Journal Sharia and Law

Volume 2013
Number 55 *Year 27, Issue No. 55 July 2013*

Article 8

July 2013

MARITIME PRIVILEGES A STUDY OF OMANI AND ENGLISH LAW

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Cover Page Footnote

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MARITIME PRIVILEGES(1)

A STUDY OF OMANI AND ENGLISH LAW

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A. Abstract

B. Introduction

1. DEFINITION AND CHARACTERISTICS OF MARITIME LIENS

1.1. Under Omani Maritime Law 1981

a) Privileged Claim

b) Attachment to Ship

c) Survival despite transfer of Ownership

1.2. Under English Law

2. THE SCOPE OF MARITIME LIENS

2.1. Introduction

2.2. Under Omani Maritime Law 1981

2.2.1. Judicial Costs

2.2.1. Custodial Expenses incurred for the Safekeeping of the Ship

(1) The expression 'maritime privileges' is a direct translation of the Omani words referring to a claim based on a maritime lien. The expression 'maritime lien' is a concept of common law that has been translated into a Omani legal term meaning 'maritime privileges'. The Omani translation of 'maritime lien' has certainly lost its original flavour in English and it appears that some of the legal meaning of the term 'maritime lien' have been transplanted in to the Omani legal term ' maritime privileges'. Therefore, it appears that the expression 'maritime privileges' in Omani sometimes overlaps with the meaning of the English term 'maritime lien'. Therefore, we shall use hereinafter the expression 'maritime liens' instead of 'maritime privileges'.

2.2.1. Maritime Liens for Port Charges

2.2.1. Wreck removal

2.2.2. Claims arising out of the Contract of employment of the Master, Seamen, and other persons hired on board.

2.2.3. Maritime Liens for Assistance and Salvage

2.2.3. General Average Liens

2.2.4. Cargo damage Lien

2.2.4. Oil Pollution

2.2.4. Maritime Lien for Personal injury and death

2.2.5. Maritime Lien for Supplies

Requirements for Lien for Supplies

2.3. Under English Law

2.3.1. Lien for Damage done by a Ship

Prerequisites for Damage Claim and Maritime Lien

a) Maritime Lien found upon Fault

b) The Ship or Part of her must be the actual Instrument of Damage

c) Physical Collision between two Ships is not necessary

2.3.2. Salvage Liens

i) Definition of Salvage

ii) Prerequisites for a Salvage Claim and Maritime Lien

a) Services must be performed intentionally

b) Salvor must be volunteer Adventurer

c) Property or Life must be in Danger

d) Services must be successful

e) Property must be proper subject of Salvage

2.3.3. Seamen's Wages

i) Meaning of "Seamen"

ii) Meaning of "Wages"

iii) Master's Wages Lien

iv) Emoluments

2.3.4. Masters' Disbursements

Requirements for a Master's Disbursement Lien

2.3.5. Bottomry

Prerequisites for Bottomry Bond as Maritime Lien

a) Necessity

b) Maritime Risk

c) Duty of Communication with the Shipowner

3. PROPERTY SUBJECT TO MARITIME LIENS

3.1. Under Omani Maritime Law 1981

3.2. Under English Law

3.2.1. Ships

3.2.2. Hovercraft

3.2.3. Sister Ships

3.2.4. Freight

3.2.5. Property subject to Individual Maritime Liens

i) Property Salvage

ii) Bottomry Bonds

iii) Wages and Disbursements

iv) Damage done by a Ship, Personal injury and loss of Life

4. THE RANKING OF MARITIME LIENS

4.1. Introduction
4.2. Under Omani Maritime Law 1981
4.3. Under English Law
4.3.1. Damage Maritime Liens
4.3.2. Salvage
4.3.3. Wages
4.3.4. Master's Disbursements
4.3.5. Bottomry Bonds
5. THE EXTICTION OF MARITIME LIENS
5.1. Under OMANI MARITIME LAW 1981
5.1.1. Statutory Time Limitations
5.1.2. Effects of a forced Sale of the Ship
5.1.3. Effects of a voluntary Sale of the Ship
5.2. Under English Law
5.2.1. Statutory Time Limitations
5.2.2. Laches
5.2.3. Bail
5.2.4. Loss or Destruction of Ship
5.2.5. Judicial Sale
6. CONCLUSION

A. ABSTRACT

This Article compares and analyses maritime liens in Omani and English law. The maritime lien is a unique security existing only on the ship and the fright. It entitles the claimant to a privileged right in a ship. The most important characteristic about the maritime lien is that it comes into existence automatically, without any cause if action being taken by the claimant such as registration, and, in principle, follows the ship wherever she sails in the world.

