**THEORY VERSUS POLICY IN THE REFORM OF ADMIRALTY JURISDICTION**

By Hilton Staniland[[1]](#footnote-1)

**1. INTRODUCTION**

A ship is often personified as the most living of inanimate objects: endowed with legal personality, she is held personally answerable for her own debts, as if she alone directed, controlled and obligated herself. This fiction, giving rise to the personification theory explaining the liability of a ship, results in the doctrine that a ship can be arrested, even where her owner and/or operator are not personally liable for the claim brought against the ship herself and enforced by her judicial sale. Thus, a seafarer, who provides a service to a ship - without any employment agreement - may nonetheless arrest the ship on which he worked since she, having enjoyed his services, is obligated to pay for those services and is herself thereby liable to arrest, even if she has been sold and passed into the hands of a new owner. So, a fiction, giving rise to a theory of personification, defeats any defence based on an absence of personal liability. And, fiction and theory having hardened into legal doctrine, determines liability for unpaid wages, and serves the public policy objective of protecting a weak seafarer against a strong shipowner.

When, however, the ship is sold by order of court to pay the wages it is the shipowner - and not the ship - who is ultimately forced to pay the wages. So, is the arrest and forced sale of the ship not better explained - free of fiction - on the basis of a procedural theory, which postulates that the arrest of the ship and the action *in rem* is more accurately described as a procedure which is actually aimed at the shipowner and not the ship herself? By virtue of this theory the shipowner is forced to pay the wages if the ship is not to be subjected to a forced sale.

These competing theories go to the essence of admiralty jurisdiction, explaining the nature of the action *in rem* and the relationship between the action *in rem* and the action *in personam.* Or should both theories, or indeed any modified theory, be eschewed in favour of the adoption and adaption of public policies that serve the national and international interests of the state concerned? Such questions are of decisive significance for national and international litigants pursuing maritime claims on the basis of the action *in rem* and/or the action *in personam*, and of comparative interest in the many Commonwealth jurisdictions, deriving their admiralty jurisdiction from the imperial Colonial Courts of Admiralty Act 1890. For the author, as the draftsman of new Admiralty Jurisdiction Bill (‘the Bill’) for Namibia, the questions are not of merely academic and intellectual curiosity, but ultimately represent difficult questions that no draftsman can escape.

Four questions arise. First, does the Colonial Courts of Admiralty Act 1890 (‘the 1890 Act’) continue to apply in Namibia? Or, to put it differently, has the 1890 Act been impliedly repealed and replaced by the South African Admiralty Jurisdiction Regulation Act 105 of 1983 (‘the 1983 Act’)? Second, if the 1890 Act does indeed apply, does it need to be repealed? Third, if the admiralty jurisdiction of the High Court should be changed by legislation, what substantive admiralty law should be applied? Fourth, what fictions, theories, doctrine and/or polices, if any, should be expressed or implied in the draft legislation covering the action *in rem* and the action *in personam*?

In attempting to answer these questions, this paper is divided into four main parts, covering areas hitherto uncanvassed in any publication on the law of Namibia. Beginning with the history of admiralty jurisdiction in Namibia, the disputed need for the Bill, and the shortcomings in the current admiralty jurisdiction, the paper then confronts the deep controversy and policy options of fundamental importance concerning the law to be applied; and, finally, it concludes by proposing draft legislative changes concerning the nature of the action *in rem* in English law,which changes are unprecedented in comparative Commonwealth jurisdictions.

**2. DOES THE COLONIAL COURTS OF ADMRIALTY ACT 1890 APPLY IN NAMIBIA?**

It is argued that the High Court of Namibia is currently correctly exercising admiralty jurisdiction as it existed in England in 1890, dating back in some respects to the original and inherent jurisdiction of the English Admiralty Court established in 1286.[[2]](#footnote-2) The Court thus continues correctly to exercise this jurisdiction, albeit archaic in many respects, over ships and cargo from foreign waters, notwithstanding that the parties may be foreign, the ships may be foreign flagged, and the causes of action may arise under foreign law, without the territorial limits of Namibia.[[3]](#footnote-3)

The contrary contention of some eminent and experienced admiralty practitioners is that the 1983 Act of South Africa has already impliedly repealed and replaced the 1890 Act; and when this contention is carefully and comprehensively advanced in the High Court, the true position will emerge conclusively, showing the applicability of the 1983 Act. The contention would have it that the 1983 Act is applicable in Namibia (on the basis that when the 1983 Act came into force it applied in the province of the Cape of Good Hope of South Africa and consequently also applied in the then South West Africa and later in 1990 when South West Africa achieved its independence from South Africa and was renamed Namibia. Closely associated with that contention is a campaign to the effect that, if the 1983 Act does not apply in Namibia, it should nonetheless be enacted, given the close links between the two neighbouring countries and the common maritime policy of the Southern African Development Community to which both countries belong. That contention and the campaign, although advanced by eminent and experienced practitioners are, with respect, doomed to failure.

The answer, it is argued, lies in the recent history of admiralty jurisdiction in South Africa and Namibia. Prior to the commencement of the 1983 Act in South Africa, admiralty jurisdiction was exercised by virtue of s 2 of the 1890 Act,[[4]](#footnote-4) which came into operation on 1 July in British possessions.[[5]](#footnote-5) Every court in a British possession which had ‘unlimited civil jurisdiction’ was constituted a Colonial Court of Admiralty.[[6]](#footnote-6) The South African High Court (previously ‘the Supreme Court’) exercised unlimited civil jurisdiction and was therefore also constituted as a Colonial Court of Admiralty. This situation was not changed by either the South Africa Act of 1909[[7]](#footnote-7) (which established the Union of South African in 1910)[[8]](#footnote-8) or the Republic of South Africa Constitution Act 32 of 1961 (which provided for South Africa to leave the Commonwealth)[[9]](#footnote-9).

The Courts of Admiralty Act 1890 was also part of the statute law of the province of the Cape of Good Hope; and, by virtue of s 1(1) of Proclamation 21 of 1919, the law as applied in that province as at 1 January 1920 was introduced into Namibia, then ‘South-West Africa.’[[10]](#footnote-10) Although Act 5 of 1972 was enacted in South Africa to govern the admiralty jurisdiction of her courts and was also made specifically applicable to Namibia, this Act was not promulgated and never applied in either South Africa or Namibia.[[11]](#footnote-11) And, while the 1890 Act was finally repealed and replaced in South Africa by the 1983 Act, no mention was made of Namibia in the 1983 Act. Since the 1890 Act has not been repealed in Namibia after her independence, it continues it is argued to be part of Namibian law until repealed and replaced by the enacted Bill. In the meantime, the 1890 Act must be read together with the Admiral Court Act 1840[[12]](#footnote-12) (‘the 1840 Act’) and the Admiralty Court Act 1861[[13]](#footnote-13) (‘the 1861 Act’).

Although, it must be conceded in all fairness, that the contention for the applicability of the 1983 had not been absolutely comprehensively advanced in the High Court, the authority for the continuing application of the 1890 Act in Namibia is formidable, being accepted in two decision of the High Court and in one decision of the Supreme Court of Appeal.[[14]](#footnote-14) If that is correct, then what of the campaign to enact the 1983 Act into the law of Namibia? That campaign is, with respect, futile. Since Namibia is a party to 1952 Convention on the Arrest of Sea-going Ships (‘the 1952 Convention’),[[15]](#footnote-15) she is precluded from enacting the 1983 Act because it would violate Namibia’s international legal obligations under the 1952 Convention in important respects, especially in relation to the unique and radical provisions that allow for the arrest of associated ships - going far beyond the lifting or piercing of the corporate veil in instances of a fraud or a sham - and disregarding the corporate veil between companies, so that the ship of one company may be arrested in relation to the claim that arose against the ship of another company, given common control of the companies.[[16]](#footnote-16)

By virtue of the 1890 Act, the High Court of Namibia has the same jurisdiction today as the English Admiralty Court had in 1890.[[17]](#footnote-17) The jurisdiction of the English Admiralty Court as of 1890 was derived from the original and inherent jurisdiction of the English Admiralty Court and other acts enforced prior to 1890, which either extended the jurisdiction or created new jurisdiction. Of these Acts, the most important were the 1840 Act and the 1861 Act, which are currently enforced in Namibia.[[18]](#footnote-18) English legislation governing admiralty jurisdiction passed subsequent to 1890 was not applicable in the Colonial Court of Admiralty[[19]](#footnote-19) and is therefore not applicable in Namibia.

