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WORLD MARITIME UNIVERSITY

Malmö, Sweden

**Maritime Liens and its Application:
A Case study of Solomon Islands**

By

ERIC JERIEL TEINIU

Solomon Islands

A dissertation submitted to the World Maritime University in partial
Fulfillment of the requirements for the award of the degree of

MASTER OF SCIENCE

In

MARITIME AFFAIRS

(MARITIME LAW AND POLICY)

2013

DECLARATION

I certify that all the material in this dissertation that is not my own work has been identified, and that no material is included for which a degree has previously been conferred on me.

The contents of this dissertation reflect my own personal views, and are not necessarily endorsed by the University.

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ABSTRACT

Title of Dissertation: **Maritime Liens and its Application – A case study of the Solomon Islands**

Degree: **MSc**

The purpose of the research is to examine and analyze the application of maritime liens, taking into consideration its historical and theoretical developments, problems of implementation and application by the court, and procedures and rules regarding enforcement of maritime lien. The associated object is to carry out an assessment and analysis of the relevant laws of the Solomon Islands, previous legal cases, and common law and judicial practice of maritime liens. The significance of the dissertation is the fact that maritime liens have been described as comprising complex procedures and because of the raft of issues involved in it. This is an area that needs to be well understood before it could be effectively utilized, especially in cases, which involve recovering unpaid wages. Although the Solomon Islands is not a party to any of these maritime liens conventions, they have been considerably accepted and have formed the basis for domestic legislation on maritime liens and their enforcement which was embodied in laws of the Solomon Islands, the Shipping Act 1998 and the Shipping (Registration) Regulations 2010. Unfortunately, these conventions have been only partially successful in achieving their objective of furthering uniformity in the laws of the maritime nations on questions relating to the creation and enforceability of the seafarers' right and interests by way of maritime liens over ships.

The writer holds the opposing view that the principle of uniformity has come into conflict with various private interests. The added convenience of international solidarity and

expectedness would not balance for the economic shortcoming of modification of domestic laws of the Solomon Islands.

The need for uniformity in this area may be illustrated by posing a number of questions and discussion as articulated in the chapters of this dissertation.

KEYWORDS: *Maritime Liens, Maritime Lien Convention, Maritime Claims, Admiralty Jurisdiction, Action in Rem, Action in Personam, Enforcement.*

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LIST OF ABBREVIATIONS

1993 Convention – International Convention on Maritime Liens and Mortgages (1993)

1967 Convention – International Convention for the Unification of Certain Rules relating to Maritime Liens and Mortgages (Brussels 1967)

FSM – Federated State of Micronesia

IMO – International Maritime Organization

MLM Conventions – Maritime Liens and Mortgages Conventions

MLC – Maritime Labour Convention 2006

PICS – Pacific Islands Countries States

PNG – Papua New Guinea

SIMSA – Solomon Islands Maritime Safety Administration

SPC – Secretariat of the Pacific Community

TDP – Trade Dispute Panel

UNCLOS – United Nations Convention on Law of the Sea

UNCTAD – United Nations Conference on Trade and Development

CHAPTER 1 INTRODUCTION

1.1 Background

*Lord Halsbury says in a note, "...the source is to be found in the ancient law of deodand, the ship being supposed to be itself responsible to the amount of the claim against it but the more tenable theory would seem to be that the present law of maritime lien has sprung from the Admiralty practise of arrest to compel appearance and security." - * Law of Merchant Shipping (5th ed. IN11) 785*

To understand the concept of maritime lien, one must understand the history of maritime law. Maritime liens are the product of evolution of custom, statute and judicial decisions.¹ A traditional maritime lien is a secured right peculiar to maritime law (the *lex maritime*). It is a privilege against the property (a ship) that attaches and gains priority without any court action or any deed or any registration. It passes with the ship when the ship is sold to another owner, who may not know of the existence of the lien. In this sense the maritime lien is a secret lien², which has no equivalent in the common law; rather it fulfills the concept of a "privilege" under the civil law and the *lex mercatoria*.³

This dissertation attempts to highlight case studies on the application of maritime liens in the Solomon Islands involving seafarers working on domestic ships and a few on in-

¹ William Tetley, (1998), 2ⁿ ed. "*Maritime Liens and Claims*"pp.59-60

² Chase Manhattan Financial Service, Inc. v McMillan 896 F.2d

³ Ibid. p.59

ternational ships as well as other related issues. It has grown to be practice that ship owners mistreat seafarers by allegedly unpaid wages due to seafarers and by virtue of contractual claims. Obviously, when seafarers in the Solomon Islands are sent home or ashore without being fully paid for their time onboard a vessel, a maritime lien could be imposed upon the ship to ensure that what was being owed to the seafarers was paid accordingly. Furthermore, failure to clear overdue charges could result in seizure of the vessel by way of court order.

In March 2012, I had the pleasure, both as a legal practitioner and individual, of being instructed by my superior, the Director of the Solomon Islands Maritime Safety Administration (SIMSA) about a case that involves maritime liens over seafarers' unpaid wages. The claim was in connection with the failure to pay wages alleged to be due to the crew who served on the vessel. The action lies against the vessel by virtue of maritime liens.⁴

A similar case in nature was upheld by the High Court of Solomon Islands in *the Wahono case*⁵. The *Wahono* case had many of the characteristics that give maritime law or admiralty jurisdiction its special attractions. To my considerable delight, I found that the above akin cases which involved unpaid seafarers' wages, and 'whilst somewhat founded from maritime liens and the ancient jurisdiction of the Admirals, was a remarkable reflection to that general area of the law and to its theme, "*maritime liens and its applications – The Wahono* as a case study in the Solomon Islands 'context has a practical significance that has reflected well the application of maritime liens and its application in the Solomon Islands context and in particular problems encountered by the seafarers'⁶ in the Solomon Islands.'⁷

⁴ (<http://www.paclii.org/maritime-law/case-summaries-maritime-liens/index.html>) (Accessed 27 July, 2013)

⁵ [2001] SBHC 102; HC-CC 009 & 010 of 2001 (23 March 2001) (<http://www.paclii.org/maritime-law/case-summaries-maritime-liens/index.html>) (Accessed 27 July, 2013)

⁶ Ibid.

⁷ Similar sentiments were highlighted by Chief Justice of the Federal Court of Australia on the F S Dethridge Memorial Address

The above case fascinated extensive research attention, and the steps taken for their relief included an order by⁸ Judge Palmer that the claim was upheld and in ‘due course, the outstanding wages were paid to the crew, having been secured by a maritime lien. A specific reference is made to the provision of the 1993 convention and various case law of the High Court of Admiralty in England.’⁹

From the national perspective, this dissertation topic is perceived as a way forward for the maritime industry because in a way, it helps ‘support the course of transitional reform currently undertaken by the SIMSA in overhauling some of the existing laws and legislations that were outdated and some old UK maritime legislations that were left unmodified for ages.’¹⁰ The paper also falls squarely within the initial idea of the current restructuring in providing SIMSA with a comprehensive legal and regulatory roles and powers (both those-existing under the Shipping Act 1998, and those which have been recently applied under the Maritime Safety Administration Act 2009), to indicate the legal source of those powers and to highlight the activities that can be undertaken to assist SIMSA to more effectively discharge both its current roles and its new functions and responsibilities. This paper also highlights an area of improvement needed to implement the obligations of the Solomon Islands under international conventions and essentially in reviving the working conditions of the seafarers and safeguarding their rights and their interests when they have been infringed.

However, this notion of maritime lien has been practiced since immemorial times in the maritime law field. Notwithstanding, the conflicting legal systems maritime nations have,

1999, Hon M E J Black AC, *Jurisdiction and the Protection of Seafarers*. 2000. 15, MLAANZ Journal (https://maritimejournal.murdoch.edu.au/archive/vol_15/2000vol15part1black.pdf) (Accessed 15 June, 2013)

⁸ Chief Justice of the Federal Court of Australia on the F S Dethridge Memorial Address 1999, Hon M E J Black AC, *Jurisdiction and the Protection of Seafarers*. 2000. 15, MLAANZ Journal (https://maritimejournal.murdoch.edu.au/archive/vol_15/2000vol15part1black.pdf) (Accessed 10 August, 2013)

⁹ Hon M E J Black AC, *Jurisdiction and the Protection of Seafarers*. 2000. 15, MLAANZ Journal (https://maritimejournal.murdoch.edu.au/archive/vol_15/2000vol15part1black.pdf) (Accessed 5, August 2013)

¹⁰ The author has used part of the above paragraphs and quotes in his own assignment submitted to World Maritime (August 8, 2013). The unpublished assignment was relatively a topical problem-solving question on *Maritime Liens - MLP 244 Maritime Law Commercial Law*. He intentionally used it to further develop it in this dissertation. (Furthermore, any exact quotes or texts refer to in the footnoting as “unpublished assignment of the author” simply refer to this assignment without alteration).

countries somehow formulated and developed their own procedure and system of maritime liens which were well suited to their own settings. Maritime liens as a focus area of study is impressive in its contents, which makes it a research priority area in both theory and practice of this field of maritime laws. Due to the fact that maritime liens have also been described as comprising complex procedures and because of the raft of issues involved in it, the international community has developed three International Conventions on maritime liens, which ¹¹ ‘are the International Convention for the Unification of Certain Rules of Law Relating to Maritime Liens and Mortgages of 1926, the International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages of 1967, and the International Convention on Maritime Liens and Mortgages of 1993 to help resolve these obstacles.’¹² With hindsight, a Solomon Islands maritime lien is quite reflective of the relevant international convention on Maritime Liens and Mortgages, 1993 and was consistent with the convention.

Moreover, in 2010 with additional regulations, the Solomon Islands put into place an established set of procedures to register a claim through maritime lien with the Registry Office by way of filling out the prescribed form. Every year there were allegedly seafarer wages dispute cases that had not been properly dealt with by the administration as well as less tendency of seafarers to institute legal proceeding at the Solomon Islands ‘admiralty courts (the High Court of Solomon Islands) for trial. For this reason, it is an area that needs to be well understood before it can be effectively utilized, especially in cases that involve recovering unpaid wages.’¹³ First, protecting seafarer interests through the maritime lien system is paramount.

¹¹ www.maritimeprofessional.com (Accessed 26 August, 2013)

¹² Ibid.

¹³ The Author has used part of the above quoted texts in his own assignment submitted to World Maritime. The unpublished assignment was relatively a topical task on *Maritime Liens - MLP 244 Maritime Law Commercial Law*, submitted on August 5, 2013. He intentionally used it to build-on later in this dissertation)

1.2 Purpose

The purpose of the research is to examine and analyze the application of maritime liens, taking into consideration the historical and theoretical developments, problems of implementation and application by the court, and procedures and rules regarding enforcement of maritime liens. Also, the associated objective is to carry out an analysis of the relevant laws of the Solomon Islands, previous legal cases, common law and judicial practice of maritime liens. Discussions will also be made by simply contemplating from the point of view of a legal practitioner during the trial process, the role played by the maritime lien system and how to better protect the rights and interests of the seafarer in the process as well as from the perspective of the maritime court, in order to protect the rights and interests of both parties.

1.3. Research Methodology

Initially, the first methodological approach that should be carried out is called, “dogmatic approach”, which simply looks at relevant scholarly publications, legal instruments, including regulations, conventions, legislations, policies and applicable judicial case laws and authorities. For this purpose, relevant laws will be drawn from domestic laws of Solomon Islands namely, the Shipping Act 1998, Shipping (Registration) Regulations 2010 and the three main international conventions namely, the ‘International Convention for the Unification of Certain Rules of Law Relating to Maritime Liens and Mortgages of 1926, the International Convention for the Unification of Certain Rules relating to Maritime, Liens and Mortgages (Brussels 1967) and the International Convention on

Maritime Liens and Mortgages (1993)’¹⁴. The second approach will basically look at the historical and evolutionary processes under common law, admiralty law and practice, which the Solomon Islands adopted from England. These are recognized and incorporated in the national legislation of the Solomon Islands in dealing with the concepts of maritime liens, which are enforceable by *actions in rem*¹⁵ against ships. Furthermore, an analytical approach will also be used concurrently. In this approach, the given cases and legislations are scrutinized to look at the particular pros and cons, and consequently, propose needed developments. It is important to note that in any legal research, a dogmatic approach is used, which involves examining the theoretical and philosophical underpinning of the law, and in this regard, this approach will be used in this dissertation.

1.4. Structure

This thesis is divided into five chapters. Chapter one is the introductory chapter and is mainly related to the research objective, research methodology, the structure of the dissertation and it also highlights the brief summary of the dissertation in general.

In Chapter two the subject of maritime liens is discussed in a contextual manner by looking at the historical background and examining features of admiralty law and some maritime claims, which create a maritime lien and are enforceable by *actions in rem* against ships. In doing so, further discussion will be carried out clearly to explain how ‘this enables a ship to be arrested and, if need be, sold and also to ascertain how the pro-

¹⁴ <http://www.maritimeprofessional.com/Forums/f15/t363/Admiralty-Jurisdiction-in-India.aspx> (Accessed 17 July, 2013)

¹⁵ www.ipsufactoj.com (Accessed 17 July, 2013)

ceeds would then be used to satisfy judgment debts against the ship, its owner or demise charterer'.¹⁶ Also, in this Chapter the notion of maritime lien is examined in the contextual details by reviewing the historical and theoretical background of the conventions on maritime liens, which have the effect of expanding the list of claims that found maritime liens formerly known at common law.

Chapter three continues from the second chapter. In this chapter, how maritime liens are enforced is discussed and it also highlights the issue of enforcement. In essence, an attempt will be made to look at the theoretical background of enforcement of maritime liens, case law and provisions of two of the conventions *the International Convention for the Unification of Certain Rules relating to Maritime Liens and Mortgages (Brussels 1967)* and *the International Convention on Maritime Liens and Mortgages (1993)*, both of which, dealt with creation and international recognition of liens and with their enforcement which was incorporated in the Solomon Islands national laws.

The fourth chapter deals with the maritime lien procedures by looking at the interests of the claimants and the state of affairs of the seafarers. Also, in this chapter, the discussion is extended to look at the legal basis, the practices and rules and how the common law and statutory laws have been modified or expanded by the provisions of certain international conventions which touch upon maritime liens.

¹⁶ The Author has used part of the above quoted text in his own assignment submitted to World Maritime. The unpublished assignment was relatively a topical problem-solving question on *Maritime Liens - MLP 244 Maritime Law Commercial Law*, submitted on August 5, 2013. He intentionally used it to build-on in this dissertation)

Chapter five is the final and concluding chapter. It provides a summary and recommendations regarding certain irregularities encountered in the International Convention of Maritime Liens 1993 and in the context of the Solomon Islands based on developments in case law, surrounding circumstances and some statutory innovations.

CHAPTER 2 HISTORICAL BACKGROUND OF MARITIME LIENS UNDER COMMON LAW

2.1. Common Law Approach

Before the modern efforts to adopt uniform international laws, the laws regulating the notion of maritime liens were based on domestic laws. England being a major maritime nation enacted legislation and its courts applied, interpreted and developed a systematic body of admiralty law. These practices took place from the period of the 1300s to the late 1800s. Irrespective of the nature of its application, the English statutes and common law cases continued to be applied to or were adopted by its colonies, dominions and protectorates everywhere, including in the Pacific Islands regions and the Solomon Islands, being a British Protectorate.¹⁷

English admiralty law is typified by the following facets. Firstly, the law was administered by a separate system of courts, called Admiralty Courts, which had their own rules and procedures. Secondly, the courts recognized that certain maritime claims give rise to

¹⁷ USP School of Law Lecture notes from Lecturer . Saiful Karim 'Topic 12 lecture notes' *Marine*

Law,. *University of the South Pacific School of Law, Semester II 2009. (Extracted from the paper authored by Thompson Maurice, J. (2006) "Admiralty Jurisdiction and Vessel Arrests in Fiji, 10 University of the South Pacific.*

maritime liens¹⁸ and thirdly, these entitled the lien holder to seek ‘an action *in rem* against a ship, which’¹⁹ could be arrested and sold by the courts in order to settle possible judgment debts. These make admiralty law and practice distinct and separate from other court matters generally.²⁰

2.2. Development of Admiralty law and Courts Jurisdiction

The development of English and Admiralty law and courts generally evolves in the following chronological order. At around the 14th century, the High Court of Admiralty dealt with only ‘piracy and other offences committed at sea, as an outward sign of the sovereignty of the seas claimed by English kings of the period’. From the period of 1389 to 1394, two statutes enacted during the reign of Richard II attempted to stop Admirals and their deputies from dealing with civil matters. These followed a bitter dispute with common law courts over matters of jurisdiction and this led to a decline in the powers of Admiralty for several centuries.²¹

The *Admiralty Court Act 1840* (UK)²² provided for Admiralty courts’ jurisdiction ‘over claims involving ships’ mortgages, claims in salvage, towage, damage, wages and neces-

¹⁸ Ibid. (Original paper from Sarah, Derrington, (2007) “My ship, my castle; the forfeiture of property rights in the admiralty context (Australia), 26 *University of Queensland Law Journal*. p.1

¹⁹ Ibid. (See also extracted from Australian Law Reform Commission (ALRC) 33 *Civil Admiralty Jurisdiction*. <http://www.austlii.edu.au/au/other/alrc/publications/reports/33/2.html#Heading4> (Accessed 18 July, 2013)

²⁰ Ibid. (<http://www.austlii.edu.au/au/other/alrc/publications/reports/33/>) (Accessed 15 June, 2013)

²¹ Ibid. ALRC 33 *Civil Admiralty Jurisdiction*, Australian Law Reform Commission Recommendation paper: www.alrc.gov.au (Accessed 15 June, 2013)

