

SISTER SHIP ARREST AND THE APPLICATION OF THE DOCTRINE OF ATTACHMENT IN AUSTRALIA: A JURISDICTIONAL COMPARATIVE ANALYSIS IN THE WAKE OF THE 1952 ARREST CONVENTION

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1 Introduction

The action *in rem*, once considered the lifeboat of Admiralty jurisdiction, has evolved through the long, colourful and at times tortuous history of Admiralty law to represent the core of Admiralty jurisdiction. Following the introduction of the 1952 Arrest Convention, the action *in rem* against the wrongdoing ship was extended to include an action against what has come to be known as the ‘sister ship’. Whilst Australia is not a party to the 1952 Arrest Convention, it is nonetheless the principle of ‘sister ship’ arrest that has been incorporated into the *Admiralty Act 1988* (Cth) as the ‘surrogate ship’ arrest.

However, with recent Australian case law highlighting the ease with which a defendant shipowner can defeat the principle of ‘sister ship’ or ‘surrogate ship’ arrest, the question then becomes, to what extent is an Australian plaintiff disadvantaged by such actions when contrasted with the remedies available to a plaintiff in comparable foreign jurisdictions?

In light of this question, the aim of this paper is twofold. First, this paper will reflect on the origins of Admiralty jurisdiction, the action *in rem*, and the introduction of Admiralty law in Australia as a means of illustrating the basis for a plaintiff to claim against *the res*. The paper will then explore the concept of ownership of the *res* and demonstrate, through recent case law, the limitations of the action *in rem* when considering ‘surrogate ship’ arrest in Australia.

Second, having identified the ease with which it is possible to defeat the ‘surrogate ship’ arrest provisions under the Admiralty Act, and in recognition of the international nature of the shipping industry, the paper will then principally describe, compare and contrast the ‘associated ship’ arrest and attachment remedies available to a plaintiff in South Africa, and the Rule ‘B’ maritime attachment available in the United States. Having described the principal differences,¹ this paper will then apply the South African and United States remedies to the facts of the Australian Federal Court decision in *Kent v ‘Maria Luisa’* as a means of assessing the measure of a potential Australian plaintiff’s disadvantage.

The paper will then conclude by positing that, if it is in the interests of potential plaintiffs to have the widest possible jurisdiction *in rem* as the 20th anniversary of the Admiralty Act approaches, timely consideration should be given to the need to strike a new balance which will provide suitable local remedies to potential plaintiffs frustrated by the judicial and legislative development of the 1952 Arrest Convention, but at the same time do not unduly make Australia an unattractive destination for foreign shipping.

2 The Development of Admiralty Jurisdiction

2.1 Early Admiralty Jurisdiction

It has been said that for ‘time out of mind, or since sometime prior to the reign of Edward 1, or since the time of Richard II, the law of England has known the Admiral, through whom the King ensured the collection of the droits, profits and emoluments of the sea’.² In addition to this function, the Admiral is also said to have ‘exercised disciplinary powers over the fleet and acted as a court in piracy and maritime causes’.³

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¹ Due to size restrictions this paper will neither examine nor compare and contrast the procedural steps connected with ‘associated ship’ arrest or maritime attachment remedies.

² Ryan, E, ‘Admiralty Jurisdiction and the Maritime Lien: An Historical Perspective’ (1968) 7 *Western Ontario Law Review* 173.

³ *Ibid*.

Whilst the first recorded use of the term ‘Admiral’ in England is in 1300,⁴ the High Court in Admiralty can trace its origins to the reign of Edward III.⁵ Following the establishment of the court⁶ the Admirals and their deputies did not confine themselves to the ‘broad and vague powers, granted by royal patent’⁷ and began to ‘assert a right to a larger jurisdiction’ including the hearing of civil suits.⁸ This asserted jurisdiction was soon felt by the common law courts,⁹ and with their vested interests,¹⁰ carried their grievances to Parliament. As a result of the ‘unwarranted arrogation of power by the Admiral’,¹¹ the common law courts were successful in having the Admiralty Court’s jurisdiction restricted to things done upon the sea.¹²

In the years that followed the Admiralty Court was, for its expansionist tendencies, to suffer at the hands of the courts of common law. By way of the writ of prohibition,¹³ first exercised in 1528 in the case of *Kyrkby c Barfoote*,¹⁴ the common law courts ‘effectively blocked the assumption by the High Court of Admiralty of in personam Jurisdiction’,¹⁵ and thus developed the jurisdiction *in rem*.¹⁶ As a consequence, however, of the restraints in exercise of *in personam* jurisdiction by the Admiralty Courts, the maritime attachment, which had ‘always been merely an adjunct to an in personam proceeding against the owner’¹⁷ fell into disuse in English Admiralty.¹⁸

In *The Beldis*¹⁹ the English Court of Appeal was asked to allow the arrest of any property of the relevant person.²⁰ This argument was rejected by the president, Sir Boyd Merriman. While justifying his position by reference to precedent, Sir Merriman also observed that:

In my opinion, arrest of property unconnected with the claim was merely procedural, and the maxim ‘cessante rationis legis cessat ipsa lex,’ applies. I for one am not prepared, to quote LORD ESHER’S words in *R v Judge of the City of London Court* (12) ([1892] 1 QB at p 299) to ‘re-open the floodgates of Admiralty jurisdiction’ upon the public, especially when that public is an international public, and I can see that the innovation would be disastrous to the prestige of the court.

The action *in rem* was therefore to become the lifeboat of Admiralty jurisdiction. Whilst various attempts were made to settle the conflict between the Admiralty Court and the common law courts none were, however, successful, with the conflict reaching its zenith following the elevation of Sir Edward Coke to Chief Justice.²¹

After a long period of decline, interest once again began to revive in the court, and following the passage of the *Frauds by Boatman Act* in 1813,²² a ‘statutory process began that was to see much of the court’s former

⁴ Cumming, C, ‘The English High Court of Admiralty’ (1993) 17 *Tulane Maritime Law Journal* 209, 219. Cumming identifies Gervase Alard as being appointed Admiral of the Cinque Ports in 1300.

⁵ Cremean, D, *Admiralty Jurisdiction Law and Practice in Australia and New Zealand* (2nd Ed, 2003) 1.

⁶ Which is suggested to be in 1340 following the battle of Sluys. See *ibid*, 2.

⁷ Ryan, above n 2, 173.

⁸ The Australian Law Reform Commission, *Civil Admiralty Jurisdiction*, Report No 33 (1986) para. 9. See The Australian Law Reform Commission, *Civil Admiralty Jurisdiction* (1986) <<http://www.austlii.edu.au/au/other/alrc/publications/reports/33/ALRC33.html>> at 4 February 2007 (‘ALRC Report’).

⁹ Towards the end of the fourteenth century, the common law courts carried their grievance to Parliament claiming an unwarranted arrogation of power by the Admiral. The petitions by the common law courts led to two statutes being passed in 1389 and 1391 which effectively limited the jurisdiction of the Admirals to ‘only such things done upon the sea’ and to the exclusion of ‘all Manner of Contracts, Pleas and Quarrels ... within the Bodies of the Counties, as well by Land as by Water ...’. See ALRC Report [9]; Cremean, above n 5, 2; Ryan, above n 2.

¹⁰ Whilst salaried, the judges of the common law courts at this time obtained the greater part of their income from fees and therefore had a direct financial interest in maintaining and extending the jurisdiction of the Westminster Hall courts. See Ryan, above n 2, 175-6.

¹¹ *Ibid*, 173.

¹² Cremean, above n 5, 2.

¹³ In addition to the power of statutory interpretation. See Ryan, above n 2, 176.

¹⁴ 1 *Selden Society*, *Select Pleas in the Court of Admiralty*, 27 as reproduced in Ryan, above n 2, 177.

¹⁵ *Republic of India v India Steamship Co Ltd (No 2)* [1998] AC 878, 906 per Lord Steyn. Lord Steyn continued to state that this ‘was done by writs of prohibition to restrain the expansion of the jurisdiction of the High Court of Admiralty’: *ibid*, 906-7.

¹⁶ Cremean, above n 5, 2-3. The action *in rem* and the maritime lien ‘constituted the most important characteristics of the pre-1890 English law and armed the maritime litigant with a far more effective remedy against the ship than he enjoyed under the common law.’ See Hofmeyr, G, ‘Admiralty Jurisdiction in South Africa’ (1982) 30 *Acta Juridica* 30, 38.

¹⁷ Davies, M, ‘In Defense of Unpopular Virtues: Personification and Ratification’ (2000) 75 *Tulane Law Review* 337, 343.

¹⁸ Tetley, W, ‘Arrest, Attachment, and Related Maritime Law Procedures’ (1999) 73 *Tulane Law Review* 1895, 1905.

¹⁹ [1935] All ER Rep 760.

²⁰ The property was in fact a ‘sister ship’ but the argument was cast in broad terms and attempted to rely on historical works and dicta from the 19th century cases.

²¹ ALRC Report, above n 8, [10]. Sir Edward Coke, as a great champion of the common law saw Admiralty, with its civil law roots, as his natural target. After Sir Edward Coke’s elevation to the bench he unleashed a “‘torrent of prohibitions,” leaving “little ... for the authority of the Admiral to operate upon ...”’. See Ryan, above n 2, 181-2. See also Cumming, above n 4, 237-8.

²² (53 Geo 111, c 87).

jurisdiction restored and much new jurisdiction added'.²³ The principal reform instruments were the *Admiralty Court Act 1840* (UK) and the *Admiralty Courts Act 1861* (UK).²⁴ With the passage of the *Admiralty Courts Act 1861* (UK), the Court was at last 'declared to be a court of record with all the powers of a superior court of common law' with jurisdiction capable of being 'exercised either *in rem* or *in personam*'.²⁵ With the passage of the *Colonial Courts of Admiralty Act 1890* (UK), the jurisdiction of both Admiralty Acts passed to courts abroad — including Australia.

2.2 Admiralty Jurisdiction in Australia

The *Admiralty Act 1988* (Cth) ('Admiralty Act') came into force on 1 January 1989.²⁶ The Act, which repealed the *Colonial Courts of Admiralty Act 1890* (UK),²⁷ is based on recommendations in Report No 33 of the Australian Law Commission on *Civil Admiralty Jurisdiction* ('ALRC Report').²⁸ The purpose of the Admiralty Act was described by Foster J in the *Port of Geelong Authority v Ship Bass Reefer*, where his Honour stated:²⁹

As indicated in the explanatory memorandum circulated with the *Admiralty Bill 1988* (Cth), the purpose of the Act is:

'to provide for the Admiralty jurisdiction of Australian Courts, in a form which is comprehensive, accessible, and consistent with Australian needs and with international standards concerning civil jurisdiction over ships.'

The object of the legislation is the regulation of 'Admiralty jurisdiction of Australian Courts both in actions *in rem* and *in personam*'.

Whilst a detailed consideration of the jurisdiction of Australian courts is beyond the scope of this paper, it is sufficient for present purposes to note that:

- The Admiralty Act was intended to reform the law with respect to Admiralty jurisdiction and strike a balance which would bring the jurisdiction more closely into line with that conferred by the United Kingdom³⁰ and, thus, more closely into line with the practice and principles adopted in the International Convention relating to the Arrest of Sea-going Ships.³¹
- The admiralty provisions of the *Administration of Justice Act 1956* (UK) formed the model for the Australian, English and South African laws.³²
- Part 1 of the *Administration of Justice Act 1956* (UK) gave effect, *inter alia*, to the International Convention relating to the Arrest of Sea-going Ships.³³
- The Admiralty Act brought Australian law 'substantially into accord with the laws of other countries'³⁴ including, for present purposes, England³⁵ and South Africa.³⁶

²³ Cremean, above n 5, 3.

²⁴ *Ibid.* See also the ALRC Report, above n 8, [11] which states that the 'principal reforms were passed in 1840 and 1861. By the Admiralty Court Act 1840 (UK) the Court was given jurisdiction, subject to the terms of the Act, over claims involving ships' mortgages and over claims in salvage, towage, damage, wages and necessaries, bottomry and possession (even though those may have arisen within the body of a country)'.

²⁵ ALRC Report, above n 8, [11]. Tetley describes the revival of the Courts *in personam* jurisdiction as a 'renaissance' but notes that the court 'no longer entailed the arrest of the person of the defendant; only his service with a writ of summons'. See Tetley, W, *International Maritime and Admiralty Law* (2002) 406.

²⁶ This paper will not address the Vice-Admiralty Courts pursuant to Royal letters patent of 12 April 1787 or the *Vice Admiralty Courts Act 1863* (UK). For a discussion of their application in Australia see ALRC Report, above n 8, [18-19].

²⁷ *Admiralty Act 1988* (Cth) s 44(1). The implementation of the *Admiralty Act 1988* (Cth) and the repealing of the *Colonial Courts of Admiralty Act 1890* (UK) was consistent with the Summary of Recommendations on Australian Legislation at [1] of the ALRC Report, above n 8.

²⁸ ALRC Report, above n 8. The Report was described by Foster J as 'a most comprehensive document' and "'involved a thorough review of developments in other countries and at the international level" in respect to admiralty law and jurisdiction'. See *Port of Geelong Authority v Ship Bass Reefer* (1992) 37 FCR 374, 380.

²⁹ *Ibid.*, 379.

³⁰ *Supreme Court Act 1981* (UK).

³¹ See *Owners of Shin Kobe Maru v Empire Shipping Co. Inc.* (1994) 181 CLR 404, 420.

³² Cremean, above n 5, 6.

³³ Signed at Brussels on 10 May 1952. According to Michael White the 'Act brings the jurisdiction more closely into line with that in England and more closely into line within the practice and principles adopted in the Arrest Convention 1952.' See White, M, *Australian Maritime Law* (2nd Ed, 2000) 29.

³⁴ Cremean, above n 5, 5.