Maritime liens secure claims for salvage, seamen's wages, master's wages and disbursements and damage done by ships in both Omani and English law. In Omani law, but not in English law, maritime liens secure also claims in respect of pilotage, pollution, personal injury, towage and cargo. In neither system is personal liability an invariable prerequisite for such liens. As a general rule, maritime liens cannot be transferred in either system. While in English law maritime liens are accorded a high priority by precedent, maritime liens are ranked according to statute in Omani. Maritime liens may variously be extinguished in both systems.

A maritime lien is a concept of international familiarity and is recognised in most jurisdictions. There exist nonetheless frequent differences between individual countries as for example to the range of claims recognised as maritime liens or to their ranking. It is this international disparity in the recognition of maritime liens which was one of the issues which the *International Convention for the Unification of Certain Rules of Law Relating to Maritime Mortgages and Liens 1926* attempted to resolve.

B. INTRODUCTION

The maritime lien on the ship is unique to shipping. To understand its underlying rationale, it is necessary to consider the various characteristics of the ship. The ship is not necessarily always in the immediate possession and control of the owner. It needs necessary expenditures to undertake and continue a maritime adventure. It needs to be navigated or managed professionally. It can cause injury to others. It can change its nationality with ease and can be registered under a flag with which it bears no beneficial link. Throughout its life, the ship can engage various creditors. And yet, in order for the ship to be an instrument of trade, it needs certain services. There has long been recognition of "creditors of necessity" in the maritime adventure: persons providing essential navigation services to the ship (i.e., master and crew); the person incurring necessary expenditures (i.e., disbursements); persons assisting ships, cargoes, and crews in situations of distress (i.e., salvors); persons suffering injury or loss caused by the ship. These persons have been perceived either as providing fundamental services to the ship, or as victims of a maritime tort that must be compensated by the negligent ship. They were deemed to deserve special protection in general maritime law. Therefore, special tools have been devised since early days to protect persons and property that have come into contact with the ship and have suffered damage or incurred expense thereby. The lien in a maritime context is one such tool.(2) It emerged in a civilian context and was adopted and further developed in English maritime law.(3) It was then inherited by the international maritime community which has over decades been very conscious of the need for international uniformity in securities over ships and how they should be enforced. There have been three international attempts

(2) "The purpose of the maritime lien is to enable a vessel to obtain supplies or repairs necessary to her continued operations by giving a temporary underlying pledge of the vessel which will hold until payment can be made or more formal security given." ***The Everosa (Southern Coal & Coal Co. v. Grauds Kugniecibas)***, 93 F.2d 732.

(3) Many excellent historical studies on maritime lien have been done by scholars because of the uniqueness of maritime lien. These studies are of significant importance because they have not only helped us understand the origin and evolution of maritime lien, but also cleared the various misunderstandings and erroneous theories relating to maritime liens. See Tetley, Maritime Liens and Claims (1985), Chapter 1.

focusing on liens: the *International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages, 1926*; the *International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages, 1967*; and the *International Convention on Maritime Liens and Mortgages, 1993*.(4) Oman is not a party to any of these conventions. However, Oman adopted the provisions of the *1926 Convention* into its *Maritime Law* and the Convention has been the model for the maritime lines provisions under the Law.

