimed on a balance of probabilities.[251] It follows that, in order to arrest or attach an associated ship, the applicant must prove on a balance of probabilities that the ship the applicant seeks to arrest or attach is an associated ship of the ship concerned.[252] If an application is made for the release of the ship the onus remains on the party effecting the arrest or attachment to justify the arrest or attachment.[253]

IX.43 It frequently happens that questions of ownership and control arise in relation to foreign ships alleged to be owned and controlled by foreign entities and, in many cases, in states having political systems differing radically from the political system existing in the Republic. Where the arrest or attachment of a ship alleged to be an associated ship is involved, the court may be faced with conflicting evidence by foreign experts on affidavit on questions of control. In such cases the rule in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*[254] is applicable. Thus regard must be had to the averments as to foreign law in the applicant's affidavits (the respondent's affidavits in the proceedings to set aside the arrest) which are admitted by the respondent (the applicant in the setting aside proceedings) together with the averments in the respondent's affidavits (the applicant in the setting aside proceedings). Where, however, the foreign law is statutory a court will not simply accept the averments made in the affidavits, but will itself examine the relevant statutes and, as far as possible, arrive at its own conclusion. The extent to which a court will rely on the evidence of experts when interpreting a foreign statutory provision will to a large extent depend on the system of law in question. The statutory provision must be interpreted as it would be by the courts of the country in which it is enacted. The closer the system of law is to that existing in the Republic the more readily a court in the Republic will rely on its own judgment. Difficulties will, however, arise where the foreign legal system has constitutional and social structures vastly different from those existing in the Republic. A court may be reluctant to form its own view where there is conflicting expert evidence and where the foreign statutes do not appear to be decisive one way or the other. In these circumstances the court may simply apply the rule in *Plascon-Evans*, resulting in the applicant for arrest having failed to prove common control and consequently having failed to show that the ship in question is an associated ship.[255]

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[251] *Lipschitz v Dechamps Textiles GMBH* 1978 (4) SA 427 (C) at 429F–G; *Chattanooga Tufters Co v Chenille Corporation of SA* 1974 (2) SA 10 (E) at 12; *Njikelana v Njikelana* 1980 (2) SA 808 (SE) at 810F–G; *Transgroup Shipping v Owners of the Kyoju Maru* 1984 (4) SA 210 (D) at 214I; *Zygos Corporation v Salen Rederierna AB* 1985 (2) SA 486 (C) at 493G–H.

[252] *Bocimar NV v Kotor Overseas Shipping Ltd* 1994 (2) SA 563 (A) at 581B–C; *The Alam Tenggiri* 2001 (4) SA 1329 (SCA) at 1334G–H; *The Le Cong* 2005 SCOSA C107 (SCA) at C110.

[253] See § X.37 below.

[254] 1984 (3) SA 623 (A).

[255] *The Le Cong* 2005 SCOSA C107 (SCA).

IX.44 In *Zygos Corporation v Salen Rederierna AB*[256] it was argued that if the court should find that the onus of proving the alleged association had not been discharged on the papers, the court should direct oral evidence to be led on the issue of whether or not the ship was an associated ship. The court pointed out that if that question was answered in the affirmative, the arrest would be valid and the court would have jurisdiction in the main action but, if answered in the negative, the arrest would be set aside and no such jurisdiction would exist. Reference was made to the analogous situation where an applicant seeks to attach the property of a *peregrinus* in order to obtain jurisdiction. The court held that while it might do so in an appropriate case, it would ordinarily be reluctant to order a *peregrinus* to contest an action before it in order to determine whether it has jurisdiction in respect of that *peregrinus*. It was emphasised that a court would be even more reluctant to make such an order where the issue was whether the court would have jurisdiction in terms of the provisions of s 3(6) of the Act.

IX.45 In *The Kadirga 5 (no 1)*[257] the question of whether the ships in question were associated ships was referred to the hearing of oral evidence by a Full Bench. The court referred to the fact that an applicant seeking to establish common control is usually at a disadvantage because it would have little intimate knowledge of the control of the companies in question. The court held that the overall picture emerging from the papers was that the ships in question were engaged in similar trade; were all managed by the same agents; were all entered for insurance purposes together; were all protected as a fleet entry for insurance purposes; and were all represented in negotiations by the same person. All the indications were thus that the companies in question were engaged in a common enterprise controlled by the same person. The alleged control was, however, denied and the court held that it was not satisfied on the papers that the denials could be rejected. Reading between the lines, it seems that the court was of the view that there were reasonable grounds for doubting the correctness of the denials and that this was the reason for the referral to the hearing of oral evidence. A similar order to that made in *The Kadirga 5 (No 1)* was made in *The Leros Strength*.[258] In that case the court pointed out that whether or not an application will be referred for the hearing of oral evidence is a matter which is in a court's discretion and that a number of factors must be taken into account in the exercise of that discretion. The court found in particular that there was some reason to think that cross-examination of the respondent's deponents might disturb the overall probabilities as they emerged on paper, and that oral evidence might well tip the scales in favour of the applicant.[259]

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[256] 1985 (2) SA 486 (C).
[257] 1999 SCOSA C12 (N).
[258] 1998 SCOSA C20 (D).
[259] The deponents in question resided overseas and it was envisaged that the oral evidence might have to be taken on commission.

IX.46 In *The Pioneer Trader*[260] a stricter view was adopted. It was pointed out that in neither of these decisions was there any reference to the decision in the *Zygos* case and, in particular, to the considerations adverted to by Friedman J at page 497 of that decision. The court was of the view that, before the hearing of oral evidence would be resorted to, strong indications would have to exist that the hearing of oral evidence would materially affect the probabilities. It is submitted that the correct approach to be adopted may be outlined as follows. While the discretion conferred by Uniform Rule 6(5)*(g)*[261] is untrammelled, where the subject matter of the dispute is whether or not an alleged association exists, the observations of Friedman J in the *Zygos* case referred to above are pertinent to the exercise of the discretion. A reference to the hearing of oral evidence should in general only be allowed in one or other form permitted by Rule 6(5)*(g)* if there are reasonable grounds for doubting the correctness of the respondent's allegations and denials, whether because of their vague, evasive or otherwise unsatisfactory nature,[262] or because of the general probabilities, or both, and if there are reasonable grounds for concluding that oral evidence could[263] affect the probabilities in a material respect. When the facts alleged by the respondent are peculiarly within the knowledge of the respondent, as will frequently be the case where the existence of an association is alleged, and for that reason cannot be directly contradicted or refuted by the opposite party, the respondent's allegations will be carefully scrutinised in the light of all the circumstances.[264]

IX.47 An applicant seeking to establish the existence of an association will frequently have to rely on inferences. The question may arise as to whether a respondent's denial raises a genuine and *bona fide* dispute of fact or serves to refute the case made by the applicant in support of the existence of the association. The ordinary principles applicable to disputes of fact on affidavit apply, and the court may reject denials where these are far fetched or clearly untenable. Whether the court will do so will depend on the circumstances of each case. Where the applicant produces powerful circumstantial evidence in favour of an association and the respondent's case in rebuttal is evasive, or is permeated by selective and limited denials; where allegations are not met head-on but are met with bald contentions that the allegations constitute hearsay or are inadmissible; where peripheral allegations are dealt with but no attempt is made to counter the allegations by setting out fully the true state of affairs; where the deponent declines to name the beneficial owner and fails to disclose why there is an objection to disclosure; and where the respondent fails to file an affidavit without explanation where it could be expected of the respondent to do so, a