³⁵ *Supreme Court Act 1981* (UK).

³⁶ *Admiralty Jurisdiction Regulation Act 1983* (S Af).

3 Distinctive Feature of Admiralty Jurisdiction — The Action *In Rem*

As noted above, in response to the hostile treatment of the Admiralty courts at the hands of the courts of common law, the Admiralty courts developed the action *in rem*³⁷ whereby the ‘ship concerned by the claim within the jurisdiction (and in some cases its cargo, freight and/or bunkers) may be arrested to found the court’s jurisdiction and provide pre-judgment security’.³⁸ The action *in rem* usually had the effect of securing the defendant’s appearance in the suit.³⁹

It has been stated that the ‘core of any country’s admiralty jurisdiction is the action *in rem* against a ship owned by the person who would be liable *in personam* on a claim relating to that ship’.⁴⁰ This position is reflected in Article 3(1) of the International Convention for the Unification of Certain Rules Relating to the Arrest of Sea-Going Ships, 1952⁴¹ (‘1952 Arrest Convention’) which states:⁴²

Subject to the provisions of paragraph 4 of this Article and of Article 10, a claimant may arrest either the particular ship of which the maritime claim arose, or any other ship which is owned by the person who was, at the time when the maritime claim arose, the owner of the particular ship, even though the ship arrested be ready to sail but no ship, other than the particular ship in respect of which the claim arose, may be arrested in respect of any of the maritime claims enumerated in Article 1(1)(o), (p) or (q).

It is therefore clear that there are two basic requirements for the arrest of a ship. The first is that ‘the claim must be related to a particular ship; the second is that the claim must be against the owner of that ship’.⁴³ It is also clear that Article 3(1) of the 1952 Arrest Convention allows for the right to arrest a sister ship as an alternative, that is, the claimant may ‘arrest either the particular ship in respect of which the maritime claim arose, or any other ship’⁴⁴ — the so-called ‘sister ship’ provision.⁴⁵

It follows that in order to arrest a ‘sister ship’ there must be a nexus between the ‘sister ship’ and the relevant person (ie the ‘wrongdoer’).⁴⁶ Prior to the passage of the Admiralty Act, the ALRC Report described the appropriate nexus in the following terms:⁴⁷

If the purpose of the action *in rem* against a surrogate ship is to persuade the relevant person to appear and to provide security, the appropriate nexus is not with the wrongdoing ship but rather with the relevant person. In other words, the proper nexus requirements are, first, between the claim and the wrongdoing ship, then between the wrongdoing ship and the relevant person and finally between the person and that person’s other ships.

Part III of the Admiralty Act provides that a matter of admiralty or maritime jurisdiction may be commenced as an action *in rem* when proceeding on a maritime lien,⁴⁸ a proprietary maritime claim⁴⁹ or a general maritime

³⁷ The title of the action was, however, not material to early Admiralty procedure which was directed against the defendant. Only after entering an appearance and stipulation for the release of his ship or property, did the case proceed ‘*ut in actione institute contra personam debitoris*’. According to Ryan, ‘There was no early concept of the action being directed against the ship or the stipulation, as distinct from the form of the action *in rem* as it later evolved. It was not until the common law prohibitions forced the Admiralty into the position that it “might have jurisdiction *quoad* the *res*, though not *quoad* its owners” ...’ See Ryan, above n 2, 190.

³⁸ Tetley, above n 25, 407.

³⁹ *Ibid.*

⁴⁰ Martin Davies, ‘International Perspectives on Admiralty Procedures’ (Speech delivered at the Maritime Law Association of Australia and New Zealand, Brisbane, 1-3 October 2003).

⁴¹ Signed at Brussels on 10 May 1952.

⁴² In the *Monte Ulia* (Owners) v *The ‘Banco’ and other Vessels (Owners)*, (*The Banco*) Lord Denning expressed the opinion that the ‘important word in that sub-section is the word “or”’. It is used to express an alternative as in the phrase “one or the other”. It means that the admiralty jurisdiction *in rem* may be invoked *either* against the offending ship *or* against any other ship in the same ownership, but not against both. This is the natural meaning of the word “or” in this context. It is the meaning which carries into effect the international Convention. It is the meaning which on high authority we ought to give to it.’ See *The Banco* [1971] 1 Lloyd’s Rep 49, 53.

⁴³ Berlingieri, F, *Berlingieri on Arrest of Ships – A Commentary on the 1952 and 1999 Arrest Conventions* (3rd Ed, 2000) 97.

⁴⁴ *Ibid.*, 113. In *The Banco* the opinion was expressed that the words ‘any other ship’ were to be construed in the singular, so that if more than one ship were liable to arrest, the claimant could select only one of them. See *The Banco*, above n 42, 53. See also *The Eleferio* [1957] 1 Lloyd’s Rep 283; *The St Merriel* [1963] 1 Lloyd’s Rep 63; and *The Berny* [1977] 2 Lloyd’s Rep 533.

⁴⁵ Berlingieri, above n 43, 113. The term ‘sister ship’ is imprecise as it technically refers to ships of the same design. It is also an inappropriate term today due to the employment of a gendered term.

⁴⁶ Adapting the language of the ALRC Report, above n 8, [205].

⁴⁷ *Ibid.*

⁴⁸ The list of maritime liens is found in s 15(2) of the *Admiralty Act 1988* (Cth).

⁴⁹ The list of proprietary maritime claims is found in s 4(2) of the *Admiralty Act 1988* (Cth).

claim⁵⁰ against a ship or property. In addition, and giving effect to the ALRC Report, section 19 of the Admiralty Act provides a right to proceed *in rem* against a ‘surrogate ship’⁵¹ for a general maritime claim.⁵²

A proceeding on a general maritime claim concerning a ship may be commenced as an action *in rem* against some other ship if:

- (a) a relevant person in relation to the claim was, when the cause of action arose, the owner or charterer of, or in possession or control of, the first-mentioned ship; and
- (b) that person is, when the proceeding is commenced, the owner of the second-mentioned ship.

The focus on the relevant person in both s 19 of the Admiralty Act and the 1952 Arrest Convention⁵³ are considered to represent another step away from what is known as the ‘personification theory’ and further towards the ‘procedural theory’ as they relate to the action *in rem*.

The personification theory can be ‘traced back to the practice of the English admiralty courts in the sixteenth century and possibly before’⁵⁴ and, as its name suggests, treats the ship as a person, a legal entity.⁵⁵ The procedural theory, however, treats the ‘arrest of a ship as essentially a device to compel the appearance of the owner of the ship.’⁵⁶ As the ‘whole notion of actions *in rem* against surrogate ships relies on the rejection of the personification theory and acceptance of the procedural theory’⁵⁷ it is therefore necessary to ask the question: who is the owner?

4 Who is the Owner of the Sister Ship?

The Admiralty Act does not define the word ‘owner’. The Admiralty Act is, however, a creature of the Australian Parliament and must be construed in accordance with the laws of Australia.⁵⁸ In the *Owners of Shin Kobe Maru v Empire Shipping Co Inc*⁵⁹ the High Court of Australia said that the Admiralty Act was intended to ‘reform the law with respect to the Admiralty jurisdiction’ and that it was ‘intended to strike a balance which would bring the jurisdiction more closely into line with that conferred by the U.K. Act and, thus, more closely into line with the practice and principles adopted in the Arrest Convention’.⁶⁰ The Court also said that when interpreting the Admiralty Act regard should be had for the ‘natural and ordinary meaning’⁶¹ of words and that a ‘statutory definition should be approached on the basis that Parliament said what it meant and meant what it said’.⁶²

Regard may also be had to s 15AB(2)(b) of the *Acts Interpretation Act 1901* (Cth) which permits consideration to be given to the ALRC Report. As the Admiralty Act reproduces the substance of draft legislation prepared by the ALRC ‘as part of its 1986 report’,⁶³ and the object of the draft legislation was to ‘strike a balance between following the English legislation and seeking to clarify and simplify the law’,⁶⁴ it is clear that when considering s 19 of the Admiralty Act consideration may be given to s 21(4) of the *Supreme Court Act 1981* (UK),⁶⁵ which

⁵⁰ The list of general maritime claims is found in s 4(3) of the *Admiralty Act 1988* (Cth).

⁵¹ The *Admiralty Act 1988* (Cth) does not use the phrase ‘sister ship’ which is described by the ALRC Report, above n 8, [205], as ‘erroneous and confusing’.

⁵² *Admiralty Act 1988* (Cth) s 19: Right to proceed *in rem* against surrogate ship.

⁵³ When considering the enactment of the *Admiralty Act 1988* (Cth) the Australian Parliament decided not to adopt the 1952 Arrest Convention. To date Australia has not signed the International Convention for the Unification of Certain Rules relating to the Arrest of Sea-going Ships signed at Brussels 10 May 1952. See Comité Maritime International Yearbook 2005-2006 available at <http://www.comitemaritime.org/year/2005_6/pdf/files/YBK05_06.pdf> at 10 February 2007.

⁵⁴ Davies, above n 17, 341.

⁵⁵ ALRC Report, above n 8, [17].

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*, [125].

⁵⁸ See joint judgment of Tamberlin and Hely J in *Kent v SS ‘Maria Luisa’ (No 2)* (2003) 130 FCR 12, 27.

⁵⁹ (1994) 181 CLR 404.

⁶⁰ *Ibid.*, 420.

⁶¹ *Ibid.*, 418.

⁶² *Ibid.*, 420.

⁶³ *Ibid.*, 416.

⁶⁴ ALRC Report, above n 8, [95].

⁶⁵ ‘As a matter of policy, clearly one argument is that Australia should adhere to the position taken by countries whose legal systems are similar to Australia’s, and by the 1952 Arrest Convention.’ See *ibid.*, [125]. It is also noted that s 19 of the *Admiralty Act 1988* (Cth) is based on s 21(4) of the *Supreme Court Act 1981* (UK), which is in turn based on the *Administration of Justice Act 1956* (UK), which provided for ‘sister ship’ arrest in s 3(4).

is in turn based on the *Administration of Justice Act 1956* (UK)⁶⁶ which gave domestic effect to the 1952 Arrest Convention.

4.1 Ownership and the Arrest Convention

Under the 1952 Arrest Convention,⁶⁷ as noted above, the nexus between the defendant and the ‘sister ship’ is found in Article 3(1) in that the vessel must be ‘owned’ by the defendant. Paragraph 3(2) further provides a deeming provision which states that ships shall be ‘deemed to be in the same ownership when all the shares therein are owned by the same person or persons’.⁶⁸

The Admiralty Act, and in particular s 19, does not make provision for the arrest of a ‘surrogate’ ship which is only co-owned by the relevant person. As the ALRC Report noted:⁶⁹

Where the other ship is only partly owned by the relevant person, neither the 1952 Arrest convention art 3(2) nor any of the recent Acts [including the *Supreme Court Act 1981* (UK) s 21(4)(ii)] allow an action *in rem* to be brought. ...

On balance there is no sufficient warrant for departing from the position adopted in the Brussels [Arrest] Convention and in all relevant overseas legislation. The proposed legislation should accordingly allow an action *in rem* against the other vessel only where all its co-owners are relevant persons on the original claim.

The question then becomes, in light of the ability to consider UK legislation, what is the position in the United Kingdom?

4.2 Ownership under the *Supreme Court Act 1981* (UK)

Both the *Administration of Justice Act 1956* (UK) and the later *Supreme Court Act 1981* (UK) use the term ‘beneficial ownership’ despite the term ‘beneficial ownership’ not being mentioned in the *travaux préparatoires* of the Convention.⁷⁰ In particular, s 21(4)(b)(ii) of the *Supreme Court Act 1981* (UK) provides for an action *in rem* to be brought against ‘[a]ny other ship of which, at the relevant time when the action is brought, the relevant person is the beneficial owner as respects all the shares in it’.⁷¹

In *I Congreso del Partido*⁷² Goff J stated that:⁷³

... the words ‘beneficially owned as respects all the shares therein’ refers only to cases of equitable ownership, whether or not accompanied by legal ownership, and are not wide enough to include cases of possession and control without ownership, however full and complete such possession and control may be.

As to demise charterers, Goff J stated:⁷⁴

⁶⁶ The *Administration of Justice Act 1956* (UK) gave effect to both the International Convention relating to the Arrest of Sea-going Ships and the International Convention on Certain Rules Concerning Civil Jurisdiction in Matters of Collision. Both Conventions were signed at Brussels on 10 May 1952. See also The UK Statute Law Database (2007) *Department for Constitutional Affairs* <<http://www.statutelaw.gov.uk/legResults.aspx?LegType=All%20Primary&PageNumber=2&BrowseLetter=A&NavFrom=1&activeTextDocId=1159108>> at 7 February 2006.

⁶⁷ Due to size restrictions this paper will not consider the International Convention on Arrest of Ships, 1999 done at Geneva, 12 March 1999 (not yet in force). At the time of writing, no major shipowning country has signed the 1999 Arrest Convention. At present only 7 countries are signatory to the 1999 Convention, namely: Albania, Algeria, Bulgaria, Estonia, Latvia, Spain and the Syrian Arab Republic. See Comité Maritime International Yearbook 2005-2006 available at <http://www.comitemaritime.org/year/2005_6/pdffiles/YBK05_06.pdf> at 10 February 2007.

⁶⁸ International Convention for the Unification of Certain Rules Relating to the Arrest of Sea-Going Ships, 1952, s 3(2).

⁶⁹ ALRC Report, above n 8, [206].

⁷⁰ Berlingieri, above n 43, 36.

⁷¹ *Supreme Court Act 1981* (UK) s 21(4)(b)(ii). See also s 3(4) of the *Administration of Justice Act 1956* (UK) which provided that ‘In the case of any such claim ... where the person who would be liable on the claim in an action in personam was, when the cause of action arose, the owner ... (b) any other ship which, at the time when the action is brought, is beneficially owned as aforesaid.’