The purpose of this Article is to examine the provisions and operation of maritime liens under *Omani Maritime Law 1981* (hereinafter referred to ***OML 1981***) compare with English admiralty practices. In order to properly undertake this task, the following issues will be discussed:

1- **Definition and Characteristics of Maritime Liens**

2- **The scope of Maritime Liens**

3- **Property subject to Maritime Liens**

4- **The Ranking of Maritime Liens**

5- **The Extinction of Maritime Liens**

1. DEFINITION AND CHARACTERISTICS OF MARITIME LIENS

1.1. UNDER *OML 1981*

The phrase 'maritime lien' appears in the ***OML 1981*** in various instances. It appears in Article 156 which enumerates the maritime liens. It appears in Article 178 which provides for the ranking of maritime liens against a maritime mortgage. It also appears in Article 188 which provides that a maritime claimant may enforce a claim by way of an action against the ship if that claimant has a maritime lien over the ship.

(4) *The International Maritime Liens and Mortgages Conventions of 1926, 1967* and *1993* have consolidated the civil/common law concepts and statutes into a relatively uniform body of maritime security law. It is interesting that each convention in turn has attempted to limit the number of liens, in order to strengthen the value of ship mortgages and thus assist in ship-financing.

Despite these references to the maritime lien, neither the *Maritime Law* nor the Omani Courts have defined the concept. However, reading the three Articles together, the maritime lien may be defined as "a privileged claim upon a ship and freight, in respect of services rendered to, or injury caused by, that ship, travelling with the ship secretively and unconditionally and enforced by means of an action against the ship."

According to this definition, one can draw at least three affirmative legal propositions:

a) Privileged Claim

A maritime lien is a privileged claim for it generally ranks in priority above all other claims against a ship, whether they arose prior to or subsequent to the attachment of the maritime lien. The consequence is that, in general, maritime liens will rank ahead even of claims that tend to better the condition of the ship, for example, a repairer or a supplier of necessaries carried within the ship's home port.

b) Attachment to the Ship

A maritime lien attaches to the ship, to proceeds of its judicial sale, and to freight. The lien attaches to the whole of the ship and not only to a part of it. The term "ship" includes the appurtenances, such as tackle, apparel, furniture, engines, and boilers.(5)

c) Survival despite transfer of the Ownership

Unless extinguished, a maritime lien travels with the ship regardless of change of ownership.(6) Therefore, a sale of the ship *per se* does not extinguish the lien.

(5) See Article 9 of the ***OML 1981*** which provides:
'(Free translation) *A ship is any structure normally operating, or made for the purpose of operating, in navigation by sea, and it include all accessories appurtenance which are necessary for it is investment.'*
'السفينة هي كل منشأة تعمل عادة او تكون معدة للعمل في الملاحة البحرية. وتشمل على جميع الملحقات والتفرعات الضرورية لاستثمارها.'

(6) See ***OML 1981***, Article 163:
'The maritime liens shall follow the ship in the hands of whomsoever it may be.'
"تتبع الديون الممتازة السفينة في أي يد تكون".

1.2. UNDER ENGLISH LAW

Although the maritime lien provides one of the most powerful security interests in English law, it is not statutorily defined. *The Supreme Court Act 1981*, which governs admiralty jurisdiction, refers to the maritime lien, but does not list either its attributes or the maritime claims which are secured by the lien. The Admiralty Court, however, has attempted to define the maritime lien, to identify its attributes, enforcement and consequences. In the landmark lien judgment, ***The Bold Buccleugh*** (7), Sir John Jervis defined the maritime lien thus:

> "A maritime lien does not include or require possession. The word is used in Maritime Law not in the strict legal sense in which we understand it in Courts of Common Law, in which case there could be no lien where there was no possession, actual or constructive; but to express, as if by analogy, the nature of claims which neither presuppose nor originate in possession. This was well understood in the Civil Law, by which there might be a pledge with possession, and a hypothecation without possession, and by which in either case the right travelled with the thing into whosoever possession it came. Having its origin in this rule of the Civil Law, a maritime lien is well defined by Lord Tenterden, to mean a claim or privilege upon a thing to be carried into effect by legal process; and Mr. Justice Story explains that process to be a proceeding *in rem*, and adds, that wherever a lien or claim is given upon the thing, then the Admiralty forces it by a proceeding *in rem*, and indeed is the only Court competent to enforce it, A maritime lien is the foundation of the proceeding *in rem*, a process to make perfect a right inchoate from the moment the lien attaches; and whilst it must be admitted that where such a lien exists, a proceeding *in rem* may be had ... This claim or privilege travels with the thing, into whoseoever possession it may come. It is inchoate from the moment the claim or privilege attaches, and when carried into effect by legal process, by a proceeding *in rem*, relates back to the period when it first attached. This simple rule ... is deduced from the

(7) (1852) 7 Moo. P.C. 267.