From such sources, it is arguable that the current heads of jurisdiction in Namibia include claims related to: salvage;[[20]](#footnote-20) damage;[[21]](#footnote-21) bottomry and respondentia bonds[[22]](#footnote-22); seafarers’ wages;[[23]](#footnote-23) masters’ wages and disbursements;[[24]](#footnote-24) towage; [[25]](#footnote-25) necessaries;[[26]](#footnote-26) pilotage;[[27]](#footnote-27) ownership;[[28]](#footnote-28) possession; [[29]](#footnote-29) cargo;[[30]](#footnote-30) mortgage;[[31]](#footnote-31) and booty.[[32]](#footnote-32)

The substantive law applied by the Colonial Court of Admiralty was the admiralty law as administered by the English High Court exercising admiralty jurisdiction in 1890.[[33]](#footnote-33) Decisions handed down in England subsequent to 1890 are, it is submitted, nonetheless applicable in Namibia in so far as they expound or clarify English admiralty law as it was prior to 1890. But decisions subsequent to 1890 in English admiralty law - which changed the prior law[[34]](#footnote-34) - are, it is submitted, not applicable in Namibia, although the extent to which such decisions changed the prior law may be arguable. Where a decision subsequent to 1890 clearly radically changed the English as at 1890, it was held in South Africa not to be applicable to the Colonial Court of Admiralty;[[35]](#footnote-35) and there is no apparent reason why the High Court of Namibia would adopt a different approach.

**3. SHOULD THE 1890 ACT BE REPEALED AND REPLACED?**

The current jurisdiction of the High Court of Namibia is some 120 years out of date, having been described 30 years ago in South Africa as “filled with many anachronisms.”[[36]](#footnote-36) It can no longer be assumed to serve the national interests of Namibia, if indeed it ever did. The case for the reform of the admiralty jurisdiction of Namibia is so compelling and urgent that failure to enact new legislation is deeply damaging to the national interests. Several reasons dictate the need for reform.

First, the determination of a comprehensive list of heads of jurisdiction is obviously necessary; but this would be a laborious task of uncertain outcome, requiring a close and critical examination of the original and inherent jurisdiction of the English Admiralty Court, an assessment of the effect of the writs of prohibition issued by the common law courts in order to restrict the jurisdiction of the English Admiralty Court, and an interpretation of the many statutes that may have created, extended, excluded or restricted the jurisdiction of the English Admiralty Court.[[37]](#footnote-37) With historical resources that are not only insufficiently available in Namibia but also difficult to adapt to local circumstances in the 21st century, a comprehensive - and authoritative - determination of that jurisdiction is most likely to remain elusive. Such uncertainty in the law is not in the interests of international trade and commerce.

Second, the short list of 13 heads of jurisdiction mentioned above unduly limit the jurisdiction of the High Court of Namibia, excluding, for example, claims for loss of life, personal injury, charterparties and general average, again falling far short of serving the national interests. What is more, great jurisdictional developments have swept past Namibia. Sister ship arrest is just one such example, and ship arrest to provide security for arbitration is another. Regarding sister ship arrest,[[38]](#footnote-38) originally any property of the defendant could be arrested; but by 1935 only ‘the offending ship’ (also variously styled as ‘the particular ship’, ‘the ship concerned’ or ‘the guilty ship’) could be arrested. This was made possible by the advent of the maritime lien. The offending ship to which a maritime lien attached was arrested. The maritime lien sprang into existence automatically, attached itself leech-like to the offending ship, and was enforced by the action *in rem*. The arrest of the ship was thus coterminous with the maritime lien.[[39]](#footnote-39) This meant that no ship other than the offending ship directly connected with the cause of action was arrested *in rem* because the maritime lien attached only to the offending ship. Conversely, it was not possible to arrest another ship owned by the owner of the offending ship, where that other ship was unconnected with the circumstances that gave rise to the maritime lien.[[40]](#footnote-40) So, by 1935 the English Court of Appeal was able to hold that proceedings *in rem* to arrest a ship applied only to the offending ship to which the cause of action related.[[41]](#footnote-41) At that time, Sir Boyd Merriman P[[42]](#footnote-42) said that:

‘Arrest, either of person or property, has long since ceased … to be necessary in order to found jurisdiction. Nor is arrest of property, other than the thing in relation to which the claim arises, necessary in order to obtain security that the judgment shall be satisfied.’

This, it is submitted, is still the position in Namibia.[[43]](#footnote-43) But the 1952 Convention effected a compromise between English law and civil law where any property of the defendant could be arrested, so that either the offending ship or any other ship belonging to the same owner (that is, a sister ship) can be arrested. It was also agreed, however, that only one ship might be arrested: it might be either the offending ship or any other ship, belonging to the same owner.[[44]](#footnote-44) No sister ship is available in Namibia where, for example, an offending ship, which causes damage to a port in Namibia, becomes a wreck of no value, so there is nothing of value to arrest. But under the Bill, enacting the 1952 Convention, the port authority would be empowered to arrest any other ship belonging to the same owner within the jurisdiction.

As to ship arrest to provide security for arbitration, neither the 1840 Act nor and 1861 Act vested the English Admiralty Court with power solely to grant security for arbitration proceedings. Therefore, the admiralty jurisdiction of the High Court of Namibia to arrest a ship in an action *in rem* cannot be exercised for the purpose of providing security for arbitration proceedings already underway.[[45]](#footnote-45) Under English law, it may be vexatious and an abuse of process to proceed by arbitration concurrently with a separate action *in rem* in respect of the same cause of action. In that event, the court may, in the exercise of its inherent power, require the claimant to elect the forum for the pursuit of the claim. Nonetheless, where it is shown by the plaintiff that an arbitration award is unlikely to be satisfied by the defendant, the security available in the action *in rem* may be ordered to stand so that, if the plaintiff may thereafter have to pursue the action *in rem,* the security will remain available in that action.

Third, the established heads of jurisdiction are often of uncertain meaning. Does, for example, the head of jurisdiction covering salvage also encompass claims based on the Wreck and Salvage Act 2004, which include (where there is a threat of pollution to the marine environment) a claim by a salvor for special compensation even when no property is - contrary to the traditional law of salvage - saved? If not, then part of the 2004 Act is enforceable in the High Court in the exercise of its ordinary (parochial jurisdiction) applying Roman-Dutch law, while another part of the same Act is to be heard and determined in the High Court in the exercise of its admiralty jurisdiction applying English law, with entirely different results.

Fourth, even when some of the current heads of jurisdiction are clear, they often impede national interests and, in so far as they are unclear, they raise unresolved issues. Take, for example, claims for necessaries supplied to a ship. The off-shore and in-port supplying of necessaries to ships - an important and growing industry in Namibia - is severely restricted by s 6 of the 1840 Act and s 5 of the 1861 Act, which stipulate that necessaries must be supplied to *foreign ships* for the Court to have jurisdiction[[46]](#footnote-46). To this end, the Vice-Admiralty Courts Rules provide in Rule 30(b) that in the affidavit to lead the warrant of arrest in an action *in rem* the deponent shall state the national character of the ship and that no owner or part owner of the ship is domiciled in ‘the possession’ that is to say, in Namibia, at the time that the necessaries were supplied. It follows that no action *in rem* can be brought before the High Court in the exercise of its admiralty jurisdiction for claims for necessaries against local debtors.[[47]](#footnote-47) Furthermore, a maritime claim for ‘equipment’ under s 4 of the 1861 Act[[48]](#footnote-48) may not appear to be the same as a maritime claim for ‘necessaries’ by virtue of s 5 of the Act.[[49]](#footnote-49) In *International Underwater Sampling Ltd and Another v MEP Systems Pte Ltd[[50]](#footnote-50)* the Supreme Court of Namibia[[51]](#footnote-51) adopted the test in *Webster v Seekamp[[52]](#footnote-52)* where Lord Tenterden held that: ‘whatever is fit and proper for the service on which a vessel is engaged, whatever the owner of that vessel, as a prudent man, would have ordered, if present at the time, comes within the meaning of the term necessary…’.[[53]](#footnote-53) It follows that the self-same goods, equipment or services may, depending on the circumstances, partake of a hybrid nature, being either equipment or necessaries for the purposes of instituting an action *in rem.*[[54]](#footnote-54) But does such a claim include goods, equipment or services provided for the maintenance, protection or preservation of the ship apart from the operation or employment of the ship and whether or not the goods, equipment or services are supplied by the shipowner or any other party? The answer is uncertain, which cannot be good for business.

Finally, and by no means least, the Rules, as established by the Queen’s Order in Council on 23 August 1883 pursuant to the Vice-Admiralty Courts Act 1863, governing the practice of the Vice-Admiralty Courts at that time are still applicable in Namibia[[55]](#footnote-55) and manifestly out of date. The Rules were explicitly stated to be applicable to the Vice-Admiralty Court in the Cape of Good Hope.[[56]](#footnote-56) These Rules had applied also to the Colonial Court of Admiralty in South Africa, which remained in force until 1 November 1986 - for three years after the commencement of the 1983 Act which repealed and replaced the 1890 Act in South Africa on 1 November 1983.[[57]](#footnote-57)

**4. POLICY OPTIONS CONCERNING THE SUBSTANTIVE ADMIRALTY LAW TO BE APPLIED**

Prior to the independence of Namibia, Roman-Dutch law, as it applied in South Africa, was also applied in Namibia; and, since independence on 20 March 1990, Roman-Dutch is still applicable in Namibia.[[58]](#footnote-58) Namibia belongs to that particular group of Commonwealth jurisdictions (Botswana, Lesotho, South Africa, Sri Lanka, Swaziland and Zimbabwe[[59]](#footnote-59)) which apply a mixed and/or hybrid system of Roman-Dutch civil law and English common law.[[60]](#footnote-60) In such a bifurcated system, one of the most fundamental - and controversial – policy questions is whether Roman-Dutch law or English law should be applied to maritime claims in the High Court in the exercise of its admiralty, as opposed to its parochial, jurisdiction.