⁷² [1978] QB 500.

⁷³ *Ibid.*, 538.

⁷⁴ *Ibid.* See also *The Father James* [1979] 2 Lloyd’s Rep 364 where Sheen J held that the words ‘beneficially owned as respects all shares therein’ did not apply to a demise charterer.

Furthermore, on the natural and ordinary meaning of the words, I do not consider them apt to apply to the case of a demise charterer or indeed any other person who has only possession of the ship, however full and complete such possession may be, and however much control over the ship he may have.

Goff J went on to explain, in connection with s 3(4) of the *Supreme Court Act 1981* (UK), that the intention of Parliament in adding the word “beneficially” before the word “owned” in section 3(4) was simply to take account of the institution of the trust, thus ensuring that, if a ship was to be operated under the cloak of a trust, those interested in the ship would not thereby be able to avoid the arrest of the ship.⁷⁵

4.3 Ownership under the Admiralty Act 1988 (Cth)

As noted above, the person who would be liable *in personam* must be when the cause of action arose:

- (a) the owner or charterer of, or in possession or control of, the first-mentioned ship; and
- (b) when the proceeding is commenced, the owner of the second-mentioned ship.

In *Malaysia Shipyard and Engineering SDN BHD v Iron Shortland as the Surrogate for the Ship Newcastle Pride*⁷⁶ Sheppard J decided that the word ‘owner’ as it appears in the Admiralty Act includes not only the registered owner, but also a beneficial owner.⁷⁷ Whilst the decision of Sheppard J can be seen to have extended the envelope of admiralty jurisdiction so that it is comparable to that of the UK, the ‘restrictive nature’⁷⁸ of s 19 of the Admiralty Act was nonetheless illustrated by the 2003 decision of the Full Court of the Federal Court of Australia in *Kent v SS ‘Maria Luisa’ (No 2)*.⁷⁹

The facts in *Kent v SS ‘Maria Luisa’* were not in dispute between the parties and can be succinctly stated.⁸⁰ On 24 April 2001 the applicant, a diver and deckhand employed in the tuna fishing and farming industry in South Australia, commenced proceedings *in rem* against the *Maria Luisa* as surrogate vessel for the vessels *Monika* and *Boston Bay* pursuant to s 4(3)⁸¹ and s 19⁸² of the Admiralty Act for severe, irreversible decompression illness.⁸³

The registered owner of the *Maria Luisa* was Everdene Pty Ltd (‘Everdene’) who was:

- (a) the registered owner at the time the proceedings were commenced; and
- (b) the trustee of the Maria Luisa Unit Trust.

Everdene was a wholly owned subsidiary of Australian Fishing Enterprises Pty Ltd (‘AFE’) who held all of the units in the Maria Luisa Unit Trust.⁸⁴

The applicant’s statement of claim claimed, relevantly:

- (a) at all material times AFE was the owner or charterer of, or in possession or control of the vessels *Monika* and *Boston Bay*;⁸⁵
- (b) at the time of the commencement of proceedings, AFE was the owner of the vessel *Maria Luisa*;
- (c) at all material times AFE owed a duty of care to the plaintiff; and
- (d) the plaintiff’s injuries were occasioned by reason of the negligence or breach on the part of AFE’s duty of care to the plaintiff.

⁷⁵ [1978] QB 500, 542.

⁷⁶ (1995) 59 FCR 535.

⁷⁷ *Ibid*, 547.

⁷⁸ Davies, above n 40.

⁷⁹ (2003) 130 FCR 12.

⁸⁰ *Kent v SS ‘Maria Luisa’* has also been the subject of journal articles by Derrington, S, ‘What is a Policy of Marine Insurance? Who is an “Owner”?’ (2003) 4(2) *Shipping & Transport Lawyer* 24, and Hurley, J, ‘The Rightful Owner’ (2004) 27 *Maritime Advocate* 32.

⁸¹ Maritime claims. Section 4(3) contains a list of the general maritime claims for which an action *in rem* may be commenced. Specifically, the applicant claimed under s 4(3)(c): a claim for loss of life, or for personal injury, sustained in consequence of a defect in a ship or in the apparel or equipment of a ship; and, (d): a claim (including a claim for loss of life or personal injury) arising out of an act or omission of ... the owner or charterer of a ship [or] a person in possession or control of a ship ... being an act or omission in the navigation or management of the ship ...

⁸² Right to proceed *in rem* against surrogate ship.

⁸³ The headnote to *Kent v SS ‘Maria Luisa’ (No 1)* states that the applicant had been employed at various times on all three vessels.

⁸⁴ AFE was therefore also the sole beneficiary of the Maria Luisa Unit Trust.

⁸⁵ The *Monika* was owned by Simone Fisheries Pty Ltd as trustee of the Simone Fisheries Unit Trust. The *Boston Bay* was owned by Blazar Fisheries Pty Ltd as trustee for the Blazar Unit Trust. The sole beneficiary of each of the two trusts was Australian Fishing Enterprises Pty Ltd. See *Kent v SS ‘Maria Luisa’ (No 2)* (2003) 130 FCR 12, 27.

The applicant also submitted that, notwithstanding that Everdene was the registered owner, AFE was the equitable or beneficial owner of the *Maria Luisa*, because AFE was the demise charterer of the vessel and therefore the ‘owner’ for the purposes of s 19(b) of the Admiralty Act. Beaumont J, in rejecting this submission, accepted that a ‘person is not a “beneficial owner” merely by being in possession as operator and manager, or under a demise charter’ — thereby following the reasoning of Goff J in *I Congreso del Partido*.⁸⁶

Beaumont J also considered if the facts were sufficient to warrant the court lifting the corporate veil on the basis of the evidence relied upon governing the corporate relationship between AFE and Everdene.⁸⁷ Relying on *Malaysia Shipyard and Engineering SDN BHD v Iron Shortland as the Surrogate for the Ship Newcastle Pride*,⁸⁸ and in the absence of evidence of a sham⁸⁹ or fraud,⁹⁰ his Honour accepted the fact that Everdene, as a wholly-owned subsidiary of AFE cannot, of itself, establish in AFE beneficial ownership of any asset owned by Everdene and therefore could not lift the corporate veil in this instance.⁹¹

On appeal⁹² the appellant contended that AFE’s interest under the Trust Deed was such that it was the owner of the *Maria Luisa* at the material time. By a majority⁹³ the Full Court of the Federal Court dismissed the appeal and affirmed the order of Beaumont J, who, on this point, stated that AFE’s rights under the trust deed constituting the Trust did not confer upon it equitable ownership in the Trust’s individual assets.⁹⁴

In the view of the majority:

- (a) Whilst AFE had a beneficial interest in the *Maria Luisa* by way of its status as beneficiary of all of the units in the Maria Luisa Unit Trust, the interest was a ‘contingent defeasible interest’,⁹⁵ and did not amount to ownership.
- (b) That, as a ‘fundamental principle of company law’ a ‘shareholder in a company, even a sole shareholder, has no property, legal or equitable in the assets of the company by reason of that shareholding’,⁹⁶ which meant that AFE did not own the assets of Everdene.

As Davies has pointed out, the decision in *Kent v SS ‘Maria Luisa’ (No 2)*⁹⁷ ‘shows how easy it is for ship operators to circumvent the surrogate ship provisions of the *Admiralty Act 1988* (Cth)’.⁹⁸ The majority judgment can be considered consistent with the approach taken in England when considering the term ‘beneficial ownership’, given the Court’s consideration of the corporate structure;⁹⁹ and consistent with the ALRC Report which concluded that it is undesirable to make ‘special provision with respect to [lifting] the corporate veil in legislation dealing with admiralty jurisdiction’.¹⁰⁰ It is, however, clear from the judgment that in order to circumvent the Australian surrogate ship provisions it is only necessary to insert a ‘wholly-owned subsidiary’,¹⁰¹ and/or unit trust, or for the person who would be liable *in personam* to sell the ‘guilty’ ship prior to a plaintiff commencing proceedings, to avoid the risk of surrogate ship arrest.

⁸⁶ [1978] QB 500.

⁸⁷ Article 3(1) of the 1952 Arrest Convention permits the arrest of ‘any other ship’ owned by the person liable. Article 3(2) then provides that ships ‘shall be deemed to be in the same ownership when all shares therein are owned by the same person or persons’. According to Berlingieri, s 3 of the 1952 Arrest Convention does not indicate in any way in which circumstances ships may be deemed to be owned by the same person, while the practical effect of piercing the corporate veil is that of considering the assets formally owned by two or more companies as owned by one legal entity only. See Berlingieri, F, ‘The 1952 Arrest Convention revisited’ [2005] *Lloyd’s Maritime and Commercial Law Quarterly* 327, 334-5. In the *travaux préparatoires* of the 1999 Arrest Convention the CMI recommended that, with respect to lifting the corporate veil, ‘this problem is of a more general nature and that a solution should not be attempted with specific application in arrest situations but that the problem would have to be left to national law’. See Berlingieri, above n 43, 477.

⁸⁸ (1995) 59 FCR 535.

⁸⁹ Which was not alleged. *Kent v ‘Maria Luisa’ (No 1)* (2002) 130 FCR 1, 9

⁹⁰ Which was not seriously suggested. See *ibid*.

⁹¹ For a discussion on the various means by which a party can pre-contract protect himself when dealing with a single asset company and post-contract pierce or otherwise avoid any corporate veil that lies between him and the assets that he seeks to attach, see Clulow, J, ‘Ship Arrest Beyond the Corporate Veil’ (2003) 17 *P & I International* 16-8.

⁹² *Kent v SS ‘Maria Luisa’ (No 2)* (2003) 130 FCR 12.

⁹³ Tamberlin and Hely JJ with Moore J in dissent.

⁹⁴ *Kent v ‘SS Maria Luisa’ (No 1)* (2002) 130 FCR 1, 10.

⁹⁵ *Kent v SS ‘Maria Luisa’ (No 2)* (2003) 130 FCR 12, 35.

⁹⁶ *Ibid*, 29.

⁹⁷ (2003) 130 FCR 12.

⁹⁸ Davies, above n 40.

⁹⁹ *Kent v SS ‘Maria Luisa’ (No 2)* (2003) 130 FCR 12, 29-30.

¹⁰⁰ ALRC Report, above n 8, [138-141].

¹⁰¹ Using the term in the judgments of *Kent v SS ‘Maria Luisa’ (No 1)* (2002) 130 FCR 1; *Kent v SS ‘Maria Luisa’ (No 2)* (2003) 130 FCR 12; and, *Malaysia Shipyard and Engineering SDN BHD v Iron Shortland as the Surrogate for the Ship Newcastle Pride* (1995) 59 FCR 535.

With hindsight, the judgment also reflects the ALRC Report's deliberations when considering lifting the corporate veil in admiralty. As the ALRC noted at paragraph 138:¹⁰²

As the general reluctance to lift the corporate veil in Australia is at least as great as it is in England, it may be assumed that similar decisions will be reached in admiralty here unless the proposed legislation clearly directs otherwise.

However, the decision in *Kent v SS 'Maria Luisa' (No 2)*¹⁰³ can be considered to leave Australian plaintiffs at a distinct comparative disadvantage to that of a number of overseas jurisdictions. Australia's 'basic maritime transport policy orientation' is dictated by its 'status as a shipper rather than as a maritime nation ... as a user rather than supplier of shipping services'.¹⁰⁴ Australia is dependent on 'foreign shipping for much of its import and export trade',¹⁰⁵ with a 'significant proportion of Australia's overseas trade carried in ships registered in "open registry" or "flag of convenience" states'.¹⁰⁶ With an increasing amount of cargo being carried under single voyage permits on foreign vessels,¹⁰⁷ it is arguable that an Australian plaintiff would face having to initiate proceedings against a foreign ship owner¹⁰⁸ who, in many instances (due to corporate restructuring following recognition of the 'sister ship' provisions in the 1952 Arrest Convention)¹⁰⁹ is little more than a "brass plate" office care of Panamanian or Liberian lawyers'.¹¹⁰

The depth and breadth of this disadvantage can be measured by comparing and contrasting Australia's 'surrogate vessel' arrest provisions with those of other countries which have, in common with Australia, large coastlines, a need for maritime trade and are not signatories to the 1952 Arrest Convention. As Davies points out, the 'most instructive part of any comparative analysis of admiralty procedure is an examination of how far beyond that core the [action *in rem*] admiralty jurisdiction reaches'.¹¹¹ The measure of Australia's disadvantage will therefore be assessed by considering the 'associated ship' arrest and attachment procedures available in South Africa, and arrest and the 'Rule B' attachment found in the United States.

5 South Africa: Arrest of Associated Ships and the Doctrine of Attachment

5.1 Development of Admiralty Jurisdiction

Because South Africa was once a British possession it shares a common history with a number of colonial countries in respect of maritime law. From the time of the first British occupation of the Cape in 1806¹¹² Vice-Admiralty Courts, administering English admiralty law, existed alongside the ordinary courts which administered Roman-Dutch law.¹¹³

In 1890 the Vice-Admiralty Courts were abolished when the British Parliament enacted the *Colonial Courts of Admiralty Act 1890* (UK).¹¹⁴ Section 2(1) of the *Colonial Courts of Admiralty Act 1890* (UK) provided:¹¹⁵

¹⁰² ALRC Report, above n 8, [138].

¹⁰³ (2003) 130 FCR 12.

¹⁰⁴ Commonwealth of Australia, Department of Transport, 'Economic Policy Developments in International Shipping – Australia's Approach' (1981) 52 *Australian Foreign Affairs Review* 395, 396 as cited in the ALRC Report, above n 8, [93]. See also the second reading speech by the Hon M C Tate, in respect of the Carriage of Goods by Sea Bill 1991, where he stated 'Australia remains essentially a shipper nation and the Bill [Carriage of Goods by Sea Bill 1991] provides for the eventual replacement of the Hague/Visby/SDR regime with the Hamburg Rules.' See the Hon M C Tate 'Second Reading Speech' (Senate, Canberra, 14 August 1991).