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[260] 2008 SCOSA C136 (D).
[261] Applicable in terms of Admiralty Rule 24.
[262] Compare the observations in this regard in another context in *The Heavy Metal* 1999 (3) SA 1083 (SCA) at 1107J–1108G and 1113J–1115H. The requirement that reasonable grounds must exist for doubting the correctness of the allegations concerned may involve a finding that reasonable grounds for disbelieving a witness exist.
[263] It is submitted that the statement in *The Pioneer Trader* 2008 SCOSA C136 (D) that there must be reason to believe that oral evidence *would* disturb the probabilities sets too stringent a test.
[264] Compare generally *Moosa Bros & Sons (Pty) Ltd v Rajah* 1975 (4) SA 87 (D) at 93; *Khumalo v Director-General of Co-operation & Development* 1991 (1) SA 158 (A) at 167G–168G.

court may hold that there is no genuine dispute of fact and may find the association proved on a balance of probabilities on the strength of the evidence produced by the applicant.[265]

IX.48 In *Hasselbacher Papier v The Stavroula*[266] it was held that where an applicant seeks to rely on inferences to establish the necessary association between the ship concerned and the associated ship, the failure of the respondent to deny the relevant allegations may be sufficient to enable the court to find that a *prima facie* case of association has been made out, and it may not be sufficient for a respondent to simply contend that the applicant has not discharged the onus of proving the alleged association while failing to admit or deny the relevant allegations thereanent. The reference in this decision to a *prima facie* case must not be misunderstood. The phrase is used to convey that a sufficient case has been made out to call for an answer from the other party. The failure of the other party to provide an answer may then lead to an adverse inference being drawn against that party. Ultimately the question is whether, having regard to the evidence pointing to the existence of an association, coupled with the failure to deny or deal with such evidence, the association has been proved on a balance of probabilities.

IX.49 In *The Als Express*[267] it was held that the plaintiff had failed to discharge the onus of proving the alleged association. However, because the court was not impressed by the conduct of the owner of the alleged associated ship and because of a lingering suspicion that it had not heard the full truth, it declined to make an order of costs in favour of the defendant and made no order as to costs.

X PROCEDURE AND MISCELLANEOUS

Arrest, summons and service

X.I Admiralty Rule 4 prescribes the procedure for the arrest of property in an action *in rem* and for the release of such property.

X.2 The Rule provides that an arrest is effected by the service of a warrant in accordance with the Admiralty Rules or by the giving of security as contemplated in s 3(10) of the Act.[268] The warrant must be issued by the registrar and must be in a form corresponding to Form 2 of the First Schedule to the Admiralty Rules.[269] The registrar may refer to a judge the question of

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[265] See the judgments of Smalberger JA and Marais JA in *The Heavy Metal* 1999 (3) SA 1083 (SCA) at 1107J–1108G and 1113J–1115H. See also the judgment of Davis J in *The Ivory Tirupati* 2002 (2) SA 407 (C) at 415H–I.
[266] 1987 (1) SA 75 (C). Compare *The Gina* 2011 (2) SA 547 (KZD) para [8].
[267] 2002 SCOSA C97 (D).
[268] Admiralty Rule 4(1).
[269] Admiralty Rule 4(2)*(a)*.

whether a warrant should be issued.[270] The registrar is, however, obliged to refer the question of whether a warrant should be issued to a judge if it appears from a certificate contemplated in Admiralty Rule 4(3) or if the registrar otherwise has knowledge that security or an undertaking has been given in terms of s 3(10)*(a)* of the Act to prevent the arrest or attachment of the property in question.[271] If the question of whether a warrant should be issued is referred to a judge, the judge may authorise the registrar to issue the warrant, or may give such directions as the judge deems fit to cause the question of whether a warrant should be issued to be argued.[272] If such question has been so referred to a judge, no warrant may be issued unless the judge has authorised the registrar to issue the warrant.[273]

X.3 Save where the court has ordered the arrest of property, the registrar may issue a warrant only if summons in the action has been issued and a certificate, signed by the party causing the warrant to be issued, is submitted to the registrar stating: *(a)* that the claim is a maritime claim and that the claim is one in respect of which the court has jurisdiction or one in respect of which the court will have jurisdiction on the effecting of the arrest;[274] *(b)* that the property sought to be arrested is the property in respect of which the claim lies or, where the arrest is sought in terms of s 3(6) of the Act, that the ship is an associated ship which may be arrested in terms of the said section;[275] *(c)* whether any security or undertaking has been given in respect of the claim of the party concerned to procure the release or prevent the arrest or attachment of the property sought to be arrested and, if so, what security or undertaking has been given and the grounds for seeking arrest notwithstanding that any such security or undertaking has been given;[276] and *(d)* that the contents of the certificate are true and correct to the best of the knowledge, information and belief of the signatory and the source of any such knowledge and information.[277]

X.4 Admiralty Rule 2(1)*(a)* provides that a summons must be in a form corresponding to Form 1 of the First Schedule and must contain 'a clear and concise statement of the nature of the claim and of the relief or remedy required and of the amount claimed if any.' Rule 2(1)*(b)* provides that the aforesaid statement must contain sufficient particulars to enable the defendant to identify the facts and contentions upon which the claim is based. Form 1 of the First Schedule provides for the insertion of the 'concise terms of the cause of action'.

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[270] Admiralty Rule 4(2)*(b)*.
[271] Admiralty Rule 4(2)*(c)*.
[272] Admiralty Rule 4(2)*(d)*.
[273] Admiralty Rule 4(2)*(e)*.
[274] Admiralty Rule 4(3)*(a)*.
[275] Admiralty Rule 4(3)*(b)*.
[276] Admiralty Rule 4(3)*(c)*.
[277] Admiralty Rule 4(3)*(d)*.

X.5 In *The Galaecia*[278] Combrinck J made a number of comments with regard to the above procedure. The judge adverted to the fact that it had become the practice to issue summonses in an abbreviated form in contravention of Admiralty Rule 2(1)*(b)* which, it was pointed out, would prejudice a defendant seeking to set aside the arrest because the defendant would not have sufficient clarity with regard to the case it had to meet. The judge was also of the view that the certificate required by Admiralty Rule 4(3) offered no real protection against spurious arrests and suggested that the certificate should be made by a representative of the arresting party. Finally, it was stated that it would be a salutary precaution for the registrar in the majority of cases to refer the question of whether a warrant of arrest should be issued to a judge for decision and that, as a matter of practice, this should be done.

X.6 As a consequence of the comments made in *The Galaecia* practice directive 27 was issued in the Natal Provincial Division.[279] The directive provides that the summons should contain a statement of the facts upon which the claim is based and a statement of the facts on the basis of which it is stated that the ship is an associated ship. It is further provided that the certificate should be signed by an attorney practising in the court out of which the warrant is issued and that when requesting a warrant the attorney should submit, in addition to the certificate required by Admiralty Rule 4(3), a statement that the attorney knows of no circumstances making it desirable to refer the issue of a warrant to a judge; in the absence of such a statement the registrar must refer the matter to a judge under Admiralty Rule 4(2)*(b)*. The directive has been the subject of well-directed criticism.[280] No similar directive has as yet been issued in the other coastal divisions.

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[278] 2006 SCOSA D252 (D).

[279] For the text of this directive see appendix IV.