²² ‘*Admiralty Court Act 1840* (UK) (Extracted from ALRC Report 33 (tabled December 1986) found that the *Colonial Courts of Admiralty Act 1890* (Imp) had limited civil admiralty jurisdiction to matters that were within the admiralty jurisdiction of England as at 1890. As a result there were many uncertainties about, and unjustified limitations on, the scope of the jurisdiction. The report outlined that any reform of the jurisdiction must take account of the fact that commercial practices had been built up on the assumption that jurisdiction would be exercised over ships and ship owners in special ways and that there were certain international trends in admiralty’. (<http://www.austlii.edu.au/au/other/alrc/publications/reports/33/>) (Accessed 15 June, 2013)

saries, bottomry and possession. This Act also authorized rules of court to be made. Under the *Admiralty Court Act 1861 (UK)*²³ the court was at last declared to be a court of record with all the powers of a superior court of common law. The jurisdiction was extended to include questions involving the ownership of ships²⁴, ‘damage to cargo, and building, equipping and repairing of ships. The entire jurisdiction conferred could be exercised either *in rem* or *in personam*.’²⁵

The *Judicature Act 1873 (UK)* was amalgamated into the High Court and then divided into five Divisions including the Probate, Divorce and Admiralty Division that dealt with all the admiralty business.’²⁶ The *Administration of Justice Act 1956 (UK)*²⁷ was passed in part to give effect to Conventions signed in Brussels on 10 May 1952 concerning Civil Jurisdiction in Matters of Collision and the Arrest of Sea-Going Ships.²⁸ However, in 1970 the Probate, Divorce and Admiralty Divisions of the High Court²⁹ were abolished and replaced by an Admiralty Court sitting as part of the Queen's Bench Division. The enactment of the *Supreme Court Act 1981 (UK)* brought modern legislation regulating admiralty jurisdiction in the UK. It incorporates many international obligations, especially those arising from the European Union. ‘The High Court now exercises the admiralty jurisdiction under the *Supreme Court Act 1981 (UK)*.’³⁰

Today “admiralty continues to be recognized as an area for specialists, (but) the basic principles of the Judicature Act system apply, subject to the special situations sometimes created by the action *in rem*, which remains the distinctive feature of admiralty.”³¹

²³ *Admiralty Court Act 1861 (UK)* (<http://www.austlii.edu.au/au/other/alrc/publications/reports/33/>) (Accessed 15 June, 2013)

²⁴ ALRC 33 *Civil Admiralty Jurisdiction* (<http://www.austlii.edu.au/au/other/alrc/publications/reports/33/>) (Accessed above dated)

²⁵ www.doma.com.au (Accessed 25 July, 2013)

²⁶ *Judicature Act 1873 (UK)*

²⁷ *Administration of Justice Act 1956 (UK)*

²⁸ www.alrc.gov.au (Accessed 15 June, 2013)

²⁹ www.mcgill.ca (Accessed 15 June, 2013)

³⁰ *Supreme Court Act 1981 (UK)* (Also www.alrc.gov.au) (Accessed 15 June, 2013)

³¹ *Ibid.*

In chapter 4 of the *ALC Rep 33*, 'when the *Colonial Courts of Admiralty Act 1890* (UK) was enacted to create and vest jurisdiction over admiralty matters in so-called 'colonial courts of admiralty', the admiralty jurisdiction of the High Court Admiralty Division extended to certain criminal and civil matters'.³²

They also had jurisdiction over a longer list of civil matters, which were vested by legislation, and 'inherent' jurisdiction of the Admiralty Court. These included:

(a) *Ship Mortgages* such as 'any mortgage of a ship or vessel, provided that the ship or vessel is or its proceeds are already under arrest, any Mortgage duly registered whether the Ship or the proceeds thereof be under Arrest ... or not.

(b) *Claims for the Building, Equipping or Repairing of a Ship* claims for the building, equipping or repairing of any ship, provided that the ship or its proceeds are under arrest at the time when the cause is instituted.

(c) *Necessaries* claims for 'necessaries' supplied to foreign ships or sea-going vessels, whether supplied within the body of a country or upon the high seas; ships at the time elsewhere than in the port to which they belong unless at the time when the cause is instituted an owner or part-owner of the ship is domiciled in Australia.

(d) *Damage to Cargo* claims by the owner, consignee or assignee of a bill of lading of goods carried into a port, etc.

(e) *Damage done to or by a Ship* Claims for damage: received by a ship or sea-going vessel whether at the time within the body of a county or upon the high seas; or done by any ship.

³² *Australian Law Reform Commission Report No. 33*. See also that the criminal matters included acts prescribed by 'the *Piracy Act 1850* (UK), ss 2 and 5; the *Foreign Enlistment Act 1870* (UK), ss 449, 472; the *Slave Trade Act 1873* (UK) and the *Pacific Islanders Protection Act 1875* (UK)' [at para. 38].

(f) *Master's and Seamen's Wages and Master's Disbursements* claims by a seaman of any ship for wages earned on board the ship whether due under a special contract or otherwise; and the master of any ship for wages earned on board the ship and for disbursements made on account of the ship.

(e) *Salvage* jurisdiction with respect to salvage claims arising on the 'high seas' and relating to property capable of being made the subject of a salvage claim.

(f) *Towage and Pilotage* A claim in the nature of towage means a claim in the nature of 'ordinary' towage, that is, towage which is required only for expediting the progress of a ship or sea-going vessel not in distress. Any other form of towage should be regarded as salvage services.

(g) *Title, Ownership, and Disputes between Co-owners* 'Claims or questions as to the title to or ownership of a ship or vessel or its proceeds in any cause of possession, salvage, damage, wages or bottomry; or between all or any of the co-owners of a ship registered at a port in Australia concerning the ownership, possession, employment or earnings of the ship or of a share thereof.

(h) *Certain Maritime Contracts* admiralty claimed inherent jurisdiction (over) contracts...made and executed on the 'high seas' for a maritime consideration.

(i) *Certain Torts at Sea* 'Certain claims for torts committed on the high seas were also asserted by admiralty to fall within its inherent jurisdiction' (E.g. in collision cases).

(j) *Bottomry and respondentia Bonds* 'Claims brought by a bond holder for the enforcement of a bottomry or respondentia bond were always recognized as distinctively admiralty matters.

(k) *Wreck at Sea.* The inherent jurisdiction extends to claims for the return of

property or for salvage for recovering property found as wreck at sea. Wreck at sea, together with pirate goods and spoils and certain kinds of Royal fish, were droits of the Crown and generally assigned to the Admiral. Wreck, in this sense, includes jetsam (shipwreck and cargo and deck gear jettisoned to lighten a vessel in extremis), whether found as flotsam (floating on the surface) or as lagan (sunken but buoyed for retrieval) and derelicts (abandoned vessels).

(l) *Master's Claims for Unpaid Freight* 'claims brought by a master for the enforcement of the possessory lien for unpaid freight attaching to the cargo in the master's possession'.³³

Some maritime claims give rise to a maritime lien; i.e. these justify the arrest of a vessel even if the vessel, which gave rise to the claim, has changed ownership.³⁴ However, it is important to note at the outset that the nature of a maritime lien is usually stated as follows:

- (i) attaches to the *res* (i.e. the ship) from the moment the claim arises in an inchoate form;³⁵
- (ii) is a claim in priority upon the *res* for all purposes to secure services performed for its benefit (such as repair or salvage) or compensation for injury caused by it;³⁶

³³ *Australian Law Reform Commission Report No. 33.* (<http://www.austlii.edu.au/au/other/alrc/publications/reports/33/>) (Accessed 15 June, 2013)

³⁴ *Wasawasa Fisheries Ltd v Karim's Ltd No 1* [1998] FJHC 76; HBG0001j.1996s (26 May 1998) (<http://www.pacilii.org/fj/cases/FJHC/1998/76.html>)

³⁵ *Wahono v The Ship MV Yung Yu No 606* [2001] SBHC 102; HC-CC 009 & 010 of 2001 (23 March 2001) (<http://www.pacilii.org/sb/cases/SBHC/2001/102.html>)

³⁶ *Ibid.*

- (iii) survives a change in ownership and does not depend upon continuing possession (for ‘a bona fide purchaser for value without notice’³⁷);
- (iv) as between themselves liens rank *pari passu* and not from the date of attachment;
- (v) from the commencement of any action in rem, the plaintiff is regarded as a secured creditor to the extent of the maritime lien.³⁸

2.3. Maritime Liens

With regards to maritime liens, the statutes in England and other common law countries have added a later list pursuant to international obligations. For the purpose of this dissertation, subjects pertaining to the later added list will be distinguished from ‘maritime liens and this notion is referred to as’ “statutory actions in rem”.³⁹

According to Thompson⁴⁰, English law traditionally recognized that maritime liens exist for the five following classes of claims. The first four exist by virtue of common law cases and the fifth through statute, that is, the *Merchant Shipping Act 1995* (UK). The claims are for:

- a) ‘Damage done by a vessel’,⁴¹
- b) Salvage,⁴²

³⁷ www.mondaq.com (Accessed 5 October, 2013)

³⁸ Isikova N, 2012. Master Thesis. The Ship Arrest Convention of 1952 and 1999: International and Ukraine Perspective. WMU (http://www.wmu.sof.or.jp/fd2012_nadiya.pdf) (Accessed 5 October, 2013)

³⁹ When the ship is arrested (as in Canada) rather than when the claims arises, and is expunged by the conventional sale of the ship. It ranks after maritime liens and is sometimes referred to as a “statutory actions in rem”. See Tetel, M.L.C., 2 Ed., 1998 at pp. 555,557.

⁴⁰ Maurice Thompson, “Admiralty Jurisdiction and Vessel Arrests in Fiji”, 10 (2) *Journal of South Pacific Law* (2006) (<http://www.pacii.org/journals/fJSPL/vol10no2/1.shtml>) (Accessed June 15, 2013)

⁴¹ Ibid (<http://www.pacii.org/journals/fJSPL/vol10no2/1.shtml>) Also see *The Bold Buccleugh*”

- c) Seamen's wages,⁴³
- d) Bottomry and respondentia,⁴⁴
- e) Master's wages and disbursements'.⁴⁵

However, the subject matters that justify the exercise of the arrest jurisdiction have been extended to include other categories referred to as “proprietary maritime claims” and “general maritime claims” in England and include international law. *Proprietary maritime claims* include ‘claims in respect of maritime liens and mortgages and claims relating to possession and ownership of the vessel’.⁴⁶ As Thompson put it, ‘these are claims where, in essence, there is a claim in respect of the very ownership of the vessel’.⁴⁷ *General Maritime Claims* comprise a longer list and relate to a whole host of matters that are ancillary to the use and operation of ships.⁴⁸ Some of these were listed in s.1 (1) of the ‘*Administration of Justice Act, 1956 (UK)*’⁴⁹ as follows:

- (a) for loss or damage to goods carried on a vessel: s.1(1)(g);
- (b) in the nature of salvage: s.1(1)(j),

⁴² Ibid. Also see *The Two Friends* (1799) 1 C. Rob. 271, 277

⁴³ Ibid. Also see *The Sydney Cove* (1815) 2 Dods. 11

⁴⁴ Ibid. Also see *Barnard v. Bridgeman* (1614) Hob. 11

⁴⁵ Ibid. Also see *Merchant Shipping Act, 1995 (UK)*, s.41 (www.pacii.org)

⁴⁶ Claims in respect of (a) and (b) are commonly referred to as “truly” *In Rem* claims and may be brought against a vessel irrespective of the vessels present ownership and irrespective of any link with any liability *In Personam* on the part of the owner of the vessel at the time the claim was commenced. Included in this category are claims in respect of maritime liens and mortgages and claims relating to possession and ownership of the vessel. In other words, these are claims where, in essence, there is a claim in respect of the very ownership of the vessel. Maurice Thompson, “*Admiralty Jurisdiction and Vessel Arrests in Fiji*.” (<http://www.pacii.org/journals/fjspl/vol10no2/1.shtml>) (Accessed June 15, 2013)

⁴⁷ Maurice Thompson, “*Admiralty Jurisdiction and Vessel Arrests in Fiji*”, (The Author has used part of the above quoted text in his own assignment submitted to World Maritime University (WMU). The unpublished assignment was relatively a topical task on *Maritime Liens - MLP 244 Maritime Law Commercial Law*, submitted on August 5, 2013. He intentionally used it to build-on in this later dissertation)

⁴⁸ Ibid.

⁴⁹ *Administration of Justice Act, 1956 (UK)*⁴⁹ (See also <http://www.pacii.org/journals/fjspl/vol10no2/1.shtml>) (Accessed 15 June, 2013)

- (c) in the nature of towage: s.1(1)(k)
- (d) in the nature of pilotage: s.1(1)(L);
- (e) in respect of the construction, repair or equipment of a vessel or dock charges or dues: s.1(1)(n);
- (f) claims by a Master or a member of the crew of a vessel for wages: s.1(1)(o)'.⁵⁰

However, as Thompson 'explained'⁵¹ in paragraph 6.19, the current position in the United Kingdom is that an action *in rem* may not be brought in respect of general maritime claims unless:

- (a) the claim arose in connection with a vessel; and
- (b) the person or entity who would be liable on the claim in a claim *in personam* must have been the Owner or the Charterer, or in possession or control of the vessel when the cause of action arose; and
- (c) at the time when the claim is brought, the person or entity who would be liable on the claim in a claim *in personam* must be the beneficial (or equitable) Owner of all of the shares in the ship or the charterer of it by demise'.⁵²

In light of the above, the very distinctive feature of admiralty law allows a maritime lien holder or, as the case may be, a general maritime claimant to commence a legal action against the ship concerned. This basically empowers relevant court officials, such as the Admiralty Marshall, to serve process on the ship concerned, arrest it and thereby subject

⁵⁰ Ibid. (<http://www.pacii.org/journals/fJSPL/vol10no2/1.shtml>) (Accessed 15 June, 2013)

⁵¹ Ibid. The author's unpublished assignment quoted from the original source, Maurice Thompson, "Admiralty Jurisdiction and Vessel Arrests in Fiji". Journal of the South Pacific Law. (<http://www.pacii.org/journals/fJSPL/vol10no2/1.shtml>) (Same as above)

⁵² Ibid.

it to its care and control.⁵³

2.4. Action in rem

After arrest, those who are interested in the ship (such as the owner or demise charterer) may choose to make an appearance. In this scenario, the matter proceeds before the relevant court as if it were an action *in personam* against those who have entered an appearance but it remains an action *in rem*. Any judgement can be enforced against the defendants personally, even if such damages exceed the value of the ship.⁵⁴

However, if those interested in the ship do not show up, public officials will sell the vessel and the proceeds will then be used to meet possible judgment debts. Paragraph 17 of the *Australian Law Reform Commission Report No. 33* explains the two theories, which are used to justify the use of *in rem* proceedings.⁵⁵

- 1) 'The personification theory, as its name suggests, treats the ship as a 'person', a legal entity'.⁵⁶
- 2) 'The procedural theory treats the arrest of a ship as essentially a device to compel the appearance of the owner of the ship.'⁵⁷

Suffice it to say, that there is no single theory, which is capable of explaining all the features of the action *in rem*.

Historically, to recap what has been reviewed above, maritime claims in England were

⁵³ Ibid.

⁵⁴ Ibid.

⁵⁵ Ibid. Author's paper submitted to WMU, quoted from the *Australian Law Reform Commission Report No. 33* (<http://www.austlii.edu.au/au/other/alrc/publications/reports/33/>) (Accessed same dated as above)

⁵⁶ Ibid. See also *The Bold Buccleugh* (1851) 7 Moo PC 267; 13 ER 884.

⁵⁷ Ibid. See also *The Dictator* [1892] P 304.

dealt with by the Admiralty Courts. Variants of these courts existed as separate courts with separate jurisdictions and practices from other courts of the realm. Some of the matters which were dealt with by the Admiralty courts included ships' mortgages, claims in salvage, towage, damage, wages and necessities, questions involving the ownership of ships and claims for damage to cargo and for the building, equipping and repairing of ships. Actions could be brought either *in personam* or *in rem*.⁵⁸

However, among other theoretical aspects of the admiralty law, one interesting feature of admiralty law is that some maritime claims create **maritime liens**, which are enforceable by actions *in rem* against ships. This enables a ship to be arrested and, if need be, sold. The proceeds would then be used to satisfy judgment debts against the ship, its owner or demise charterer.⁵⁹

2.5. International Conventions and Maritime Liens

To be fully acquainted and well conversant with the terms “*maritime liens*” the author wishes to define distinctly the term, “lien” and “maritime lien” respectively.

What is a lien?

‘The right to hold the property of another as security for the performance of an obligation. A common lien lasts only so long as possession is retained, but while it lasts can be asserted against the whole world. A equitable lien exists independently of possession; i.e. it may bind property not in possession at the time

⁵⁸ Ibid.

⁵⁹ Ibid.

*the obligation is incurred, but it cannot avail against the purchaser of a legal estate for value without notice of the lien’.*⁶⁰

What is maritime lien?

A maritime lien in English Law has been defined by textbook writers and scholars in two ways either as (i) a privileged claim against a ship ‘to be put into effect by legal process,’⁶¹ or (ii) ‘a right to a part of the property in the *res* (the ship)’.⁶² The essence of a ‘maritime lien was expressed concisely by the court in *The Bold Buccleugh*’⁶³ as a right, which “travels” with the ship into whose possession it may go subsequently. In hindsight, the Judge in that case might have extended this slightly by saying “and wheresoever it and that subsequent possession may be”. Because it, the ship, is to “pay for the wrong it has done” it must be compelled to do so by Admiralty process by forced sale, thus making the proceeds of sale available to satisfy the existing lien holders; if the proceeds are limited then each privileged creditor will receive satisfaction in a court-determined order of priorities until the available proceeds are exhausted.⁶⁴

See also in *Scott L.J. in The Ripon City*; he said the maritime lien:

“... consists in the substantive right of putting into operation the admiralty courts executive function of arresting and selling the ship, so as to give a clear title to the purchaser and, thereby, enforcing distribution of the proceeds amongst the lien creditors in

⁶⁰ Tekle Yemane, 1988. Master Thesis. Maritime Liens and Mortgages. World Maritime University, Malmo, Sweden. Pp.8-9. (The legal definition was quoted from the Osborn’s Concise Law Dictionary (7th. ed.))