¹⁰⁵ The Hon Lionel Bowen, 'Second Reading Speech – Admiralty Bill 1988' (Senate, Canberra, 28 April 1988).

¹⁰⁶ ALRC Report, above n 8, [93].

¹⁰⁷ Australian Government, Department of Transport and Regional Services, Bureau of Transport and Regional Economics, *Waterline* (2006) 41 <http://www.btre.gov.au/docs/waterline/wl_41/wl41.pdf> at 10 February 2007. The number of single voyage permits issued in 1990 was less than 100. In 2006 over 350 single voyage permits were issued by the Department of Transport and Regional Services.

¹⁰⁸ According to the Federal Court of Australia Annual Report 2005/2006 16 arrests were made under the *Admiralty Act 1988* (Cth). For the year 2004/2005 6 arrests were made; 2003/2004 12 arrests were made; and in 2002/2003 9 arrests were made. See Federal Court of Australia, *Annual Reports* (2007) <<http://www.fedcourt.gov.au/aboutct/ar.html>> at 10 January 2007.

¹⁰⁹ International Convention for The Unification of Certain Rules Relating to the Arrest of Sea-Going Ships, 1952, s 3(2).

¹¹⁰ John Hare, *Shipping Law & Admiralty Jurisdiction in South Africa* (1999) 77. Alternatively described as the '\$2 company with elusive principals and no assets other than the vessel itself'. See the ALRC Report, above n 8, [93].

¹¹¹ Davies, above n 40.

¹¹² In 1795 the British responded to France's overrunning the Dutch Republic by occupying the Cape. After returning it at the Treaty of Amiens in 1802, the British re-annexed the colony in 1806 after the beginning of the Napoleonic Wars. See Encyclopedia Britannica, *Accentuated European Impact, c 1810-35* (at 18 February 2007) Britannica 2007.

¹¹³ Rycroft, A, 'Changes in South African Admiralty Jurisdiction' [1984] *Lloyd's Maritime and Commercial Law Quarterly* 417.

¹¹⁴ The *Colonial Courts of Admiralty Act 1890* (UK) came into effect on 1 July 1891.

¹¹⁵ *Ibid*, s 2(1).

Every Court of law in a British possession, which is for the time being declared in pursuance of this Act to be a court of Admiralty, or which, if no such declaration is in force in the possession, has therein original unlimited civil jurisdiction, shall be a Court of Admiralty, with the jurisdiction in this act mentioned, and may for the purpose of that jurisdiction exercise all the powers which it possesses for the purpose of its other civil jurisdiction, and such Court in reference to the jurisdiction conferred by this Act is in this Act referred to as a Colonial Court of Admiralty. Where in a British possession the Governor is the sole judicial authority, the expression 'Court of law' for the purposes of this section includes such Governor.

The Cape and Natal Supreme Courts, as courts with unlimited civil jurisdiction in British possessions, became Colonial Courts of Admiralty¹¹⁶ with the same jurisdiction as the admiralty jurisdiction of the High Court in England. The difficulty with investing the Supreme Court with admiralty jurisdiction was that there were now two sources of admiralty jurisdiction in South Africa: the 'ordinary jurisdiction of the Supreme Court which applied Roman-Dutch law and the special jurisdiction of the admiralty courts applying English law'.¹¹⁷

The effect of the two sources of admiralty jurisdiction meant that the same case could give rise to different decisions. For example, 'a claimant having a privileged hypothec'¹¹⁸ recognized by Roman-Dutch law but not by the English admiralty law could not assert his claim in admiralty proceedings and participate in the admiralty court's fund'.¹¹⁹

According to the South African Law Commission, *Report on the Review of the Law of Admiralty, Project No 32* (1982)¹²⁰ ('SALC Report'):¹²¹

The position, therefore is that not only may the rights of the parties themselves depend upon whether action is instituted in the admiralty court or in the ordinary courts, but rights of persons who are not parties to the action at all may depend upon which court decides the action.¹²²

Fortunately, there were 'very few admiralty decisions of the Cape and Natal courts' and later, 'the South African Supreme Court sitting with Admiralty Jurisdiction'.¹²³ After what has been described as 'an unnaturally long period of inactivity in the field of maritime law in general and admiralty law in particular during which there have been few reported cases to give any outward indication that courts were indeed functioning in South Africa'¹²⁴ South Africa began to witness a resurgence in admiralty cases adorning the law reports. This resurgence can be attributed to a number of factors, including:

- the closure of the Suez Canal — which led to an enormous increase in the volume of traffic calling at South African ports;
- the increasing presence and activity of local cargo insurers;
- the opening of the Richards Bay harbour — with its facilities for the bulk handling of iron ore and coal;
- controversies concerning the payment of seamen's wages in terms of the ITF;¹²⁵ and
- the perceived 'good value for money' factor associated with the South African legal profession.¹²⁶

With the increasing volume of shipping matters coming before the South African courts it became apparent that, if South Africa was to 'maintain an adequate level of expertise, reform was necessary'.¹²⁷ After what has been

¹¹⁶ Hare, above n 110, 14.

¹¹⁷ Rycroft, above n 113, 417.

¹¹⁸ The term 'hypothec' is the appropriate civil law term in English that corresponds to the common law concept of 'mortgage'. See Department of Justice Canada, *Bijural Terminology Record* (2007) <http://www.justice.gc.ca/en/ps/bj/harm/hypothecue_mortgage_16.html> at 10 February 2007.

¹¹⁹ Rycroft, above n 113, 417.

¹²⁰ The report is dated 15 September 1982. South African Law Commission, *Report on the Review of the Law of Admiralty, Project No 32* (1982) ('SALC Report').

¹²¹ The writer wishes to acknowledge the assistance of Mr Martinus (Tienie) Cronje of the South African Law Reform Commission, Department of Justice and Constitutional Development, for his assistance in obtaining a copy of the original draft of the SALC Report.

¹²² SALC Report, above n 120, 9.

¹²³ Hare, above n 110, 14.

¹²⁴ Dillon, C, and van Niekerk, J P, *South African Maritime Law and Marine Insurance: Selected Topics* (1983) 3 as reported in Friedman, D B, 'Maritime Law in Practice and in the Courts' (1985) 102 *South African Law Journal* 45.

¹²⁵ International Transport Workers Federation. See <<http://www.itfglobal.org/index.cfm>> at 10 January 2007. One of the goals of the ITF is to improve conditions for seafarers of all nationalities and to ensure adequate regulation of the shipping industry to protect the interests and rights of the workers. See <<http://www.itfglobal.org/seafarers/index.cfm>> at 10 January 2007.

¹²⁶ Friedman, above n 124, 46-7.

¹²⁷ *Ibid.*, 53.

described as a number of ‘false starts’¹²⁸ and ‘one abortive attempt at modernisation’¹²⁹ Mr Douglas Shaw QC was commissioned to investigate South African admiralty law problems and to draft a new statute. The work of Shaw QC was to awake South Africa from its ‘freeze’¹³⁰ and enable the country to ‘come of age’¹³¹ with the passage of the Admiralty Jurisdiction Regulation Act of 1983.¹³²

5.2 The Admiralty Jurisdiction Regulation Act No 105 of 1983

The Admiralty Jurisdiction Regulation Act of 1983, (‘AJRA’) which came into operation on 1 November 1983, had the stated purpose of providing for:¹³³

the vesting of the powers of the admiralty courts of the Republic in the provincial and local divisions of the Supreme Court of South Africa, and for the extension of those powers; for the law to be applied by, and the procedure applicable in, those divisions: for the repeal of the Colonial Courts of Admiralty Act, 1890 ... and for incidental matters.

According to Hare, by ‘this jurisdictional metamorphosis the 1983 Act sought to extend the jurisdiction of the (then) Supreme Court in Admiralty to all maritime disputes’.¹³⁴ By way of section 2 of the AJRA, the broad jurisdiction ‘reflects the unlimited jurisdiction of the High Court and the constitutional right¹³⁵ of everyone in South Africa, *incola* or *peregrinus* to have recourse to a court’.¹³⁶

The AJRA is said to have evoked a ‘generally favourable response’; it has been suggested that ‘other countries might well model their Admiralty laws upon aspects of the statute’;¹³⁷ and the AJRA ‘received a fulsome praise’ in Parliament.¹³⁸ Despite the broadly positive reaction to the AJRA, an acknowledgement that a ‘foreigner can arrest a ship owned by a foreigner as security for a claim pending in some foreign country which is based on a foreign cause of action and is subject to foreign law’¹³⁹ in the opinion of Didcott J raised an important issue of judicial policy: namely whether the court should be allowed to be ‘transformed into some sort of judicial Liberia or Panama’; to be ‘turned into a court of convenience for the wandering litigants of the world’.¹⁴⁰

Outside of policy considerations, there has also been criticism of the AJRA along the lines that the ‘jurisdiction of the courts has been widened unwarrantedly’; and that the Act is ‘tantamount to a legal maritime disaster’.¹⁴¹ It would, however, appear that the broader South African legal community and the judiciary have a ‘high regard’ for the Act.¹⁴² According to Friedman J.:

The Act, in my view, is an outstanding piece of legislation; it is bold, innovative and comprehensive, and as I have already had occasion in a judgment to state, it ‘contains a number of sections ... with novel, unusual and at times far-reaching provisions with which our courts will be required, at some time in the future, to deal’.¹⁴³ It is, what is more, a measure that has a realistic regard, first, to the need for the

¹²⁸ *Ibid.*

¹²⁹ Hare, above n 110, 16.

¹³⁰ Friedman, above n 124, 45.

¹³¹ Hare, above n 110, 16.

¹³² *Admiralty Jurisdiction Regulation Act No 105 of 1983*. According to the SALC Report, above n 120, 10, ‘the admiralty law in South Africa is the English law as it stood in 1891 together with any amendments to that law by virtue of statutes having the force of law in South Africa’.

¹³³ Hare, above n 110, 16.

¹³⁴ *Ibid.*, 16.

¹³⁵ Section 34 of the South African Constitution provides that ‘Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.’ See <<http://www.polity.org.za/html/govdocs/constitution/saconst02.html?rebookmark=1#32>> at 10 January 2007.

¹³⁶ Hare, above n 110, 16.

¹³⁷ In *Euromarine International of Mauren v The Ship Berg* 1984 (4) SA 647, 663C (N) Milne JP said of the Act: ‘There is no doubt that it was intended to be, and indeed, according to many informed circles is, a model piece of legislation which would in many respects be an improvement on the admiralty legislation of other Western seafaring nations.’

¹³⁸ Staniland, H, ‘The Implementation of the Admiralty Jurisdiction Regulation Act in South Africa’ [1985] *Lloyd’s Maritime & Commercial Law Quarterly* 462, 463.

¹³⁹ *Admiralty Jurisdiction Regulation Act No. 105 of 1983*, s 5(3). See Staniland, above n 138, 463.

¹⁴⁰ *Katagum Wholesale Commodities Co Ltd v The MV Paz* 1984 (3) SA 261, 263A (N). The opinion of Didcott J is, however, not entirely grounded in merit, as s 7(1)(a) provides that the court has a discretion to decline to exercise admiralty jurisdiction in any proceedings on the ground of *forum non conveniens*. Fortunately, the learned judge’s concerns have not materialised and if the legislative requirements are met, the South African courts will grant an order for the arrest of a vessel as security for a claim in a foreign forum. See Smith, P, *Ship Arrest Handbook* (1997) 208.

¹⁴¹ Staniland, above n 138, 463 quoting Booyesen, H, ‘South Africa’s New Admiralty Act: A Maritime Disaster?’ (1984) 6 *Modern Business Law* 75, 83.

¹⁴² *Ibid.*

¹⁴³ *Katagum*, above n 140, 263A.

expeditious handling of maritime work and, secondly, to the ever-shrinking world of international trade in shipping matters. I believe it is a measure which is likely to be held in high regard throughout the shipping world, one which other countries may well seek to emulate. It has and will for some time continue to have teething troubles, to be sure; but these are only minor ailments, which will eventually disappear.¹⁴⁴

5.3 Associated Ship Arrests and Attachment

One of the ‘novel, unusual and at times far-reaching provisions with which our courts will be required, at some time in the future, to deal’¹⁴⁵ which gave rise to the ‘renaissance of shipping law’¹⁴⁶ in South Africa was section 3(6) of the AJRA, which provides for the arrest of an ‘associated ship’ instead of the ship in respect of which the maritime claim arose.

One of the reasons for the creation of the ‘associated ship’ provisions in the AJRA can be found in the 1952 Arrest Convention. As already noted, the 1952 Arrest Convention, pursuant to Article 3, provides that ‘a claimant may arrest either the particular ship in respect of which the maritime claim arose, or any other ship which is owned by the person who was, at the time when the maritime claim arose, the owner of the particular ship’ — the so-called ‘sister ship’ provision.

In response to the ‘sister ship’ provision in the 1952 Arrest Convention, shipowners were ‘quick to limit the exposure of their fleets by re-financing their ships into one-ship companies’.¹⁴⁷ As a consequence, a ‘proliferation of “single-ship” companies — variously described as “asset-poor” or “brass-plate” identities emerged to replace the traditional liner fleets.’¹⁴⁸

This stratagem was noted by the SALC Report when it said that the:¹⁴⁹

International Convention with regard to the Arrest of Sea-going Ships, to which reference has been made above, makes provision for the arrest to found an action *in rem* of a sister ship, that is to say, a ship in the same ownership as the [g]uilty ship. The provisions of the Bill are an extension of this notion based on the fact that since the conclusion of the Convention its provisions have been defeated by the proliferation of “one ship companies”, that is to say, companies owning only one ship and therefore avoiding the Convention. The extension is, it is thought, a logical extension of the Convention, but the broad notions upon which the Convention is founded have been preserved.