Civil Law…"[8]

Later, in ***The Tolten*** [9] Scott L.J. confirmed the civil law influence in the creation of the maritime lien, and highlighted the two characteristics common to all such liens; namely, that they give security and a certain preferences:

> "The phrase 'maritime lien' was not the original expression in our admiralty diction. We borrowed from the French, who had in their word "privilege' a clearer and less ambiguous name: hence their telling phrase 'creances privilegiees' to describe the secured rights of the sea creditors -., our judges in early cases used our word 'privilege' with the same meaning as that in which 'maritime lien' was subsequently used. The essence of the 'privilege' was and still is, whether in Continental or in English law, that it comes into existence automatically without any antecedent formality, and simultaneously with the cause of action, and confers a true charge on the ship and freight of a proprietary nature in favour of the 'privileged' creditor. The charge goes with the ship everywhere, even in the hands of a purchaser for value without notice, and has a certain ranking with other maritime liens, all of - which take precedence of mortgages."

Again, in ***The Tolten***[10] Scott L.J. appeared to say, somewhat contentiously in the light of views to the contrary, that the maritime lien gives rise to a substantive right. The lien, he said, consists:

> "…in the substantive aright 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 accordance with their several priorities, and subject thereto rateably. I call that function of the court "executive" because, once the lien is admitted, or is established by evidence of the right to compensation for damage suffered through the defendant ships negligence, there is then no further judicial function for

(8) *Ibid*. at pp. 284-285.
(9) [1946] P. 135 at pp. 149-150.
(10) [1946] P. 135 at pp. 143-144.

the court to perform, save that in the registry where the priorities, quantum and distribution -are dealt with..."

The substantive characteristics of the maritime lien were also alluded to in ***The Ripon City*** (11) where Gorell Barnes J. defined such a lien as:

"... a lien is a privileged claim upon a ship in respect of service done to it, or injury caused by it, to be carried into effect by legal process. It is a right acquired by one over a thing belonging to another - *a jus in re aliena*. It is, so to speak, a subtraction from the absolute property of the owner in the thing."

2. THE SCOPE OF MRITIME LIENS

2.1. Introduction

The scope of maritime liens determines what type of claims shall give rise to the status of maritime liens. The determination of the scope of maritime liens is important because it not only affects the interests of creditors between privileged claims and regular claims, but also relates to the recognition of foreign maritime liens if the liens granted in another legal system are not identical.

This section is to make a comparative evaluation of the scope of maritime liens in Omani law in contrast with the lien's status in English law.

2.2. UNDER *OML 1981*

Under ***OML 1981***, there are only five types of maritime claims that can be secured by maritime liens. The five types of maritime claims provided for by the *Maritime Law* are listed in Article 156 as follow:

'(Free translation)

1) *Judicial costs incurred in order to preserve the ship and to procure its sale and the distribution of the proceeds of sale; tonnage dues, light or port dues, and other taxes and charges of the same character; pilotage dues; indemnities for damage caused to works forming part of harbours, docks, and navigable ways; expenses for*

(11) [1897] P. 226 at p. 242.

wreck removal; cost of watching and preservation from the time of the entry of the ship into the last port;

2) *Claims resulting from an employment contract for the master, the crew and other people employed on board the ship.*

3) *Payment for assistance and salvage, as well as the ship's contribution to general average.*

4) *Compensation for collision or other navigation accidents, compensation for bodily harm to passengers and crew as well as for loss or damage to cargo and baggage.*