⁶¹ More strictly perhaps it can be said that the lien attaches to a ship is alleged to be offended. The nature of maritime lien was considered by the Privy Council in *The Bold* case. <http://www.uniset.ca> (Accessed 16 July, 2013)

⁶² *M.V. Elisabeth and Others v Harwan Investment & Trading PVT, Ltd, H.*, Financial Law Reporter, April 27, 2011 Issue. The learned Judge has considered the case of *m.v. Elisabeth Vs. Harwan Investment and Trading Pvt. Ltd.*1 as also *J. S. Ocean Liner LLC Vs. M. V. Golden Progress & Anr.*2, to which the learned Judge was also a party, and disagreed with the Division Bench Judgment of Gujarat High Court in the case of *Croft Sales and Distribution Ltd. Vs. M V Basil3* dated 17 February 2011 in OJ Appeal No. 6 of 2011 in Admiralty Suit No. 10 of 2010, which were actions in rem upon which the learned Judge has rightly negated the Defendant’s contention that the 1999 Convention applies in the case only where the government interest is involved and with 1 AIR 1993 SC 1014’. (<http://indiankanoon.org/doc/1715036/?type=print>) (Accessed 16 July, 2013)

⁶³ *The Bold Buccleugh* (1851) 7 Moo. P.C. 267.

⁶⁴ *Ibid.*

accordance with several priorities and subject to these rateably...”⁶⁵

Lack of international consensus produces conflicts of laws

The subject of priorities between competing maritime claims against the same res serves only to encourage “forum shopping” which is an issue due to lack of international uniformity. A claimant may think he has a merit to claim according to his own domestic law, but if he finds himself in the hands of a court competent to determine priorities in some foreign jurisdiction and that court considers that the claim has a relatively less favourable priority than the Claimant had assumed, the claimant may lose if the liquidated res proves a meager treasure house.⁶⁶

It is essentially important that some form of international consensus is reached in respect of the following; ‘(i) what categories of claim carry a maritime lien; and (ii) how they rank for priority if the ship, which is the subject of the lien, does not realize a sufficient amount to pay off all lienors in full.’⁶⁷

International Conventions on Maritime Liens and Mortgages

The main conventions on this subject were as follows:

- **International Convention of 1926 for the Unification of Certain Rules of Law Relating to Mortgages and Liens'**

⁶⁵ [1897] p 266.

⁶⁶ Hill C, Soering K, Hosoi T, Helmer C, 1985. *ARREST OF SHIPS*. Lloyd's of London Press Limited. P. 5

⁶⁷ Ibid. (The Author has used part of the above quoted texts in his own assignment submitted to World Maritime University (WMU). The unpublished assignment was relatively a topical task on *Maritime Liens - MLP 244 Maritime Law Commercial Law*, submitted on August 5, 2013. He intentionally used it to build-on in this later dissertation)

- **International Convention for the Unification of Certain Rules relating to Maritime Liens and Mortgages (Brussels 1967)**
- **International Convention on Maritime Liens and Mortgages (1993)**

Seeking of uniformity

The add fuel to the plea that there should be a much wider adoption of international conventions on the subject of maritime liens so as to unify, not only the varied individual national thinking on which claims enjoy maritime liens and which do not, but also the question of ranking priorities as between the maritime lien holders, mortgagees and other creditors. In that regard, a purchaser of a vessel has to always reckon with the possibility of maritime liens and under many foreign laws all or most of the claims, which only give a right of action *in rem* in the UK give rise to such liens.⁶⁸ Therefore, the ‘1993 Convention was adopted because it was recognized that ‘international uniformity in the field of maritime liens and mortgages is needed in order to improve conditions for ship financing and the development of national merchant fleets’.⁶⁹

⁶⁸ Ibid.

⁶⁹ Dostal Matej, 1997. Masters Thesis. Harmonisation of certain rules relating to the mortgages and maritime liens in Slovakia with International standards. World Maritime University, Malmo. P. 55 (Also cited by the author in his unpublished assignment submitted to WMU, 2013).

CHAPTER 3 HOW MARITIME LIENS ARE ENFORCED, ISSUE ARISES AND GROUNDS FOR ENFORCEMENT ACTION

3.1. General overview of the enforcement of Maritime Liens

It is a trite observation that the existence of one's legal rights is of no use to the holder unless these rights can be enforced. Enforcement action can be pursued through such civil causes as breach of contracts or torts. Sometimes they can be pursued as a special cause of action or maritime claim.⁷⁰ For a maritime lien there are many ways to enforce it. Some views are that the maritime lien can only be exercised through judicial proceedings.⁷¹ Some views are that the person who holds the maritime lien can also express the lien by registration of the claims.⁷² In essence, it is commonly believed that exercise of the maritime lien must go through four main parts, including ship seizure, ship auction, registration of the claims and allocation of proceedings.⁷³

⁷⁰ USP School of Law Lecture notes from Lecturer Saiful Karim 'Topic 11 lecture notes' *Marine Law, University of the South Pacific School of Law, Semester II 2009*. (From William Tetley (1998) 2nd ed. "Maritime Liens and Claims", International Shipping Publication, Canada).

⁷¹ Qingsha Zhu, Masters Thesis . Seafarer Payment Protection through Maritime Liens: Law and Practice in China, Lund University.

⁷² Ibid.

⁷³ Ibid.

Enforcement and/or execution of maritime liens is premised in a variety of statutes, practices and overlapping rules and moreover, on decisions upheld in the courts. In essence, the practitioner cannot rely on legal concepts alone, however, for practical considerations play an essential role in a successful execution procedure. Here, the heights of legal theory mingle with the most mundanely practical.⁷⁴

3.2. The scope of arrest in the enforcement of maritime liens and other claims

For better clarification, the author wishes to quote an explanation highlighted by [Niyati Nath](#);⁷⁵ “...A maritime lien may be enforced by an action in rem – where the plaintiff seeks to enforce a claim to or against the res or property – or by an action in personam. In an action in rem, the plaintiff commences the proceeding by going after a specific property, whereas in an action in personam, the plaintiff may take the defendant's property to satisfy a judgment only after he has succeeded in the proceeding...[sic]”⁷⁶

In a way, the proceedings may commence by way of issuing a notice to the vessel and taking steps where necessary to arrest it, so that it does not leave the court's jurisdiction. In the event of non-appearance by the defendants in court to defend the allegations against him or her, the proceedings will continue against the vessel and eventually,

⁷⁴ John S. Rogers. April 1973. Enforcement of Maritime Liens and Mortgages. Tulane University, Tulane Law Review.

⁷⁵ Niyati Nath, 2012. India: Maritime Lien In India, [JSA Advocates & Solicitors](#).
<http://www.mondaq.com/india/x/208090/Marine+Shipping/Maritime+Lien+In+India> (Accessed 16 July, 2013)

⁷⁶ Ibid.

through the court's order, the ship might be sold to satisfy the claim. However, an 'action *in rem* prevents a claim from being defeated by the mere fact of the ship travelling beyond the jurisdiction of the court'.⁷⁷

3.2.1. Recognition of the Traditional English Maritime Liens

The Solomon Islands 'is not a party to either the 1926, the 1967 or the 1993 Maritime Liens and Mortgages Convention but has incorporated'⁷⁸ into its law the 1993 Convention which has the force of law in the Solomon Islands. The Solomon Islands still recognizes the traditional English maritime liens. It has not recognized any other maritime liens.

In England and Commonwealth countries, including the Solomon Islands and as earlier noted in chapter two, the term "maritime lien" 'applies only to a select group of maritime claims, such as seamen's wages, master's wages, master's disbursements, salvage, damage (caused by the ship), bottomry and respondentia . These are known as'⁷⁹ "traditional maritime liens".⁸⁰

In contrast, there are other maritime claims, which do not give rise to traditional maritime liens in the U.K. and the Commonwealth countries, but only to "*statutory rights in rem*". These are maritime claims resulting from services supplied to the ship or damages done by the ship, notably claims for "necessaries" provided to the vessel (e.g. bunkers, supplies, repairs, and towage), as well as, for breaches of charter party and for contribu-

⁷⁷ Ibid. (<http://www.mondaq.com/india/x/208090/Marine+Shipping/Maritime+Lien+In+India>) (Accessed 16 July, 2013)

⁷⁸ Section 201 of the Shipping Act 1998 (<http://www.alrc.gov.au/sites/default/files/pdfs/publications/ALRC33.pdf>) (Accessed 16 July, 2013)

⁷⁹ (<http://www.mcgill.ca/files/maritimelaw/marliensconf.pdf>) (Accessed 16 July, 2013) Also quoted texts from the unpublished assignment of the author submitted to WMU.

⁸⁰ See this classic enumeration given by Gorrell Barnes, J. in *The Ripon City* [1897] P. 226 at p. 242. See also Tetley, *International Conflict*, 1994 at p. 539. (<http://www.mcgill.ca/files/maritimelaw/marliensconf.pdf>) (Accessed 16 July, 2013)

tions of the ship.⁸¹

The 'latter are simply rights granted by statute to arrest a ship in an action *in rem* for a maritime claim. Unlike traditional maritime liens, statutory rights *in rem* do not arise with the claim; they do not "travel with the ship" (i.e. they are expunged if the vessel is sold in a conventional sale before the action *in rem* is commenced on the claim concerned); and they rank *after*, rather than *before*, the ship mortgage in the distribution of the proceeds of the vessel's judicial sale'.⁸²

However, in the United States and civil law jurisdictions (most European Countries), 'claims for necessities, cargo damage and general average, among others, are granted full status as maritime liens by the relevant national legislation,⁸³ and/or by international conventions binding those States,⁸⁴ thus resulting in conflict of laws when such claims are asserted in maritime proceedings before United Kingdom and Commonwealth courts, where they have no maritime lien status according to the *lex fori*'.⁸⁵

In this regard, in order to be fully acquainted with and to 'understand maritime lien conflicts, one must also be familiar with a few other categories of maritime claims. Professor William Tetley Q.C. highlighted that first come "special legislative rights", a category of claim (not always recognized by maritime law authors) arising under modern national statutes, particularly with respect to harbour and dock dues, wreck removal and

⁸¹ Tetley, *Int'l Conflict*, 1994 at p. 539; Tetley, *M. L. & C.*, 2 Ed., 1998 at pp. 445-446 (general average contributions); pp. 555-562 (necessaries - U.K.) and pp. 577-578 (necessaries - Canada), p. 646 (repairs - U.K.) and p. 652-654 (repairs - Canada); pp. 703-708 (towage); pp. 732 and 739 (cargo damage), p. 732 (breach of charterparty).

⁸² Prof. William Tetley, Q.C. MARITIME LIENS IN THE CONFLICT OF LAWS. published in J.A.R. Nafziger & Symeon C. Symeonides, eds., *Law and Justice in a Multistate World: Essays in Honor of Arthur T. von Mehren*, Transnational Publishers Inc., Ardsley, N. Y. 2002 at pp. 439-457

⁸³ Ibid.

⁸⁴ Ibid.

⁸⁵ Prof. William Tetley, Q.C. MARITIME LIENS IN THE CONFLICT OF LAWS. published in J.A.R. Nafziger & Symeon C. Symeonides, eds., *Law and Justice in a Multistate World: Essays in Honor of Arthur T. von Mehren*, Transnational Publishers Inc., Ardsley, N. Y. 2002 at pp. 439-457. Cited also in the Author's unpublished assignment submitted to WMU.

pollution. He further states that ‘These statutes confer upon governments or their agencies special rights, such as detention and sale of the ship, often coupled with a right of priority on the sale proceeds. In other cases, the statutes provide expressly for certain claims to be secured by a maritime lien with a very high priority’.⁸⁶ ‘Such rights usually outrank even the costs of arresting and selling the ship, as well as the "traditional" maritime liens. they are also sanctioned by international conventions on maritime liens and mortgages.’⁸⁷

The ‘costs of seizing or arresting the ship and of preserving it pending the completion of the suit and its judicial sale are another type of maritime claim. According to Professor William Tetley, “...in France for instance, such law costs (*frais de justice*), as well as the costs of the judicial sale and the distribution of the proceeds, and the costs of maintenance of the vessel under seizure (*custodia legis*), are treated as conferring a *privilege maritime* (maritime lien) superior to other maritime liens enumerated in Law No. 67-5.’⁸⁸ ‘In the U.K., Canada and the U.S., on the other hand, costs of arrest and sale and expenses in *custodia legis* do not constitute "traditional" maritime liens, but are understood as a separate class of maritime claim, outranking such liens. And, of course, there are ship mortgages, which almost always compete with the other categories of maritime claim for priority when a ship is sold in a judicial sale’.⁸⁹

3.3. Issue of prioritizing the maritime liens and other claims

⁸⁶ Prof. William Tetley, Q.C. MARITIME LIENS IN THE CONFLICT OF LAWS. published in J.A.R. Nafziger & Symeon C. Symeonides, eds..

⁸⁷ Prof. William Tetley, Q.C. MARITIME LIENS IN THE CONFLICT OF LAWS. published in J.A.R. Nafziger & Symeon C. Symeonides, eds., Law and Justice in a Multistate World: Essays in Honor of Arthur T. von Mehren, Transnational Publishers Inc., Ardsley, N. Y. 2002 at pp. 9-10

⁸⁸ *Ibid.* p.10

⁸⁹ *Ibid.*

It is important to note at the outset that in question of priorities of liens, the maritime liens attached on any maritime property are always superior to any other maritime liens (other claims) or security device (mortgages, hypothèque) (Article 5 of the 1993 Convention). Justice Matthews explained this clearly in the *Guiding Star*⁹⁰ case in the following terms: “...in determining the order of priority among several claimants, the first classification therefore, is in to liens, maritime and non maritime, the latter being post pond until after satisfaction of the former...”⁹¹

However, there are associated problems with the ranking of maritime liens especially with respect to other categories of maritime claims, which are quite different from country to country, and this is one of the controversial issues and/or ‘the principal cause of the conflicts of law in this area of maritime’⁹² law.

3.3.1. Supplies of Necessaries to the ship

With respect to supplies of necessaries to the ship, there is no maritime lien, and foreign law cannot be adduced to alter the English rule of ranking under which the claim of "repairs or necessaries" rank after those of the mortgagee. On equitable principles, a necessities claimant might be preferred to a mortgagee if the latter stood up, knowing that the ship-owners were insolvent and that the claimant was carrying out work or supplying materials that were directly benefiting his interest.⁹³ However, where a repairer has done work on the ship to the order of the owner and can retain the ship by virtue of his repairer's "possessory lien", a mortgagee cannot take possession without first discharging this

⁹⁰ See The *Guiding Star*, C.C.1883, 18 F. 263, 264.

⁹¹ Gustavus H. Robinson, Handbook of Admiralty Law in the United States, Minnesota: West Publishing Company, 1939. Pp.419 / 421.

⁹² William Tetley, 2008. 4 ed., Tetley's maritime & admiralty law. ,Montreal. (www.mcgill.ca/maritimelaw/) (Accessed 16 July, 2013)

⁹³ Yemane Tekle, 1988. Thesis: Maritime Liens and Mortgages, World Maritime University, Malmö, Sweden. (The full paragraph was also cited by the Author's assignment submitted to World Maritime University, August 2013 prior to submission of this dissertation).

possessionary lien. Further, if the repairer is forced to give up possession by court order, the court will protect his right by giving him priority over all claims and mortgages, except for maritime liens that have been attached before the possessory lien.⁹⁴

3.3.2. Mortgages

A mortgage ‘is the most important form of security required by a lender. In order for this security to pay off, a mortgagee should seek certain basic rights and forms of enforcement procedures. Although there are some differences in jurisdiction with regards to types of mortgages and their execution or ranking, there are some basic principles, which have to be applied. First of all, a mortgagee will require the right to take possession of a vessel to enable him to sail the vessel to an amenable jurisdiction where he will be able to arrest it to provide security for the mortgagee’s claim for the unpaid indebtedness.’⁹⁵ In order for the mortgage to get priority it must be registered by the registrar of the ship’s port of registry and rank according to the date of registration. But failure to register will mean it does not enjoy priority (and enforcement is certainly too difficult).

‘It is prevailing rule, that the existence of liens is a matter of substance and may be governed by the law of the contract, while ranking of liens is a matter of procedure and therefore determined by the *lex fori*. For instance, ‘if a vessel was arrested in in Solomon Islands Port, in the case of dispute, each court which would turn to the 1993 Convention seeking explanation whether such a lien is granted by the national law, would not find an answer. Thus the prospective lienee may conceivably lose his lien.’⁹⁶

⁹⁴ Ibid..

⁹⁵ Hardwood, 1991. *Shipping Finance*. London: Euromoney Books. P.74.

⁹⁶ (The full quoted texts in the paragraphs were also cited by the Author’s assignment submitted to World Maritime University, August 2013 prior to submission of this dissertation).