At the time the AJRA was enacted, the “brass-plate” shipowning company was the norm’¹⁵⁰ and due to the separate legal entity of such companies, a claimant was restricted to proceeding against only the ‘guilty ship’. It is clear that section 3(6) of the AJRA is designed to remedy this mischief brought about by the 1952 Arrest Convention ‘sister ship’ provisions.¹⁵¹

Section 3(6) of the AJRA provides that:¹⁵²

Subject to the provisions of subsection (9),^[153] an action in rem, other than such an action in respect of a maritime claim contemplated in paragraph (d)^[154] of the definition of ‘maritime claim’, may be brought by the arrest of^[155] an *associated ship* instead of the ship in respect of which the maritime claim arose.

¹⁴⁴ Friedman, above n 126, 54.

¹⁴⁵ *Ibid.*

¹⁴⁶ John Hare, [Revisions to Chapter 2] *Shipping Law & Admiralty Jurisdiction in South Africa* (1999) 16. See <<http://www.uctshiplaw.com/booknew/Chapter%202.pdf>> at 10 January 2007.

¹⁴⁷ *Ibid.*, 37.

¹⁴⁸ Staniland, H, and McLennan, J S, ‘The Arrest of an Associated Ship’ (1985) 102 *South African Law Journal* 148, 148. The rush to one-ship companies was fuelled by the realization of the potentially vast oil pollution liabilities which the loss of the *MT Torrey Canyon* on 18 March 1967 off southern England generated. See John Hare, [Revisions to Chapter 2] *Shipping Law & Admiralty Jurisdiction in South Africa* (1999) 37. See <<http://www.uctshiplaw.com/booknew/Chapter%202.pdf>> at 10 January 2007. See also ‘The Torrey Canyon’s Last Voyage’ (2007) <<http://www.lboro.ac.uk/departments/hu/ergsinhu/aboutergs/lasttrip.html>> at 11 January 2007.

¹⁴⁹ SALC Report, above n 120, 14.

¹⁵⁰ Hare, above n 146, 37.

¹⁵¹ Staniland and McLennan, above n 148, 148.

¹⁵² *Admiralty Jurisdiction Regulation Act 1983* (S Af), s 3(6). Emphasis added.

¹⁵³ The Minister may, by notice in the Gazette ‘exclude from the provisions of subsection (6) any ship owned by a company named in the notice’. By GN R267 of 8 February 1985 and GN 1825 of 5 September 1986 the Minister excluded from the provisions the two major shipowning companies then domiciled in South Africa: Safmarine Ltd and Unicorn Lines (Pty) Ltd, as well as the MT Mobil Refiner owned by Petroleum Transport International (Pty) Ltd. Since the notice Safmarine Ltd has become part of the Danish A P Moller-Maersk Group but remains exempt from the South African associated arrest provisions. See <<http://mysaf.safmarine.com/safsitev5/SafSiteControl?ssaction=com.saf.homeportal.action.StartAction>> at 10 January 2007. See also Hare, above n 146, 38.

Section 3(7)(a) of the AJRA then defines an ‘associated ship’ as:¹⁵⁶

- (a) For the purpose of subsection (6) an associated ship means 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.

Section 3(7)(a)(i) has the effect of preserving the true ‘sister ship’ arrest in that the associated ship must now be owned by the same person who then owned the guilty ship when the cause of action arose. This provision is analogous to s 19 of the Admiralty Act.

Section 3(7)(b)(i) deems that ships shall be owned by the same person if the majority in number of, or of voting rights in respect of, or the greater part, in value, of the shares in the ships are owned by the same persons. There is, however, no equivalent provision in the Admiralty Act to s 3(7)(b)(i) and it is suggested that any analogous claim in Australia would face strong difficulties given the ALRC Report’s negative attention to similar deeming provisions.¹⁵⁷

Section 3(7)(a)(ii) introduces the ‘novel’ sections of South African admiralty law which differentiate the South African ‘associated ship’ provisions from the arrest practice of all other maritime states — including Australia. Pursuant to s 3(7)(a)(ii) the associated ship must, at the time of the arrest be owned by a person who controlled the company which owned the guilty ship when the maritime claim arose. Person in s 3(7)(a)(ii) means a natural person.

Section 3(7)(a)(iii) extends s 3(7)(a)(ii) by addressing the situation where both ships are company owned. In other words, the associated ship must at the time of the arrest be owned by a company which is now controlled by a person who then owned the guilty ship, or controlled the company which owned the guilty ship at the time the maritime claim arose.

It is these provisions¹⁵⁸ that establish an association through common control that, as noted, have no parallel in the Admiralty Act or any other maritime jurisdiction and which ‘distinguish South African associated ship arrest provisions from “sister” ship or “surrogate” ship arrest provisions elsewhere’ and ‘contribute most to South Africa’s reputation as an arrest friendly jurisdiction’.¹⁵⁹

The associated ship provisions in s 3(7)(a) are further supplemented by s 3(7)(b) which provides assistance in establishing an association through common ‘ownership’ or ‘control’ in the form of a deeming provision. For present purposes the relevant section is s 3(7)(b)(ii) which provides that ‘a person shall be deemed to control a company if he has power, directly or indirectly, to control the company’.¹⁶⁰

The association through common control requires a ‘then’ and ‘now’ inquiry, and in this the control inquiry shares common ground with the surrogate ship arrest provisions in the Admiralty Act. However, as the association through common control is ‘akin to, although by no means the same as, piercing the corporate veil’¹⁶¹ Australian case law has determined that the extent of any common ground does not extend beyond the

¹⁵⁴ The reference to ‘other than such an action in respect of a maritime claim contemplated in paragraph (d)’ has the effect of removing claims based upon mortgages, hypothecation, right of retention, pledge or other charge, bottomry or respondentia from the associated ship procedure as these claims are peculiar to the ship in relation to which the claims arise. See Hare, above n 146, 38-9.

¹⁵⁵ The words ‘may be brought by the arrest of’ has the effect of enabling the creditor also to proceed by way of attachment. See *ibid*, 39.

¹⁵⁶ *Admiralty Jurisdiction Regulation Act 1983* (S Af), s 3(7)(a).

¹⁵⁷ ALRC Report, above n 8, [206].

¹⁵⁸ The provisions have been held to create substantive rights and obligations as the plaintiff ‘acquires a right which he never had before, namely to recover what is due to him from a party who was not responsible for the damage suffered by him’. See *The Berg* 1986 (2) SA 700, 712C-D (AD), per Miller JA.

¹⁵⁹ Bradfield, G, ‘Guilt by Association in South African Admiralty Law’ [2005] *Lloyd’s Maritime and Commercial Law Quarterly* 234, 236. Derrington has also commented that as a result of the passage of the *Admiralty Jurisdiction Regulation Act 1983* (S Af) ‘South Africa has developed a reputation of being an arrest friendly jurisdiction.’ See Derrington, S, ‘Ship Arrest and the Admiralty Jurisdiction of Australia and South Africa: Too Far or Not Far Enough?’ (2005) 11 *The Journal of International Maritime Law* 409, 411.

¹⁶⁰ *Admiralty Jurisdiction Regulation Act 1983* (S Af), s 3(7)(b)(ii).

¹⁶¹ Hare, above n 146, 41.

past and present focus of the inquiry required under the AJRA. As Sheppard J stated in *Malaysia Shipyard and Engineering SDN BHD v Iron Shortland as the Surrogate for the Ship Newcastle Pride*:¹⁶²

The Commission said that the predominant view was that a special provision in the legislation [for lifting the corporate veil] was undesirable. It said that the fundamental consideration was the undesirability of making special provision with respect to the corporate veil in legislation dealing with Admiralty jurisdiction. If questions of the liability or indebtedness of corporate groups were to be addressed, this was properly done through company or insolvency law rather than in specific legislative contexts such as Admiralty jurisdiction.¹⁶³

If one considers that liability or indebtedness for corporate groups should be left to company or insolvency law, it is clear that the associated arrest provisions represent a departure from the principle of the separate legal entity upheld in *Salomon v Salomon & Co Ltd*,¹⁶⁴ and, for the most part, undermine the ‘perfectly legitimate use of the corporate form to limit risk in commercial undertakings generally and in shipping particularly.’¹⁶⁵

As Steyn J stated in *Glastnos Shipping Ltd and Continental Chartering & Brokerage Ltd Hong Kong Branch v Panasian Shipping Corporation and Withers (The Glastnos)*:¹⁶⁶

I accept that Mr. Farias resorted to the device of incorporation to attain the benefits of limited liability. That is, of course, why the shipping trade is structured on the basis of one ship companies, but by itself it affords no basis for piercing the corporate veil, and the evidence before me certainly does not justify an inference that the companies were vehicles for the commission of fraud.¹⁶⁷

For the corporate veil to be lifted at common law, it has to be established that the corporate structure is a ‘mere façade, involving an element of fraud or improper conduct, or that there is failure to maintain the separate identity of the company from that of its shareholders’.¹⁶⁸ Under the AJRA statutory piercing provisions, these grounds are presumed. It therefore follows that the separate identity of the shipowning companies is disregarded once common control is established.¹⁶⁹

5.4 Control under the Admiralty Jurisdiction Regulation Act

The concept of ‘control’ is not given exhaustive treatment in the AJRA, which merely provides that a ‘person shall be deemed to control a company if he has power, directly or indirectly, to control the company’.¹⁷⁰ In *E E Sharp & Sons Ltd v MV Nefeli*,¹⁷¹ the first reported case to deal with the arrest of an associated ship, King AJ held in relation to the element of control:¹⁷²

In my view this relates to the overall control, such as is exercisable for instance by a majority shareholder or his nominee, of the assets and destiny of the company; it does not refer to its day-to-day management and administration. ... There must be managing agents in all the major ports of the world who in a sense control innumerable merchant ships owned by different interests and quite independent of each other. It could never have been the intention of the legislature that such vessels could be arrested as ‘associated ships’.

It is therefore clear that control for the purposes of the Act may be from both within and external to the company structure, but must be something more than day-to-day management and administration.¹⁷³ This clearly eliminates ships under the same management company, or with the same agents, from being regarded as associated for the purposes of the AJRA.

¹⁶² (1995) 59 FCR 535.

¹⁶³ *Ibid.*, 546. In this Sheppard J can be seen to referring to the ALRC Report, above n 8, [141].

¹⁶⁴ [1897] AC 22.

¹⁶⁵ Bradfield, above n 159, 239.

¹⁶⁶ [1991] 1 Lloyd’s Rep 482.

¹⁶⁷ *Ibid.*, 490.

¹⁶⁸ Bradfield, above n 159, 240.

¹⁶⁹ *Ibid.*

¹⁷⁰ *Admiralty Jurisdiction Regulation Act 1983* (S Af), s 3(7)(b)(ii).

¹⁷¹ 1984 (3) SA 325 (C).

¹⁷² *Ibid.*, 326-7.

¹⁷³ The decision by King AJ in *E E Sharp & Sons Ltd v MV Nefeli* was, however, given before the 1992 amendments to the AJRA which recognised that it was possible for a person to control a company without necessarily controlling the shares in that company. See *Zygos Corp v Salen Rederierna AB* (1985) (2) SA 486, 489C (C).

The AJRA, however, requires a claimant to look at the ‘control of a company’ ... ‘directly or indirectly’, which in turn directs the inquiry to, *inter alia*:

- the shareholding of the company;
- the board of directors of the company;
- the managing director or chief executive officer of the company; and
- any statutory peculiarities implying control, such as the company being under the control of a judicial manager or liquidator/receiver.¹⁷⁴

Whilst it is beyond the scope of this paper to comment on the judicial development of the meaning of ‘control’ under the AJRA,¹⁷⁵ the present high water mark for on the notion of ‘control’ is the Supreme Court of Appeal decision in *The Heavy Metal*.¹⁷⁶

In *The Heavy Metal* the vessel arrested as an ‘associated ship’ (the *MV Heavy Metal*) was owned by a company whose majority registered shareholder and sole director was a Cypriot advocate — Mr Lemonaris. Mr Lemonaris had also been at the relevant time the registered majority shareholder and sole director of the company that owned the ‘guilty’ ship (the *MV Sea Sonnet*). On a strict interpretation of the facts, this would have proven sufficient to establish common control under the AJRA. Mr Lemonaris, however, asserted that he was merely the nominee shareholder for different beneficial or actual holders of the shares in each of the shipowning companies.¹⁷⁷ Mr Lemonaris was in fact acknowledged to be:¹⁷⁸

Probably a nominee for a certain Mr Vafias and his family, and not directly involved in the business of owning or operating ships but serving only as ‘postbox’ and registered office for the Brave Maritime group of companies, and possibly in other roles, such as the authorised signatory of the companies.

The matter was further complicated in that Mr Lemonaris contended that the laws of Cyprus precluded him from divulging the identity of the actual or beneficial owners of the shares in the respective shipowning companies.¹⁷⁹ After initially stating that the alleged controller of the guilty ship at the relevant time was not the actual controller of that ship, Mr Lemonaris subsequently deposed in an affidavit that:¹⁸⁰

It is normal practice in Cyprus for Advocates to be appointed as nominee shareholders and Directors. We act on the instructions of beneficial owners, which instructions are often given through intermediaries. We are required by the laws of Cyprus to abide strictly by, and carry out, these instructions and we are more often than not, as in the case of my relationship with [Dahlia] and [the appellant], simply ‘postboxes’.

I am therefore merely a nominee Director and shareholder of [Dahlia] and [the appellant] in which I have no interest or ownership. I exercise no control over these companies and, indeed, I have no discretion to represent these companies without having received instructions as I have, for example, for the purpose of dealing with this application.