[280] See Cooke 'The Galaecia' (2007) 124 *SALJ* 247. With regard to that part of the directive which provides that the summons must contain a statement of the facts upon which the claim is based, Cooke points out that this requirement constitutes a requirement more burdensome than that provided for in Admiralty Rule 2(1); equates the requirements for a summons with the requirements for particular of claim; is inconsistent with the lax approach to pleadings in admiralty and the general approach that the principal purpose of the Act is to assist the party applying for the arrest rather than the party opposing it (*The Heavy Metal* 1999 (3) SA 1083 (SCA) at 1106I–J); and that, in any event, the directive is invalid to the extent that it has the effect of altering the requirements of the Rules. The author also points to the practical disadvantages of that part of the directive which requires the certifying attorney to file a statement that he or she knows of no circumstances making it desirable to refer the issue of a warrant to a judge. Quite apart from the question of the validity of a practice directive seeking to alter the Rules, there can be no doubt that the directive does not rest comfortably with the general approach in admiralty, endorsed by the Act and the Admiralty Rules, that plaintiffs seeking redress against the elusive ship are assisted by a summary procedure to secure the claim at an early stage in the litigation when those plaintiffs may have little knowledge of the evidence supporting the claim. It is submitted that Cooke is correct in stating that if the existing Admiralty Rules are complied with defendants should not be prejudiced and are, in any event, not without remedies. In particular, a defendant who is left in doubt about the case brought against it can summarily obtain particulars of the case in terms of Admiralty Rule 14(3)*(b)*(ii).

X.7 Admiralty Rule 6(2) provides that a summons in an action *in rem* must be served on the property in respect of which the action is brought in the same manner as that in which a warrant must be served. Admiralty Rule 6(3) provides that a warrant, and thus also a summons *in rem*, must be served *(a)* in the case of a ship or its equipment, furniture, stores or bunkers, by affixing a copy to any mast, or to any suitable part of the ship, equipment, furniture, stores or bunkers and by handing a further copy to the master or other person in charge of the ship; *(b)* in the case of cargo, by handing a copy to the person in charge of the cargo and, unless the said person will not permit access to the cargo or the cargo has not been landed or it is not practical to do so, by affixing a further copy to the cargo; *(c)* in the case of freight, by handing a copy to the person by whom the freight is payable; *(d)* in the case of a container, by handing a copy to the person in charge of the container and, unless the said person will not permit access to the container, or the container has not been landed or it is not practical to do so, by affixing a further copy to the container; *(e)* in the case of a fund, by handing a copy to the registrar and, should a referee have been appointed by the court in respect of the fund, by handing a copy to the referee; *(f)* in the case of property deemed to have been arrested in terms of s 3(10)*(a)*, by service on the address for service appointed in terms of Admiralty Rule 4(6); *(g)* in any other manner ordered by the court. Admiralty Rule 6(4) provides that if property has been sold, service must be effected on the person having custody of the proceeds.

X.8 Section 3(11)*(c)* of the Act provides that if an action *in rem* is instituted against or in respect of a fund in terms of s 3(5), the plaintiff must give notice of the said action to the registrar (which in terms of Admiralty Rule 6(2) the plaintiff will do by serving the registrar with the summons) or other person holding the fund, and to all persons known by the plaintiff to be interested in the fund.

X.9 The above provisions regulate the procedure to be followed in an action *in rem*. It seems clear, however, that not all proceedings *in rem* need necessarily be commenced by action and an order for arrest may be made on motion.[281]

X.10 The court may, in the exercise of its admiralty jurisdiction, order that any arrest made or to be made be subject to such conditions as to the court appears just, whether as to the furnishing of security or the liability for costs, expenses, loss or damage caused or likely to be caused or otherwise.[282] Section 3(8) of the Act specifically provides that property shall not be arrested and

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[281] *Dias Compania Naviera SA v The Al Kaziemah* 1994 (1) SA 570 (D) at 575D–F. The court relied *inter alia* on the definition of 'admiralty action' in s 1(1) of the Act and Admiralty Rule 3(3) – now Admiralty Rule 4(3).

[282] Section 5(2)*(c)*. See for example *The Argun* 2001 (3) SA 1230 (SCA) at 1243A–H. It is submitted that the section confers a wide and unfettered discretion on the court. Compare *The Wisdom* (No 2) 2003 SCOSA B201 (D) at B209H–B210A; *The Newmarket* 2006 (5) SA 114 (C) at 118F–I. In the latter case it was argued that because the cargo could not be discharged at Cape Town, an order should be issued in terms of s 5(2)*(c)* that the ship proceed to Durban and discharge the cargo there. The court, however, found it unnecessary to deal with this argument.

security therefor shall not be given more than once in respect of the same maritime claim by the same claimant.[283] Section 5(2)*(d)* of the Act, however, provides that, in addition to property already arrested or attached, further property may be arrested or attached in order to provide additional security for a claim. Section 3(8) applies only where there has been an arrest (actual or deemed, in terms of s 3(10)*(a)* of the Act) and security has been provided. Where there has been an arrest but no security has been given, re-arrest is not prohibited. Moreover, where the first arrest was invalid and was set aside the section would, similarly, have no application.[284]

X.11 Finally it should be noted that the courts have recognised the inherent urgency which inevitably arises from the detention of a ship[285] whether as a result of an arrest or an attachment.

Custody and preservation of property arrested or attached

X.12 It appears that the effect of the arrest or the attachment of property is to transfer the custody of the property, but not possession, to the sheriff,[286] who is the court's officer and representative[287] and who preserves the property for the benefit of creditors.[288] Admiralty Rule 21(1) specifically provides that any property arrested or attached must be kept in the custody of the sheriff, who may take all such steps as the court may order or as appears to the sheriff to be appropriate for the custody and preservation of the property, including the removal and storage of any cargo and the removal, disposal and storage of perishable goods which have been arrested or attached, or which are on board any ship which has been arrested or attached. The word 'may' in the Rule must not be construed as being merely permissive. It connotes the conferment of a right on the sheriff coupled with a duty to exercise that right whenever it appears to the sheriff to be appropriate to do so,[289] and the Rule obliges the sheriff to keep the property in his or her custody, which places the sheriff in overall control of the property.[290] The Rule is thus largely declaratory of the common law to the effect that it is the duty of the sheriff, after property has been arrested or attached, to keep it in safe custody and to take all reasonable steps necessary for the preservation of the property. The sheriff may incur such expenses as are reasonably necessary for

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[283] See § V.4 above. With regard to the question whether a judgment flowing from an arrest *in rem* constitutes, for the purposes of s 3(8), the same claim as the cause of action giving rise to the judgment, see *The Ivory Tirupati* 2003 (3) SA 104 (SCA) and § IX.38 above.

[284] *Great River Shipping Inc v Sunnyface Marine Ltd* 1992 (2) SA 87 (C); *The Wisdom C* 2008 (1) SA 665 (C) at 673B–G.

[285] *The Pretty Time* 2009 SCOSA B410 at B410H–I.

[286] Shaw *Admiralty Jurisdiction and Practice* 65, relying on the English authority cited by him in n 22.

[287] *The Ocean King* 1997 (4) SA 349 (C) at 354D–E.

[288] *The Argun* 2000 (4) SA 857 (C) at 863G–H.

[289] *The Avalon* 1996 (4) SA 989 (D) at 1000G–H; *The Ocean King* 1997 (4) SA 349 (C) at 353J–354C*; The Argun* 2001 (3) SA 1230 (SCA) at 1237G–I; *The Delta Peace* 2001 (4) SA 110 (D) at 114E–H.