This question did not, of course, arise in Australia, Hong Kong, New Zealand and Singapore where the Colonial Courts of Admiralty Act 1890 also applied.[[61]](#footnote-61) But it did arise in South Africa within the wider context of the *bellum juridicum* of Roman-Dutch law ‘purists’ (less charitably ‘antiquarians’) between English law ‘modernists’ or ‘pragmatists’ (less charitably) ‘pollutionists.’ And the battle raged most fiercely in the fields of delict/tort, contract and criminal law, with the English law lobby at its strongest in in the nineteenth and twentieth centuries, and the Roman-Dutch law lobby experiencing a renaissance during the period 1950-1980.[[62]](#footnote-62) As to admiralty and maritime law, in 1875 De Villiers CJ in South Africa held, in a case dealing with a bill of lading, that:

‘No Roman-Dutch law authorities have been quoted in this case, nor indeed are they likely to be of much assistance to the Court in a question affecting the merchant law of the present day. The enormous development of commerce in recent times requires a corresponding development of the mercantile law, so that it becomes impossible rigidly to apply the rules which obtained in Holland in the beginning of the present century to questions which arise out of customs of later growth.’

As Chairman of the Commission on Law Reform in 1879, De Villiers CJ recommended English maritime law as ‘a highly necessary and important change in the laws of the Colony.’[[63]](#footnote-63) When the Colonial Courts of Admiralty Act 1890 was due to be repealed and replaced in South Africa, the question of the law to be applied provoked debate in Parliament;[[64]](#footnote-64) and the Admiralty Jurisdiction Regulation Bill originally provided in clause 7(1)(b) for the Admiralty Court to take account of:

‘The laws, past or present, and decisions of courts of maritime States with regard to maritime matters and the views of writers with regard to such matters; [and] the provisions of any international convention, whether or not the Republic is a party to such a convention’.

This clause, being obviously overly-wide and imprecise, would have led to protracted arguments as to the law to be applied. So, it was replaced by s 6 of the 1983 Act as follows:

‘(1)  Notwithstanding anything to the contrary in any law or the common law contained a court in the exercise of its admiralty jurisdiction shall– (a) with regard to any matter in respect of which a court of admiralty of the Republic referred to in the Colonial Courts of Admiralty Act, 1890, of the United Kingdom, had jurisdiction immediately before the commencement of this Act, apply the law which the High Court of Justice of the United Kingdom in the exercise of its admiralty jurisdiction would have applied with regard to such a matter at such commencement, in so far as that law can be applied; (b) with regard to any other matter, apply the Roman-Dutch law applicable in the Republic.’

But whether s 6 is an improvement may evoke different views. The incorrect reference to ‘High Court of Justice of the United Kingdom’ in s 6 must be taken to be a reference to the Supreme Court of England and Wales as constituted by the Supreme Court Act 1981, now the Senior Courts Act 1981. That much is clear; but the interpretation and implementation of s 6(1) bristles with difficulties. Shipping disputes are often urgent matters and the law to be applied should therefore be readily ascertainable. But s 6(1) is no model of pellucid clarity, its comprehensive meaning still being established by litigation. In *Transol Bunker BV v MV Andrico Unity*, *Grecian-Mar SRL v MV Andrico Unity[[65]](#footnote-65)* Corbett CJ held that under s 6(1)

‘a Provincial or Local Division of the Supreme Court [now the High Court] is required in the exercise of its admiralty jurisdiction to apply English admiralty law, as it was on 1 November 1983, with regard to ‘any matter’ … in respect of which a pre-1983 South African Court of admiralty, established under the Colonial Courts of Admiralty Act 1890, had jurisdiction immediately prior to 1 November 1983; and with regard to any other matter to apply Roman-Dutch law’.

The meaning of s 6(1) thus depends on the proper definition of the particular ‘matter’ in question. So, for example, if the matter is based on contract of marine insurance[[66]](#footnote-66)or an attachment of property to found or confirm jurisdiction[[67]](#footnote-67) or a sheriff’s maritime claim for ‘preservation expenses,’[[68]](#footnote-68) or a charterparty Roman-Dutch law is applicable. But when, for instance, the matter is the recognition of a foreign maritime lien or a maritime claim based or damage done by a ship[[69]](#footnote-69) English law as of 1 November 1983 is applicable. That one court should apply one of two possible legal systems laws (depending on the sometimes arguable classification of the matter), leading to different procedures and judgments, is manifestly unsatisfactory.

English cases subsequent to 1 November 1983 may be binding, provided they reflect English law as of 1 November 1983. They must, therefore, be examined to determine their applicability.[[70]](#footnote-70) South African cases prior to 1 November 1983 may also be applicable, provided they, too, reflect English law as of 1983. Again, close examination of the cases is required.

The South African Admiralty Court must, of course, apply the most authoritative English law.[[71]](#footnote-71) So, decisions of the Privy Council – not strictly binding in England – are also not binding in South Africa, but obviously entitled to greater persuasive authority under s 6(1).[[72]](#footnote-72) Although an English statute is clearly an authoritative source of English law, its application in South Africa may give obviously rise to practical difficulties for lack of suitable local application, rendering its relevance moot.

Although s 6(1) is more precise than clause 7(1)(b), effecting to some extent a reconciliation between competing pro-English law and pro-Roman-Dutch law lobbies,[[73]](#footnote-73) the reconciliation was - and remains - controversial, despite valiant attempts by the Maritime Law Association of South Africa to amend s 6. In a memorable metaphor Professors HR Hahlo and Ellison Kahn said generally of Roman-Dutch law, ‘Like a jewel in a brooch, the Roman-Dutch law in South Africa today glitters in a setting that was made in England.’[[74]](#footnote-74) But Professor Booysen with particular reference to admiralty law is of the view that:

‘The incorporation by one independent State of another’s legal system with which no constitutional links, apart from cool diplomatic relations, any longer exist, is not only an extraordinary step but also reflects unfavourably on a State’s sovereignty and its parliamentary, judicial and administrative ability to develop its own laws.’[[75]](#footnote-75)

In so far as a majority judicial view can be determined, it would appear to favour the application of English law, or at least reference to it as a source of very persuasive precedent. Thus, Leon J described the Roman-Dutch maritime law as ‘largely fragmentary and relatively undeveloped as a modern system of mercantile law,’[[76]](#footnote-76) while Friedman J, speaking extra-curially, expressed the view that:

‘Without wishing to detract from the greatness of our Roman-Dutch writers of the seventeenth and eighteenth century, one must point out that much of what they have to say about many of the aspects of maritime law have little application, and cannot readily be adapted to modern situations. In addition, their writings, to a certain extent, were commentaries on statutory enactments in the Netherlands, not all of which necessarily have been applied in South Africa; some were promulgated subsequent to the year 1652 (in which case they would apply in South Africa in certain circumstances only) and some were laws of a purely local nature (in which case they would not form part of the Roman-Dutch law in force in South Africa at all).’[[77]](#footnote-77)

The utility of Roman-Dutch law in relation to charterparties has been acknowledged only in respect of general principles,[[78]](#footnote-78) while the application of that system of law to contracts of, for example, marine insurance was likened by Professor Davis (now Davis J) to the ‘automatic socialisation of Rip van Winkle into the last two decades of the twentieth century.’[[79]](#footnote-79) Despite a decision of the Appellate Division of South Africa (now the Supreme Court of South Africa) in which the history of marine insurance was canvassed,[[80]](#footnote-80) the value of Roman-Dutch law as a viable system of law to govern contracts of marine insurance has been considered to be largely undetermined and uncertain.[[81]](#footnote-81) Even subsequent and substantial research into the Roman-Dutch law of marine insurance[[82]](#footnote-82) has apparently failed to convince the marine insurance industry of the viability of that legal system. On the other hand, the industry has not embraced the proposed Marine Insurance Bill based on the English Marine Insurance Act of 1906, which was drafted under the auspices of the Maritime Law Association of South Africa. But English law will probably be heavily relied upon where, for instance, the self-same clauses in a contract of marine insurance to be construed by a South African Admiralty Court have already been interpreted in an English judgment.[[83]](#footnote-83)

So, for Namibia, the most fundamental question in repealing the 1890 Act is whether or not s 6(1) of the 1983 Act of South Africa should serve as a model for the law to be applied? For several policy reasons, the answer is in the negative. First, it would be anachronistic and arbitrary for the Namibian Court in the early twenty-first century to apply two different systems of substantive law, depending upon the vagaries of the admiralty jurisdiction of the English Admiralty Court in the late nineteenth century. What is more, the application of English law - frozen as of 1 November 1983 - would ensure the instant obsolescence of some areas of the law and the incipient decrepitude in respect of other areas of the law.