As far as ranking is concerned, it is not clear under the Solomon Islands laws whether the claims listed in Article 5 of the 1993 Convention 'will be satisfied in the exact order as they appear. Provided it is so, claims for rewards for salvage of the vessel would have rather lower priority and would have to be satisfied after masters and seafarer's wages claims followed by other claims. However, if the vessel had been lost, there would have been no security for satisfying claims for salvage or any other claims, which rank ahead of it. Neither is there any provision stipulating in which order liens and salvage should be satisfied nor has any provisions been drawn as to the ranking of maritime liens of the same category. As already mentioned, the 1993 Convention contains provisions, but in the Shipping Act 1998 there is no reference made to their ranking in respect of other maritime liens whatsoever'.⁹⁷

3.3.3. Conflicts on laws - The 1993 Convention

The 1993 Convention 'regulates problems that arise under a conflict of laws in respect of maritime liens and mortgages, which is quite satisfactory and proper. As far as maritime and other liens are concerned, there is no conflict of law. Other liens rank after the maritime liens specified in the Convention and amongst themselves are ranked accordingly. Similarly, there is no conflict of law in the Convention regarding possessory liens and maritime liens, which rank before mortgages'⁹⁸ or in other words, possessory liens must be satisfied before a mortgagee can exercise his right to take possession.

According to the author's view, 'maritime liens must rank in the order given by this Convention, provided however, that maritime liens that have been attached to a ship pri-

⁹⁷ Ibid.

⁹⁸ The 1993 Convention

or to a salvage operation are subordinated to the claim for salvage, which secured the ship and made it available as security for the enforcement of other maritime liens'⁹⁹.

In 'order to understand conflicts of law in the realm of maritime liens and related maritime claims, one must first become a "comparativist" in order to grasp the differences between the competing national laws. In fact, *any* study of the conflict of laws presupposes a comparative law analysis. Similarly, comparative law cannot be studied exhaustively without examining the conflicting rules of the jurisdiction in question, because those rules are themselves part and parcel of that national law. Conflicts of maritime lien laws are easy to perceive through the lens of comparative law.'¹⁰⁰

3.3.4. Applying Procedural Theory

In determining the fate of the cases which involve both claims for unpaid wages and other claims, 'ascertaining a proper procedure is crucial, since there are other potential claimants from different jurisdictions, claiming the same. For this reason, a procedural theory is applicable. By arresting the vessel, courts may summon the beneficial owner to attend to answer the claims against him. However, the crux of granting one lien a higher rank than the other is simply due to the availability of insufficient funds to satisfy all arisen claims if proceedings are an action *in rem*. Hence, applying the procedural theory

⁹⁹ See the 1993 Convention stipulates in Article 5 (2) (The full quoted texts in the above paragraph was also cited by the Author's assignment submitted to World Maritime University, August 2013 prior to submission of this dissertation).

¹⁰⁰ In this regard, it is noteworthy that Dicey's first edition of 1896 was not entitled *Conflict of Laws*, but rather *A Digest of the Law of England with Reference to the Conflict of Laws*, Stevens & Sons, London, 1896. (The Author has used part of the above quoted texts in his own assignment submitted to World Maritime University (WMU). The unpublished assignment was relatively a topical task on *Maritime Liens - MLP 244 Maritime Law Commercial Law*, submitted on August 5, 2013. He intentionally used it to build-on in this later dissertation).

will make the owner personally liable for the total value payable to the claimants, if the claim exceeds the value of the ship'.¹⁰¹

3.4. Issues of time to enforce a maritime lien

Article 9, which provides extinction of maritime liens by lapse of time, remains a controversial issue as to whether the one-year period is for limitation of actions or only limits the period of priority rights. The author holds the view that the one-year period should consider the scheduled period, mainly due to the following reasons. First, after a period of one year the 'maritime liens set out in article 4 should be terminated unless, prior to the expiry of such period, the vessel has been arrested or seized, such arrest or seizure leading to a forced sale'¹⁰². Secondly, within that one-year period the claimant's claims should be suspended and interrupted based on the application of the doctrine of laches, the idea is that if the lien holder "slept" on his right and neglected to pursue it for an unreasonable time, then in a way he should lose the right¹⁰³.

This idea was coupled with the notion that such delay would have seriously prejudiced the interests of the potentially responsible defendant. It depends upon the Judge's discretion to determine what constitutes a delay so unreasonable to entitle a court to discharge the lien.¹⁰⁴ The issue is whether the object of the lien has already passed into the hands of an innocent purchaser or whether it still remains in the hands of the original owner would be liable. In the former case, delay will be likely to be considered as much less

¹⁰¹ (The full quoted texts in the above paragraph was also cited by the Author's assignment submitted to World Maritime University, August 2013 prior to submission of this dissertation).

¹⁰² 1993 Convention Article 9.

¹⁰³ Hill, C. Hosoi, K.S.T, Helmer, C. 1985. *Arrest of Ships*. Lloyd's of London Press Limited.

¹⁰⁴ Ibid.

excusable.

In the *Alletta case*,¹⁰⁵ one of the very unique examples, which has been pleaded as a counter to the enforcement of a maritime lien, Judge Mocatta quoted an old mid-19th century ruling (extracted from *The Bold Buccleugh*¹⁰⁶) as follows:

It is not necessary to say that the lien is indelible, and may not be lost by negligence or delay unnecessarily the rights of the third parties may be compromised, but where reasonable diligence is used, and the proceedings are laid in good faith, the lien may be enforced, in whosoever possession the thing may come. [sic]

Mocatta, J. further advanced his decision from a 1891 case (*The Kong Mangus*¹⁰⁷) as there are no recent sources reinforcing the same apart from the above precedent case:

There are no decisions which enable me to fix any particular period in relation to laches, and I come to the conclusion that the principle that should guide my decision is this, that in each case it is necessary to look at the particular circumstances, and see whether it would be inequitable, after the period of time, which of course is taken into account, and after the circumstances which may have happened (including amongst those the loss of witness, the loss of evidence, and including also the change of property), to entertain a suit of this kind.

In light of the above discussion, it would be fair to say that the *practical* application of a laches defence in modern courts has virtually disappeared and has become more of an academic collector's item. It has been superseded over the years of this century gradual-

¹⁰⁵ The *Alletta* (1974) 1 Lloyd's Rep.40

¹⁰⁶ (1851) 7 Moo. P.C. 267.

¹⁰⁷ The *Kong Magnus* (1891) p.223

ly by the introduction of the various statutory time limitation¹⁰⁸ periods. The doctrine of laches is, however, still to be found frequently pleaded in Solomon Islands admiralty courts.

It is also considered that seafarers loss of maritime liens could result in the expiration of a year's scheduled period, loss of the ship, expiration of the summon created when a transfer of the ship takes place, loss of the main claim guaranteed, acceptance of the seafarers of other forms of security and expiration of right registration when courts auctions the ship.

3.5. Issue of ascertaining the beneficial owner in order to pursue claim

In the Solomon Islands, most of the maritime lien claims instigated by seafarers against ship owners were alleged to be totally unfounded and/or baseless. In most instances, the claims were entirely premised on mere assumptions, which had to be proved, and most of their assertions were vague and not backed by any evidence. The underlying problem stemmed from the ownership issue. Hence, in order for seafarers to be successful in their claims, it is far better for them to provide accurate details and supporting evidence of a factual nature and not mere assertions and homespun rhetoric in substantiating their claims.

First, it needs to be examined 'how the beneficial (ultimate) ownership and control of vessels can be cloaked by owners who for one reason or another wish to remain anonymous'.¹⁰⁹ 'Basically, this issue will be examined by reference not only to specific ship registration procedures'¹¹⁰ 'but also by examining more general corporate instruments

¹⁰⁸ Limitation Act [Cap 18]

¹⁰⁹ Hill, C. Hosoi, K.S.T, Helmer,C. 1985. "what is beneficial owner". Pp.15-16

¹¹⁰ Maritime Transport Committee (2003). Ownership and Control of Ships.Organisation for Economic Cooperation and Development (OECD).(<http://ntl.bts.gov/lib/24000/24400/24410/17846120.pdf>). (Accessed 14 August, 2013)

which provide the principal means of effectively cloaking beneficial ownership'.¹¹¹ Hence, it is important to note, because 'anonymity can be sought by owners for a variety of reasons. Some may be perfectly legitimate and even innocuous. Others may wish to remain anonymous to minimize legal and fiscal exposure (which may not be legal)',¹¹² or 'for reasons that are absolutely illegal, such as criminal activities or money laundering'.¹¹³

In an attempt to examine further the above issues, the means by which secretive owners use vessel registration procedures to ensure their anonymity will be examined. The features of corporate and shipping register requirements that permit, or even facilitate, the cloaking of the true identities of the ultimate owners of vessels will be also analyzed. These owners are those who exercise true control of what those vessels do, and the purposes which the revenue they generate can be put to.¹¹⁴

In the above contention, the 'IMO's Legal Committee considered this issue at its 84th Session in April 2002, and concluded that from its perspective the following questions were relevant:

- *Who appoints the crew?*
- *Who fixes the use of the ship?*
- *Who signs the charter party on behalf of the owner?'*¹¹⁵

These important matters were noted and sanctioned 'during the Diplomatic Conference on Maritime Security held at IMO in December 2002'.¹¹⁶

¹¹¹ Maritime Transport Committee (2003). Ownership and Control of Ships. Organisation for Economic Cooperation and Development (OECD). (<http://ntl.bts.gov/lib/24000/24400/24410/17846120.pdf>). (Accessed 14 August, 2013)

¹¹² World Health Organization (1 November 1988). *International medical guide for ships: including the ship's medicine chest*. World Health Organization (<http://en.wikipedia.org/wiki/User:Haus/5>) (Accessed 14 August, 2013)

¹¹³ Maritime Transport Committee (2003). (OECD). (<http://ntl.bts.gov/lib/24000/24400/24410/17846120.pdf>). (Accessed 14 August, 2013)

¹¹⁴ Maritime Transport Committee (2003). Ownership and Control of Ships. Organisation for Economic Cooperation and Development (OECD). (<http://ntl.bts.gov/lib/24000/24400/24410/17846120.pdf>). (Accessed 14 August, 2013)

¹¹⁵ Ibid. <http://ntl.bts.gov/lib/24000/24400/24410/17846120.pdf> (Accessed 14 August, 2013)

Nevertheless, because of the requirement of English statutory (Admiralty) law to determine beneficial ownership, the courts have vested themselves with the discretionary power to investigate beneficial ownership, to “pierce the corporate veil” or façade of nominee or registered ownership, (See *dicta* in *The Aventicum*¹¹⁷) The Admiralty judge subsequently stated his view in the *Maritime Trader case*¹¹⁸ that a court should only use that power if there was a genuine likelihood that the owning company, (legally registered as such) was formed merely as a device to hide the ship away from being used as security or sold to satisfy a judgement.¹¹⁹

It is true, however, that sometimes states, will readily be granted ‘State flags for ships that might be a risk to seafarers, the marine environment, and the cargo on board’.¹²⁰ This is the case of Solomon Islands which has considerably lesser standards compared to others.

Therefore, to reiterate, identifying the rightful owners, is paramount for protection of third parties, in this instance for seafarers’ unpaid wages. ‘There are occasions when the owner of a vessel is liable for loss or damage. It is essential in these cases to be able to confirm the owner’s identity in order to know who to proceed with legal action against. The ship registry office provides an excellent means of identification information to third parties when the owner needs to be found.’¹²¹ In ‘court actions, a court may receive in evidence a Register Book or transcript thereof, a Certificate or Registry, or any Declaration made in connection with registry’¹²².

¹¹⁶ Ibid.

¹¹⁷ *The Aventicum* (1978) 1 Lloyd’s Rep. 184

¹¹⁸ *The Maritime Trader* (1981) 2 Lloyd’s Rep. 153.

¹¹⁹ Ibid.

¹²⁰ Extracted from Justice John Middleton. Admiralty Education 2007: Ship Registration and the Role of the Flag. (<http://www.fedcourt.gov.au/how/admiralty>) (Accessed 14 August, 2013)

¹²¹ El- Sayed, HM. (1987), “Maritime Mortgages” in *Maritime Regulations in the United Kingdom of Saudi Arabia*, Graham & Trotman, London. Pp. 215. See also Rogers Rhea, Master Thesis, (2012), *Ship Registration: Critical Analysis*, World Maritime university, Malmo, Sweden. (www.sof.or.jp/fd2011_rogers.pdf) (Accessed 14 August, 2013)

¹²² Ibid.

3.6. Enforcement of maritime lien by way of Mareva Injunction

A maritime lien can be enforced by way of a ‘*Mareva* injunction’ which gives in *personam* rights only, that is, rights (only) against the defendant, whereas an *action in rem* gives or creates, when such action taken, rights of property against the *res*.¹²³

For example supposing a bank has been assigned the proceeds of an arbitration award as security for a loan, the prior obtaining of a *Mareva* injunction against the fund created by those proceeds, or so much of it as was necessary to pay them off as creditor, did not work to the plaintiff’s advantage as the *Mareva* injunction would not “stand up against” the bank’s equitable assignment of the whole fund. The injunction would therefore not be granted (*Pharoah’s Plywood Co. Ltd v. Allied Woods Products Pte. Ltd.*)¹²⁴

For instance, the innocent charterer of a ship which is the subject matter of an injunction, may convince the court that unless the ship is freed from the “freezing order” effect of the injunction so as to be able to leave the jurisdiction to continue trading, his basic rights under the charter’s terms are being denied him (*The Rena K*¹²⁵). Indeed, even the ship-owner himself can validly argue that he needs to sail his ship away from the jurisdiction to reasonably carry on his business and that his purpose in doing so is not solely to remove his ship from exposure to be seized as security (*The Angel Bell*).¹²⁶

¹²³ *The Rena K* (1979) Q.B.377.

¹²⁴ (1980) LMLN.7

¹²⁵ *The Rena K* (1979) Q.B. 377

¹²⁶ *Iraqi Ministry of Defence v Arcepey Shipping Co. S.A. (The Angel Bell)* (1980) 1 Lloyd’s Rep. 632.

3.7. Critical analysis of the above issues

3.7.1. Issues of conflicts

It was demonstrated above that issues pertaining to conflicts of laws in ranking of liens exist and in particular because conflicting views of different systems of priorities that came into play, a court might be encountered 'with a claim, which under its national law, is a maritime lien, but it is not a maritime lien in the law of the forum.

In any event, a court should first decide whether or not to recognize that foreign maritime lien as a maritime lien, despite the fact that claims within its own territorial jurisdiction would not constitute a maritime lien. However, in the event that the court decides to recognize the foreign maritime lien as a maritime lien, then it must decide how to rank the underlying claim in the distribution of the judicial sale proceeds. The solutions given in such a national conflict of law differ completely between countries, and notably as between the common law dominion, on the one hand, and the civil law system, on the other'.¹²⁷

Arguably, the rules of ranking and conflicts of law was discussed in the English case of *The Ruta*;¹²⁸ It was articulated that enforcement of maritime liens at times involves conflicts of law. In deciding on issues of conflicts as well the complications of ranking of maritime liens, the courts ought to decide on whether a maritime liens carried a substantial or whether it is a procedural device, before choosing whether to apply the law of the lien arose (*lex causae*) or the law of the forum where it sought to be enforced. (*lex*

¹²⁷ www.uniocean.com (Accessed 14 August, 2013)

¹²⁸ "The Ruta" [2000] 1 Lloyd's Reports p. 359 (<http://www.mondaq.com/india/x/208090/Marine+Shipping/Maritime+Lien+In+India>) (Accessed 14 August, 2013)

fori).¹²⁹ The remarkable solution to this issues of substantial right and procedural device conflicts, can have legal implications in the enforcement in the forum court, especially if a overseas maritime lien is contradictory to the maritime liens recognized by the law of the Solomon Islands for instance. A policy should be made clear to the extent that the law of the place where the lien arose ought to be applied if a maritime lien is a substantive right. Likewise, the forum court will apply if it is a procedural. Notably, the rationale behind such policy is, overseas petitioners would appreciate benefits in the manner of lawsuit that are not experienced by national petitioners who are compelled by the civil procedure rules of the forum.¹³⁰

3.7.2. Availability of remedy for other liens despite lack of maritime lien in action in rem

In ascertaining remedies available for maritime liens, the courts should be flexible in their decisions, especially in a claim, which by its nature is actionable *in rem* despite the lack of a maritime lien. For instance, the special status of a ship repairer is worth a comment. ‘He has two rights: (i) a possessory lien, which is a product of the common law, and (ii) a right to proceed in rem against the ship. His possessory lien, if he exercises it, is subordinate to any maritime liens, which may have accrued against the ship earlier, for example master’s or crew’s wages overdue at the time the possessory lien is exercised. If he forgoes his possessory lien by losing physical possession of the ship and leaves himself merely his right to proceed *in rem* against the ship, he may find himself worse off in the order of the priorities.’¹³¹

¹²⁹ Ibid.

¹³⁰ Ibid. <http://www.mondaq.com/india/x/208090/Marine+Shipping/Maritime+Lien+In+India> (Accessed 14 August, 2013)

¹³¹ Hill, C. Hosoi, K.S.T, Helmer,C. 1985. “A ship repairer’s lien” in *Arrest of Ships*. Lloyd’s of London Press Limited. P.5 (Also quoted by the authors in his unpublished assignment submitted to World Maritime University prior to submission of this dissertation, August 5, 2013).

In the case of *Owners of Bulou*¹³², the plaintiff has repaired the vessel and the defendant failed to pay him. In this case, maritime lien was not pleaded but the fact that defendant acknowledged his liability warrants such an arrest. In Fiji and Solomon Islands, a repairer of vessel has a reasonable *action in rem* against the vessel despite lack of maritime liens.¹³³ The previous case decision the *Donald Pickering & Sons Enterprises Ltd v Karim's Ltd*¹³⁴ was also relied on in this case.