5) *Claims resulting from contracts entered into or acts done by the master, acting within the scope of his authority, away from the ship's home port, where such contracts or acts are necessary for the preservation of the ship or the continuation of its voyage, whether the master is or is not at the same time owner of the ship, and whether the claim is his own or that of ship-chandlers, repairers, or other contractual creditors."*[(12)]

2.2.1. Judicial Costs

Judicial costs are traditionally awarded a high priority, under *1926*

(12) Article 156 of the ***OML 1981*** provides in Arabic:

" يعد ديناً ممتازاً....حسب الترتيب الآتي:

1- المصاريف القضائية التي انفقت لحفظ السفينة وبيعها وتوزيع ثمنها ورسوم المنائر والموانئ ورسوم الارشاد وغيرها من الرسوم والتعويضات عن الأضرار التي تلحق منشآت الموانئ والأحواض وطرق الملاحة ومصاريف الحراسة والصيانة منذ دخول السفينة في آخر ميناء.

2- الديون الناشئة عن عقد عمل الربان والبحارة وغيرهم ممن يرتبطون بعقد عمل على السفينة.

3- المكافآت المستحقة عن المساعدة والإنقاذ وحصة السفينة في الخسائر المشتركة.

4- التعويضات المستحقة عن التصادم وغيره من حوادث الملاحة والتعويضات عن الإصابات البدنية التي تحدث للمسافرين والبحارة وغيرهم ممن يرتبطون بعقد عمل على السفينة والتعويضات عن هلاك أو تلف البضائع والأمتعة.

5- الديون الناشئة عن العقود التي يبرمها الربان، والعمليات التي يجريها خارج ميناء تسجيل السفينة في حدود صلاحياته القانونية لحاجة فعلية تقتضيها صيانة السفينة أو متابعة السفر سواء أكان الربان مالكا للسفينة أم غير مالك لها وسواء أكان الدين مستحقا له أم لمتعهدي التوريد أو المقرضين أو الأشخاص الذين قاموا بإصلاح السفينة أو غيرهم من المتعاقدين."

Convention.(13)Judicial costs ordinarily include the costs of the arrest and sale of the ship, costs of the action of the arresting party up to and including the arrest, and costs of the party who obtained the order for appraisement and sale of the ship, up to and including that order.(14)

Judicial costs are also given a high priority in English law. In ***The Heinrich***,(15) the court held that the cost of the solicitors, who had preserved the property by their services, had priority before the wages of the master.

2.2.1. Custodial Expenses incurred for the Safekeeping of the Ship

Expenses to protect the ship during the period of custody of the law(16) include costs of guarding and preserving the ship to enable it to be sold for the best possible price and these can include wharfage; crew repatriation costs, repairs necessary to permit the ship to be sold.(17) It is clear that custodial expenses must have incurred since the arrival of the ship in its last port (i.e. port of arrest).

2.2.1. Maritime Liens for Port Charges

The provision for port charges in the ***OML 1981*** is virtually similar to that in the *1926 Convention*, which also embraces the claims for pilotage dues as maritime liens.(18) As a matter of fact, the tonnage, pilotage and harbour dues,

(13) *Liens and Mortgages Convention 1926*, Article 2 (1).

(14) ***The Immacolata Concezione***, (1884) 9 P.D. 37 at p. 42; ***The Conet***, [1965] 1 Lloyd's Rep. 195 at p. 197; ***The Falcon,*** [1981] 1 Lloyd's Rep. 13 at p. 17; Meeson, N., *Admiralty Jurisdiction and Practice* (2000) at para. 6-034. Reasonable fees payable to attorneys are covered by this provision, provided that they are spent for the preservation the ship and to procure its sale.

(15) (1872) L.R. 3 A. & E. 505.

(16) The *Liens and Mortgages Convention1926,* at Article 2(1) gives a first right to expenses "incurred in the common interest of the creditors in order to preserve the vessel or to procure its sale and the distribution of the proceeds of sale".
English courts have been much less generous in the expenses awarded after arrest. Originally, for example, the arrest of a ship by seamen terminated their employment contracts, thus barring any claim for wages earned during the period of "custody of the law".