That the Namibian Admiralty Court and the Supreme Court of Appeal would be bound to apply English law – whether or not those Courts consider the English law to result in a just determination of a particular maritime claim – would fix the Namibian court with an invidious responsibility. Although the binding force of English law would of course have to yield to the Constitution of Namibia, the forced application of English law, would appear to be based on the assumption that the Namibian Courts lack the resources to develop their own law or even to decide for themselves when to depart from some or other aspect of English law. This is surely an untenable assumption in any independent jurisdiction; and is certainly not a tenable assumption in South Africa, which is one the most popular and major arrest jurisdictions of the world. The admiralty courts in Australia, New Zealand, Singapore and Hong Kong have, as discussed below, rejected the application of the procedural theory expounded by the House of Lords in *The Indian Grace No. 2[[84]](#footnote-84)* in respect of the nature of the action *in rem.* Although Steel J has spoken extra-curially of the ‘engine room’ of the development of admiralty law moving from England to Anglo-Commonwealth jurisdictions[[85]](#footnote-85), in Australia Allsop J has paid tribute to the great international importance of English admiralty law.[[86]](#footnote-86) The enduring and evolving value of English admiralty law for Anglo-Commonwealth jurisdictions, and the even wider international recognition and respect enjoyed by that law, would it is suggested be generally accepted.

Taking all these considerations into account, the Bill - diverging widely from its South African counterpart - provides for the application of current and appropriate English admiralty and maritime law (not Roman-Dutch law) while allowing for the reception of other Anglo-Commonwealth precedent to all maritime matters and claim. Unlike the law in South Africa, English law is not binding on the High Court of Namibia in the exercise of its admiralty jurisdiction:

‘(1) Notwithstanding anything to the contrary in any other law or the common law contained, the High Court shall, in the determination of any maritime matter or claim, apply the law which the Supreme Court of England and Wales as constituted by the Senior Courts Act 1981 would apply to the maritime matter or claim, provided that law can be applied and there is no compelling reason not to apply the law.

(2) Subject to subsection (1) of this section, the High Court may, in the interpretation and application of this Act, consider the International Convention for the Unification of certain Rules relating to the Arrest of Seagoing Ships 1952, the preparatory texts to that Convention, the decisions of foreign courts in respect of comparative legislative provisions, and any publication.

(3)  The provisions of subsections (1) and (2) of this section shall not derogate from the provisions of any other law of Namibia.

(5) The provisions of subsections (1) and (2) of this section shall not supersede any agreement relating to the system of law to be applied in the event of a dispute.’

In comparison with s 6(1) of the 1983 Act, there are inherent in this unprecedented draft legislation several policy advantages for Namibia, which combine, it is suggested, the advantages but exclude the disadvantages of the application of English law. First, the Admiralty Court would apply only one legal system; and not two systems of law, giving different results. Second, there would be no need for a painstaking examination of the history of the English Admiralty Court in order to determine whether English law or Roman-Dutch law would be applicable. Third, the applicable English law would not be frozen as of 1 November 1983, progressively falling out of date; instead, it would be current English law abreast of contemporary developments in international business and trade. Fourth, there would be no need to determine whether the potentially applicable English law reflects English law as at 1 November 1983 or some earlier or later date. Fifth, the Courts of Namibia would not be absolutely bound by current English law, but would be free to depart from such law where they find compelling reasons to do so, thereby developing when necessary and appropriate Namibian admiralty law suited to national and international circumstances that are relevant to Namibia. Sixth, the Courts of Namibia would not have to adopt and/or adapt old and modern Roman-Dutch law to such circumstances. Seventh, the application of current English law would (most probably more than Roman-Dutch law) be recognised by the international maritime business community, thereby facilitating the international trade of Namibia. And, finally, Namibia would inherit the benefit of a highly sophisticated, internationally recognised and respected body of admiralty law developed at great cost over many centuries that would update and build upon the English admiralty law already being applied in the High Court in the exercise of its admiralty jurisdiction under the 1890 Act.

**5. SHOULD THE NATURE OF THE ACTION *IN REM* BE REFORMED?**

Assuming the application of current English law under the Bill, a question of national significance and international interest arises in respect of the practical utility of the utility of the action *in rem*. Since the High Court in Namibia would be enjoined to apply English law, unless there is a compelling reason not to do so, should the legislature be content to remain silent in the light of the unanimous but controversial decision of the House of Lords in *The* *Indian Grace No. 2[[87]](#footnote-87)* (described as a ‘volcanic disturbance’ by Steel J[[88]](#footnote-88) and as a matter of ‘the utmost importance’ by Allsop J[[89]](#footnote-89)). In the House of Lords it was held that an action *in rem* was (for the purposes of s 34 of the English Civil Jurisdiction and Judgments Act 1982), to be regarded as an action against the shipowners, that is, an action *in personam,* from the moment that the Admiralty Court is seized with jurisdiction, so that the action *in rem* is not against the ship (as the personification theory would have it) but against the shipowner (in terms of the procedural theory). Since an action *in personam* had already been brought in India for damage to cargo, it was held to be contrary to s 34 to permit the same issue to be litigated afresh between the same parties in an action *in rem* in England. The action *in personam* thus merged with the action *in rem*.

The procedural theory of the nature of the action *in rem* as described in *The Indian Grace No. 2* does not appear to have been followed in any comparative Commonwealth jurisdiction. In Hong Kong, in *The Britannia*[[90]](#footnote-90), the law prior to *The Indian Grace No. 2* was invoked - without reference to decision in the House of Lords - on the basis that a cause of action *in rem* does not merge in a judgment *in personam*. In Singapore, in *Kuo Fen Ching v Dauphin Offshore Engineering & Trading Pte Ltd,*[[91]](#footnote-91) the procedural theory as portrayed in *The Indian Grace No.* 2 was dismissed as a ‘theoretical’ exposition, not constituting the *ratio*, so that a writ *in rem* issued and served on a ship survived a change of ownership of the ship, including the dissolution of the shipowing company. Otherwise, it was held, a good action *in rem* could be defeated by dissolving the defendant shipowning company (resulting in the non-existence of the shipowners due to financial impecuniosity), after having entered an appearance to defend. In New Zealand, in *The Irina Zharkikh and Ksenia Zharkikh*[[92]](#footnote-92) the rule that an unsatisfied *in personam* judgment did not exclude a subsequent action *in rem* was upheld and extended by analogy to an unsatisfied arbitral award (notwithstanding *The Indian Grace No. 2*). In the Federal Court of Australia, in *The Comandate,[[93]](#footnote-93)* it was held that, prior to the unconditional appearance of the relevant person, the action *in rem* is - contrary to *The Indian Grace No. 2* - against the ship, not the owner or demise charterer of the ship. After appearance, the action *in rem* continues as an action *in rem* and also as an action *in personam* against the relevant person who appears. In the Supreme Court of South Africa, in *Transnet Ltd v The Owner of the MV Alina II[[94]](#footnote-94)*, it was assumed - without deciding - that a claimant whose claim has not been satisfied after an action *in rem* may bring an action *in personam* for the balance, provided the owner is personally liable, so that the judgment *in rem* does not merge in a judgment *in personam*, although for the purposes of the decision it was expressly held that it was not strictly necessary to consider *The Indian Grace No. 2.*[[95]](#footnote-95)

**6. WHICH FICTION, THEORY AND POLICY?**

In the absence of specific legislation what would the position be in Namibia? Would the High Court follow the House of Lords in *The Indian Grace No. 2*? Or would the Court find a compelling reason not to do so? Or would it adopt, adapt or fashion a legal fiction? Or would it apply the procedural theory, the personification theory, or a hybrid theory? Or would it determine the issue on the basis that the doctrine received from English law, while not entirely satisfactory, is clearly not compellingly wrong and is therefore to be followed and applied? Or would it hold that had the legislature intended it to depart from the House of Lords it would have legislated accordingly?

Arguments supporting some of these options are to be found in one form or another, direct or indirect, in the varied, often cross-referenced, and sometimes competing commentaries concerning the nature of the action *in rem* and/or the effect of *The Indian Grace No. 2* emanating from different jurisdictions, including the UK,[[96]](#footnote-96) the USA,[[97]](#footnote-97) Australia,[[98]](#footnote-98) New Zealand,[[99]](#footnote-99) Hong Kong,[[100]](#footnote-100) and South Africa.[[101]](#footnote-101) Since the answer of the High Court in Namibia would, it is suggested, be largely uncertain it would be tantamount to provide the answer in draft legislation. And to legislate is to choose, not between fictions and theories (as useful as they may sometimes be to understanding, developing and applying existing law), but to provide for the promotion of specific policy objectives. That policy is to provide for the just enforcement of valid maritime claims and to give effect to the international obligations of the state under the 1952 Convention. This policy trumps fictions, theories, and doctrine. So approached the nature of the action *in rem* would instead become a matter of statutory construction. Existing and competing fictions, theories and doctrines would not be reliable guides to the construction of the statute, leading as they probably would in this particular case to uncertainty, even compounding confusion.