3.7.3. The Mareva Injunction analyzed

Mareva injunctions are examined only in so far as it is necessary to compare them fully with actions *in rem* and the process and effects of arrest and to distinguish their features, advantages and disadvantages. What is vitally crucial here is to realize from the outset that an injunction of the *Mareva* type does not:

- a) *Create in favour of the plaintiff any property right in the asset (s) which is /are the subject matter of the injunction.*
- b) *It therefore does not: put the plaintiff in any improved position or, if you like “higher up the existing priority ladder” compare to other secured or even unsecured creditors.*
- c) *It does not bar the way either for the defendant himself or any third party, whose existing interests in the subject matter may have been adversely affected, applying to the court to have the injunction lifted.*¹³⁵

¹³² [2009] FJHC 262; Admiralty Action 2 of 2009 (25 November 2009) (<http://www.pacii.org/maritime-law/summaries-of-important-cases/case-summaries-arrest-of-ships-and-pre-judgment-security/index.html>) (Accessed 14 August, 2013)

¹³³ Ibid. (<http://www.pacii.org/maritime-law/summaries-of-important-cases/case-summaries-arrest-of-ships-and-pre-judgment-security/index.html>) (Accessed 14 August, 2013)

¹³⁴ [1997] FJHC 20; [1997] 43 FLR 41 (6 February 1997) and Baobab Industries Ltd v Owners of the Yacht ‘Jubilant’ [2009] FJHC 167; Admiralty Action 01.2009L (19 August 2009). (<http://www.pacii.org/maritime-law/summaries-of-important-cases/case-summaries-arrest-of-ships-and-pre-judgment-security/index.html>) (Accessed 14 August, 2013)

¹³⁵ Hill C, Hosoi T, Soehring Ka, Helmer C. (1985) *Arrest of Ship*. P.36

To support the above contention, the author relied on the South Pacific case of *Best v Owner of the Ship Glenelg*,¹³⁶ the admiralty matter which involved a *Mareva* injunction, and in the present case the *res in rem* action no longer exists **where the action in rem proceeded as an action in personam.**

The important point to note from this case was the Appeal Court stated that in fact there is a cause of action. The action was proceeded by way of securing a lien over the vessel for unpaid wages of the seafarers who served on the vessel. It was contented that even if the vessel leaves the jurisdiction, the liens travel with her and that cause of action does not become “unreasonable”. In this case, the wreck of that vessel however, does not rule out the fact that liens still travel with her and that the cause of action ‘continues to exist wherever the vessel is and whatever condition she is in’.¹³⁷ The Appeal Court discovered these factors to be indicative of a strong *in personam* element in the action *in rem*¹³⁸. The Appeal Court relied on *The Banco*¹³⁹ Lord ‘Denning M.R., and *Caltex Oil – (Australia) Pty Limited -v- Dredge Willemstad*¹⁴⁰ Gibbs J’. for the rule “...that where an action is commenced in rem, the entry of appearance by the defendant enables the plaintiff to continue the actions against the defendant as if they were actions in personam...”¹⁴¹

3.7.4. Ranking of maritime liens

As clearly noted in the previous discussion, complications arise when ranking maritime liens of different categories. The problem is associated with the policy that was put into place, on which different liens are based. In the Solomon Islands lien for seafarer’s wag-

¹³⁶ No 2 [1982] VUCA 1; [1980-1994] Van LR 48 (14 July 1982) (<http://www.pacii.org/maritime-law/case-summaries-maritime-liens/index.html>) (Accessed 14 August, 2013)

¹³⁷ Ibid.

¹³⁸ <http://www.pacii.org/maritime-law/case-summaries-maritime-liens/index.html> (Accessed 14 August, 2013)

¹³⁹ (1971) 1 All E.R. 524, C.A.,

¹⁴⁰ (1975) H.C. 136 C.L.R. 529

¹⁴¹ Ibid.

es have not been fully well administered by any policy, except in the main Shipping Act 1998 and, therefore, there are no policy considerations, which aim at protecting seafarers from exploitation.

3.7.5. Limitation for a suit for seaman's wages

While section 151(1) of the Shipping Act 1998, prescribed claims arising out of the seafarer and employment agreement for a period of one year for a law suit and other claim under section 15 (3) for a three year period,¹⁴² it does not clearly specified the period of limitation for enforcement of maritime lien. In this regard, the writer suggests that a law should be put into place to regulate and provide 'that a maritime lien should stand extinguished on the expiry of one year from the date of its creation, but the claim may, if not barred by limitation, be enforced by an *action in personam*.'¹⁴³ The law should also provide 'that the limitation period of one year may be extended by the court, if the claimant is unable to commence an action to enforce the lien against the ship for reasons beyond his control'.¹⁴⁴

¹⁴² See S.151 (3) Court proceedings in respect of all other claims shall be commenced before the expiry of three years from the termination of the voyage. (See <http://www.mondaq.com/india/x/208090/Marine+Shipping/Maritime+Lien+In+India>) (Accessed 14 August, 2013)

¹⁴³ Article by Niyati Nath, (2012)(<http://www.mondaq.com/india/x/208090/Marine+Shipping/Maritime+Lien+In+India>)

¹⁴⁴ Ibid.

**CHAPTER 4 MARITIME LIENS PROCEDURES AND RULES,
FOUNDED UNDER COMMON LAW, CASE LAW AND STATUTO-
RY LAW AND BY CERTAIN PROVISIONS OF INTERNATIONAL
CONVENTIONS**

4.1. The Admiralty Jurisdiction that regulates procedures and rules for the admiralty claims in the Solomon Islands

The common law continues to be recognized in the Solomon Islands. Section 15(1) of the *Western Pacific (Courts) Order in Council 1961*¹⁴⁵ expressly stated that in exercising its jurisdictions (including admiralty) the court would use: *a) the statutes of general application in force in England on the 1st day of January, 1961 and (b) the substance of the English common law and doctrines of equity, and with the powers vested in and according to the course of procedure and practice observed by and before Courts of Jus-*

¹⁴⁵ Section 15(1) of the *Western Pacific (Courts) Order in Council 1961*

*tice in England, according to their respective jurisdictions and authorities.*¹⁴⁶

Furthermore, Order 31 of the 'High Court (Civil Procedure) Rules 1964 (*"the Rules"*) says: *the jurisdiction of the High Court in relation to Admiralty matters shall be exercised in accordance with the procedure practice and forms for the time being in use in the High Court of Justice in England in Admiralty matters with such adaptation as local circumstances render necessary*'.¹⁴⁷

The application of these legal arrangements in the contemporary Solomon Islands is discussed in the case '*Puia v TJ Ocean Enterprises Ltd*'¹⁴⁸. Similarly, in Fiji s. 21 of the *Supreme Court Act* Cap 13 authorized the Supreme Court (now High Court) to exercise this jurisdiction pursuant to s. 56(2) of the *Administration of Justices Act 1956* (UK). This is further explained by the High Court in *Captain & Crew of the MV Voseleai v Owners of the MV Voseleai*.¹⁴⁹ Elsewhere in the Pacific region, the nexus between colonial laws and admiralty laws of contemporary Pacific Islands Countries States (PICS) has been discussed by the courts in Papua New Guinea (*Ship 'Federal Huron' v Ok Tedi Mining Ltd*)¹⁵⁰ and *Federated State of Micronesia (People of Rull ex rel Ruepong v MV*

¹⁴⁶ Peter Heathcoate, (1997) *Maritime Law in the South Pacific – Towards Harmonisation* (PhD Thesis, University of the South Pacific).

¹⁴⁷ Wahono case, can be cited : <http://www.pacii.org/sb/cases/SBHC/2001/102.html>) Also see: The Western Pacific (Courts) Order in Council 1961. Order 31. Admiralty Jurisdiction (www.vanuatu.usp.ac.fj) (Accessed 14 August, 2013)

¹⁴⁸ [2003] SBHC 61; HC-CC 312 of 2002 (10 January 2003). (<http://www.pacii.org/cgi-bin/disp.pl/sb/cases/SBHC/2003/61.html?stem=0&synonyms=0&query=2003%20and%20sbhc%20and%2061%20and%20hc%20and%20cc%20and%20312%20and%20of%20and%202002%20and%2010%20and%20january%20and%202003>) (Accessed 14 August, 2013)

¹⁴⁹ [1994] FJHC 4; HBG0006j.1994s (28 October 1994) Full case can be cited: ([http://www.pacii.org/cgi-bin/disp.pl/fj/cases/FJHC/1994/4.html?stem=0&synonyms=0&query=\[1994\]%20and%20fjhc%20and%204%20and%20hbg0006j%20and%201994s%20and%2028%20and%20october%20and%201994](http://www.pacii.org/cgi-bin/disp.pl/fj/cases/FJHC/1994/4.html?stem=0&synonyms=0&query=[1994]%20and%20fjhc%20and%204%20and%20hbg0006j%20and%201994s%20and%2028%20and%20october%20and%201994)) (Accessed 14 August, 2013)

¹⁵⁰ [1986] PGSC 9; [1986] PNGLR 5 (20 January 1986)) Full case can be cited: ([http://www.pacii.org/cgi-bin/disp.pl/pg/cases/PGSC/1986/9.html?stem=0&synonyms=0&query=\[1986\]%20and%20pgsc%20and%209%20and%20\[1986\]%20and%20pnglr%20and%205%20and%2020%20and%20january%20and%201986](http://www.pacii.org/cgi-bin/disp.pl/pg/cases/PGSC/1986/9.html?stem=0&synonyms=0&query=[1986]%20and%20pgsc%20and%209%20and%20[1986]%20and%20pnglr%20and%205%20and%2020%20and%20january%20and%201986)) (Accessed 14 August, 2013)

*Kyowa Violet*¹⁵¹ and *MV Hai Hsiang v Pohnpei*¹⁵².

The Solomon Islands have enacted legislation in recent times, which regulates the grounds, practices and procedures of the admiralty courts. In recent times international conventions have been adopted to regulate maritime liens and arrest of ships but they have not been satisfied by Solomon Islands. Therefore, the relationship between these recent international conventions and the former common law and English statutory rules is by no means clear.

The only recent legislative provisions of the International Conventions are contained in the Solomon Islands' *Shipping Act 1998* (Part XIII – Legal Proceedings). This seems to modify quite substantially common law grounds for maritime liens and grounds for actions *in rem*. In the case of *Wahono v The Ship MV Yung Yu No 606*,¹⁵³ the High Court applied relevant provisions of the Act together with applicable common law rules regarding priority of maritime liens.

In principle, the admiralty jurisdiction of the Solomon Islands is based on the Admiralty jurisdiction of this Court contained in Order 31 of the High Court (Civil Procedure) Rules 1964 ("*the Rules*"). It was amended in Chapter 15. 4 of the Solomon Islands Courts (Civil Procedure) Rules 2007 ("the new Rule"),¹⁵⁴ which provides for all the admiralty claims to be started at the admiralty jurisdiction of the High Court.

¹⁵¹ [2006] FMSC 53; 14 FSM Intrm. 403 (Yap. 2006) (21 September 2006) Full case available ([http://www.pacii.org/cgi-bin/disp.pl/fm/cases/FMSC/2006/53.html?stem=0&synonyms=0&query=\[2006\]%20and%20fmsc%20and%2053%20and%2014%20and%20fsm%20and%20intrm%20and%20403%20and%20yap%20and%202006%20and%2021%20and%20september%20and%202006](http://www.pacii.org/cgi-bin/disp.pl/fm/cases/FMSC/2006/53.html?stem=0&synonyms=0&query=[2006]%20and%20fmsc%20and%2053%20and%2014%20and%20fsm%20and%20intrm%20and%20403%20and%20yap%20and%202006%20and%2021%20and%20september%20and%202006))

¹⁵² [1996] FMSC 56; 7 FSM Intrm. 456 (App. 1996) (8 April 1996)). ([http://www.pacii.org/cgi-bin/disp.pl/fm/cases/FMSC/1996/56.html?stem=0&synonyms=0&query=\[1996\]%20and%20fmsc%20and%2056%20and%207%20and%20fsm%20and%20intrm%20and%20456%20and%20app%20and%201996%20and%208%20and%20april%20and%201996](http://www.pacii.org/cgi-bin/disp.pl/fm/cases/FMSC/1996/56.html?stem=0&synonyms=0&query=[1996]%20and%20fmsc%20and%2056%20and%207%20and%20fsm%20and%20intrm%20and%20456%20and%20app%20and%201996%20and%208%20and%20april%20and%201996)) (Accessed 14 August, 2013)

¹⁵³ [2001] SBHC 102; HC-CC 009 & 010 of 2001 (23 March 2001) ([http://www.pacii.org/cgi-bin/disp.pl/sb/cases/SBHC/2001/102.html?stem=0&synonyms=0&query=\[2001\]%20and%20sbhc%20and%20102%20and%20hc%20and%20cc%20and%20009%20and%20010%20and%20of%20and%202001%20and%2023%20and%20march%20and%202001](http://www.pacii.org/cgi-bin/disp.pl/sb/cases/SBHC/2001/102.html?stem=0&synonyms=0&query=[2001]%20and%20sbhc%20and%20102%20and%20hc%20and%20cc%20and%20009%20and%20010%20and%20of%20and%202001%20and%2023%20and%20march%20and%202001)) (Accessed 14 August, 2013)

¹⁵⁴ Solomon Islands Courts (Civil Procedure) Rules 2007.

Also section 209 (1) of the Shipping Act 1998¹⁵⁵ ("the Act") provides for admiralty jurisdiction in the High Court. Section 209 (2) of the Act lists the claims, which fall within the admiralty jurisdiction in the same way as the UK legislation. It is important to note as well that there are no specific sections that set out the conditions for ship arrest and for sister ship arrest. The following sections 209 (2) and (3) provide the High Court with both *in rem* and *in personam* jurisdiction in admiralty matters. The limit on Magistrates Courts to *in personam* proceedings means that most Admiralty matters are begun in the High Court. Procedure in the admiralty jurisdiction is governed by section 209 of the Shipping Act 1998. The High Court sitting in Admiralty has limited jurisdiction to apply the provisions stipulated under section 209 and general practices of the High Court, and not to establish its own rules where no other procedures are prescribed.

Halsbury's Laws of England 4th edition (1987) in paragraph 307,¹⁵⁶ sets out in turn what the jurisdiction of the High Court of Justice in England in Admiralty matters are:

"The Admiralty jurisdiction of the High Court of Justice is derived partly from statute and partly from the inherent jurisdiction of the High Court of Admiralty (see the Administration of Justice Act 1956, s.I(I)). The Administration of Justice Act 1956 lists the areas of jurisdiction of the High Court under eighteen paragraphs (see s.I(I)(a) - (s)). In addition the High Court has any other jurisdiction which either was vested in the High Court of Admiralty before 1st November 1875 or is conferred on the High Court as being a court with Admiralty jurisdiction by or under any Act which came into operation on or after that date, and also any other jurisdiction connected with ships or aircraft vested in the High Court which is for the time being assigned by the rules of court to the

¹⁵⁵ Shipping Act 1998

¹⁵⁶ Halsbury's Laws of England, 4th edition, 7th Volume, at paragraph 813. (https://api.turnitin.com/viewGale.asp?oid=86728129&key=6905a64a7e1c8cb47f719e7fb30a9767&lang=en_us&output=json&session-id=7f5946aa788bd4a455e23e05f526bee9) (Accessed 14 August, 2013)

Queen's Bench Division and directed by the rules to be exercised by the Admiralty Court."¹⁵⁷

Section I (I)(o) of The Administration of Justice Act 1956 (UK) confers jurisdiction on the High Court of Justice to hear and determine any claim in respect of wages of a ship's crew. That jurisdiction may be invoked by proceedings *in rem* against the ship in question, or against what is generally referred to as a "sister" ship (*the case in point here*) (*see para. 311 Halsbury's Laws of England 4th edition*). That jurisdiction also extends to all ships whether British or not and whether registered or not and wherever the residence or domicile of their owners may be, and to all claims wheresoever arising. Specific mention is made in Halsbury's Laws of England¹⁵⁸ regarding the position of foreign ships:

*"The High Court has jurisdiction in actions for wages by the master or a member of the crew of a foreign ship, but may in its discretion refuse to entertain such an action"*¹⁵⁹.

4.2. Issues related to seafarers exercising Maritime Liens

In the following are a few other cases exemplifying issues pertaining to exercising of liens, the procedures and the legal basis in determining their claims. By examining the verdicts and the advanced arguments articulated in each case scenario, one would be able to extricate the following issues. First, issues of amalgamating of common law position with the International Conventions on Maritime Liens regarding claims associated with *res*. Second, issues pertaining to an action arising from a dispute over the service

¹⁵⁷ Halsbury's Laws of England 4th edition. 1987

¹⁵⁸ Halsbury's Laws of England 4th edn., at para. 339

¹⁵⁹ Ibid.

contract of the seafarer and the Admiralty Court jurisdiction. Third, an action concerning a seafarer's rights during registration procedure in a foreign judiciary sale. Fourth, an action concerning whether to clarify the lien in litigation is an issue that needs to be dealt with appropriately and finally, issues of jurisdiction and forum of convenience.

i. Issues arising when amalgamating the Admiralty Common Law position and the 1993 International Convention with regards to claims associated with *res*.

In the *Wahono* case there were two separate claims by numerous plaintiffs which were virtually identical in nature in that they related to claims for wages against their employer, Sanwa Trading Co., Ltd ("*Sanwa*"), whose registered office was in Tokyo, Japan.¹⁶⁰ The plaintiffs' 'maritime lien was for unpaid seafarer's wages and extended over the vessels and their catch'.¹⁶¹ The plaintiffs submitted that their lien takes precedence over any claims that the Ministry of Fisheries (on behalf of the government) may have over the proceeds of the catch; the matter in dispute in this application. However, by a letter dated 14th February 2001, the Under Secretary on behalf of the Government (Ministry of Fisheries) under section 52 of the Fisheries Act 1998¹⁶² asserted claims over the catch in both vessels as well.

