Maritime Liens in South Africa

The features of maritime versus statutory liens in England and Wales were discussed in an article published in *Sea Venture* issue 24. In keeping with the topic of maritime liens, this article takes a look at the position in South Africa, which remains an important jurisdiction for the arrest of ships and the enforcement of maritime claims.

**The maritime lien**

South African admiralty law has its origins in English law and it is therefore relevant to have regard to an early definition of the maritime lien from the case of *Harmer v Beil (The Bold Buccleugh)* (1852):

“A claim or privilege upon a thing to be carried into effect by legal process...this claim or privilege travels with the thing, into whosever possession it may come. It is inchoate from the moment the claim or privilege attaches, and when carried into effect by legal process, by a proceeding in rem, relates back to the period when it first attached.”

From this definition it is possible to determine the characteristics of the maritime lien, namely that is a claim enforced by legal proceedings in the form of the action in rem which travels with the property, that being the vessel, irrespective of whether the holder of the maritime lien remains in possession of the vessel or not and irrespective of changes in ownership of the vessel.

The maritime lien can be distinguished from other maritime claims recognised in South Africa in that the lien attaches to the vessel from the point of the incident giving rise to the lien and remains valid until it has been discharged. Prof. John Hare, a leading writer on the topic, explains that a maritime lien may be discharged by payment or waiver of the debt, by an exclusion clause such as a Himalaya Clause in a contract, physical loss of the asset, capture in times of war, latches (being an unreasonable delay in asserting a right resulting in harm to the defendant) or upon judicial sale by a competent court. The holder of the maritime lien does not have to remain in possession of the vessel in order for the maritime lien to be valid. The lien is inchoate or, put differently, remains unperfected until legal proceedings are commenced to enforce it.

In the case of other maritime claims which do not constitute a maritime lien, the party asserting the claim is required to show that the Owner of the property to be arrested is, at the time of the arrest, personally liable for the claim (described in South African law as *in personam* liability).

Whilst there are no specified time limits for the enforcement of maritime liens as a distinct category, the ordinary position in South Africa is that all civil claims in contract or delict (fort) prescribe within a period of three years from the date that the debt fell due. An exception arises in the case of collision claims under section 344 of the Merchant Shipping Act which limits the time period to two years.

Section 344 states, amongst other things, that the period of prescription shall be two years in respect of legal proceedings to enforce any claim or lien against a ship or its Owners in respect of any damage to or loss of another ship, caused by the fault of the former ship and shall begin to run on the date when the damage or loss or injury was caused.

These concepts were carried over into South African common law and, later, the Admiralty Jurisdiction Regulation Act, 1983, created a specific procedural framework for the recognition and enforcement of the maritime lien. For example:

- A maritime lien is stipulated to be a maritime claim;
- The arrest of a ship in rem may be commenced in South Africa if the claimant has a maritime lien over the property, without the need to show personal liability on the part of the owner; and
- Certain maritime liens, such as salvage and crew wage claims, enjoy a preference over a number other categories of claims, for example ship mortgage claims and claims for the supply of goods or rendering of services to a ship, in terms of the ranking of claims against a fund constituted by the judicial sale of property in the jurisdiction.

In keeping with our common law roots and the historic influence of English maritime law, the heads of maritime claims recognised as maritime liens in the South African admiralty jurisdiction are limited to the following:

1. Damage done by a ship;
2. Salvage;
3. Seaman’s wages;
4. Bottomry;
5. Respondentia, and
6. Master’s Wages and Distraint.

**The maritime lien and the associated ship arrest**

The concept of the ‘associated ship’ arrest sets South Africa apart from most other admiralty jurisdictions by permitting claimants to arrest ships which are owned or controlled, directly or indirectly, by the same person or entity. The concept goes beyond the traditional sister ship arrest in that it allows a claimant to pierce (or look through) the one-ship owning entities of both the ship concerned and the target ship in order to determine a single repository of power.

Against this background, the maritime lien can be used to good effect in conjunction with the associated ship arrest. Let’s take, for example, a situation in which ship A collides with ship B, resulting in a total loss of ship B. Assuming that ship B is no longer available as a target of arrest in order to prosecute or, at least, to obtain security for a damages claim arising from the collision, the Owner of ship A can assert its maritime lien by arresting an associated ship which, at the time of arrest, is owned or controlled by the same person who owned or controlled ship B when the claim arose.
The maritime lien and the security arrest

Maritime liens can also be utilised in conjunction with a South African procedure known as the ‘security arrest’ which allows a claimant to arrest property for the specific purpose of obtaining security for a claim, notably for foreign court or arbitration proceedings.

In this regard, let’s take a situation in which a claimant in seeking to enforce a salvage claim in legal proceedings in England and requires security for the claim. If the offending vessel is found in South Africa, it would be susceptible to arrest even if ownership of the vessel has changed hands in the intervening period. It may do so because, in principle, the claimant need only show that it would be able to assert a lien over the vessel in support of an arrest in rem, but for the foreign proceedings.

Foreign maritime liens enforced in South Africa

There have been attempts in the past by creditors to elevate foreign maritime liens to the same status as those recognised in terms of South African common law by arguing that the provisions of the Admiralty Jurisdiction Regulation Act are sufficiently broad to incorporate all categories of liens, be they local or foreign.

The debate was put to rest following the 1987 Cape High Court decision in the Andrico Unity where it was held that – in application of English law - a foreign maritime lien not falling into any one of the lien categories recognised by the domestic rules of English law cannot be accorded the status of a maritime lien in an English Court and, for this reason, the same rationale must be applied to South African courts exercising admiralty jurisdiction.

That said, if the subject matter of an unrecognised foreign lien claim falls within the broad definition of maritime claim in South Africa (for example, a necessaries claim), it may still be enforced by way of an action in rem, but it will not enjoy the status of a maritime lien.

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