To ensure the full payment of a valid maritime claim is just policy objective. The action *in rem* is the prime means by which that objective may be achieved. But *The India Grace No. 2* may diminish the utility of the action *in rem* for where there is no appearance and no full satisfaction of the default judgment, there could be no subsequent action *in personam* for the balance of the claim, given the formidable defences based on cause of action estoppel and/or issue estoppel and/or merger and/or *res judicata* that might be arrayed against the claimant. This would be unfortunate in that a strong claim proved in a default judgment *in rem* – and proved to the same standard as if there was an appearance[[102]](#footnote-102) - may well go unsatisfied, being limited to the value of the ship or even less if there are other claimants with higher priorities. For the claimant, this is an unpredictable happenstance. To preclude the claimant from subsequently proceeding in an action *in personam* for the balance of the claim is to put legal theory before practical utility, with results that are adverse to policy objectives.

Nor should an appearance to defend an action *in rem* necessarily result in personal liability if such liability did not already exist. This contrary to the notion that a person entering an appearance to an action *in rem* thereby necessarily incurs personal liability on the underlying maritime claim irrespective of whether the person is otherwise personally liable on the claim. Entering an appearance to defend and defending an action *in rem* is indeed a submission to the jurisdiction. And, where a person entering the appearance to defend is already personally liable on the underlying claim and is personally cited under the forms of procedure that person has then been properly cited and any judgment will be enforceable as a judgment *in personam* against all the assets of that person. But, as mentioned, an appearance to defend should not of itself, automatically and invariably, result in personal liability. Assume, for example, an action *in rem* against a ship for the unpaid wages of a seafarer. The action *in rem* gives effect to the maritime lien for unpaid wages. That maritime lien arises automatically by mere operation of law and, provided the seafarer has provided service to the ship, it arises independently of the existence or not of any employment agreement and is independent of the personal liability of the shipowner. Why, and how, can an appearance in these circumstances for the limited purpose of submitting to the jurisdiction and defending the action *in rem* also be interpreted as an acceptance of *in personam* liability by the shipowner, when no such liability could have existed prior to the appearance? If by entering an appearance to defend the action *in rem* (where the claim is limited to the value of the arrested property) the shipowner is automatically deemed to have accepted *in personam* liability, it follows that to defend the action *in rem* is to run the risk that the claim may now become enforceable against all the other property and assets of the shipowner, even where he or she was not personally liable for the claim at the time it arose. This consideration would make an owner think twice before defending an action *in rem.*

So, how, if at all, may draft legislation give effect to such considerations and the policy objectives already outlined?

**7. LEGISLATIVE OPTIONS**

The answer, it is argued, lies in the following clause in the Bill which would, if enacted, better ensure that the considerations and policy objectives mentioned above are achieved:

‘In an action *in rem* in respect of a maritime claim –

(a) the action *in rem* shall have effect only against the particular property arrested in the action *in rem* and shall not be deemed in any way to have effect as an action *in personam* in the event that there is no appearance to defend*;* and,

(b) notwithstanding no appearance to defend and default judgment in the action *in rem* under paragraph (a), the maritime claimant may also bring an action *in personam* for so long as, and to the extent that, such default judgment remains unsatisfied and there is *in personam* liability; and

(c) an appearance to defend an action *in rem* is a submission to the jurisdiction of the court and does not in itself create or impose *in personam* liability if such liability did not already exist; and

(d) an action *in rem* and an action *in personam* may, if the requirements for the actions are fulfilled, be brought simultaneously to the extent of the claim.’

Paragraph (a) should remove the debilitating effect that a strict application of the procedural theory would have on the utility of the action *in rem* (reducing it to a ‘dangerous lottery),*[[103]](#footnote-103)* and indeed should obviate the need for any reference to any fiction or theory. Nor does the clause as a whole draw any distinction between an action *in rem* based on a maritime lien as opposed to a statutory lien.

Paragraph (b) should facilitate the full satisfaction of a claim already justly adjudged in an action *in rem* if there already is *in personam* liability. Conversely, it should prevent an abuse of process where, for instance, the action *in personam* is either brought in an attempt to claim more than a full satisfaction of the maritime claim, or to bring a second claim where the first claim is successfully defended, unjustly violating the principle of *res judicata.*

Paragraph (c) makes it clear that an appearance to defend an action *in rem* is a submission to the exercise of the *in rem* jurisdiction. Furthermore, by making an appearance to defend the owner of the ship is potentially liable to satisfy the claim to the full extent of his assets, his liability not being limited by the value of the ship, provided however the owner is personally liable on the claim.

Paragraph (d) is intended to clarify the relationship between the other paragraphs and their possible implications. It should make it clear that paragraph (b) is not to be construed as permitting only sequential but also parallel or concurrent actions *in rem* and *in personam*.

**8. CONCLUSION**

The international trade of Namibia is growing, offshore mining and oil exploration is being developed, more goods are moving through Namibia to and from neighbouring states, ports are being expanded, more supplies and services are being provided to ships, and ship repair facilities are increasing. Maritime claims, too, will inevitably increase and be dealt with on the basis of the action *in rem* and the action *in personam*.

The draft reform of admiralty jurisdiction giving domestic effect to the 1952 Convention and much English admiralty law - but keeping distinct the action *in rem* and the action *in personam* - would better serve current policy objectives and the interests of litigants. And in respect of these actions, the law of Namibia - with unique statutory provisions - would be less aligned with English law and more aligned with the law in other Commonwealth jurisdictions.