Cypriot Advocates are not, in terms of the ethical rules applicable, permitted to disclose information given to them in confidence by their clients. The information contained in the instructions given to me when I attended to the registration of [Dahlia] and [the appellant] was given to me in confidence and I am accordingly not at large to disclose this information.

I am, however, able to disclose that Mr Nikolaos Vafias did not own or control [Dahlia] at the time of the delivery and sale of the MV ‘Sea Sonnet’ or at any other material time.

The court *a quo* dismissed an application to set the arrest of the *MV Heavy Metal* aside.¹⁸¹ On appeal to the Supreme Court of Appeal, one of the issues for determination was the interpretation of the phrase ‘the power, directly or indirectly, to control’.¹⁸²

¹⁷⁴ Hare, above n 146, 41.

¹⁷⁵ For a detailed consideration of the meaning of control under the AJRA see Bradfield, above n 159, 240.

¹⁷⁶ *MV Heavy Metal: Palm Base Maritime SDN BHD v. Dahlia Maritime Ltd* 1998 (4) SALR 479 (C) (at first instance) and *MV Heavy Metal: Belfry Marine Ltd v Palm Base Maritime SDN BDN* 1999 (3) SA 1083 (SCA) (on appeal).

¹⁷⁷ *MV Heavy Metal: Belfry Marine Ltd v Palm Base Maritime SDN BDN* 1999 (3) SA 1083, 1090B-D [13] (SCA).

¹⁷⁸ *Ibid*, 10891 [11].

¹⁷⁹ *Ibid*, 1090E [13].

¹⁸⁰ *Ibid*, 1090E [13].

¹⁸¹ *MV Heavy Metal: Palm Base Maritime SDN BHD v Dahlia Maritime Ltd and Others* 1988 (4) SALR 479 (C).

¹⁸² *MV Heavy Metal: Belfry Marine Ltd v Palm Base Maritime SDN BDN* 1999 (3) SA 1083, 1106C [9] and 1107DD [2] (SCA).

In upholding the association, the court, which was split 3-2 on the issue, held that s 3(7)(b)(ii) identified two possible sources of control: direct and indirect.¹⁸³ The court equated ‘direct’ control with *de jure* authority over the company, that is, the control exercised by the registered majority shareholder as the person who, according to the register of the company, is entitled to control its destiny.¹⁸⁴ As to ‘indirect’ control, the court held it meant *de facto* control of the company, that is, the power to control a company that would be wielded through someone who had direct control of the company, as would be the case with the beneficial or actual owner holding shares in a company through a nominee.¹⁸⁵ The court was also of the opinion that this extension of *de jure* power to *de facto* power is in line with the objective of the section, that is, to prevent the true owner, ‘by presenting a distorted picture to the outside world’ from concealing his assets from attachment and execution by his creditors.¹⁸⁶

It follows that if the same person exercised *de jure* power to control both the company owning the ‘guilty’ ship and the company owning the targeted ship, the ‘statutory requirement of a *nexus* between the two companies will have been satisfied’.¹⁸⁷ According to the court, this was the position in which Mr Lemonaris found himself.¹⁸⁸ On the other hand, the court found that if *de jure* control of the respective companies vested in different hands, it would be open to the arresting creditor to establish that the same person was in *de facto* control.¹⁸⁹ This would also establish the statutory nexus to satisfy the provisions of s 3(7)(a) of the AJRA.¹⁹⁰ In the view of the majority, either form of control can be satisfied to bring the subsection into operation.¹⁹¹

It follows that under s 3(7)(a) of the AJRA and the facts, Mr Lemonaris, as registered majority shareholder, was the party in direct control of both companies at the relevant time.¹⁹²

It has been submitted by Hare¹⁹³ that the majority in *The Heavy Metal* would have taken a very different view had the appellant and Mr Lemonaris disclosed evidence to the court clarifying the true seat of control of the two shipowning companies. The court was, however, confronted with the refusal to identify both those persons and the uncorroborated assertion that they were not one and the same.¹⁹⁴ This ‘cloak of secrecy’¹⁹⁵ led Smalberger JA to state:

It is precisely for that reason, because the creditor is at such a disadvantage in tracing the assets of his debtor, of which this case is a prime example, that the subsection was worded as it is. The result is not as unfair as it may at first blush seem, for it lies within the power of the shipowner to arrange his affairs and his relationship with the company in question so as to avoid any prejudicial consequences to himself ...¹⁹⁶

...

In my view that silence and the failure of the appellant to offer an adequate explanation for it, when the appellant must have appreciated that it ran the risk of an inference being drawn against it, justifies the conclusion that the appellant had every reason not to be candid with the court and, consequently, that the dispute raised by Lemonaris as to the beneficial ownership of the Heavy Metal was a contrived one and as such was not a genuine dispute of fact.¹⁹⁷

Whilst there is nothing ‘*per se* opprobrious in structuring a fleet owned by one-ship companies’,¹⁹⁸ the decision in *The Heavy Metal* means that if the actual owner of shares in the company which owns the targeted ship held its shares through the same nominee director who also held the shares in the guilty ship, the owner of the targeted ship risks having its ship arrested for a claim with which it had no link other than its majority, but

¹⁸³ Ibid, 1106C [9] and 1107DD [14].

¹⁸⁴ Ibid, 1106E-F [10].

¹⁸⁵ Ibid, 1106D [9].

¹⁸⁶ Ibid, 1106B [18].

¹⁸⁷ Ibid, 1106G-H [11].

¹⁸⁸ Ibid, 1106H [11].

¹⁸⁹ Ibid, 1106H-I [12].

¹⁹⁰ Ibid, 1106H-I [12].

¹⁹¹ Ibid.

¹⁹² Smalberger JA held that ‘Apart from that, it seems to me that the appellant in any event failed to rebut the inference arising on the papers, that the power behind Lemonaris in respect of the Heavy Metal is in fact the same entity who is the power behind Lemonaris in respect of the Sea Sonnet.’ See *MV Heavy Metal: Belfry Marine Ltd v Palm Base Maritime SDN BDN* 1999 (3) SA 1083, 1107H-I [16] (SCA).

¹⁹³ Hare, above n 146, 43.

¹⁹⁴ Bradfield, above n 159, 245.

¹⁹⁵ *MV Heavy Metal: Belfry Marine Ltd v Palm Base Maritime SDN BDN* 1999 (3) SA 1083, 1107G-H [17] (SCA).

¹⁹⁶ Ibid.

¹⁹⁷ Ibid, 1106D-E [19].

¹⁹⁸ Hare, above n 146, 44.

nominee, shareholder being the same shareholder in the company owning the ship against which the claim lay.¹⁹⁹

5.5 Assessing the Measure of Australia's Disadvantage

In *Kent v 'Maria Luisa' (No 2)*,²⁰⁰ as AFE had the power under the terms of the trust to collapse the trust and convert any asset of the trust fund (ie the *Maria Luisa*) into its property;²⁰¹ AFE owned all the shares of Everdene;²⁰² and there was evidence of common directors and the company secretary shared the same registered office, principal place of business and telephone number,²⁰³ it is possible to conclude that AFE 'controlled' Everdene for the purposes of s 3(7)(b)(ii) of the AJRA.

As to the interposition of the *Maria Luisa* Trust between AFE and the *Maria Luisa*, it would have no significance under s 3(7)(a)(iii) as the AJRA directs attention not to whether AFE owned the *Maria Luisa*, but to whether it controlled the company that owned it.

5.6 Attachment

Whilst the 'associated ship' provisions arguably represent the most visible extension of South Africa's admiralty jurisdiction, it is still open to a maritime claimant to attach the ship in respect of which the maritime claim arose in proceedings *in personam* against its owner.²⁰⁴

As noted above, due to the various restraints in the exercise of *in personam* jurisdiction by the Admiralty courts, the maritime attachment fell into disuse in English Admiralty. The attachment has, however, been incorporated into s 3(2)(b) of the AJRA and provides that an action *in personam* may only be instituted against a person, and for present purposes, a person 'whose property within the court's area of jurisdiction has been attached by the plaintiff or the applicant, to found or to confirm jurisdiction'.²⁰⁵

According to Hare, the maritime 'attachment' mirrors the procedure of attachment at common law with the notable exception that it is available to both *incola*²⁰⁶ and *peregrinus*²⁰⁷ without other jurisdictional grounds being present.²⁰⁸ The wording of the provision requires that the defendant to the action be the owner of the property attached. As maritime attachment was not part of the English law in 1891, the South African courts apply Roman-Dutch law in determining issues of ownership.²⁰⁹

Whilst the wording of s 3(2)(b) would suggest that the property must be within the court's area of jurisdiction, the 'court has a general liberty to order an anticipatory attachment',²¹⁰ the effect of which is to enable a plaintiff to obtain an anticipatory attachment which would materialise when the property (ie a tramp ship with no established schedule) comes within the court's jurisdiction.

Whilst the Admiralty Act permits a plaintiff to commence an action *in personam*,²¹¹ it does not entitle a plaintiff to pre-judgment security. The attachment, as a stand-alone procedure or in addition to an associated vessel arrest to obtain pre-judgment security, therefore has no equivalent under the Admiralty Act.

¹⁹⁹ Bradfield, above n 159, 246.

²⁰⁰ (2003) 130 FCR 12.

²⁰¹ Clause 12(a) of the trust deed stated: '... as soon as practicable after the vesting date the trustee is to convert the property constituting the trust fund into money, and to divide the proceeds of such conversion amongst the Unit-holders, provided that the trustee may in its discretion, at the request of any Unit-holder, transfer to such Unit-holder any asset of the trust fund on account of the Unit-holders entitlement on the termination of the trust.' See *Kent v SS 'Maria Luisa' (No 2)* (2003) 130 FCR 12, 30.

²⁰² *Kent v 'SS Maria Luisa' (No 1)* (2002) 130 FCR 1, 6.

²⁰³ *Ibid.*

²⁰⁴ Wallis, M, 'The Associated Ship Jurisdiction in South Africa: Choice Assorted or Only One Bite at the Cherry?' [2000] *Lloyd's Maritime and Commercial Law Quarterly* 132, 140.

²⁰⁵ *Admiralty Jurisdiction Regulation Act 1983* (S Af), s 3(2)(b).

²⁰⁶ A person resident or domiciled within the court's area of jurisdiction.

²⁰⁷ A person not resident or domiciled anywhere within the Republic of South Africa.

²⁰⁸ Hare, above n 146, 17.

²⁰⁹ *The Vallabh Patel* 1994 (1) SA 550 (SCA).

²¹⁰ Hare, above n 146, 18.

²¹¹ *Admiralty Act 1988* (Cth) s 9.

6 United States of America: Arrest and the Maritime Attachment

6.1 Development of Admiralty Jurisdiction

The colonial and Vice-Admiralty and maritime courts established in the United States brought with them the general maritime law of England. Early decisions of these courts made ‘painstaking reviews’ of sources including Justinian’s Digest, the Laws of Oleron and the Maritime Ordinances of Louis XIV.²¹² As the United States had broken its political ties with Great Britain during the American Revolution²¹³ the maritime attachment²¹⁴ survived,²¹⁵ in addition to the action *in rem*, as procedures for the enforcement of maritime claims in the United States despite the demise of the doctrine of attachment in England by the end of the 18th century.²¹⁶

In *Schiffahrtsgesellschaft Leonhardt & Co v A. Bottacchi S.A. De Navegacion*²¹⁷ the Eleventh Circuit, relying on *Manro v Almeida*²¹⁸ declared:²¹⁹

We view the procedures employed in the present case, including the postattachment hearing, as entirely consistent with Rule B(1). For this reason we find that the court had the authority, under its inherent power to apply traditional maritime law, to issue the writ of attachment; it need not have relied on any grant of authority under Rule B(1).

Unlike the position in either South Africa or Australia, US law does not contain an equivalent to the ‘associated ship’ or ‘surrogate ship’ arrest procedure.

In the United States, ‘arrest’ and ‘attachment’ are similar but different procedures for seizing the defendant’s assets and obtaining personal jurisdiction in admiralty. As pre-trial remedies they are described as far more powerful than the corresponding remedies in civil actions on land in that they allow the plaintiff to seize the defendant’s assets without either notice or hearing and without posting bond for the defendant’s expenses.²²⁰

6.2 Pre-judgment Seizure and the Constitutional Guarantee of Due Process

The notion of seizing a defendant’s assets without either notice or hearing or other procedural safeguards to protect the property owner has been held by United States courts to violate the property owner’s Fourteenth Amendment guarantee of procedural due process. In *Sniadach v Family Finance Corp*²²¹ Douglas J held that:²²²

Where the taking of one’s property is so obvious, it needs no extended argument to conclude that absent notice and a prior hearing (cf. *Coe v. Armour Fertilizer Works*, 237 U.S. 413, 423) this prejudgment garnishment procedure violates the fundamental principles of due process.

In what has become known as the *Sniadach-Fuentes*²²³ line of cases, the prejudgment seizure of property has been held to violate the constitutional guarantee of due process unless ‘the property owner is given notice and a

²¹² Theis, W H, ‘United States admiralty Law as an Enclave of Federal Common Law’ (1999) 23 *Tulane Maritime Law Journal* 73, 78.

²¹³ 1775-1783.

²¹⁴ Maritime attachment is described as the *saisie conservatoire* of the common law. See Tetley, W, ‘The General Maritime Law – The Lex Maritima (With a Brief Reference to the *Ius Commune* in Arbitration Law and the Conflict of Laws)’ (1994) 20 *Syracuse Journal of International Law and Commerce* 105, 123.

²¹⁵ In 1825 the United States Supreme Court said in *Manro v Almeida* 23 US (10 Wheat) 473, 490 (1825) of maritime attachment: ‘Its origin is to be found in the remotest history, as well of the civil as the common law.’