[290] *The Ocean King* 1997 (4) SA 349 (C) at 351F. Upon arrest or attachment the property is held *in custodia legis*; *Pentow Marine (Pty) Ltd v The Fund from the Sale of The Argos* 1994 (2) SA 700 (C) at 705D, 708B–C.

that purpose and may hold the person who has procured the arrest or attachment responsible for reimbursing him those expenses.[291]

X.13 The Rules do not specify what steps the sheriff should take to preserve the property but expressly leave it to the sheriff to take such steps 'as appears to the sheriff to be appropriate'. A court will not readily interfere with the exercise by the sheriff of this discretion. The action which the sheriff will be required to take in order to preserve the property will differ from case to case depending on the circumstances, such as – where the property in question is a ship – the condition and size of the ship, the nature and size of the cargo, the size of the crew and the language they speak, etc. The exercise of the discretion is not entirely untrammelled, and Admiralty Rule 21(2) enjoins the sheriff to consult any person who has caused the arrest or attachment of the property and to act in accordance with any relevant order of court.[292] While such persons must be given the opportunity to state their views, the sheriff is not obliged to follow them, although the sheriff must at all times act reasonably and responsibly, particularly bearing in mind that the sheriff acts as an officer of the court.[293]

X.14 The sheriff and not the auctioneer charged with the sale of the property retains the custody of the property pending its sale where this has been ordered, and a distinction must be drawn between functions constituting preservation and those facilitating the sale. Thus all matters directly concerned with the maintenance and preservation of the property remain under the control of the sheriff. For example, matters affecting the master and crew (such as termination of their employment, payment of their wages and expenses – including repatriation expenses), the employment of persons to safeguard the property, the employment of a ship's agent, the insurance of the property, approaching the court for the discharge of cargo, the making of the arrangements for the berthing or shifting of a ship, and the handling and disposal of a ship's documents are all matters concerning the maintenance and preservation of the property. On the other hand, the auctioneer fixes the date of the sale, obtains an appraisement, advertises the sale and accepts a suitable bank guarantee for payment.[294] There can be little doubt that the sheriff, if he or she fails to take reasonable steps to preserve the property, will be liable in delict for any loss flowing from such failure.[295]

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[291] *The Avalon* 1996 (4) SA 989 (D) at 1003B–C. The costs incurred by the sheriff in preserving the ship and the sheriff's reasonable remuneration earned in connection therewith during the period that the ship remained under arrest are recoverable by a party as part of such party's costs of suit: *The Argun* 2004 (1) SA 1 (SCA) at 13G–14G.
[292] *The Delta Peace* 2001 (4) SA 110 (D) at 114G–115B.
[293] *The Ocean King* 1997 (4) SA 349 (C) at 351G–H.
[294] *The Ocean King* 1997 (4) SA 349 (C) at 352–3.
[295] *The Limb* 1999 (4) SA 221 (C) at 227B–C; Shaw *Admiralty Jurisdiction and Practice* 66.

X.15 In *The Limb*[296] the ship had been damaged in a collision while under arrest and before her sale in terms of s 9 of the Act. The ship was at all material times in the custody of the sheriff. The sheriff brought an application for an order, *inter alia*, declaring that he was entitled to pursue any claim for damages arising out of the collision, contending that he was duty bound to reverse or recover the diminution in value caused by the collision which duty, it was alleged, arose from the sheriff's duty to take custody of and preserve the ship. The court, in considering the nature of the sheriff's functions, held that the essence of the sheriff's power (and authority and duty) in terms of Admiralty Rule 21(1) is to 'preserve the property', which is suggestive of preventive measures; and that while the general rule of the Roman-Dutch law is that the sheriff would be liable for negligence in failing to prevent harm, the sheriff's responsibility ended with prevention and did not extend to curing, unless the sheriff had been at fault in failing to prevent damage. The court accordingly concluded that the sheriff did not have the power or authority which he sought and the relief in question was refused on this and other grounds.

X.16 Admiralty Rule 21(3) provides that the sheriff is entitled to a reasonable remuneration for effecting any arrest or attachment of property to found or confirm jurisdiction and for any act done in terms of Admiralty Rule 21, and it is specifically provided that any such remuneration may be less or greater than the corresponding remuneration in any tariff prescribed in the Uniform Rules or elsewhere. Not only is there no provision for a tariff of fees but the sheriff's remuneration is not subject to taxation. Nor can it be said that the reference in Admiralty Rule 21(3) to the tariff in the Uniform Rules is an indication that the quantum of the remuneration contemplated by Rule 21(3) should be in the vicinity of the comparable tariff in the Uniform Rules.[297]

X.17 In order to pass as 'a reasonable remuneration' the amount charged will have to present, not only to the sheriff but to all who have an interest in it, as objectively reasonable in the light of all the circumstances.[298]

X.18 In *The Argun*[299] it was pointed out that once a fund is established the sheriff will be able to lodge a preferential claim against the fund in respect of the costs and expenses incurred in taking custody of and preserving the property; that the sheriff's claim will rank under s 11(4)*(a)* of the Act; and that in the event of an arresting party paying the sheriff the preservation expenses incurred by the sheriff, such party will, pursuant to s 11(8), acquire the sheriff's preference under s 11(4). The question of what remedies the sheriff has in respect of such costs and expenses

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[296] 1999 (4) SA 221 (C).
[297] *The Delta Peace* 2001 (4) SA 110 (D) at 115D–G.
[298] *The Delta Peace* 2001 (4) SA 110 (D) at 117G–H.
[299] 2001 (3) SA 1230 (SCA) at 1238G–1239A.

before the establishment of a fund was also considered.[300] The court, in considering this aspect, found it unnecessary to decide whether, in terms of s 6(1) of the Act, English or Roman-Dutch law applied because under both systems the sheriff could, so it was held, recover the costs and expenses from the arresting parties who are jointly and severally liable. The court held that the continued arrest of the vessel at the instance of each arresting party should have been made conditional, in terms of s 5(2)*(c)* of the Act, on that party reimbursing the sheriff for the sheriff's reasonable expenses incurred in preserving the ship during the period the ship was under arrest at the instance of that arresting party. It was held, however, that the sheriff had no such right of recovery against the owner, principally on the ground that the *res* was not being preserved for the benefit of the owner, but for the benefit of the arresting parties.[301]

Caveat notice

X.19 The Admiralty Rules have, in part, adopted the admiralty caveat procedure in relation to actions *in rem*. Any person who intends to institute an action *in rem* against any property which has been arrested or attached may file with the registrar and serve, in accordance with the provisions of Admiralty Rule 6(2) and (3), a notice of such intention (caveat).[302] A copy of the notice must also be served on (i) the person who caused the arrest of the property to be effected or his or her attorneys; (ii) all parties of record; and (iii) the port captain.[303] When such a notice has been filed and served, the property cannot be released from arrest or attachment unless the person desiring to obtain the release of the property has given notice to the person who has filed the (caveat) notice that he or she desires to obtain the said release. Where such notice has been given and the person who gave such notice has not consented to the release of the property or, in any other case, if the person who caused the arrest of the property to be effected has not consented to the release of the property, the property cannot be released unless the court so orders.[304]

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[300] The court found that the liability of the arresting parties for such costs and expenses was a matter falling within the jurisdiction of the High Court of Admiralty in 1890 necessitating reference to the English admiralty law as at November 1983. But because reference had to be made to the English principles of private international law, this in turn necessitated determining whether the matter fell to be classified as one of substance or procedure. If the former, so held the court, English law applied; if the latter the *lex fori* would apply, namely the law of South Africa.