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2. The date of the origin of the Admiralty Court is a matter of debate: see, for example, Sanborn, *Origins of the Early English Maritime and Commercial Law* (Profession Books Ltd 1930) 278‑284; Marsden *Select Pleas in the Court of Admiralty* vol I (B. Quaritch, 1894) xii; Roscoe, *Admiralty Jurisdiction and Practice* (Stevens and sons 1920) 2–3; Spelman, *Of the Admiral – Jurisdiction and the Officers thereof* (Lord Bishop of Lincoln 1723) 217‑223; Browne, *A Compendious View of the Civil Law and of the Law of the Admiralty* vol II (Butterworth 1802) 21‑26; Godolphin, *A View of the Admiral’s Jurisdiction* (Edmund Paxton 1661) 1‑7 23‑30; Marsden, ‘Six Centuries of the Admiralty Court’ (1898) 67 *The Nautical Magazine* 85 86 89; Senior, (1919) 35 *Law Quarterly Review*  73 74; and Mears, *Select Essays in Anglo-American Legal History* vol II (Little Brown and Company 1908) 353. [↑](#footnote-ref-2)
3. For example, in *International Underwater Sampling Ltd and Another v MEP Systems Pte Ltd* 2011 (1) NR 81 (SC) all the parties were foreign, the ship was foreign flagged, and the cause of action arose abroad. [↑](#footnote-ref-3)
4. *(53 and 54 Vict c 27). See Trivett & Co (Pty) Ltd and Others v Wm Brandt's Sons & Co Ltd and Others* 1975 (3) SA 423 (A). [↑](#footnote-ref-4)
5. *Trivett and Co (Pty) Ltd v Wm Brandt’s Sons and Co Ltd* 1975 (3) SA 423 (A) 434. [↑](#footnote-ref-5)
6. *The Yuri Maru* 1927 AC 906 (PC) 913. [↑](#footnote-ref-6)
7. (9 Edw 7 c 9). [↑](#footnote-ref-7)
8. Since the Union of South Africa’was clearly also a British possession’ the Colonial Courts of Admiralty Act was applied in the Republic: *Trivett and Co (Pty) Ltd v Wm Brandt’s Sons and Co Ltd* 1975 (3) SA 423 (A) 432. And, by virtue of s 135 of the 1909 Act, the continuation of the 1890 Act was effectively affirmed: ‘all laws in force in the several colonies at the establishment of the Union shall continue in force in the respective provinces until repealed or amended by Parliament’. See further *Tharros Shipping Corp SA v Owner of the Ship Golden Ocean* 1972 (4) SA 316 (N) 319. [↑](#footnote-ref-8)
9. *Trivett and Co (Pty) Ltd v Wm Brandt’s Sons and Co Ltd* 1975 (3) SA 423 (A) 432 [↑](#footnote-ref-9)
10. *Freiremar SA v The Prosecutor-general of Namibia and Another* 1996 NR 18 (HC) 28A*; In Binga v Administrator-General, South West Africa, and Others* 1984 (3) SA 949 (SWA) 972C-E. In *R v Goseb* 1956 (2) SA 696 (SWA) it was held that it was to be inferred from s 1 (1) of Proclamation 21 of 1919 (SWA) that the Legislature intended to introduce into South West Africa (now Namibia) the law of South Africa, as existing and applied in the province of the Cape of Good Hope. See also *S v Redondo* 1993 (2) SA 528 (NmS) 539I-540E; and B Bamford, *The Law of Shipping and Carriage in South Africa* (Juta & Co Ltd 1983) 4. [↑](#footnote-ref-10)
11. See *Euromarine International of Mauren v The Ship Berg and Others* 1984 (4) SA 647 (N) 665E; *Freiremar SA v The Prosecutor-general of Namibia and Another* 1996 NR 18 (HC) 28E. [↑](#footnote-ref-11)
12. 3 & 4 Vict c 65. [↑](#footnote-ref-12)
13. 24 Vict c 10. [↑](#footnote-ref-13)
14. See *Banco Exterior De Espana SA and Another v Government of the Republic of Namibia and Another* 1992 (2) SA 434 (Nm) 442C; *Freiremar SA v The Prosecutor-general of Namibia and Another* 1996 NR 18 (HC) 27H-J, 28C; *International Underwater Sampling Ltd and Another v MEP Systems Pte Ltd* 2011 (1) NR 81 (SC). [↑](#footnote-ref-14)
15. The Convention, which entered into force at the international level on 24 February 1956, has received the ratification or accession of 78 states. [↑](#footnote-ref-15)
16. As to the associated ship provisions see: Hilton Staniland, ‘Shipping’ in *The Law of South Africa* (LexisNexis Butterworths 2006) para 168; John Hare, *Shipping Law & Admiralty Jurisdiction in South Africa* (Juta and Company Ltd 2009) 103-116; Gys Hofmeyr, *Admiralty Jurisdiction Law and Practice in South Africa* (Juta and Company Ltd 2006) 70-76; and especially Malcolm Wallis *The Associated Ship & SA Admiralty Jurisdiction* (Siber Ink 2011) [↑](#footnote-ref-16)
17. This was the position in South Africa and there is no reason why the current position is different in Namibia. Although the 1890 Act came into force in 1891, the date at which the jurisdiction of the Colonial Court of Admiralty in South African was determined, and hence in Namibia, was 1890: see *Beaver Marine (Pty) Ltd v Wuest* 1978 (4) SA 263 (A) 274; *Malilang v MV Houda Pearl* 1986 (2) SA 714 (A) 723; *Shipping Corporation of India Ltd v Evodmon Corporation* 1994 (1) SA 550 (A) 560 but contrast *The Wave Dancer: Nel v Toron Screen Corporation (Pty) Ltd* 1996 (4) SA 1167 (A) 1176; *Magat v MV Houda Pearl* 1983 (3) SA 421 (N) 425-426. [↑](#footnote-ref-17)
18. See *Freiremar SA v Prosecutor-General of Namibia and Another* [1996 NR 18 (HC)](http://ipproducts.jutalaw.co.za/nxt/foliolinks.asp?f=xhitlist&xhitlist_x=Advanced&xhitlist_vpc=first&xhitlist_xsl=querylink.xsl&xhitlist_sel=title;path;content-type;home-title&xhitlist_d=%7blrna%7d&xhitlist_q=%5bfield%20folio-destination-name:'y1996NRpg18'%5d&xhitlist_md=target-id=0-0-0-341); *Namibia Ports Authority v MV Rybak Leningrada* [1996 NR 355 (HC)](http://ipproducts.jutalaw.co.za/nxt/foliolinks.asp?f=xhitlist&xhitlist_x=Advanced&xhitlist_vpc=first&xhitlist_xsl=querylink.xsl&xhitlist_sel=title;path;content-type;home-title&xhitlist_d=%7blrna%7d&xhitlist_q=%5bfield%20folio-destination-name:'y1996NRpg355'%5d&xhitlist_md=target-id=0-0-0-343); *International Underwater Sampling Ltd and Another v MEP Systems (Pty) Ltd* 2010 (2) NR 468 (HC) 469C-D; and *International Underwater Sampling Ltd and Another v MEP Systems Pte Ltd* 2011 (1) NR 81 (SC). Other earlier legislation touching upon admiralty jurisdiction included: 13 Richard II, Statutes I, chapter 5; 15 Richard II, chapter 3; 17 Edward II, chapter 13; 2 Henry IV, chapter II; and 2 William and Mary, Session 2, chapter 2. [↑](#footnote-ref-18)
19. *Magat v MV Houda Pearl* 1983 (3) SA 421 (N) 426. [↑](#footnote-ref-19)
20. Admiralty Court Act of 1840, s 6. [↑](#footnote-ref-20)
21. Admiralty Court Act of 1861, s 7. [↑](#footnote-ref-21)
22. Jurisdiction over these claims was within the inherent jurisdiction of the English Admiralty Court: *The Aline* (1839) 1 Wm Rob 111; *The Janet Wilson* (1857) Sw 261; and *The Dowthorpe* (1843) 2 Wm Rob 73. These bonds are now extinct given modern means of communication between the master and the shipowner, which enables a master to request funds from the shipowners for the prosecution of the voyage without the necessity of raising money on the security of the ship or its cargo. [↑](#footnote-ref-22)
23. Jurisdiction over these claims was within the inherent jurisdiction of the English Admiralty Court, which extended by s 10 of the 1861 Act. [↑](#footnote-ref-23)
24. Admiralty Court Act 1861, s 10. [↑](#footnote-ref-24)
25. Admiralty Court Act of 1840, s 6. [↑](#footnote-ref-25)
26. Admiralty Court Act of 1840, s 6; Admiralty Court Act of 1861 s 5. [↑](#footnote-ref-26)
27. Jurisdiction over these claims was within the inherent jurisdiction of the English Admiralty Court: *The Nelson* (1805) 7 Ch Rob 227; *The Bee* (1822) 2 Dods 498; the *Clan Grant* (1887) 6 Asp MLC 144. [↑](#footnote-ref-27)
28. Admiralty Court Act of 1840, s 4; Admiralty Court Act of 1861, s 8. [↑](#footnote-ref-28)
29. Jurisdiction over these claims was within the inherent jurisdiction of the English Admiralty Court. [↑](#footnote-ref-29)
30. Admiralty Court Act of 1861, s 6. [↑](#footnote-ref-30)
31. Admiralty Court Act of 1840, s 3. [↑](#footnote-ref-31)
32. Admiralty Court Act of 1840, s 22. [↑](#footnote-ref-32)
33. *Magat v MV Houda Pearl* 1982 (2) SA 37 (N) 39; *Wm Brandt’s Sons & Co Ltd v Waikiwi Shipping Co Ltd* 1973 (4) SA 358 (N) 360; *Kandagasabapathy v MV Melina Tsiris*, *Hethumuni v MV Antigoni Tsiris* 1981 (3) SA 950 (N) 953; *The Wave Dancer Nel v Toron Screen Corporation* (*Pty*) *Ltd* 1996 (4) SA 1167 (A) 1176; *Transol Bunker BV v MV Andrico Unity; Grecian-Mar SRLl v MV Andrico Unity* 1989 (4) SA 325 (A) 334-335. [↑](#footnote-ref-33)