¹⁶⁰ [2001] SBHC 102; HC-CC 009 & 010 of 2001 (23 March 2001) [http://www.pacii.org/cgi-bin/disp.pl/sb/cases/SBHC/2001/102.html?stem=0&synonyms=0&query=\[2001\]%20and%20sbhc%20and%20102%20and%20hc%20and%20cc%20and%20009%20and%20010%20and%20of%20and%202001%20and%2023%20and%20march%20and%202001](http://www.pacii.org/cgi-bin/disp.pl/sb/cases/SBHC/2001/102.html?stem=0&synonyms=0&query=[2001]%20and%20sbhc%20and%20102%20and%20hc%20and%20cc%20and%20009%20and%20010%20and%20of%20and%202001%20and%2023%20and%20march%20and%202001) (Accessed 14 August, 2013)

¹⁶¹ Ibid. ([http://www.pacii.org/cgi-bin/disp.pl/sb/cases/SBHC/2001/102.html?stem=0&synonyms=0&query=\[2001\]%20and%20sbhc%20and%20102%20and%20hc%20and%20cc%20and%20009%20and%20010%20and%20of%20and%202001%20and%2023%20and%20march%20and%202001](http://www.pacii.org/cgi-bin/disp.pl/sb/cases/SBHC/2001/102.html?stem=0&synonyms=0&query=[2001]%20and%20sbhc%20and%20102%20and%20hc%20and%20cc%20and%20009%20and%20010%20and%20of%20and%202001%20and%2023%20and%20march%20and%202001)) (Accessed 14 August, 2013)

¹⁶² section 52 of the Fisheries Act 1998

On 15th February 2001, an order for the sale of the catch was obtained and on 16th February 2001, the catch of both vessels was sold, totalling \$82,014-00. This amount was paid into court. On 23rd February 2001, the plaintiffs filed Notice of Motion for Judgment in both claims. This was heard on 28th February 2001 and granted the same day. The plaintiffs now came to Court seeking orders to have the amount held in Court released to the Plaintiffs in partial satisfaction of the judgment debt. The Counsel for the Ministry of Fisheries and Marine Resources ("*the Ministry*") appeared and opposed the application. Also in attendance was the counsel representing the defendants. He informed the court that he had been instructed by his clients to abide to any decision of the court. In this present case, order was granted in favour of the plaintiffs.

In light of this case, the issue which arise, is how to merge the 1993 Convention and the common law which is commonly practiced in the Solomon Islands jurisdiction and in particular, prioritizing of liens over the vessels and associated claims attached to them. In this present case, the court rely on the common law and section 201(3) and (4) of the Shipping Act 1998. Subsection 201(3) provides that claims for wages by seamen in respect of their employment on the vessels can be secured by a maritime lien on the vessel (*Article 4 of the International Convention of Maritime Liens and Mortgages, 1993* [*"the Convention"*]). Subsection 201(4) gives priority to such liens over other claims (*see Article 5 of the Convention*). It follows that whatever claims, the Ministry may have had to give first priority to the plaintiffs over the vessels.

To the extent the vessels did not include the catch, conceded neither section 201 nor the Convention would apply. The court relied, however, on section 209(2)(g) of the Shipping Act as conferring general admiralty jurisdiction *in rem* with respect to wages. The counsel for the plaintiffs submitted that the Shipping Act is silent on priorities of maritime liens over the catch; this question would have to be determined in accordance with the common law and to some extent the *Administration Act 1956 (UK)*.

In common law, a lien may be attached to freight/cargo (which would include the catch) provided it is enforced in conjunction with the enforcement of the lien against the vessel, for the same debt.¹⁶³

In this case, the author holds the view that the decisions discussed above are consistent with the 1993 Convention.

ii. Disputes arising between Trade Dispute Panel (the Tribunal) and Admiralty Court jurisdiction

At this juncture, it is important to note that disputes which arise over the service contract of the seafarer of a foreign sea going vessel should be determined under the jurisdiction of the competent maritime court of the place where the domicile of the claimant is located, where the contract is signed, where the domicile of the defendant is located, or where the port of embarkation of the seafarers is located.

¹⁶³ See the case of *Morgan v. The S.S. Castlegate* ¹⁶³48 per Lord Herschell LC:

"But besides that, no authority has been cited in which the Court of Admiralty has ever granted process against freight for the purpose of enforcing a maritime lien upon it except as consequential upon and in connection with process against the ship".;

At pages 54 - 55 Lord Watson also states:

"The difficulty which the appellant has to encounter, in this branch of his claim, is to be found in the fact that the Admiralty Court has never recognised the possibility of there being a proper maritime lien upon freight which is not associated with or founded upon a right to proceed in rem against the ship. No process having for its sole object the attachment of cargo in order to enforce a maritime lien for freight can issue from that Court. The warrant to arrest cargo must apparently be accompanied by a warrant to arrest the corpus of the ship; an attachment of the ship being an essential preliminary to the Courts exercising jurisdiction to enforce a proper lien on freight. These circumstances appear to me to necessitate the inference that no claim which cannot be enforced either against the ship or her owners can, according to the practice of the Courts of Admiralty, be attended with a maritime lien upon freight.

*The absolute dependence of a lien on freight upon the liability of the ship to attachment for the same debt appears to me to have recognised by the Court of Queen's Bench in *Smith v. Plummer*, where the captain of a vessel claimed a lien for wages upon freight. There being no lien upon ship, the claim was rejected for the reasons thus stated by Lord Ellenborough C.J.: "Then if he has no lien on the ship, as appears from these cases he can have none upon the freight, as the lien on the freight is consequential to the lien upon the ship."*

In contrast, for seafarers' labour disputes pertaining to unfair dismissal matters, the proper avenue according to the writer's view is to resort to the labour tribunal¹⁶⁴. Section 5 of *Unfair Dismissal Act [Cap 77]* excludes certain cases:

“(1) Section 2 does not confer a right on any person employed under a contract of employment for a fixed term (whether or not the term might be renewed) unless he is a citizen of Solomon Islands.

(2) That section does not confer a right on any person if, under, his contract of employment, he ordinarily works outside Solomon Islands.

*(3) But a person who, under his contract of employment, is employed to work on board a ship registered in Solomon Islands under Part I of the Merchant Shipping Act 1894 is to be treated as a person who, under that contract, ordinarily works in Solomon Islands”*¹⁶⁵

In light of the above, s 5 (3) it is properly construed and implied that seafarer labour disputes involving an ordinary seafarer who is domiciled in Solomon Islands and engaged to work on board a registered vessel in the Solomon Islands can institute a claim through the tribunal. For labour dispute cases in the Solomon Islands, the dispute has to go through certain procedural requirements under the Trade Dispute Panel,¹⁶⁶ which makes the seafarer's labour disputes go through four stages, including mediation or arbitration through the labour tribunal and litigation and appeal through the High Court of Solomon Islands. Until today, there have neither been any seafarers' labour case settled by the tribunal nor records of seafarers' unfair or wrongful dismissal cases that were adjudicated and registered with the tribunal.¹⁶⁷

¹⁶⁴ Sec Complaint of unfair dismissal 6. (1)

¹⁶⁵ Unfair Dismissal Act [Cap 77] (Solomon Islands)

¹⁶⁶ Section 3 of Trade Dispute Panel Act (Cap 75).

¹⁶⁷ Interviewing via chat with Wickly Faga, Deputy Chairman, Trade Dispute Panel (Honiara, 2 May 2013).

For example, the Trade Disputes Panel Committee in the Solomon Islands is a board that deals with many employment issues, such as wrongful dismissal and union recognition.¹⁶⁸ It can be noted that the Unfair Dismissal Act [Cap 77] (Solomon Islands) holds that if an employee is terminated by notice and there is no valid reason for the termination, then there will be an unfair dismissal. Valid reasons for termination are included in s 4. For this end, this is the area of law that needs to be well understood, because in very few instances most seafarers are terminated unfairly by their employers without giving notice. At times, it is unclear where to institute such a claim of unfair dismissal of a seafarer where it carries both jurisdictional parameters of the trade dispute tribunal and the competent maritime court for liens over the wages.

In common law a contract for a fixed term will come to an end when that term expires. There is no need for the employer to tell the employee that work is finishing, or for the employee to tell the employer that he or she is not going to turn up to work after the date of expiry. This is not a dismissal situation and the contractual relationship is simply ending. The Solomon Islands laws are quite different to the common law. Section 3(b) of the Unfair Dismissal Act makes it clear that a failure to renew is a dismissal, and if the dismissal is not in accordance with s 4 then it will be an unfair dismissal.¹⁶⁹

In other words, in the Solomon Islands fixed term contracts must be renewed unless there is a good reason not to renew them. Interestingly, this Act only applies to the Solomon Island citizens (see s 5), and you can contract out of the provisions of the Act in limited circumstances (s 4(4)).

In determining the question of whether a dismissal of an employee is fair or not, the beginning point is Section 4(1) of the Unfair Dismissal Act [Cap. 77] ("the Act") states:

¹⁶⁸ Trade Disputes Act (Cap. 75).

¹⁶⁹ s.4 Unfair Dismissal Act . "Fair" and "unfair" dismissal

“ An employee who is dismissed is not unfairly dismissed if:

- (a) he is dismissed for a substantial reason of a kind such as to justify the dismissal of an employee holding his position; and*
- (b) in all circumstances, the employer acted reasonably in treating that reason as sufficient for dismissing the employee.”*

In relation to the practical application of Section 4(1) of the Act, the test formulated in the case *Earl v. Slater & Wheeler Ltd* ¹⁷⁰ on page 150 where Sir John Donaldson P said:

“ The question in every case is whether the employer acted reasonably or unreasonably in treating the reason as sufficient for dismissing the employee and it had to be answered with reference to the circumstances known to the employer at the moment of dismissal...”

Wrong dismissal – lien for wages and damages. Therefore, seafarers who have been wrongly dismissed, have a lien for the wages which are due to them up to that time of dismissal.¹⁷¹

In *Jones v Locke*,¹⁷² a seaman wrongfully dismissed was held on appeal to be entitled to all or a portion of his share of entitlements and the case was remanded for retrial. In *Furness Withy & Co. v McManamy & Young*,¹⁷³ after a detailed study of Canadian and English decisions, a seaman wrongly discharged was held to be able to claim the wages he

¹⁷⁰ [1973] 1 All E.R. 145

¹⁷¹ Tetley William.(1998) 2nd ed., Maritime Liens and Claims. International Shipping Publications. p.289

¹⁷² (1884) 17 N.S.R. 189

¹⁷³ (1940) C.S. 276. (Que. Supr.Ct)

would have earned. In *Marchand v The Samuel Marshall*¹⁷⁴ a ship was arrested before the end of the season and the court awarded the seamen thus affected, not only their wages, but also wages which by the articles were normally only due to them at the end of the season.

In that regard, there would seemed to be a lien for damages for wrongful dismissal. In the *Fort Morgan v Jacobson*¹⁷⁵ the Supreme Court of Canada granted a master the wages due to him up to the time of his improper dismissal, and three months additional wages, as damages, as well as the expenses of his repatriation trip to Norway. The action was in *rem* against the ship. Also, in *Karamanlis v The Norsland*¹⁷⁶ wages were granted from the date of arrest to the date when the owner giving notice of abandonment of the voyage terminated the seamen's contracts. The sum, along with repatriation expenses, was ranked as a seaman's wage lien.

In addition, the author also believes that the labour arbitration and in particular staying proceedings in favour of arbitration lacks legal basis. In the Solomon Islands, there are three principal laws and rules regulating this area of labour arbitration of seafarer, the Employment Act (Cap 72), Labour Act (Cap 73) and Labour (Seamen) Rules.

The lengthy process in the relief procedure after entering the litigation process, and in particular the proceedings from the tribunal sitting have to be re-referred. Thus, the original intention of creating the tribunal to encourage settlement of disputes for just and fair resolution of labour disputes, and to protect the legitimate rights and interests of the seafarers' are at stake. The fact of the matter was that the Act was silent on the litigation procedures that cater for seafarers' labour disputes and deviated from its original intention, resulting in more complicated procedures than general civil disputes through admiralty court. The lengthy period this incurred, the delay and the possibility of failing to

¹⁷⁴ (1921) 20 Ex. C.R.299 (1921) 67 D.L.R. 107

¹⁷⁵ (1919) 59 S.C.R. 404., (1919) 51 D.L.R. 149.

¹⁷⁶ (1971) F.C. 487 at pp.495-6 (Fed. Ct. of Can.)

meet times bars, are too harsh to the seafarers and not conducive to the protection of the seafarers' rights and interests.

The writer supports the view of Lai in his article,¹⁷⁷ 'that labour arbitration requires the followings: First, it artificially increases the cost of workers to protect their own interest. Secondly, labour arbitration committee staffs lack professional knowledge in legal contents. Third, the labour arbitration committee lacks of independently. Finally, the labour arbitration committee lacks supervision'¹⁷⁸, [sic].

However, to ascertain whether a contract of service exists, the following should be taken into consideration. Firstly, the notion of mutuality of obligation was required of a servant¹⁷⁹ to provide his own work and skill in the performance of some service for his master. Secondly, one has to agree to the degree of control of others to control the performance of the service and lastly, consistency in the contract of service is essential.¹⁸⁰

However, the underlying issues left unsolved in connection with the special status of the seafarer as a party to the labour dispute, where the law requires the matter to proceed under the tribunal. This is bound to cause the awkward situation of not being able to register and seek repayment at the maritime court and in timely manner even though the seafarer wages enjoy a maritime lien.

Unsigned employment contract and financial constraints experienced by ship-owners.

In the PNG case of *Taru v New Ireland Shipping Ltd*, the owner of two coastal vessels experienced financial difficulties and did not pay the salaries and other entitlements of

¹⁷⁷ Laim Anjun.(2010) .*On the abuses of Labour Arbitration Demand Requirement Procedure*. Legal System and Society. Vol.9,

¹⁷⁸ Ibid.

¹⁷⁹ www.lawofcontract.co.uk

¹⁸⁰ Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497 (www.oup.com) (Accessed 10 August, 2013)

thirty seafarers, who then took the company to court. The National Court (the Court) in PNG decided the case. The claim was undisputed by the company, so judgment was entered for the plaintiff.¹⁸¹

Important issues pertaining to this aforementioned case are simply intended to identify maritime legal principles embodied in the judgments so that they may be used as precedents in future cases in countries of the Pacific Islands region about the contents of maritime case laws decided by courts in the region.¹⁸²

This case illustrated a very sad scenario in which the ship owner had encountered financial difficulties and was unable to pay the seafarers. In this case, the seafarers instituted a class action, seeking payment of their unpaid dues and other entitlements against the ship-owner and they succeeded. The fact that ship-owner did not take further steps to defend the claim clearly indicated that it was in serious financial difficulties, so it will be interesting to know whether the plaintiffs were able to recover the judgment sum of close to half a million kina (PNG money) at all.¹⁸³

Substantially, the cause of action is by way of commencing an action *in rem* against the ships and, by having the ships arrested, and obtain security of some kind to ensure payment of the judgment sum.

The court noted initially the preliminary point, i.e. it was bound by several PNG Supreme Court cases, which stated that the entry of default judgment resolves all questions of liability in relation to the matters pleaded in a statement of claim. However, this was subject to two exceptions, one of which was that a trial judge in hearing for assessment of damages should make a cursory inquiry on liability in order to be satisfied that there

¹⁸¹ [2008] PGNC 155; N3501 (24 October 2008). Mr. Yoli Tom'tavala also cited full case note in his case note article, Maritime Legal Advisory. Issue 36. September, 2013. Secretariat of the Pacific Community (SPC). P.1 [http://www.pacii.org/cgibin/disp.pl/pg/cases/PGNC/2008/155.html?stem=0&synonyms=0&query=\[2008\]%20and%20pgnc%20and%20155%20and%20n3501%20and%2024%20and%20october%20and%202008](http://www.pacii.org/cgibin/disp.pl/pg/cases/PGNC/2008/155.html?stem=0&synonyms=0&query=[2008]%20and%20pgnc%20and%20155%20and%20n3501%20and%2024%20and%20october%20and%202008) (Accessed 14 August, 2013)

¹⁸² Ibid. P. 1

¹⁸³ Ibid.

is in fact a cause of action clearly pleaded, for which default judgment has been entered. If such an inquiry reveals no cause of action or the matters pleaded make no sense, proceeding to an assessment of the damages would be a ineffective exercise. The court did so and concluded that the plaintiffs had sufficiently pleaded a cause of action with appropriate particulars of their losses or damages.¹⁸⁴

In the absence of any written contract of service, section 15 of the Employment Act requires an employer to ‘make a written record of the terms and conditions of the contract and produce them. The sections states: ‘a statement by the employee as to the terms and conditions of the contract shall be conclusive evidence of those terms and conditions unless the employer satisfies the Secretary or an Arbitration’¹⁸⁵ that there is no contract of service expressly binds them.¹⁸⁶

The court held in this case that owing to the fact that the defendant failed to keep or produce a written record of the terms and conditions of the contract, the court relied on the statements of the plaintiffs concerning their claims. They found that each of the plaintiffs was entitled to salaries or wages, hardship, housing, leave and stevedoring allowances, on the rates they were claiming. The court awarded the plaintiffs damages of K427,956.38 with an interest of 8 percent from the date of the issue of the writ to the date of judgment.¹⁸⁷

iii. Staying proceeding in favour of arbitration

For the purpose of this chapter and in particular the maritime lien procedure, the intention of an arrest procedure is simply twofold, namely (i) to obtain security for a mari-

¹⁸⁴ Ibid. See also Mr. Yoli Tom’tavala case note article.

¹⁸⁵ [http://www.paclii.org/cgi-bin/disp.pl/pg/cases/PGNC/2008/155.html?stem=0&synonyms=0&query=\[2008\]%20and%20pgnc%20and%20155%20and%20n3501%20and%2024%20and%20october%20and%202008](http://www.paclii.org/cgi-bin/disp.pl/pg/cases/PGNC/2008/155.html?stem=0&synonyms=0&query=[2008]%20and%20pgnc%20and%20155%20and%20n3501%20and%2024%20and%20october%20and%202008) (Accessed 14 August, 2013)

¹⁸⁶ Ibid.