[301] The result of the decision is less than satisfactory viewed from the perspective of claims for wages by the crew against the owner. If the crew members are compelled to fund the detention of the ship pending the determination of their claims they may, because of their impecuniosity, be precluded from prosecuting their claims in the jurisdiction and obtaining security for their claims.

[302] Admiralty Rule 4(4)*(a)*. The Rule does not extend this procedure to a person intending to attach property in proceedings *in personam*.

[303] Admiralty Rule 4(4)*(b)*.

[304] Admiralty Rule 4(4)*(c)* and *(d)*.

X.20 Where such notice has been given a release warrant may be issued only (i) with the consent of the person who caused the arrest of the property to be effected and the consent of all persons who have given any such notice; or (ii) on the giving of security in the sum representing the value of the property or the amount of the claims of the person who caused the arrest of the property to be effected and all the persons who have given notice and have not consented to the release.[305] The court may, notwithstanding (i) and (ii) above, order the issue of a release warrant.[306]

X.21 A caveat notice is filed and served by a person who 'intends to institute an action *in rem*' and thus does not constitute the service of any process by which action is instituted or the issue of any process for the institution of an action *in rem* in terms of s 1(2)*(a)* of the Act.

X.22 The caveat procedure has the advantage of enabling creditors to preserve their rights without having to incur the costs of instituting action which would simply serve to reduce the value of any fund flowing from the sale of the property in terms of s 9 of the Act. As pointed out by Hare[307] the issue of a caveat notice does not interrupt the running of prescription. Creditors who have not instituted proceedings but have elected to issue caveat notices would thus have to monitor the situation so as to take steps, if necessary, to prevent their claims prescribing.

The furnishing of security or an undertaking, release of the arrested property and the setting aside of an arrest

X.23 Before the Act, Admiralty Courts recognised the practice whereby the owner of the *res* provided security to prevent its arrest or to obtain its release from arrest. The rule was that the bail (security) represented the property and that once given the property was wholly released from the cause of action and could not be arrested again in respect of that cause of action.[308]

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[305] Admiralty Rule 4(7)*(b)*(i) and (ii). The value referred to in the Rule is not the net value of the property, but its market value: *The Belnor* 2000 SCOSA B13 (D). It is submitted that the effect of Rule 4(7)*(b)*(ii) is that where the amount of the claims exceeds the value of the property, the release of the property can be secured by the provision of security in a sum equal to the value of the property. Where the claims in total are less than the value of the property, its release can be obtained by providing security in amounts equal to the claims. See § X.25 below.

[306] Admiralty Rule 4(7)*(c)*.

[307] *Shipping Law and Admiralty Jurisdiction* 2 ed § 2-5.4. A caveat notice does not interrupt the running of prescription as it does not constitute `process' by which proceedings are instituted in terms of s 15(1) of the Prescription Act 68 of 1969.

[308] See the authorities cited in *Great River Shipping Inc v Sunnyface Marine Ltd* 1992 (2) SA 87 (C) at 90C–G. Thus in proceedings *in rem* the security furnished takes the place of the property so that once security has been furnished there can be no further recourse against the property by the same claimant in respect of the same cause of action. Where, however, a judgment was given against a ship and her owner in Hong Kong (in which jurisdiction the owner apparently incurred liability when it entered appearance), the judgment creditor was held to be entitled to levy execution against the ship (or an associated ship) to satisfy the judgment against the owner, even where the ship had

Moreover, security notionally replaces the property arrested and may be dealt with in the same way as the property might have been had it been kept under arrest.[309] This approach is reflected in s 3(8) of the Act which provides that property shall not be arrested and security therefor shall not be given more than once in respect of the same maritime claim by the same claimant.[310]

X.24 The Admiralty Rules provide that property under arrest may be released only in terms of a release warrant directed to the sheriff and issued by the registrar.[311] Service of such warrant shall be effected on the property arrested and on all persons referred to in Admiralty Rule 4(4)*(b)*,[312] namely, the person who caused the arrest of the property to be effected or such person's attorneys, all parties of record and the port captain. Any person giving security or an undertaking in terms of s 3(10) of the Act to prevent the arrest or attachment of property must appoint an address contemplated in Rule 19(3) of the Uniform Rules at which any summons or warrant in an action *in rem* against the property may be served.[313] Admiralty Rule 4(7)*(a)*(i) and (ii) provides that in cases where no (caveat) notice has been given[314] under sub-rule (4), a release warrant may be issued only (i) with the consent of the person who caused the arrest to be effected; or (ii) on the giving of security in a sum representing the value of the property or the amount of the claims of the person who has caused the arrest to be effected.

X.25 Before the introduction of Admiralty Rule 4(7)*(a)*(ii) in 1997[315] the equivalent Rule (then Rule 3(5)*(a)*) expressly included, in relation to the reference to the value of the property or the amount of the claim, the words 'whichever is the lower'. The words 'whichever is the lower' were not repeated in Admiralty Rule 4(7)*(a)*(ii) or in Admiralty Rule 4(7)*(b)*(ii). Nevertheless, the omission of these words does not affect the meaning of the Rule,[316] which gives effect to the firmly entrenched principle that in proceedings *in rem* the *res* represents the limit of liability. The owner or other interested party can obtain the release of the property by providing security to the value of the property even where the claim or claims exceed its value.[317] In terms of Admiralty

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been released against the provision of security. See *The Ivory Tirupati* 2003 (3) SA 104 (SCA) at 118B–E. This principle applies equally where the property concerned is property other than a ship.

[309] *The Alam Tenggiri* 2001 (4) SA 1329 (SCA) at 1332G–H and authorities cited.

[310] See § V.4 above for a discussion of this section.

[311] Admiralty Rule 4(5)*(a)*.

[312] Admiralty Rule 4(5)*(b)*.

[313] Admiralty Rule 4(6).

[314] In regard to the issue of a release warrant where notice has been given see § X.20 above.

[315] In terms of GN571 of *Government Gazette* No 17926 of 18 April 1997.

[316] See Wallis *The Associated Ship* 348 n 25.

[317] The owner can provide security to the value of the property where the amount of the claim exceeds that value and can provide security to the amount of the claim where this is less than the value of the property. The owner cannot, however, in proceedings *in rem*, be compelled to provide security in excess of the value of the property and this, it is submitted, is equally true in the case of a security arrest (see chapter V § II.2). To the extent that the decision in *The Wisdom (No 2)* 2003 SCOSA B201 (D) suggests the contrary, the decision cannot be supported.

Rule 5(4), where property has been attached, security to the value of the claim must be provided in order to obtain the release of the property.

X.26 Notwithstanding the provisions of Rule 4(7)*(a)*(i) and (ii), the court may order the issue of a release warrant.[318]

X.27 A release warrant applies only with regard to the particular arrest referred to in the warrant.[319] Subject to Admiralty Rule 4(9)*(b)*, any security must be in a form acceptable to the registrar.[320] Rule 4(9)*(b)* provides that any dispute with regard to any release, including any dispute relating to the form or amount of any such security or the value of any property, must be referred to the court, which may itself resolve the dispute or may give such directions as it deems appropriate for the resolution of the dispute.