34. In South Africa, for instance, the approach of the Colonial Court of Admiralty was explicitly left open with regard to such decisions: *Malilang v MV Houda Pearl* 1986 (2) SA 714 (A) 723. [↑](#footnote-ref-34)
35. In *Malilang v MV Houda Pearl* 1986 (3) SA 960 (A) 966–967 the court declined to apply *Miliangos v George Frank* (*Textiles*) *Ltd* 1976 AC 443 (HL), dealing with the date on which a successful claim in foreign currency should be converted into the local currency. [↑](#footnote-ref-35)
36. South African Law Commission, *Report on the review of the law of Admiralty jurisdiction*, *Project* 32, 15 September (1982) 10. [↑](#footnote-ref-36)
37. In South Africa it has been held that when jurisdiction was created by legislation, it could not be extended by either the acquiescence or the express consent of the parties: *Alahaji Mai Deribe & Sons v The Ship Golden Togo* 1986 (1) SA 505 (N). [↑](#footnote-ref-37)
38. In the seventeenth and eighteenth centuries, there existed in the English Admiralty Court an archaic right, long since obsolete, in terms of which it was possible to arrest the actual person of the defendant, if he was within the realm. The last recorded instance of such an arrest appears to have occurred in 1780: per Dr Lushington in *The Clara* (1855) Sw 1 accepted as correct in *The Beldis* [1935] All ER Rep 760, 768. Any personal property of the defendant within the realm, whether it was the ship or other property, could also have been arrested: *The Heinrich Bjorn* (1885) 10 PD 44 also cited in *The Beldis* [1935] All ER Rep 760, 765. It did not matter whether or not the ship had no connection with the cause of action, so long as the ship belonged to the defendant. The purpose of the arrest was to found jurisdiction (*The Beldis* [1935] All ER Rep 760, 767) and to make the defendant provide bail or security for the claim (*The Banco* [1971] 1 Lloyd’s Rep 49, 53). If the defendant did not appear, the proceedings went on as an action *in personam*: *The Beldis* [1935] All ER Rep 760, 767. [↑](#footnote-ref-38)
39. *The Banco* [1971] 1 All ER 524, 531. [↑](#footnote-ref-39)
40. *The Beldis* [1935] All ER Rep 760, 768. [↑](#footnote-ref-40)
41. *The Banco* [1971] 1 All ER 524, 531. [↑](#footnote-ref-41)
42. *The Beldis* [1935] All ER 760, 768. [↑](#footnote-ref-42)
43. But in civil law countries, there was at that time a right to arrest a ship or any other property of the defendant in order to found jurisdiction and to obtain security, even though the ship or other property was not connected to the cause of action. [↑](#footnote-ref-43)
44. As to the compromise see: *The Banco* [1971] 1 All ER 524, 531. [↑](#footnote-ref-44)
45. Although the practice of concurrently proceeding in arbitration and in court on the same cause, the mere expression of an intent and willingness to embark on arbitration in the context of an arrest of a ship is not such an abuse. The party will only be precluded from arresting the vessel in an action *in rem* if, upon being put to an election, the party chooses arbitration, a situation which did not obtain in *International Underwater Sampling Ltd and Another v MEP Systems Pte Ltd* 2011 (1) NR 81 (SC). As to an abuse of process, see generally *The Tuyuti* [1984] 2 All ER 545, 549 – 550; *The Andria* [1984] 1 All ER 1126, [1984] 2 WLR 570; *The Cap Bon* (1967) 1 Lloyd's Rep 543. [↑](#footnote-ref-45)
46. *International Underwater Sampling Ltd and Another v MEP Systems (Pty) Ltd* 2010 (2) NR 468 (HC) 469C-D. [↑](#footnote-ref-46)
47. *Green Fisheries Corporation v Lubrication Specialist (Pty) Ltd and Another* 2003 NR 50 (HC) 52E-F. [↑](#footnote-ref-47)
48. See s 4 of the 1861 Act: ‘The High Court of Admiralty shall have jurisdiction over any claim for the building, equipping, or repairing of any ship, if at the time of the institution of the cause the ship or the proceeds thereof are under arrest of the Court.’ [↑](#footnote-ref-48)
49. See s 5 of the 1861 Act. [↑](#footnote-ref-49)
50. 2011 (1) NR 81 (SC). [↑](#footnote-ref-50)
51. *A Weissglass NO v Savonnerie Establishment* 1992 (3) SA 928 (A) 942B. [↑](#footnote-ref-51)
52. (1821) 4 Barn & Ald 352. [↑](#footnote-ref-52)
53. This doctrine was followed in *The Riga* (1872) LR 3 A & E 516; *Foong Tai & Co v Buchheister & Co* 1908 AC 458; *The Equator* 1921 Vol 9 Ll LR 1; *Borneo Company v Mogileff' and Freight* 1921 Ll List LR 528; and *The Flecha* 1854 Vol 17 BMC 438. [↑](#footnote-ref-53)
54. *International Underwater Sampling Ltd and Another v MEP Systems Pte Ltd* 2011 (1) NR 81 (SC). [↑](#footnote-ref-54)
55. *Green Fisheries Corporation v Lubrication Specialist (Pty) Ltd and Another* 2003 NR 50 (HC) 52E-F; *Namibia Ports Authority v M V Rybak Leningrada* 1996 NR 355 (HC) 357F. A copy of the Rules is available on the website of the High Court of Namibia. [↑](#footnote-ref-55)
56. See Schedule A to the Rules. [↑](#footnote-ref-56)
57. *MT Argun v Master & Crew of the MT Argun* 2004 (1) 1 (SCA) 143;*Transnet Ltd v The Owner of the MV Alina[2011] ZASCA 129 (15 September 2011)* para 26. [↑](#footnote-ref-57)
58. By virtue of article 140(1) of the Constitution of Namibia. See also R Zimmermann and D. Visser , ‘South African Law as a Mixed Legal System’ in the Introduction to R Zimmermann and D. Visser (eds), S*outhern Cross. Civil Law and Common Law in South Africa* (1996) 3. [↑](#footnote-ref-58)
59. See JH Pain, ‘The Reception of English and Roman-Dutch Law in Africa with Reference to Botswana, Lesotho and Swaziland’(1978) 11 *Comparative and International Law Journal of Southern Africa* 137. [↑](#footnote-ref-59)
60. As to mixed jurisdiction of South Africa and other mixed jurisdictions see generally Vernon Valentine Palmer, (ed) *Mixed Jurisdictions Worldwide* (2001); E Oruca, E Attwooll and S Coyle (eds), *Studies in Legal Systems; Mixed and Mixing* (1996); K Zweigert and H Kotz, *An Introduction to Comparative Law* (1998); and T P van Reenen ‘Major Theoretical Problems of Modern Comparative Legal Methodology (3): The Criteria Employed for the Classification of Legal Systems’ (1996) 29 *Comparative and International Law Journal of Southern Africa* 71. [↑](#footnote-ref-60)
61. In, for example, Australia, Hong Kong, New Zealand and Singapore the 1890 Act was replaced by the Admiralty Act No. 34 of 1988; High Court Ordinance Chapter 4; New Zealand Maritime Law Admiralty Act 1973; and the High Court (Admiralty Jurisdiction) Act (Cap 123, 2001 Rev Ed) respectively. [↑](#footnote-ref-61)
62. See Vernon Valentine Palmer (ed), *Mixed Jurisdictions Worldwide The Third Legal Family* (Cambridge 2001) 83-200; Edwin Cameron, ‘Legal Chauvinism, Executive-Mindedness and Justice LC Steyn’s Impact on South African Law’ (1982) 99 *South African Law Journal* 38; A van Blerk, ‘The Irony of Labels’ (1982) 47 *Journal for Contemporary Roman-Dutch Law* 255 and ‘The Genesis of the Modernist-Purist Debate: A Historical Bird’s-eye View’ (1984) 47 *Journal for Contemporary Roman-Dutch Law* 255. [↑](#footnote-ref-62)
63. J P van Niekerk, `Insurance Law’ in D Zimmermann and D P Visser (eds), *Southern Cross: Civil Law and Common Law in South Africa* (Clarendon Press (1996) 447. [↑](#footnote-ref-63)
64. House of Assembly Debates (Hansard) Vol 108, col. 11177 (11 August 1983). [↑](#footnote-ref-64)
65. 1989 (4) SA 325 (A) at 334. [↑](#footnote-ref-65)
66. *Shooter t/a Shooter’s Fisheries v Incorporated General Insurances Ltd* 1984 (4) SA 269 (D). [↑](#footnote-ref-66)
67. *The Shipping Corporation of India Ltd v Evdomon Corporation* 1994 (1) SA 550 (A). [↑](#footnote-ref-67)
68. *MT Argun v Master & Crew of the MT Argun* 2004 (1) SA 1 (SCA) 143. [↑](#footnote-ref-68)
69. *MV Stella Tingas*: *Transnet Ltd t/a Portnet v Owners of the MV Stella Tingas* 2002 (1) SA 647 (D). [↑](#footnote-ref-69)
70. See in this respect the views of Douglas Shaw *Admiralty Jurisdiction and Practice* (Juta and Company 1987) 74. [↑](#footnote-ref-70)
71. *Van der Linde v Calitz* 1967 (2) SA 239 (A) 250; *Gentiruco AG v Firestone SA* (*Pty*) *Ltd* 1972 (1) SA 589 (A) 617; *Naidoo v Marine and Trade Insurance Co Ltd* 1978 (3) SA 666 (A) 677; *Brady-Hamilton Stevedore Co v MV* “*Kalantiao*”1987 (4) SA 250 (D) 253. [↑](#footnote-ref-71)