¹⁸⁷ Ibid.

time claim, and (ii) to secure the ship-owner's appearance and/or to found jurisdiction over the *in personam* defendant. However, one question that has yet to be fully settled is how far the arrest action may be pursued for the sole aim of getting security in respect of a future arbitration award¹⁸⁸. The author views that an understanding of how the principles of arbitration differs from legal action through the court is essentially required. Arbitration could be described as litigation in the "private sector", as distinguished from resort to the courts, which could be described as litigation in the "public sector".¹⁸⁹

At the outset, one has to know that arbitration is essentially a personal matter, arising from contract (the arbitration entered into voluntarily and on their own mutually agreed terms by both parties). It follows from this basic thinking that an *in rem* action allowed under statutory powers and on the basis of court jurisdiction to hear and determine a dispute, should not be used for a matter, which the parties themselves have already agreed to take before a private (arbitration) tribunal.¹⁹⁰

iv. Seafarers' rights during registration procedure in the judicial sale

In determining the rights of the seafarers' during the registration procedure in the judicial sale, the standing point is the acknowledgment of foreign judicial sale as an *in rem* or property matter. As such, it is widely accepted that the legality of an adjudication affecting property or *a res* is determined by the rules of procedures of the forum, which entered the judgment.¹⁹¹

In essence, the seafarer's rights to a maritime lien is futile unless the seafarer (a) may

¹⁸⁸ S.30 of the Arbitration Act [Cap 2].

¹⁸⁹ Hill, C.Hosoi,K.S.T, Helmer,C. 1985. Arrest of Ships. Lloyd's of London Press Ltd. P.24

¹⁹⁰ Ibid.

¹⁹¹ Ibid. p.1094

have his lien recognized; (b) may oblige the court to sell the ship; (c) may have the priority of his lien recognized; (d) and then may collect ‘on the proceeds of the sale according to that priority.’¹⁹² ‘The maritime lien will not be effective if the price received at the judicial sale is not for the full value of the ship. This latter requirement is in turn dependent on the purchaser of the ship obtaining a title, which is free and clear of all liens, mortgages and charges.’¹⁹³ In addition, satisfaction of the above considerations is indispensable to a meaningful and equitable maritime lien.

In *the Trenton*,¹⁹⁴ Brown, D.J held that unless the judicial sale discharges all liens:

“...No one could possibly know the value of his purchase, for one could foresee the amount of claims that might be made against the vessel in other countries...”¹⁹⁵ [sic].

In light of this, judicial sale provides a title of ownership, ‘free and clear of all claims and is therefore crucial to the full realization of the maritime lien.’¹⁹⁶

In the Solomon Islands it has not yet been settled whether a foreign judicial sale transmits a free and clear title.

The Position of the 1926 Convention on Liens and Mortgages with regards to judicial sale

The 1926 Convention does not specifically stipulate that the judicial sale provides a

¹⁹² Stone, Arthur J. (2002) Canada's admiralty court in the twentieth century. 47. McGill Law Journal (Canada) https://api.turnitin.com/viewGale.asp?oid=31222008&key=bb60e56025d4c219ee1756e560c25034&lang=en_us&output=json&session-id=7f5946aa788bd4a4 (Accessed 14 August, 2013)

¹⁹³ Ibid. (https://api.turnitin.com/viewGale.asp?oid=31222008&key=bb60e56025d4c219ee1756e560c25034&lang=en_us&output=json&session-id=7f5946aa788bd4a4) (Accessed 14 August, 2013)

¹⁹⁴ 4 F. 657 at P.663 (E.D. Mich, 1880).

¹⁹⁵ Ibid.

¹⁹⁶ (https://api.turnitin.com/viewGale.asp?oid=31222008&key=bb60e56025d4c219ee1756e560c25034&lang=en_us&output=json&session-id=7f5946aa788bd4a4) (Accessed 14 August, 2013)

clear title to the purchaser, but the text implies as much, if the principle is found in the national law of the place of the judicial sale.¹⁹⁷

The position of the 1967 Convention on Liens and Mortgages with regards to judicial sale

The 1967 Convention in art. 11 explicitly spells out the consequence of judicial sale, providing that: (i) the ship is in the jurisdiction of the Contracting State where the sale is taking place, and (ii) the national laws of the Contracting State have been complied with.

The position of the 1993 Convention on Liens and Mortgages with regards to judicial sale.

The 1993 Convention in art. 12, is identical to the 1967 Convention in art. 11, except for that “area of jurisdiction” replaces “jurisdiction” and questions of charterparties after the judicial sale are left to national law.

v. Whether to exercise the lien in litigation

In the aforementioned case, *Maruwa Shokai (Guam) v Pyung Hwa 31*¹⁹⁸, an agency contract was entered between the plaintiff and the defendant for the services and supplies to the vessels owned by the defendant. The court granted the plaintiff an arrest order. The defendant advanced arguments to strike out the case on two remarkable grounds:¹⁹⁹

¹⁹⁷ In particular arts 1,2,3 & 9 of the Convention reading together.

¹⁹⁸ [1993] FMSC 1; 6 FSM Intrm. 001 (Pon. 1993) (4 January 1993) (<http://www.pacii.org/fm/cases/FMSC/1993/1.html>) (Accessed 14 August, 2013)

¹⁹⁹ Ibid. <http://www.pacii.org/maritime-law/case-summaries-maritime-liens/index.html> (Accessed 10 August, 2013)

Firstly, the defendant opposed the application on the ground that the transshipment of fish did not give rise to maritime liens, as it did not qualify as necessities supplied to the vessel. The court also held that stevedoring expenses were similar to transshipment costs of getting the fish from the vessel to the market, which extended the scope of necessities.²⁰⁰ Secondly, the defendant strongly opposed the application that necessities in pursuant to contract agency is outside of the purview of maritime jurisdiction. In light of this, maritime liens should be determined according to the nature of the goods rather than nature of the contract.²⁰¹ The defendant's motion in this case was dismissed.²⁰²

It is settled under the common law that a maritime lien can be exercised in litigation. The case demonstrated that fish transported from the vessel to the market, constituted a maritime liens for the for the purposes of general maritime law.²⁰³ In this case, a maritime line due to a general agent is not time barred. In essence, the important aspects of Admiralty Court's jurisdiction was that maritime contract cannot be converted into a non-maritime contract.²⁰⁴

vi. Action in rem and procedure for in rem action where no maritime lien existed.

In *Chandra v Kiribati Shipping Services Ltd*²⁰⁵, the arrest order was issued for the sum owed by the ship owner to the plaintiff for repair and electrical maintenance done to a vessel.²⁰⁶

²⁰⁰ (<http://www.pacii.org/fm/cases/FMSC/1993/1.html>) (Accessed 10 August, 2013)

²⁰¹ Ibid.

²⁰² Ibid

²⁰³ Ibid. (<http://www.pacii.org/fm/cases/FMSC/1993/1.html>) (Accessed 10 August, 2013)

²⁰⁴ Ibid.

²⁰⁵ [2010] FJHC 43; *Admiralty Action 1.2010* (4 February 2010). (<http://www.pacii.org/maritime-law/summaries-of-important-cases/case-summaries-arrest-of-ships-and-pre-judgment-security/index.html>)

²⁰⁶ Ibid. (<http://www.pacii.org/maritime-law/summaries-of-important-cases/case-summaries-arrest-of-ships-and-pre-judgment-security/index.html>) (Accessed 14 August, 2013)

The court decision premised on the fact that common law recognized that the claim for repairs could not constitute a maritime lien. In deliberating its decision, ‘the court cited legislative provisions, which allowed the *in rem* action. The *in rem* jurisdiction of the High Court of Fiji is derived from s. 21 of the High Court Act Cap 13. Also, section 1(1) of the Administration of Justice Act provides the High Court of Fiji with jurisdiction to decide a claim in respect of the construction and repair of a vessel’.²⁰⁷

The High Court (Admiralty) Rules set out the procedure whereby no warrant of arrest is issued until an affidavit has been filed identifying the parties and the nature of the claim. The Court found that the plaintiff was able to establish a lawful right to claim the monies due and owing pursuant to a contract, and thus established a claim on which an order for arrest could be founded.²⁰⁸

Therefore, procedure for *in rem* action is *actionable per se* where no maritime lien exists. Also, the writer supports the decision enunciated above as it is consistence with the 1993 Convention, but may have a lien ranking after mortgages under the national law in virtue of art.6. This lien ranking lasts for six months or 60 days from a bona fide sale of the ship.²⁰⁹ A right of retention may also be granted under national law to shipbuilders and repairmen in virtue of art. 7 (1) (a) and (b), whose right, in case of a judicial sale, ranks against the sale proceeds immediately after the maritime lien holders mentioned in art. 4 (See art.12 (4)).

²⁰⁷ Ibid.

²⁰⁸ Ibid. (<http://www.paclii.org/maritime-law/summaries-of-important-cases/case-summaries-arrest-of-ships-and-pre-judgment-security/index.html>) (Accessed 14 August, 2013)

²⁰⁹ 1993 Convention art. 6 (b)).

4.3 Whether there is a specially protected status of seamen's wages in Admiralty law.

The state of affairs of the seafarers is crucial and to avoid being exploited by the ship-owners, a well-protected policy or law should be put into place. The 'rationale for such concern about seamen's wages was stated in *The David Pratt's* old primeval case:²¹⁰

*"Seamen are not a class of men who ordinarily make provision against the future. On their return from a voyage they are usually dependent on their wages for present support, and if they are withheld they ordinarily find themselves in a state of entire destitution, not only without present means to provide for their immediate and most pressing necessities, but without credit"*²¹¹

In agreement with the above assertion, there can be no doubt as to the specially protected status of seamen in Admiralty Law.²¹² Owing to the status of the seafarers rights to a lien, which is the subject matter of the dissertation, a South African case of *the Master and Crew of the Mt Argun*'.²¹³ can be cited where there were three actions *in rem* against the defendant vessel, the *MT "Argun"*. The 'claims, based on maritime liens, which seamen have for their wages, all concerned unpaid wages to the master and vari-

²¹⁰ 7 F. Cas. 22, 25 (D. Me. 1839) (<https://bulk.resource.org/courts.gov/c/F3/211/211.F3d.261.99-30102.html>) (Accessed 14 August, 2013)

²¹¹ Ibid.

²¹² Appeal resulted in the Order this Court that their arrests in Cases AC 127/99 and AC 134/99 lapsed during 2001. This Order was given in Case No. AC 42/2002 on June 21 2002. (www.law.sun.ac.za) (Accessed 14 August, 2013)

²¹³ In the High Court of South Africa [Cape of Good Hope Provincial Division]

Case Nos : AC127/99, AC134/99 AC4/02, In the matter between : The Master and Crew of The MT "Argun" claiming under Case No AC127/99, The Former crew of the Mt "Argun" claiming under Case No AC134/99. The Master and Crew of The MT "Argun" claiming under Case No AC4/0 (<http://www.saflii.org/za/cases/ZAWCHC/2002/51.pdf>) (Accessed 10 August, 2013)

ous members of crews of the *Argun*'.²¹⁴

In this case Foxcroft, J cited Lord Stowell's quotes, in which he referred to sailors as "*these men, who are the favourites of the law*"²¹⁵.

A remarkable statement of Sir William Scott in the *MADONNA D'ldra, I Dodson*²¹⁶ quoted in the above *Argun* case affirmed the same, where he said:

"Now, it must be taken as the universal law of this court, that mariner's wages take precedence of bottomry bonds."

The 'same Judge also referred to *mariner's wages* as a category of *sacred lien*, and in a later case, the *Sydney Cove*',²¹⁷ he continued in the same vein, observing that:

"A seaman's claim for his wages was sacred so long as a single plank of the ship remained."

Thomas also points out:²¹⁸

"The master has never enjoyed the same weight of judicial sympathy as the seaman and although in relation to other claimants the master and seamen are treated as one, in relation to each other the seaman is probably superior."

See also Kay, Shipmasters and Seamen, (1895) at p.30 as cited by Thomas, where it is stated that:

"A Court of Admiralty always sought to protect them against circumvention, oppression and injustice and even against misapprehension

²¹⁴ Ibid.

²¹⁵ In the *MINERVA*, 1825(1) HAGGARD 347 at 358, leaving no doubt as to his view.

²¹⁶ 37 (1811) at 40

²¹⁷ 1815 (2 Dods.11)

²¹⁸ Ibid. (Extracted from the above *Argun* case of South Africa) (<http://www.saflii.org/za/cases/ZAWCHC/2002/51.pdf>) (Accessed 3 August, 2013)

*and error and was anxious that they should not be harassed with litigation and that questions of wages should be speedily settled.”*²¹⁹

In *the Argun case*, the plaintiffs’ claims were granted and the plaintiffs proved their claims in the court, as amended, and were entitled to judgment.²²⁰

Cases upheld that seafarers and master’s wages continue to be granted a high rank under all national laws and international conventions.²²¹

4.4 Weakness of the *lex fori* rule

In England maritime claims are not codified and the fact that they were not documented, has been raised and reflected well in debates on, to a large extent, procedural/substantive theories of the rule.

There is no law that explicitly confers that such a maritime claim warrants a maritime liens be given to its creditor. Relatively, the Supreme Court Act 1981, 32 at sect. 20(1) and (2), and the relevant statute only sets forth a list of maritime claims subject to the Admiralty jurisdiction of the High Court of Justice, some of which are secured by maritime liens and others of which are secured, if at all, by mere statutory rights *in rem*.²²²

The majority decision of the Admiralty Court invites forum shopping, owing to the fact that they misinterpreted the ‘maritime lien as a procedural remedy rather than a substantive property right. The whole perception was not justifiable for *necessariesmen*, who

²¹⁹ Ibid.

²²⁰ Ibid. (<http://www.saflii.org/za/cases/ZAWCHC/2002/51.pdf>) (Accessed 3 August, 2013)

²²¹ Tetley William.(1998) 2nd ed., Maritime Liens and Claims. International Shipping Publications. p.324

²²² AMC 1221 at p. 1248.2 (www.uniocean.com) also W. Tetley, "Maritime Liens and Claims", 2 Ed., 1998) See also W. Tetley, "International Maritime and Admiralty Law", 2002 at pp. 512-514 See <http://tetley.law.mcgill.ca/conflicts/marliensconf.pdf> (Accessed 14 August, 2013)

were entitled to an assumed lien when they concluded and performed contracts for supplying or repairing a vessel. In countries like the United States of America they are entitled and a court can grant 'them the status and priority of maritime lienors for their claims, arising out of such contracts, and the claims will be honoured as full-fledged maritime liens throughout the world, even in countries where the same claim would have a different character'.²²³

4.5. Related issues of forum of convenience and Jurisdiction

An issue related to forum of convenience and the competent jurisdiction in settling seafarers' cases has remained a debatable concern for the maritime courts. Strictly, speaking vessels registered in the Solomon Islands and manned by Solomon Islands master and crew, when the proceedings are presided in a foreign jurisdiction, the proper forums should be determined according to where the disembarkation of the seafarers took place. This concept is upheld in the above case of the Wahono. For a foreign vessel manned by Solomon Islands seafarers, a forum of convenience was settled based on where the seafarers domiciled. In contrast, a slightly different case scenario was articulated in the case of 'Captain & Crew of the MV Voseleai v Owners of the MV Voseleai'²²⁴ where the M.V. Voseleai ('the vessel') was a Solomon Islands registered vessel which had sailed from Honiara by a Solomon Islands master and crew to Suva, where she was to

²²³ Ibid. Also for the relevant provisions, 32 U.K. 1981, c. 54 see Tetley, M.L. & C., 2 Ed., 1998, Appendix "F" <http://www.mcgill.ca/files/maritimelaw/marliensconf.pdf> (Accessed 14 August, 2013)

²²⁴ [1994] FJHC 4; HBG0006j.1994s (28 October 1994) (<http://www.paclii.org/cgi-bin/disp.pl/fj/cases/FJHC/1994/159.html?stem=0&synonyms=0&query=captain%20and%20crew%20and%20of%20and%20the%20and%20mv%20and%20voseleai%20and%20v%20and%20owners%20and%20of%20and%20the%20and%20mv%20and%20voseleai>)

undergo extensive repairs. The vessel arrived in the port of Suva on the 15th of August 1993 and has remained there.

On the 30th of June 1994, the plaintiffs proceed *in rem* action for unpaid wages.²²⁵ The defendant by way of response in his affidavit however rebutted the following relevant concession:

*"The owners of the vessel M.V. Voseleai do not dispute owing the crew monies but the owners have advised that these monies should be collected in the Solomons once the vessel departs Suva on its voyage back home." And "The proper forum for the Crews if they dispute the amounts stated by the owners of the vessel to be owing is the Courts in the Solomon Islands."*²²⁶

Although the jurisdiction of the Court has not been questioned it is helpful to negotiate the same and as a starting point reference may be made to Section 21 of the High Court Act (Cap. 13), which provides²²⁷:

*"The Supreme Court (now High Court) shall be a Colonial Court of Admiralty within the meaning of the Colonial Courts of Admiralty Act, 1890, of the United Kingdom and shall have and exercise such Admiralty Jurisdiction as is provided under or in pursuance of subsection 2 of Section 56 of the Administration of Justice Act, 1956 of the United Kingdom or as may from time to time be provided by any Act, but otherwise without limitation, territorially or otherwise."*²²⁸

Also, in the *Federal Business Development case*,²²⁹ an action commences against the

²²⁵ Ibid.

²²⁶ Ibid.

²²⁷ Ibid.