X.28 In *Zygos Corporation v Salen Rederierna AB*[321] the court was called upon to assess the amount of security to be provided to secure the release of the ship from arrest. This required an assessment not only of the quantum of the plaintiff's claim, but also of the quantum of the security already held by the plaintiff. Friedman J, relying on English authority, held that the plaintiff was entitled to security sufficient to cover the amount of its claim, together with interest and costs on the basis of its 'reasonably arguable best case'.[322] In *Bocimar v Kotor Overseas Shipping Ltd*[323] Corbett CJ referred to the application of this test in the *Zygos* case without commenting on its appropriateness or otherwise in that case, but pointed out that Friedman J in fact appeared to make the probabilities the criterion.[324] It is submitted that there is no justification for the adoption of the English test of the 'reasonably arguable best case'. The standard is either proof on a *prima facie* basis or on a balance of probabilities. It is clear that at the arrest stage the plaintiff need only establish the facts giving rise to the alleged cause of action on a *prima facie* basis. Where the cause of action gives rise to a claim sounding in money, the existence of a loss is an essential element of the cause of action and, like the existence of the underlying liability, is determined provisionally and not finally, and it is submitted that on this

[318] Admiralty Rule 4(7)*(c)*.
[319] Admiralty Rule 4(8).
[320] Admiralty Rule 4(9)*(a)*.
[321] 1984 (4) SA 444 (C).
[322] At 457C–D.
[323] 1994 (2) SA 563 (A) at 582F–J.
[324] It is submitted that Corbett CJ was not stating that in that case the probabilities would be the criterion but was seeking to emphasise that Friedman J in fact applied a test other than the 'reasonably arguable best case'. The standard of proof to be applied is, it is submitted, proof on a *prima facie* basis. It is interesting to note that in the court *a quo* (Unreported Case No AC 218 1993 (C)) Scott J, referring to the 'reasonably arguable best case' test, stated that he understood this to mean no more than a reference to the manner of determining the quantum of the claim based on facts in respect of which *prima facie* proof is sufficient.

basis need only be established *prima facie*.[325] Where it becomes necessary to determine the quantum of the plaintiff's claim in order to assess the amount of the security, similar principles apply and it is submitted that the quantum of the plaintiff's claim falls to be determined on a *prima facie* basis. Friedman J did not expressly advert to the standard of proof applicable with regard to the assessment of the quantum of the security already held by the plaintiff. While this assessment will determine the quantum of the plaintiff's claim which is unsecured, in terms of the decision in the *Bocimar* case the quantum of the security already held falls to be determined on a balance of probabilities.

X.29 Section 3(10)*(a)*(i) of the Act provides that property is deemed to have been arrested and to be under arrest if at any time, whether before or after the arrest, security or an undertaking has been given to prevent the arrest of the property or to obtain its release from arrest. The legislature's intention was not merely to relieve the plaintiff of the need, and the defendant of the inconvenience, of an arrest. The legislature's intention was that substantially the same legal consequences relative to execution would pertain to the security as would have pertained to the property had it remained under arrest.[326]

X.30 Arrested vessels are almost invariably released in South African practice against the furnishing of a letter of undertaking or a bank guarantee by a Professional and Indemnity Club.[327] The Act distinguishes between security on the one hand and an undertaking on the other. In *The Merak S*,[328] the Supreme Court of Appeal, overruling the decision in the court *a quo*,[329] held that, given the aforesaid practice, there was no compelling reason which could have induced Parliament to restrict the ordinary meaning of the word 'security' in s 5(2)*(d)* so as to exclude club letters and bank guarantees which, the court held, constituted security. It is undeniably so that such guarantees also, as a matter of language, constitute undertakings. The court held, however, that the reference to an 'undertaking' in the Act must be taken to refer to an undertaking which does not constitute personal security. In *The Silvergate*[330] it was, moreover, held that the effect of the furnishing of an undertaking is the same as the effect of furnishing

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[325] Compare *Bocimar NV v Kotor Overseas Shipping Ltd* 1994 (2) SA 563 (A) at 580I–581B.
[326] *The Jute Express* 1992 (3) SA 9 (A) at 18D–G.
[327] Letters of undertaking usually contain an undertaking by the arrester to release the ship arrested and a further undertaking to refrain from arresting or attaching any other ship in the same or associated ownership, control or management against an undertaking by the party furnishing the letter to meet the claim if successful. The former undertaking may thus confer benefits on third parties. Where this is the case, if the undertaking is governed by South African law, it must be accepted by such parties if they wish to avail themselves of the benefit: *The Michele* 2000 SCOSA B96 (D). Where security is not provided to obtain the release of the ship it is imperative that the main dispute should be resolved with the utmost expedition. See chapter X § II.4 n 11.
[328] 2002 (4) SA 273 (SCA) at 279B–H.
[329] Reported in [2000] 1 Lloyd's Rep 619.
[330] 1999 (4) SA 405 (SCA) at 422I–423D. See also *The La Pampa* 2006 (3) SA 441 (D) at 450F–G.

security in the sense that the ship's release has been purchased, and she is free from further arrest in any country in respect of the same claim.

X.31 The *Merak S* was applied in the *Bow Neptune*.[331] In the latter case it was argued that security in the form of a bank guarantee or undertaking by a foreign Professional and Indemnity Club would mean, in the event of default, that the party concerned may have to seek to execute in a foreign jurisdiction, and that this did not constitute security as envisaged by the Act and the Admiralty Rules. This argument was rejected. It was held that although there was an element of risk where the guarantee or undertaking was furnished by the foreign entity, this was 'akin to modern commercial practice' and the undertaking furnished by the Professional and Indemnity Club was held to constitute security within the meaning of the Act. It would of course always be open to a party to show that the undertaking furnished by the particular foreign club did not, in the circumstances, constitute adequate security.

X.32 A question which may arise in relation to the usual form of a club letter is whether the creditor is released from its promise not to re-arrest the ship in question (or any other category of ships covered by the promise) if the guarantor fails or refuses to honour the undertaking to meet the claim or is liquidated or sequestrated. Where the club letter does not explicitly deal with this question there appear to be two alternatives. Either the default of the guarantor will entitle the party accepting the guarantee to resile from the promise not to re-arrest the ship or ships in question in respect of the claim, or the view will be taken that as the default of the guarantor was a foreseeable risk undertaken by the creditor in accepting the security in the place of the ship, the ship or ships in question remain immune from further arrest in respect of the claim.[332]

X.33 In *The Alam Tenggiri*[333] it was held that the deeming provision in s 3(10)*(a)*(i) serves, upon the release of the arrested property, to preserve an arrest *in rem* intact. It does this not only in the case of security lodged with the registrar, but also in the case of an undertaking. Where an undertaking is given and accepted, the property is by a legal pretence considered to remain under arrest. The security afforded by the undertaking notionally replaces the arrested property and can be dealt with in the same way as the property could have been had it been kept under arrest. The argument that, because an undertaking and not security had been furnished, nothing remained under the control of the court for the arrest order to operate on, and that the court had no jurisdiction to set aside the arrest, was accordingly rejected. The further argument that the

[331] 2005 SCOSA B313 (D).

[332] See the discussion in *The Silvergate* 1994 (4) SA 405 (SCA) at 423E–G where Farlam AJA found it unnecessary to resolve this question. The question may, in a particular case, be resolved as a matter of construction. Note also the discussion in *The Silvergate* at 422G–H relating to the letter of undertaking and the question of reciprocity. See further *The Ivory Tirupati* 2003 (3) SA 104 (SCA) for the interpretation of the letter of undertaking in that case.