72. *Brady-Hamilton Stevedore Co v MV* “*Kalantiao*” 1987 (4) SA 250 (D) 253; and *Transol Bunker BV v MV Andrico Unity*, *Grecian-Mar SRL v MV Andrico Unity* 1989 (4) SA 325 (A) 339–340. [↑](#footnote-ref-72)
73. Section 6(1) has been described as ‘an ingenious compromise between the pro-Admiralty and pro-Roman-Dutch lobbies’: BR Bamford, *The Law of Shipping and Carriage in South Africa* (Juta and Company 1983) 195. [↑](#footnote-ref-73)
74. *The South African Legal System* (1968) 585. [↑](#footnote-ref-74)
75. Hercules Booysen, ‘South Africa’s New Admiralty Act: A Maritime Disaster?’ (1984) 6 *Modern Business Law* 84. See also the Parliamentary debate: House of Assembly Debates (Hansard) Vol 108, col. 13106 (2 September 1983). [↑](#footnote-ref-75)
76. *Euromarine International of Mauren v The Ship Berg* 1984 (4) SA 647 (N) 665C. [↑](#footnote-ref-76)
77. DB Friedman, ‘Maritime Law in Practice and in the Courts’ (1985) 102 *South African Law Journal* 45. [↑](#footnote-ref-77)
78. Anne Waring, *Charterparties*: *a Comparative Survey of South Africa*, *English*, *and American Law* (Juta and Company 1983) 5 where it is opined that the Roman-Dutch law ‘can be authoritative as a general rule only in general principle, because the needs of modern, complex, and sophisticated shipping have far outstripped the usefulness of most of the Roman-Dutch law.’ [↑](#footnote-ref-78)
79. Editorial, ‘1984: The Return of Roman-Dutch Law’ (1984) 8 *South African Insurance Law Journal* 83; see also D M Davis ‘Marine Insurance – A Consideration of Important Aspects of Cargo Insurance’ (1983) 7 *South African Insurance Law Journal* 42, 46. [↑](#footnote-ref-79)
80. *Mutual & Federal Insurance Co Ltd v Oudt­shoorn Municipality* 1985 (1) SA 419 (A). [↑](#footnote-ref-80)
81. C Dillon and JP van Niekerk *South African Maritime Law and Marine Insurance: Selected Topics* (Butterworth 1983) 109. [↑](#footnote-ref-81)
82. See, in particular, JP van Niekerk *The Development of the Principles of Insurance Law in the Netherlands from 1500–1800* (Juta and Company 1998) where it is said that, ‘ The English law of marine insurance and of insurance generally is, and not only in an historical sense, very much of a species of European law . . . That a great deal of uniformity did exist, is obvious, the more so when superficially diverse systems such as those of the Dutch and English are compared’ (xxxvii footnote 25). [↑](#footnote-ref-82)
83. See D B Friedman ‘Maritime Law in Practice and in the Courts’ (1985) 102 *South African Law Journal* 45, 58 where the learned judge said that ‘in most spheres of maritime law the differences between legal systems are often minimal or even non-existent, and one can obtain a great deal of guidance from these other systems’. See also *Shooter t/a Shooter’s Fisheries v Incorporated General Insurances Ltd* 1984 (4) SA 269 (D) 275A, which was a case involving a contract of marine insurance where Friedman J referred to English decisions as of ‘great persuasive authority’. And, in *Zygos Corporation v Salen Rederierna AB* 1985 (2) SA 486 (C), the court was prepared in principle to consider the implementation of s 3(4) of the English Administration of Justice Act as an aid in interpreting s 3(6) and (7) of the South African 1983 Act. Compare the view of Didcott J in not referring to the English law in respect of the arrest of a ship in terms of s 5(3) of the 1983 Act in *Katagum Wholesale Commodities Co Ltd v The MV Paz* 1984 (3) SA 261 (N) 269A. [↑](#footnote-ref-83)
84. [1998] 1 Lloyd’s Rep 1. [↑](#footnote-ref-84)
85. Foreword to Damien J Cremean, *Admiralty Jurisdiction Law and Practice in Australia, New Zealand, Singapore and Hong Kong* (Federation Press 2008) v. [↑](#footnote-ref-85)
86. James Allsop, ‘Maritime Law – The Nature and Importance of Its International Character’ (2010) 34 *Tulane Maritime Law Journal* 555, 582. [↑](#footnote-ref-86)
87. [1998] 1 Lloyd’s Rep 1. [↑](#footnote-ref-87)
88. Speaking extra-curially in the foreword to Damien J Cremean, *Admiralty Jurisdiction Law and Practice in Australia, New Zealand, Singapore and Hong Kong* (Federation Press 2008) v. [↑](#footnote-ref-88)
89. James Allsop, ‘Maritime Law – The Nature and Importance of Its International Character’ (2010) 34 *Tulane Maritime Law Journal* 555, 582. [↑](#footnote-ref-89)
90. [1998] 1 HKC 221. [↑](#footnote-ref-90)
91. [1999] 2 *SLR (Reissue*) 793, 801. [↑](#footnote-ref-91)
92. [2001] 2 *Lloyd’s Rep* 319, para 72. [↑](#footnote-ref-92)
93. [2008] 1 *Lloyd’s Rep* 119 para 128. [↑](#footnote-ref-93)
94. [2011] *ZASCA* 129 (15 September 2011). [↑](#footnote-ref-94)
95. See Gys Hofmeyer, *Admiralty Jurisdiction Law and Practice in South Africa* (Juta and Company 2006) 52 where it is argued that, given the Admiralty Rules and the 1983 Act, it is ‘difficult’ to see how *The Indian Grace No. 2* is applicable in South Africa. [↑](#footnote-ref-95)
96. See, for example, Simon Beckwith, ‘*Res judicata* and foreign judgments: the *Indian Grace’* (1994) 43 *International and Comparative Law Quarterly* 185; FD Rose, ‘The Nature of Admiralty Proceedings’ 1998 *Lloyd’s Maritime and Commercial Law Quarterly*  27; Nigel Teare Q C, ‘The Admiralty action *in rem* and the House of Lords’ 1998 *Lloyd’s Maritime and Commercial Law Quarterly* 33; Brian Davenport QC, ‘End of an Old Admiralty Belief’ (1998) 114 *Law Quarterly Review* 169; Sarah Derrington, ‘The continuing utility of the action in rem’ (2007) 123 *Law Quarterly Review* 358; D C Jackson *Enforcement of Maritime Claims* (Informa Professional 2005) 17.41 - 17.42, 27.5 - 27.6; Aleka Mandaraka-Sheppard, *Modern Admiralty Law and Risk Management* (Routledge-Cavendish 2001) 87 - 93; N Meeson and J A Kimbell *Admiralty Jurisdiction and Practice* (Informa Law & Finance 2011) 3.24 - 3.29. For commentary on the decision in the Court of Appeal in *The Indian Grace No. 2* see Brian J Davenport, ‘Injustice just avoided’(1994) 110 *Law Quarterly Review* 25. [↑](#footnote-ref-96)
97. See, for example, George K Walker ‘The Personification of the Vessel in United States Civil in rem Proceedings and the International Law Context’ 15 (1991) *Maritime Lawyer* 177; Martin Davies ‘In Defense of Unpopular Virtues: Personification and Ratification’ 75 (2000-2001) Tulane Law Review 337; and for a different perspective Paul Schiff Berman ‘An Anthropological Approach to Modern Forfeiture Law: The Symbolic Function of Legal Actions Against Objects’ 11 (1999) *Yale Journal of Law and The Humanities* 18. [↑](#footnote-ref-97)
98. See, for example, Michael Jonsson ‘The Nature of the Action In Rem’ 75 (2001) *Australian Law Journal* 105; Paul Myburgh ‘Richard Cooper Memorial Lecture Admiralty Law – What is it Good For?’ 28 (2009) *University of Queensland Law Journal* 19; Andrew Dahdal and Peter Gillies ‘Characterising the Action In Rem in Australia and the Implications on International Commercial Arbitration’ 40 (2009) *Journal of Maritime Law and Commerce* 271; and Paul Myburg, ‘Arresting the Right Ship: Procedural Theory, the *In Personam* Link and Conflict of laws’ in Martin Davies (ed), *Jurisdiction and Forum Selection in International Maritime Law Essays in Honor of Robert Force* (Kluwer Law 2005) 283; James Allsop ‘Maritime Law – The Nature and Importance of Its International Character’ 34 (2010) *Tulane Maritime Law Journal* 555. [↑](#footnote-ref-98)
99. See, for example, Robert fisher ‘The Purpose of Admiralty Law’ 18 (2004) *Maritime Law Association of Australia and New Zealand* 14. [↑](#footnote-ref-99)
100. See, for example, Mark West, ‘Arbitrations, Admiralty actions in rem and the arrest of ships in the Hong Kong SAR: in the twilight of *The Indian Grace (No. 2*)?’ (2002) *Lloyd’s Maritime and Commercial Law Quarterly* 259. [↑](#footnote-ref-100)
101. See, for example, Gys Hofmeyr *Admiralty Jurisdiction Law and Practice in South Africa* (2006 Juta & Co Ltd) 50; John Hare *Shipping Law & Admiralty Jurisdiction in South Africa* (2009 Juta & Co Ltd) 34; Hilton Staniland ‘Admiralty Law’ to be published in (2011) *Annual Survey of South African Law.* [↑](#footnote-ref-101)
102. *Kuo Fen Ching v Dauphin Offshore Engineering & Trading Pte Ltd* [1999] 2 *SLR (Reissue*) 793, 803. [↑](#footnote-ref-102)
103. *Per* Allsop J in *The Comandate* [2008] 1 *Lloyd’s Rep* 119 para 128. [↑](#footnote-ref-103)