²¹⁶ Tetley, above n 38, 408.

²¹⁷ 1986 AMC 1 (11 Cir *en banc* 1985).

²¹⁸ 23 US 473, 488-9 (1825). In *Manro v Almeida* the court held that the maritime attachment was a part of American general maritime law at the time the American Constitution was adopted.

²¹⁹ *Schiffs Leonhardt v A Bottacchi* 1986 AMC 1, 9 (11 Cir *en banc* 1985). In 1844 the United States Congress enacted special admiralty rules, including Admiralty Rule 2, the predecessor of the modern Rule B.

²²⁰ Rutherglen, G, ‘The Contemporary Justification for Maritime Arrest and Attachment’ (1989) 30 *William and Mary Law Review* 541, 542. For a critical discussion on the maintenance of maritime arrest and attachment in the United States see *ibid*, 556-9.

²²¹ 395 US 337 (1969).

²²² *Ibid*, 341-2 per Douglas J.

²²³ *Fuentes v Shevin* 407 US 67 (1972); *Sniadach v Family Finance Corp* 395 US 337 (1969); and *North Ga Finishing, Inc v Di-Chem, Inc* 419 US 601 (1975). The *Sniadach* Court held that the Fourteenth Amendment procedural due process required notice or an opportunity for a hearing prior to the garnishment of a defendant’s wages to safeguard against wrongful seizure. The *Fuentes* line of cases broadened the scope of the *Sniadach* decision and held that due process guaranteed a defendant an opportunity for a hearing prior to any deprivation of property. See Borri, G, ‘Maritime Attachment and Arrest: Facing a Jurisdictional and Procedural Due Process Attack’ (1978) 35 *Washington & Lee Law Review* 153, 159.

meaningful opportunity to be heard before seizure, or unless ‘exigent circumstances’ justify an *ex parte* seizure.’²²⁴

However, as a vessel can be arrested without any prior notice²²⁵ and served with an *in rem* process under Supplemental Rule C²²⁶ (‘Rule C’) (discussed below), and without the shipowner being given any opportunity for a ‘prior hearing’, there is doubt that the constitutional validity of arrest under the *Sniadach-Fuentes* line of cases, except in ‘extraordinary situations’²²⁷ would survive judicial constitutional scrutiny.

The constitutional validity of Rule C has, however, survived, with the courts deciding that either special circumstances existed given ‘most admiralty cases involve international commerce and that most assets in maritime commerce, such as vessels and their cargoes, are exceptionally mobile’;²²⁸ or that ‘maritime law was historically so different from common law that the *Sniadach-Fuentes*’ principles were irrelevant’²²⁹ to justify departure from the constitutional safeguards guaranteeing due process. In any event, Rule C obtained constitutional certainty when the Supplemental Rules for Admiralty Claims and Asset Forfeiture Actions were amended in 1985 to provide for judicial scrutiny before the issuance of any warrant or arrest.²³⁰

In a similar vein, constitutional challenges to the doctrine of attachment now found in Supplemental Rule B²³¹ (‘Rule B’) (discussed below) have failed with the District Court finding in *Schiffahrtsgesellschaft Leonhardt & Co v A. Bottacchi S.A. De Navegacioni*²³² that it had the power to issue a writ of attachment independent of its authority derived under Rule B(1).²³³

Today, the arrest of a vessel in the United States is governed by the Supplemental Rules for Certain Admiralty Claims contained in the Federal Rules of Civil Procedure.

6.3 Supplemental Rule C — Actions *In Rem*

Supplemental Rule C provides that an action *in rem* may be brought:

- (a) to enforce any maritime lien;²³⁴
- (b) whenever a statute of the United States provides for a maritime action *in rem* or a proceeding analogous thereto.²³⁵

Except as otherwise provided by law a party who may proceed *in rem* may also, or in the alternative, proceed *in personam* against any person who may be liable.²³⁶

When comparing Rule C with the Admiralty Act it is important to note two points. First, Rule C only permits an action *in rem* against maritime property when a US statute permits, or when a ‘maritime lien’ is available. In the United States the category of maritime liens is considerably wider than that available in Australia.²³⁷ There are also two sources of maritime lien in the United States — contract liens and traditional liens. Contract liens include liens for repairs, supplies, towage, use of dry dock or marine railway or other necessities²³⁸ governed by

²²⁴ Davies, above n 17, 359.

²²⁵ Fed R Civ P Supp Rule C(4). ‘No notice other than execution of process is required when the property that is the subject of the action has been released ...’

²²⁶ Fed R Civ P Supp Rule C.

²²⁷ Those in which the seizure secured an important governmental or public interest where prompt action was necessary and the state maintained strict control over the seizure process. See *Central Soya Co v Cox Towing Corp* 417 F Supp 658, 662 (ND Miss 1976) and *Techem Chem Co v M/T Choyo Maru* 416 F Supp 960, 968 (D Md 1976).

²²⁸ Rutherglen, above n 220, 542.

²²⁹ Davies, above n 17, 359.

²³⁰ Notes of Advisory Committee on 1985 amendments. The purpose of the amendment is to eliminate any doubt as to the rule’s constitutional validity under the *Sniadach* line of cases.

²³¹ Fed R Civ P Supp Rule B. This provision only applies when there is *in personam* liability of the owner of the surrogate ship. Rule B is unique in that it provides a vehicle for garnishing cash, assets or credits in the hands of third parties and thereby obtaining prejudgment security and jurisdiction for *in personam* claims where the debtor cannot be found in the judicial district.

²³² 1986 AMC 1 (11 Cir *en banc* 1985).

²³³ The power to grant maritime attachments is described by Kimball as ‘an inherent component of the Admiralty jurisdiction bestowed on the Federal Courts by Article III of the United States Constitution.’ See Kimball, J D, ‘Overview of Significant Recent Developments in New York Arbitration, 2004-2006’ (Paper presented at the ICMA conference, Singapore, 2007).

²³⁴ Fed R Civ P Supp Rule C(1)(a).

²³⁵ Fed R Civ P Supp Rule C(1)(b).

²³⁶ Fed R Civ P Supp Rule C(1).

²³⁷ *Admiralty Act 1988* (Cth) s 15. According to the ALRC Report, above n 8, [94], only a handful of maritime lines are recognized in ‘England and Australia, but a large number in the United States’.

²³⁸ Including pilotage, wharfage, and stevedoring.

the *Maritime Lien Act*.²³⁹ The second type of maritime lien, the traditional lien, includes personal injury, seaman's wages, collision, salvage, general average and cargo damage.

Second, the application of Rule C is restricted to the 'guilty ship'. That is, as the ship is the *in rem* defendant under Rule C (i.e. the ship is 'personified'), a plaintiff cannot proceed against any other property such as a 'surrogate' or 'sister' ship, irrespective of the connection between the two ships. It also follows that if a plaintiff does not have a 'maritime lien' as defined under United States law, and/or the vessel is outside the judicial district where the arrest is contemplated, a plaintiff is unable to rely on effecting an arrest by way of Rule C.

However, as mentioned, the United States retained the admiralty 'attachment', as well as the arrest *in rem*, as procedures for the enforcement of maritime claims.

6.4 Supplemental Rule B — Attachment

Attachment has been described by the United States Supreme Court as a method by which a party may:²⁴⁰

have his action in personam, and compel appearance by the process of attachment on the goods of the trespasser, according to the forms of the civil law, as engrafted upon the admiralty practice. And we think it indispensable to the purposes of justice, and the due exercise of the admiralty jurisdiction, that the remedy should be applied, even in cases where the same goods may have been attachable under the process of foreign attachment issuing from the common law Courts.

Today, Supplemental Rule B ('Rule B')²⁴¹ provides that if a defendant is not found within the district, a verified complaint²⁴² may contain a prayer for process to attach the defendant's tangible or intangible personal property — up to the amount sued for²⁴³ — in the hands of garnishees named in the process.²⁴⁴

According to Schoenbaum, Rule B was promulgated to preserve the ancient process of attachment and garnishment in admiralty matters, and the purpose of the attachment is two-fold: to secure the defendant's appearance and to satisfy the claim of an injured plaintiff.²⁴⁵ The property attached does not need to have a direct connection to the claim,²⁴⁶ as Rule B permits attachment of the defendant's 'tangible or intangible personal property', only being restricted by the words 'up to the amount sued for'. As the action is *in personam*, but directed at the personal property, it is often referred to as a *quasi in rem* action.²⁴⁷

It is also a precondition that the defendant not be 'found within the district' in which the assets sought to be attached are located — the sufficient minimum contacts requirement.²⁴⁸ In *International Shoe Co v State of Washington*²⁴⁹ the court held:²⁵⁰

'Presence' in the state in this sense has never been doubted when the activities of the corporation there have not only been continuous and systematic, but also give rise to the liabilities sued on, even though no consent to be sued or authorization to an agent to accept service of process has been given. ... Conversely it has been generally recognized that the casual presence of the corporate agent or even his conduct of single or isolated items of activities in a state in the corporation's behalf are not enough to subject it to suit on causes of action unconnected with the activities there.

It follows that a defendant will be considered 'found within the district' if it satisfies the sufficient minimum contacts established in *International Shoe*.²⁵¹ It is submitted that a vessel calling at a port in the United States

²³⁹ *Maritime Lien Act 1920*, 46 USC, §§ 971-975.

²⁴⁰ *Manro v Almeida*, 23 US (10 Wheat) 473, 496 (1825).

²⁴¹ Fed R Civ P Supp Rule B.

²⁴² The complaint must be cognizable in admiralty.

²⁴³ According to Kimball, above n 233, if the 'claim is subject to adjudication in a forum where an award of attorneys' fees or arbitrators' fees is typical, the complaint may also state a claim for those amounts (based on reasonable estimates) and attachment may be obtained to secure those claims as well.'

²⁴⁴ Rule B has been described as an 'extraordinary remedy' in that it allows pre-trial seizure of a defendant's property on an ex parte basis. See Murnane, D, 'United States – Rule B attachment developments' (2006) 5 *The Britannia Steam Ship Insurance Association Limited News* 8.

²⁴⁵ Schoenbaum, T J, *Admiralty and Maritime Law* (1987) 610.

²⁴⁶ The Rule B attachment can also be used in aid of arbitration.

²⁴⁷ The attachment is also sometimes referred to as a 'quasi in rem jurisdiction' in the United States. See *Belcher Co of Alabama Inc v M/V Maratha Marine*, 724 F 2d 1161, 1163-4, 1984 AMC 1679, 1681 (5 Cir 1984).

²⁴⁸ The filing of a general appearance or an offer to accept service of process in the district after the attachment has already been effected cannot defeat the Rule B attachment.

²⁴⁹ 326 US 310 (1945).

²⁵⁰ *Ibid*, 317 (footnotes omitted).

where the owners have no other direct ownership interests would not meet the sufficient minimum contacts requirement in *International Shoe* and would therefore be at risk of Rule B attachment.²⁵²

Rule B attachments are often used as a means to attach ‘sister ships’ where the ‘guilty ship’ is not within the judicial district.²⁵³ Rule B attachments therefore enable the same result to be achieved as that under the ‘surrogate ship’ provisions in the Admiralty Act. However, as mentioned, Rule B enables a plaintiff to attach ‘tangible or intangible personal property’ with their being no requirement for a nexus between the ‘guilty’ ship and the property to be attached.

In *Winter Storm Shipping Ltd v Thai Petrochemical Industry Public Company Ltd*²⁵⁴ (*Winter Storm Shipping v TPI*) the plaintiff, a non-US corporation, chartered its vessel, the *M/V Ninemia*, to the defendant, a Thai corporation, to carry oil cargo from Rabigh, Saudi Arabia to Rayong, Thailand. The plaintiff claimed that the defendant breached the charterparty by failing to pay the full freight due.²⁵⁵ The plaintiff filed a complaint against the defendant, characterising its claim as admiralty and maritime in nature, in the United States District Court for the Southern District of New York.

The plaintiff then further alleged that the defendant could not be:²⁵⁶

‘found within this District’ within the meaning of Rule B of the Supplemental Rules for Certain Admiralty and Maritime Claims ... and sought an order directing the Clerk to issue process of maritime attachment and garnishment pursuant to Rule B ... attaching TPI’s assets held by garnishees in the amount of \$361,621.58.

The defendant subsequently entered into an unrelated commercial transaction with Oppsal Shipping Co Ltd (‘Oppsal’) which maintained an account with the Royal Bank of Scotland in London (‘RBS’). The defendant’s contract with Oppsal called for the defendant to pay Oppsal in US dollars. When the electronic funds transfer reached the intermediary bank between that of the plaintiff and the defendant the intermediary bank, the Bank of New York (‘BNY’), in response to the earlier services of process of attachment procured by the plaintiff, placed a stop order on the funds transfer to the defendant.²⁵⁷

The defendant then moved in the District Court for the Southern District of New York to vacate the attachment of the funds held by the BNY. The Defendant was successful in its application with the Court finding that electronic funds were not ‘property’ that can be attached under Admiralty Rule B.

The plaintiff then appealed to the United States Court of Appeals for the Second Circuit which stated:²⁵⁸

There is no question that federal admiralty law regards a defendant’s bank account as property subject to maritime attachment under Rule B. ... Nor are we able to discern in admiralty law or elsewhere a basis for regarding TPI’s funds in BNY’s hands prior to their electronic transfer to RBS as anything other than funds held by BNY for the account of TPI.

This Circuit has not previously considered in an admiralty case the susceptibility of funds involved in an EFT to attachment under Admiralty Rule B. Unlike the district court, however, we find significant guidance in *United States v. Daccarett*, 6 F.3d 37 (2d Cir. 1993), which involved a civil forfeiture action under federal drug laws. *Daccarett* holds that ‘an EFT while it takes the form of a bank credit at an intermediary bank is clearly a seizable *res* under the forfeiture statutes.’ Id. At 55. The case is instructive in the admiralty field because the attachments of funds in *Daccarett* were accomplished pursuant to the Admiralty Rules, incorporated by reference into the forfeiture statute.