[333] 2001 (4) SA 1329 (SCA). This case proceeded on the basis that the undertakings in question did not constitute 'security' within the meaning of the Act. Subsequently and in *The Merak S* 2002 (4) SA 273 (SCA) the contrary was held to be the case.

provisions of s 3(10)*(a)*(i) did not apply to a security arrest under s 5(3)*(a)*, and that s 3(10)*(a)*(i) could accordingly not be invoked to support the view that there was an arrest which could be set aside, was similarly rejected. It was held that the effect of s 5(3)*(b)* was that property arrested under s 5(3)*(a)* as security is to be treated (unless the court orders otherwise) in the same way as property arrested under s 3(5) of the Act.

X.34 Section 3(10)*(a)*(ii) provides that any property deemed to have been arrested in terms of s 3(10)*(a)*(i) is deemed to be released and discharged therefrom if no further step in the proceedings, with regard to a claim by the person concerned, is taken within one year of the giving of any such security or undertaking. The Rule was clearly intended to prevent the hardship which could occur if security had to be maintained indefinitely while no steps were being taken to advance the proceedings.[334] The court is, however, in terms of s 5(2)*(d*A*)* of the Act, empowered to extend this period.[335] The section refers only to property deemed to have been arrested and not to property actually arrested. Notwithstanding the general observation that when it is said that a thing is deemed to be something, this constitutes an admission that it is in fact not that which it is deemed to be,[336] s 3(10)*(a)*(ii) must be interpreted in the light of the provisions of s 3(10)*(a)*(i). When this is done it is apparent that the deeming provision in s 3(10)*(a)*(i) is expressly made applicable whether security is furnished before or after the arrest. The fiction in s 3 (10)*(a)*(ii) thus applies both to the case where security is given to prevent the arrest of property and to the case where there has been an arrest and the security is given to obtain the release of property from such arrest.[337]

X.35 Section 5(2)*(d)* of the Act provides that a court may order that any security given be increased, reduced or discharged subject to such conditions as to the court appears just and, as pointed out above, security includes guarantees such as undertakings and bank guarantees.[338] The section also provides that, for the purpose of increasing any security, the court may authorise the arrest or attachment of further property, notwithstanding the provisions of s 3(8) of the Act that property shall not be arrested and security therefor shall not be given more than once in respect of the same maritime claim by the same claimant.[339]

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[334] *Golden International Navigation SA v Zeba Maritime Co Ltd* 2008 (3) SA 10 (C).
[335] See generally § VII.1 above.
[336] *R v CC of Norfolk* (1891) 65 LTNS 222 at 224; *The Cape Spirit* 1999 (4) SA 321 (SCA) at 328D–F. This is, of course, not an invariable rule and the meaning of a deeming provision must depend on the interpretation of the statute in which these words appear: *The Jute Express* 1992 (3) SA 9 (A) at 18D–E.
[337] *The Cape Spirit* 1999 (4) SA 321 (SCA) confirming the judgment in the court *a quo* reported in 1998 (2) SA 952 (D). See the interesting dissenting judgment of Farlam AJA.
[338] *The Merak S* 2002 (4) SA 273 (SCA) at 279B–H.
[339] For comment on this section see § V.4 above.

X.36 In *The Georg Lurich*[340] the applicant sought to obtain the release of a ship from arrest by providing security in the form of another ship also owned by the applicant. The Admiralty Rules do not provide for the provision of security in this form, but the court held that the Admiralty Rules were probably not exhaustive and that, having regard to the provision in the Admiralty Rules[341] which entitles the court to deviate from or supplement the Rules, the court could, in appropriate circumstances, order the release of the ship on a ground which differed from the grounds referred to in the Admiralty Rules. The court, however, refused to order the release of the ship against the security tendered, namely, the other ship, on the grounds of the legal and practical difficulties which could follow from such an order.

X.37 Apart from seeking consent to release or providing security, the owner of the property arrested may apply to have the arrest set aside either wholly or in part.[342] An arrest is a radical invasion of the rights of the owner who may challenge the arrest, not only on procedural grounds, but on the ground that the arresting party has not made out a *prima facie* case on the merits.[343] Thus the owner may ask that the warrant be set aside or be limited to an arrest in respect of an amount less than the amount for which the arrest was granted. The owner may, for instance, contend that the original applicant for arrest did not make out a case for the full amount for which the arrest was granted and may contend that the claim of the arresting party lies in a lesser sum than the sum for which the arrest was ordered or that the claim is already partially secured.[344] If the arrest is challenged the onus remains on the party who secured the arrest to justify the arrest[345] and, it is submitted, the amount of the claim in respect of which the arrest was

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[340] 1994 (1) SA 857 (C).

[341] At the time Admiralty Rule 23; now Admiralty Rule 25.

[342] In ordering a security arrest the court frequently expressly reserves the right of the respondent to apply to set aside the arrest. While this has been held to be a salutary procedure it is clear that even in the absence of such an order the respondent is entitled to apply to have the arrest set aside. See *Cargo Laden on Board The Thalassini Avgi v The Dimitris* 1989 (3) SA 820 (A) at 834A–D. In *The Baha Karahasan* 2003 SCOSA B231 (D) the court refused to recognise an order made by a foreign court having the effect of releasing a ship from an arrest made in South Africa.

[343] This trite principle was specifically affirmed in *The Logan Ora* 1999 (4) SA 1081 (SE) at 1086J–1088F. As to what constitutes a *prima facie* case see § V.20ff above.

[344] *Zygos Corporation v Salen Rederierna AB* 1984 (4) SA 444 (C).

[345] *Anderson & Coltman Ltd v Universal Trading Co* 1948 (1) SA 1277 (W) at 1283–4; *American Cotton Products Corporation v Felt & Tweeds Ltd* 1953 (2) SA 753 (N) at 755B–E; *Banks v Henshaw* 1962 (3) SA 464 (D) at 465D–E; *Zygos Corporation v Salen Rederierna AB* 1984 (4) SA 444 (C) at 450G–H; *Transgroup Shipping (Pty) Ltd v Owners of The Kyoju Maru* 1984 (4) SA 210 (D) at 214I; *Transol Bunker BV v The Andrico Unity* 1987 (3) SA 794 (C) at 799D–E; *Cargo Laden on Board The Thalassini Avgi v The Dimitris* 1989 (3) SA 820 (A) at 834C–F; *Weisglass NO v Savonnerie Establishment* 1992 (3) SA 928 (A) at 936F–G; *Bocimar NV v Kotor Overseas Shipping Ltd* 1994 (2) SA 563 (A) at 578G; *The Orient Stride* 2009 (1) SA 246 (SCA) at 248B–D. Some of these decisions dealt with attachments and not arrests but the principle is the same in both cases. In *Golden Meats & Seafood Supplies CC v Best Seafood Import CC* 2011 (2) SA 491 (KZD) M sold a cargo of crab to BS. BS alleged that only part of the cargo had been delivered to it by M and that it consequently had a claim in respect of which M was personally liable to it. On 2 November 2010 BS arrested that part of the cargo delivered to it by M in an action *in rem*. GM, however, alleged that before the arrest ownership of the cargo had passed to it and GM applied to have the

granted. Where an applicant fails to discharge the onus of justifying the arrest on the papers the court will in general be slow to allow an applicant to augment its case for the arrest by leading oral evidence.[346]