²²⁸ Section 21 of the High Court Act (Cap. 13),

²²⁹ *Federal Business Development Bank v SS Thorfinn* [1989] FMSC 8; 4 FSM Intrm. 057 (Truk 1989) (30 May 1989) (<http://www.paclii.org/fm/cases/FMSC/1989/8.html>) (Accessed 14 August, 2013)

defendant vessels by way of securing the loan to enforce collection of delinquent loans. The plaintiff filed an *ex parte application* and the vessel was arrested. The counsel for the defendant opposed the application on the basis of admiralty jurisdiction.²³⁰ The court warrant of arrest was vacated.

In this case, the court held that the plaintiff's submission was indefensible that US common law was no longer persuasive. In support of the application, the plaintiff cited various case laws of US, UK legislation and the Canada that give effect to the recognition of ships mortgage's as maritime liens enforceable in admiralty. The plaintiff argued that the above statutes along with the 1967 Conventions created a common law that should be adopted in this instance'.²³¹

The court hold the opposing view based on a number of sources: Firstly, FSM has lacked a shipping industry that required that protection of admiralty.²³² Secondly, the action was based on the foreign corporation action against the foreign vessel, which does not warrants proceedings under those various Acts. Interestingly, in this case the court did not longer accept various aspects of statutes and jurisdictional issues. Furthermore, there was no ship mortgages registration regime in FSM and 'the international convention could not be applied as the purpose of that document was the establishment of reciprocal recognition.'²³³

²³⁰ Ibid. (<http://www.pacii.org/maritime-law/summaries-of-important-cases/case-summaries-arrest-of-ships-and-pre-judgment-security/index.html>) (Accessed 14 August, 2013)

²³¹ Ibid.

²³² Ibid.

²³³ Ibid. (<http://www.pacii.org/maritime-law/summaries-of-important-cases/case-summaries-arrest-of-ships-and-pre-judgment-security/index.html>) (Accessed 14 August, 2013)

4.6. The procedures and issues of registration of Maritime Liens in the Solomon Islands

Regulation 24 (1) (2) (3) of the Shipping (Registration) Regulations 2010²³⁴, sets out the procedures to register a maritime liens. The following provisions stated: (1) *Applications for the registration of maritime liens affecting registered vessels must be made to the registrar on the approved form, and must be accompanied by the prescribed fee.* (2) *A maritime lien must be in the form approved by the registrar for registration under this regulation.* (3) *The registrar may require that any relevant particulars be provided in relation to a maritime lien to be registered under these Regulations, and may enter any relevant details in the register, as determined by the registrar, when the registration of a maritime lien affecting a registered vessel is accepted in accordance with these Regulations.*²³⁵

While the above stated provision (reg. 24 (1) (2) (3)) attempts to modernize the maritime laws applying in the Solomon Islands in setting clear procedures for the registration of liens, it somehow deviates from the traditional norm of maritime liens. Suffice it to say, that the whole concept of maritime liens is that, they are ‘invisible’, i.e. they are not registered and cannot be capable of being registered.

In the *A.J. Stone*, “*Let the Boat Buyer Beware*,”²³⁶ it does not require any judicial action to be created, not does it require a deed or registration to become active. And here is the major difficulty with the maritime lien in general maritime law: unlike the mortgage or hypothec, it is not registered, so that it could cause difficulties to unsuspecting buyers or mortgagees.²³⁷ The famous *Bold Buccleugh*²³⁸ case articulated that a maritime lien at-

²³⁴ Shipping (Registration) Regulations 2010 (Solomon Islands)

²³⁵ Ibid. Reg. 24

²³⁶ (1974) 12 Osgood Hall L.J. 643.

²³⁷ Ibid.

²³⁸ (1851), 7 Moo. P.C. 267.

taches to the *res* from the time the event occurred that gave rise to the lien but remains *inchoate* until called into effect by proceeding *in rem*, whereupon it relates to the period when it first attached. In light of this, whether *in rem* procedure exists because of maritime liens or vice versa is not clear, but however, maritime liens arise, like all liens, by operation of law and give rise in the holder to a claim which may be enforced against the property over which the lien is held.²³⁹

In contrast, it is not disputed that there is nothing wrong or right with any given law. The author also supports the view that regulations 24 does comply with s35 of the Shipping Act 1998 of Solomon Islands, which provides for the registration of maritime liens and mortgages²⁴⁰. The Shipping Act 1998 is the main principal shipping Act, which has come into force and has been widely recognized and practiced by the citizens for the last 15 years, which give effect to certain international maritime conventions. The rationale behind section 35 of the Shipping Act 1998 reading together with Regulation 24 of the Shipping (Registration) Regulations 2010 was that, it is intended to protect the holder of

²³⁹ Grime Robert. (1978). *Shipping Law*. Sweet & Maxwell, London. P. 40.

²⁴⁰ Section 35 of the Shipping Act 1998 (Solomon Islands).

Registration of Maritime Licences and Mortgages. 35. (1) A registered vessel is capable of being made security for a loan or other financial obligation, by way of a mortgage in the prescribed form. (2) The Registrar, upon the production to him of a mortgage, shall register the mortgage by making an entry of the mortgage in the Register. (3) The Registrar shall -(a) register mortgages in the order in which they are produced to him for that purpose;(b) endorse and sign a memorial on each mortgage, stating the date and time that it was produced to him and entered in the Register; and(c) endorse and sign a memorial on the Certificate of Registry to the effect that a mortgage has been registered against the vessel. (4) Notwithstanding anything contained in this Act or the International Convention on Maritime Liens and Mortgages, 1993, a maritime lien is not enforceable against a vessel owned by a *bona fide* purchaser for value with notice unless such lien has been registered in the Register of Vessels at the port in which the ship is registered, but it is enforceable against the owner and vendor who has incurred the debt from which the maritime lien arises, irrespective of registration. (5) The Registrar shall, at the request of the holder of a maritime lien register the maritime lien by making the entry in the register -(a) describing the claim against the owner, demise charterer, manager or operator of the vessel secured by the maritime lien on the vessel;(b) of the date of the event which gave rise to the maritime lien against the vessel; and(c) of the name and address of the lien holder for the service of notice or documents. (6) Subject to Article 9 of the International Convention on Maritime Liens Mortgages 1993, a maritime lien shall be extinguished, after a period of one year.The copy of Act can be accessed online: (http://www.paclii.org/sb/legis/num_act/sa1998111/) (Accessed 14 August, 2013)

the lien as well as the buyer of a ship, and does so with a relatively simple device (although it can envisage that some problems might arise out of proving that it indeed was a *bona fide* acquisition of the vessel). At the outset, it is not a question of right or wrong but however, it is simply what the legislators wanted irrespective of whether they knew what it entailed.

It is important to note that the standard SPC draft Shipping Act in which most of the PICS countries adopted contains clear provision for the registration of liens (the same applied to s.34 of the Shipping Act 1998 of Samoa). In that regard, it makes it more understandable, justifiable and operable as it would then be a well-known fact in the South Pacific region. So to say that no other country provides for registration of maritime liens is not right. In fact all the South Pacific Islands countries, which have applied the SPC model law, have its specific provisions for the registrations of maritime liens.²⁴¹

Also from the economical perspective of the maritime industry in the Solomon Islands, it will be a further source of revenue if SIMSA wants to apply those provisions of the regulations by approving forms for liens and setting registration fees. However, on the other hand, a comprehensive set of laws that are made in accordance with the best international practice, traditional maritime norms and the obligations applying under international law is crucial for the Solomon Islands.

²⁴¹ Critical discussion and analysis of section 35 of the Shipping Act 1998 (Solomon Islands)

CHAPTER 5 CONCLUSION AND RECOMMENDATIONS

5.1. Conclusion

In so far as the analysis and discussions are concerned, most of the misconstructions and flawed theories relating to maritime liens have ascended because the maritime lien has been reflected as a common law concept²⁴², even as a remedy, when in reality it is a right, a privilege, in the codified civilian tradition.²⁴³ Ranking of maritime liens, should be an equitable process, wherein the court is bound to temper justice with equity on the basis of certain rules of statute or general maritime law. However, the role and claims of government (as in the *Wahono case*) has a certain form of special legislative rights, which should be a new, emerging force, of which unfortunately, the national law and these Maritime Liens Conventions take no cognizance.

Conversely, the solutions to these issues and many other associated question affecting the rights of the individuals proceeding²⁴⁴ their rights via maritime liens claims are far from clear. Supplies of necessities to ships were abolished by the 1967 Conventions and the 1993 Convention is even more rational by simply permitting national maritime liens for necessities, but ranking them after the traditional maritime liens and ship mortgages.

²⁴² Tetley .W.1998. 2nd Ed. Maritime Liens and Claims. International Shipping Publication. p.7

²⁴³ Ibid.

²⁴⁴ John M, Kluz.(undated) *Ship Mortgages, Maritime Liens, and their enforcement: The Brussels Conventions of 1926 and 1952* (<http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1880&context=dlj>) (Accessed 3 August, 2013)

Meanwhile, with regards to mortgages, the writer views that ship mortgages, maritime liens and other charges should be properly defined and ranked in a uniform international convention, to which all shipping nations are party, in order to give equitable protection to the different interests in a maritime venture.

In the meantime, the gap created by the alleged demise of the Admiralty attachment adopted by the Solomon Islands from the United Kingdom has been partly filled by the *Mareva Injunction* though the action is *rem* and arrest of the *res*. Indeed *Mareva Injunctions* for seafarers are at stake, owing to the fact that there was no available court, which would accept jurisdiction to adjudicate on that right, as it requires the court to have appropriate rules of procedures to execute on that right.

Equally, this paper supports the view that a Solomon Islands admiralty court deciding the claims of seafarers should apply only the maritime law closely connected with the proceedings, under the modern choice of law, and this ‘will not always be the substantive rule of maritime law’²⁴⁵ in the Solomon Islands.

In addition, failing to assert ones’ claims within a reasonable time sometimes causes prejudices to third parties and thus become time barred. Laches should be treated as an equitable sanction, because unreasonable delay can affect rights of all the parties concerned and these are areas that ought to be seen and to be properly regulated. Whether a court will apply the laches doctrine is usually premised on three criteria: lapse of time, the prejudice suffered and the reasons for the delay.

In ascertaining ownership or beneficial ownership, an investigation is to be done not only to determine who is the legal owner of the shares of the company concerned, but also who has an equitable interest and only thus by taking account of both legal and equitable ownership can be able to determine the beneficial owner. However, obtaining access to

²⁴⁵ Ibid. (<http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1880&context=dlj>) (Accessed 14 August, 2013)

government and private shipping documentation in the Solomon Islands responsible government agencies and private companies has been difficult at times as the entire management (and thus most of the records pertaining to the registry and relevant documents) is sometimes conducted from overseas counterpart offices.

However, this dissertation has proceeded on the basis of available material and the questions posed by the thesis have been addressed in a comprehensive manner. Basically, important information for the research has been obtained through secondary sources such as government documents, reports by international bodies and Internet articles. Such material has substantially contributed to the research questions and fulfilled the purposes of the study. While Chapters 1 and 2 of the dissertation laid down the relevant introductory and background information, which embarked on reviewing and contextualizing the relevant scholarly published articles, books and international convention, Chapters 3 to 4 focused on the more substantive task of reviewing and discussing the relevant cases and issues. In doing so, these chapters 2 to 4 ascertained the application of Maritime Liens and the enforcement from the Solomon Islands perspective, and then analyzed the position of the Solomon Islands adopted under the Admiralty and common law system.

5.2. Recommendations

The focus on the SIMSA as the architect for enforcing, overseeing and regulating the welfare of the seafarers in the maritime sector²⁴⁶ is influenced by the fact that States, by virtue of their exclusive jurisdiction over vessels flying their flag, are uniquely placed to

²⁴⁶ Manoni, Filimon M., *Analysing the international legal framework for flag State duties: 'a Marshall Islands perspective'*, Doctor of Philosophy thesis, Faculty of Law, University of Wollongong, 2012. <http://ro.uow.edu.au/theses/3617> (Accessed 10 August, 2013)

undertake enforcement measures. It must be borne in mind, however, that the legal recognition of other forms of jurisdiction in no way diminishes the primacy of flag State jurisdiction as the predominant enforcement mechanism in the maritime sector.²⁴⁷

In galvanizing SIMSA's role pertaining to the welfare and interests of seafarers and in particular with regards to irregularities and complex issues arising in securing wages of seafarers through maritime liens, the government (through maritime and labour division), seafarers unions, maritime institutions along with the private shipping entrepreneurs must act swiftly to develop a comprehensive policy framework and/or put into place laws to regulate the wages of seafarers.

Nevertheless, the purpose of formulating such a regime is to enhance seafarers' protection, which means that the statute would simply require ship-owners to 'pay their seafarers their hard earned wages promptly and to protect seamen from "arbitrary and unscrupulous" ²⁴⁸refusals of their employers to pay their wages'.²⁴⁹

Revisiting and overhauling current regimes which spell out wages and maritime liens and, where necessary amending specific provisions in the relevant Acts in the Solomon Islands is necessary and crucial. Also the responsible ministry should properly educate and plainly explain the bills to the legislatures by thoroughly examining the bills (proposed laws) and making amendments to where necessary, before agreeing to their final form. Because the end product of it, is the law, which is the framework within which citizens of nations consent to be governed which embodied on the theory of democracy that once people elect their lawmakers (legislators), they recognize the legitimacy of the laws made on their behalf by the lawmakers and consent to abide by those laws.²⁵⁰

²⁴⁷ Ibid.

²⁴⁸ <http://www.seamenschurch.org/article/house-subcommittee-coast-guard-and-maritime-transportation>

²⁴⁹ <http://seamenschurch.org/article/house-subcommittee-coast-guard-and-maritime-transportation> (Accessed 14 August, 2013)

²⁵⁰ Parliament Fact Sheet No. [2] "LAW MAKING", Research and Information Centre, National Parliament Of Solomon Islands. (<http://www.parliament.gov.sb/files/project/factsheet2lawmaking.pdf>) (Accessed 10 October, 2013)

In addition, demanding payment by ship owners to pay seafarers promptly is necessary. It is purposely envisioned to avoid ‘ship owners from using the threat of nonpayment to force seafarer to release the ship of all claims and to prevent seafarers from being put ashore penniless and becoming a public charge on the harbor’.²⁵¹

Also, the Act should be purposefully ‘simple to encourage quick payment of wages without the need for lengthy procedures or judicial interpretation’²⁵² and furthermore, to ‘deter unscrupulous ship-owners from withholding seafarers’ wages by imposing a two-day penalty for each day that wage payments are delayed.’²⁵³ In enforcing such a penalty sanction, the penalty should be ‘imposed only when the delay was caused by arbitrary and unscrupulous acts or omissions’.²⁵⁴

Moreover, ‘the text of the statute should make it clear that penalty wages do not apply every time a seafarer’s wages are not paid in a timely manner’,²⁵⁵ but should be formulated in such a way that a seafarer is ‘entitled to penalty wages only when the failure to pay is without sufficient cause. Without sufficient cause means either conduct which is in some sense arbitrary or willful, or at least a failure not attributable to impossibility of payment’.²⁵⁶

In addition, the contents of the current laws in the Solomon Islands that regulate maritime liens are quite flawed. Section 201 of the *Shipping Act 1998* that spells out the *application of liens* and Part XIII that sets out the *legal proceedings for maritime claims* are silent on addressing circumstances surrounding the wrongful or unfair termination of seafarers. Neither does *regulation 24 of the Shipping (Registration) Regulations 2010*²⁵⁷

²⁵¹ <http://seamenschurch.org/article/house-subcommittee-coast-guard-and-maritime-transportation> (Accessed 14 August, 2013)

²⁵² FISCAL YEAR 2007 COAST GUARD AUTHORIZING LEGISLATION, JUNE 20, 2006, Committee on Transportation and Infrastructure. <https://bulk.resource.org/gpo.gov/hearings/109h/30651.txt>

²⁵³ Ibid. (<https://bulk.resource.org/gpo.gov/hearings/109h/30651.txt>)

²⁵⁴ <http://seamenschurch.org/article/house-subcommittee-coast-guard-and-maritime-transportation> (Accessed 14 August, 2013)

²⁵⁵ Ibid.

²⁵⁶ Ibid.

²⁵⁷ Reg. 24 of the Shipping (Registration) Regulations 2010

tackle the same. Regulation 24 goes on to set procedures to register maritime liens and so in a way, maritime claims for unfair dismissal of seafarers tumble into three complex phases. First, a process of registration of maritime liens with the Registry Office. Secondly, proceeding in filing of TDP cases for unfair dismissal. Thirdly, instituting a claim for a maritime claim through the maritime court (High Court). Specific provisions should be put into place so as to protect the seafarers being exploited by ship-owners.

It is evident that Tribunal board members, High Court juries, assessors and/or maritime judges were not well trained or versed with the basic knowledge of maritime law, admiralty law and shipping law in general and this, in a way, contributes to the flaws in deliberations or in adjudicating the claims that constitute maritime claims in nature. At this juncture, from the national perspective the Solomon Islands has not accumulated an impressive stock of human capital in this area of law; therefore, priority should be given to train competent legal specialist for this specialty. Alternatively, it is suggested also that a proposed three-day workshop for High Court judges, Tribunal board members, mariners, and legal practitioners is crucial. By these, visiting maritime legal specialists with extensive experience and maritime background would be requested to come to deliver some basic lectures covering all areas of maritime law.

The Solomon Islands should urgently work towards and to take further steps to ratify the MLC 2006 and moreover, to prepare its own domestic legislations to include the provisions in the MLC relating to employment agreement of seafarers. The employment agreement should be written and basically the proposed Act purports to regulate the MLC provisions and in particular provide for seafarer leave entitlement and control payment of wages of seafarers.’²⁵⁸

²⁵⁸ Maritime Law Convention (MLC) 2006 (Title 2 provisions relating to seafarer’s employment agreements including leave entitlements and wages.

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