²⁵¹ It is beyond the scope of this paper to address in detail the sufficient minimum contacts requirement established by the Supreme Court in *International Shoe Co v Washington* 326 US 310 (1945). However, for present purposes, it is necessary to note that Rule B survives the Supreme Court decision in *Shaffer v Heitner* where the Court held that the minimum contacts test of *International Shoe* should have been applied to assertions of *in rem* as well as *in personam* jurisdiction.

²⁵² If a vessel is attached pursuant to a Rule B claim it is necessary to satisfy constitutional due process requirements that the defendant be entitled to a prompt hearing to preliminarily determine the property of the attachment or garnishment. See Supplemental Rule E(4)(f).

²⁵³ As Rule B enables a plaintiff to attach the defendant’s ‘tangible or intangible property’, Rule B may also be used to attach bunkers or other equipment owned by a defendant debtor.

²⁵⁴ 310 F 3d 263, 2002 (2d Cir NY 2002). Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit denied 16 June 2003. See *Thai Petrochemical Industry Public Co Ltd v Winter Storm Shipping Ltd* 123 S Ct 2578 (2003).

²⁵⁵ Said to be US \$361,621.58 (including interest and anticipated attorneys’ and arbitrators’ fees).

²⁵⁶ 310 F 3d 263, 266 2002 (2d Cir NY 2002).

²⁵⁷ As a cautionary note, the attachment will only secure the funds in the intermediary bank at the moment it is served, meaning that knowledge of the size of the attachment is crucial.

²⁵⁸ 310 F 3d 263, 276-7 2002 (2d Cir NY 2002).

As the EFT was ‘tangible or intangible personal property’ and the defendant was not ‘found within the district’ of New York the Court reinstated the attachment order obtained by the plaintiff.²⁵⁹

In *Winter Storm Shipping v TPI* the Second Circuit Court of Appeals construed the definition of property broadly. Four years later, the scope of Rule B attachments was again considered by the Second Circuit in *Aqua Stoli Shipping Ltd v Gardner Smith Pty Ltd*²⁶⁰ (*Aqua Stoli v Gardner Smith*). In *Aqua Stoli v Gardner Smith* the Court was asked to consider an appeal from a judgment of the United States District Court for the Southern District of New York sitting in admiralty which vacated an order of maritime attachment served by Aqua Stoli Shipping on various banks within the Southern District of New York which temporarily handled electronic fund transfers to or from Gardner Smith.²⁶¹

Whilst articulating the requirements for the grant of a Rule B attachment, the Court nonetheless held that electronic funds were attachable.²⁶² However, in footnote 6 the Court went on to observe:²⁶³

The correctness of our decision in *Winter Storm* seems open to question, especially its reliance on *Daccarett*, 6 F.3d at 55, to hold that EFTs are property of the beneficiary or sender of an EFT. Because *Daccarett* was a forfeiture case, its holding that EFTs are attachable assets does not answer the more salient question of whose assets they are while in transit. In the absence of a federal rule, we would normally look to state law, which in this case would be the New York codification of the Uniform Commercial Code, N.Y. U.C.C. Law §§ 4-A-502 to 504. Under state law, the EFT could not be attached because EFTs are property of neither the sender nor the beneficiary while present in an intermediary bank. Id. §§ 4-A-502 cmt. 4, 4-A-504 cmt. 1.

The observations of the Court in *Aqua Stoli v Gardner Smith* were subsequently considered by Rakoff J in *Seamar Shipping Corp v Kremikovtzi Trade Ltd and Kremikovtzi Corp*²⁶⁴ (*Seamar Shipping v Kremikovtzi Trade*).

In *Seamar Shipping v Kremikovtzi Trade*, Rakoff J of the United States District Court for the Southern District of New York considered the narrow question of whether ‘an EFT can be attached under Rule B(1)(a) where the defendant is the intended beneficiary of the EFT, rather than the originator’.²⁶⁵ In doing so, the Court considered *Winter Storm Shipping v TPI* and *Aqua Stoli v Gardner Smith* and held that attachment of electronic fund transfers was permitted only when the defendant is the originator of the funds, as in *Winter Storm Shipping v TPI*, and because ‘in *Aqua Stoli*, although the attachment applied to EFTs “to or from” the defendant, neither the court nor the parties addressed whether the funds that were actually attached had been sent to or from the defendant’.²⁶⁶

When considering the alternative, that is, whether electronic fund transfers are attachable under Rule B when the defendant is the beneficiary, Rakoff J held:²⁶⁷

Given that *Aqua Stoli* called *Winter Storm* into serious doubt, see *Aqua Stoli*, 460 F.3d at 446 n.6, it would be illogical to construe other statements in *Aqua Stoli* to broaden *Winter Storm*. To the contrary, taken as a whole, *Aqua Stoli* requires this Court to construe *Winter Storm* narrowly. Accordingly, *Winter Storm*’s holding that an EFT is the property of an originator while in transit does not imply a corollary rule that the EFT is also the property of a beneficiary while in transit.

It follows from the decision in *Seamar Shipping v Kremikovtzi Trade* that attachment of electronic fund transfers is only permitted when the defendant is the originator of the funds. As the decision in *Seamar Shipping v Kremikovtzi Trade* has just been appealed, it is clear that the Second Circuit will be required to revisit the issue of attachment in the near future.

Today, approximately 80 per cent of all payments in US dollars are routed through some 20 intermediary banks in New York.²⁶⁸ As a result of the *Winter Storm-Seamar Shipping* line of cases a plaintiff intending to bring a

²⁵⁹ Ibid, 280.

²⁶⁰ 460 F 3d 434 (2d Cir 2006).

²⁶¹ Whilst the banks temporarily handled wire transfers in US dollars to or from Gardner Smith, they did not hold accounts in Gardner Smith’s name.

²⁶² 460 F 3d 434, 446 (2d Cir 2006).

²⁶³ Ibid.

²⁶⁴ 461 F Supp 2d 222 (2006).

²⁶⁵ Ibid, 225.

²⁶⁶ Ibid.

²⁶⁷ Ibid.

maritime claim, and possessed with knowledge of the identity of the originator (and until conclusively settled, the beneficiary) of the funds, can now intercept funds in the possession of an intermediary bank in New York independent of where the funds originate from or are instructed to be received. As a plaintiff does not need a connection with New York, it is clear that the Rule B attachment has a much wider application when compared to the ‘surrogate ship’ provisions in the Admiralty Act to assist a plaintiff in pursuit of debts owed by foreign shipping companies employing ships registered in flag of convenience states with registered addresses being no more than brass plate offices care of Panamanian or Liberian lawyers.

Before leaving the discussion on admiralty attachment in the United States it is, however, necessary to return to the Federal Court decision in *Kent v SS ‘Maria Luisa’*. Despite the clear and wide advantages afforded by attachment to a plaintiff in the United States, (particularly in light of the commercial structures employed in international shipping) on the facts it is suggested that the remedy would not have produced a different result to that delivered by the Federal Court. As Kent alleged that AFE was the owner of the *Maria Luisa*, Kent would not be proceeding *in rem* against the *Maria Luisa*, but would instead proceed *in personam* against AFE. Pursuant to Rule B(1)(a) Kent would then apply to attach AFE’s ‘tangible or intangible property’, on the premise that AFE was ‘not found within the district’. But herein lies the difficulty. First, Kent would be barred from attaching the *Maria Luisa* under Rule B for the same reasons he was unsuccessful in arresting the vessel pursuant to Rule 19 of the Admiralty Act — AFE did not own the *Maria Luisa*. That is, pursuant to Rule B, the *Maria Luisa* was not the ‘tangible property’ of AFE. Second, AFE would be ‘found within the district’, that is, AFE would not satisfy the negative stipulation of Rule B(1) and instead, it is suggested, would meet the sufficient minimum contacts requirement established in *International Shoe Co v State of Washington*²⁶⁹ as AFE had a continuous and systematic presence in South Australia, and was a company capable of being sued.²⁷⁰

7 Australia as Part of the International Fleet — or Time to Abandon Ship?

According to the Australian Law Reform Commission:²⁷¹

If the interests of potential plaintiffs is in having the widest possible jurisdiction *in rem*, there are international constraints on how far this can be done. Arrest *in rem* in admiralty carries with it in the common law world an assertion of jurisdiction to determine the merits. This is accepted internationally as an exception to the general principle that arrest ad fundandam jurisdictionem is regarded as an exorbitant assertion of jurisdiction. But a wholesale expansion of the ability to arrest *in rem* in admiralty may run the risk of being seen abroad as exorbitant.

...

The need for international uniformity also imposes a restraint. It is to the benefit, not only of shipowners but also of all parties engaged in international maritime trade, if ships entering Australian ports are not subject to a legal regime which differs widely and unjustifiably from the international norm.

It is clear then, when considering ‘sister ship’ arrests, the Admiralty Act adopted a conservative approach which would not offend the international comity of the 1952 Arrest Convention. But, as this paper has illustrated, and a casual inspection of the list of States Parties to the Convention reveals, there is far from international comity when considering ‘sister ship’ arrest.²⁷²

It is now a little over 18 years since the Admiralty Act came into force and ‘questions are being asked as to whether the provisions of the Act ought to be reviewed in light of international developments’.²⁷³ It is not the purpose of this paper to advocate for the adoption of ‘associated ship’ arrests as available to plaintiffs in South

²⁶⁸ UK Defence Club, ‘Rule B Attachment — Friend or Foe?’ (2006) 1 *Soundings*. See <http://www.ukdefence.com/downloads/soundings/soundings_1_2006.pdf> at 13 January 2007.

²⁶⁹ 326 US 310 (1945).

²⁷⁰ Australian Fishing Enterprises Pty Ltd is a registered Australian company (ACN 008 131 235). Date of ASIC search 14 February 2007. See Australian Securities & Investments Commission, *National Names Index* (2007) <http://www.search.asic.gov.au/cgi-bin/gns030c?acn=008_131_235&juris=9&hdtext=ACN&srchsrc=1> at 14 February 2007. The ASIC search is included for illustrative purposes only. The date of the writ *in rem* filed in *Kent v ‘SS Maria Luisa’ (No 1)* (2002) 130 FCR 1 was 24 April 2001.

²⁷¹ ALRC Report, above n 8, [94].

²⁷² See Comité Maritime International Yearbook 2005-2006 available at <http://www.comitemaritime.org/year/2005_6/pdffiles/YBK05_06.pdf> at 10 January 2007. At 1 January 1986 there were 57 states party to the Convention, including many states of little significance in world shipping. According to the Comité Maritime International at 2005/2006 there were 82 states party to the 1952 Arrest Convention, which is arguably well short of what could be labeled comity, given that there are, as at 14 February 2007, 191 members of the United Nations. See United Nations, *List of Member States* (2005) <<http://www.un.org/Overview/unmember.html>> at 14 February 2007.

²⁷³ Derrington, above n 159, 409.

Africa, or the reintroduction of the lost English admiralty ‘attachment’ remedy available in the United States.²⁷⁴ It is, however, the purpose of this paper to highlight the legislative restrictions imposed on an Australian plaintiff seeking pre-trial security through ‘sister’ (or equivalent) ship arrest and, by default, the lack of comparative reach afforded under the Admiralty Act. With the low state acceptance of the 1999 Arrest Convention, and Australia’s position as an ever-increasing user of maritime transport services, it follows that timely consideration should be given to finding a new balance which affords local remedies for plaintiffs dealing with ships, but at the same time does not unfairly and negatively impact shipowners so as to make Australia an unattractive port of call to foreign shipping.

8 Conclusion

With the loss of the admiralty attachment in English common law, the action *in rem* has come to represent the core of admiralty jurisdiction. With the extension of the action *in rem* to ‘sister ships’ following the introduction of the 1952 Arrest Convention, the reach of admiralty jurisdiction was extended beyond that of an action solely against the wrongdoing ship.

Whilst Australia is not a party to the 1952 Arrest Convention, the concept of ‘sister ship’ arrest has nonetheless been retained under the ‘surrogate ship’ arrest provisions within the Admiralty Act. However, just as corporate restructuring of the traditional liner fleets in response to the 1952 Arrest Convention contributed to the demise of the effectiveness of the ‘sister ship’ arrest provisions internationally, recent Australian case law has similarly demonstrated the ease in which shipowners can employ similar arrangements to defeat the Australian ‘surrogate ship’ arrest provisions.

Recognising the limits of the ‘sister ship’ arrest provisions in the 1952 Arrest Convention, and those of the ‘surrogate ship’ arrest provisions in the Admiralty Act, the object of this paper has been to describe, compare and contrast the Australian ‘surrogate ship’ arrest provisions with the ‘associated ship’ arrest provisions in South Africa, and the Rule B attachment in the United States. In doing so, this paper has illustrated how far beyond the action *in rem* the respective South African and United States admiralty jurisdictions reach to provide effective pre-judgment security to a plaintiff otherwise frustrated by the constraints of the 1952 Arrest Convention provisions.

By applying the principles of the ‘associated ship’ and Rule B attachment remedies to the Federal Court decision in *Kent v ‘Maria Luisa’*, this paper has also illustrated the comparative disadvantage facing Australian plaintiffs when attempting to obtain pre-judgment security against a defaulting or injurious shipowner. In doing so, it is hoped that as the 20th anniversary of the Admiralty Act approaches, the novel South African ‘associated ship’ provisions, when coupled with the rich history of the maritime attachment in the United States, will serve as models for change and thereby provide potential Australian plaintiffs with a steady compass with which to navigate the often uncharted waters which represent today’s ship ownership structures.

²⁷⁴ For a discussion of the merits for maintaining arrest and attachment see Rutherglen, above n 220, 556-62.