X.38 In *Transol Bunker BV v The Andrico Unity*[347] Marais J held that in an application to set aside an arrest, the party who obtained the order may advance any ground to justify the arrest, irrespective of whether or not such ground was relied upon in initially obtaining the order, and the fact that this involved the filing of a fourth set of affidavits did not, in the view of the judge, constitute an obstacle. This view has since been endorsed by the Supreme Court of Appeal.[348] Thus if an applicant for arrest fails originally to allege sufficient facts to make out a *prima facie* case the defect can be cured by the applicant in replying affidavits. In *The Ya Mawlaya No. 1*[349] the court was called upon to decide whether a rule *nisi* calling upon owners to show cause why a ship should not be arrested as security for an alleged claim should be made final. Magid J (with whom Page J and Combrink J concurred) distinguished the decision in *Transol Bunker* and held that in the circumstances of the case before him – which was concerned with whether an arrest should be made and not with whether an existing arrest should be set aside – the ordinary procedural rules should be applied, namely, that the respondent was not entitled to 'change course' in its replying affidavit. However, Admiralty Rule 9(3)*(c)* specifically provides that it will not be an objection to a replying affidavit or further affidavit after a replying affidavit that it raises new matter and the decision cannot be supported.[350]

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arrest set aside. It was contended that as M had originally owned the cargo arrested, the onus was on GM to prove that M was no longer the owner of the cargo when the cargo was arrested and that ownership of the cargo had passed to it. This contention was rejected and it was held, in accordance with the established authorities, that the onus was on BS as the arresting party to prove the requirements for a valid arrest, one of which was that the party alleged to be personally liable owned the property arrested. It was pointed out that, in the light of these authorities, the decision in *Davis v Isaacs & Co* 1940 CPD 497 was wrongly decided.

[346] *Zygos Corporation v Salen Rederierna AB* 1985 (2) SA 486 (C) at 497B–G. See § IX.44ff above.

[347] 1987 (3) SA 794 (C) at 798D–800E. In this case the new ground, sought to be introduced to justify the arrest, existed at the time when the arrest was first ordered and Marais J (at 800A–B) left open the question whether different considerations would apply where this was not the case.

[348] See *Cargo Laden on Board The Thalassini Avgi v The Dimitris* 1989 (3) SA 820 (A) at 834F–G; *Weissglass NO v Savonnerie Establishment* 1992 (3) SA 928 (A) at 936G–I; *The Wisdom C* 2008 (3) SA 585 (SCA) at 590G–591B; see also *The Rizcun Trader (2)* 1999 (3) SA 956 (C) at 963E–G; *The Si Sandokan* 2001 (3) SA 824 (D) at 828H–829D.

[349] 1999 SCOSA C30 (N) at C40B–41B.

[350] The Rule reflects the general approach in admiralty which is to avoid unnecessary formality and encourage expedition. If an applicant is prevented from adducing new matter in reply this may simply result in the applicant bringing a new application involving further costs and delay. Prejudice to the respondent can be avoided by allowing the respondent to file further affidavits together with an adjournment and an order that the respondent pay the wasted costs.

X.39 In an application to set aside an arrest the onus is on the arresting party to justify the arrest and to prove the requirements for such arrest. Once the applicant to set aside the arrest has discharged that onus, the onus is on the other party to prove some countervailing factor of sufficient weight to persuade the court not to grant the order. [351]

X.40 A party wishing to set aside an arrest can seek to do so in terms of Uniform Rule 6(12)*(c)*.[352] The Rule provides that a person against whom an order was granted in its absence in an urgent application may by notice set down the matter for reconsideration of the order. Thus two threshold requirements must be satisfied before the Rule can be invoked. The original order sought to be reconsidered must have been granted pursuant to an urgent application and must have been granted in the absence of the party seeking reconsideration of the order. It is clear that once these threshold requirements have been met, the Rule confers a wide discretion on the court to reconsider the original order. The court also has a wide discretion with regard to the nature of any order it makes pursuant to such reconsideration.[353] The Rule does not prescribe the procedure to be followed, but where the court exercises its admiralty jurisdiction the court will be free to follow any procedure it considers to be fair and appropriate in order to dispose of the matter.[354] In *The CMA CGM Okapi*[355] an application was brought as a matter of urgency in terms of the Rule seeking the reconsideration of three orders authorising the arrests of three ships. It was held that a court entertaining an application for reconsideration was entitled to, and should have regard to, changes in circumstances and information available at the time of the reconsideration of an arrest, even if the circumstances and the information were not available at the time of the original arrest. The reason why an applicant to set aside an arrest will resort to Rule 6(12)*(c)* rather than proceed on motion to set the arrest aside is because of the urgency of the matter. In such a case the applicant will have to make out a case that urgency exists. The applicant's own failure to treat the matter as urgent together with a failure to furnish any explanation for its failure may result in the application under Rule 6(12)*(c)* being dismissed.[356]

X.41 Rule 49(11) of the Uniform Rules (applicable to admiralty proceedings in terms of Admiralty Rule 24) provides that where an appeal has been noted or an application for leave to

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[351] *Cargo Laden on Board The Thalassini Avgi v The Dimitris Avgi* 1989 (3) SA 820 (A) at 833A–D;*Golden Meats & Seafood Supplies CC v Best Seafood Import CC* 2011 (2) SA 491 (KZD) at 495C–D. The approach set out in the text was laid down by the Appellate Division in the former case in relation to the setting aside of an arrest made in terms of s 3(5) of the Act. In the latter case the judge applied that approach in regard to an arrest made in terms of s 3(4)*(b)* of the Act. With regard to the question whether the onus to prove countervailing facts is a separate onus or merely an onus to adduce evidence, see chapter II n 290.

[352] Applicable in admiralty in terms of Admiralty Rule 24.

[353] *ISDN Solutions (Pty) Ltd v CSDN Solutions CC* 1996 (4) SA 483 (W) at 487B; *Lourenco v Ferela (Pty) Ltd* 1998 (3) SA 281 (T) at 290H.

[354] Admiralty Rule 25.

[355] 2010 SCOSA B433 (KZN).

[356] Compare *The CMA CGM Okapi* 2010 SCOSA B433 (KZN) at B437G–H.

appeal has been made against an order, the operation/execution of the order is suspended pending the decision of the appeal or application, unless the court otherwise orders. In *The Snow Delta*[357] it was held that once an interim order of attachment is discharged there is no order having operation and no order to execute – there is nothing that can be suspended. Where the interim order is not confirmed it has in effect been dismissed, and there is no order having operation that can be revived by the noting of an appeal or an application for leave to appeal.[358] The question which arises is whether similar considerations apply to an arrest *in rem* made pursuant to an order for arrest made by the registrar which is subsequently challenged and set aside by the court. While the registrar's order is not an adjunct to another order in the same way as an interim order of attachment, which is only intended to operate until the return day of the rule *nisi*, it may be said that it is implicit in the registrar's order that it is provisional in the sense that it was only intended to continue to operate unless and until challenged. On this basis, if the challenge succeeds, the case for arrest is effectively dismissed and there is no order having operation which can be suspended in terms of Uniform Rule 49(11). It is submitted that this approach is the correct one. Where the registrar's order is confirmed there is an order that can be suspended pending an appeal.

[357] 2000 (4) SA 746 (SCA). This decision overruled, by implication, the decision in *The Trienna* 1998 (2) SA 938 (D). See also *The Snow Delta* 1996 (4) SA 1234 (C).
[358] See chapter VI § IV.48.