(17) ***The General Serret***, (1925) 23 Ll. L. Rep. 14 at p. 15.

(18) *Liens and Mortgages Convention 1926*, Article 2(1) (pilotage dues incurred in bringing

etc. are compulsorily levied on ships in Oman, and the subject ship will be unable to leave before paying these dues. However, in practice those dues are normally prepaid by the ship's agent. Query -- once the ship's agent prepaid these dues for the ship, whether his claim for reimbursement will be secured by maritime liens? Unfortunately, the position is not clear enough at the present time. It may be said that if the agent has paid the dues in the capacity of an agent, under Omani law, such an act should be deemed as an act done by his principal, and therefore, the claims for the dues have been satisfied and the maritime liens securing the same have been extinguished. Further, agent's claims for reimbursement of the dues against his principal should be regarded as claims under the agency agreement and should not be secured by any maritime liens.

Claims for port charges or some other related expenses such as pilotage or towage are commonly treated as special legislative rights in English law, and this idea can be sought in the early existence of the *Harbour, Docks, and Piers Clauses Act of 1847*.(19)

2.2.1. Wreck removal

Oman grants the authority the right to remove wrecks and to sell them.(20)

the ship into the last port, i.e. the port of seizure); In English law, however, pilotage claims have only a statutory right *in rem; s*ee Meeson, 2 Ed., 2000 at paras. 2-095 to 2-097; See also *Supreme Court Act 1981*, U.K. 1981, c. 54, sects. 20(2)(1) and 21(4).

(19) There have been some old cases where it was indicated that towage could give rise to a maritime lien (see ***The La Constancia*** (4 N. of C. 512) and ***The Feronia*** (1868) L.R. 2 A & E 65). However, this reasoning was not upheld in later cases (see ***The La Constancia*** (4 N. of C. 512) and ***The Feronia*** (1868) L.R. 2 A & E 65).The exact position of pilotage is still doubtful (see Meeson, N., *Admiralty Jurisdiction and Practice*, p. 40]. However, there is no doubt that, in terms of the *Supreme Court Act 1981*, these two matters give rise to a right of action *in rem*.

(20) Article 170 of the ***OML 1981*** provides:
'(Free translation) *The concerned Maritime Department shall have the right to seize the shipwreck for securing any expenses thereof. The Department can sell the wreck through auction and get the debt thereto with priority to any other creditor from the price….'*
" للإدارة البحرية المختصة حق حبس حطام السفينة ضمانا لمصاريف إزالة الحطام. ولها بيعه إدارياً بالمزاد والحصول على دينها من الثمن بافضلية على أي دائن آخر…".

The authority and individuals who remove wrecks have a lien on the wreck, which has the same rank as the lien for the costs of the preservation of the ship.

2.2.2. Claims arising out of the Contract of Employment of the Master, Seamen, and other persons hired on board.

Due to the perilous nature of working as a sailor, seamen have been historically treated with respect and admiration. Their lawful earnings therefore should be protected by the law and given a priority among other maritime claims.

The term "seamen" includes not only those who "hand, reef and steer," but all persons employed on board ships, during the voyage and its normal incidents, to assist in their navigation(21) and preservation, to promote the purposes of the voyage(22) or to provide services traditionally performed by seamen.(23)

(21) ***First Bank & Trust v. Knachel,*** 999 F.2d 107 (5th Cir. 1993) (Ship must be in navigation for seaman to have a preferred mortgage lien for wages. A ship is considered in navigation when there is an intention to put out to sea, and when repairs had been furnished for the impending voyage.)

(22) For example, a musician on an excursion vessel is considered a seaman**.** ***Cisenfield v. S.S. Steel Pier*****,** 1934 AMC 939 (S.D. Fla. 1934). Likewise, a caterer's claim for wages paid to shipboard food preparation employees is entitled to preferred status as "crew wages" because the work is traditionally done by seamen. ***General Electric Credit & Leasing Corp. v. Drill Ship Mission Exploration*****,** 668 F.2d 811 (5th Cir. 1982).

(23) *See, e.g.,* ***General Elec.Credit v. Drill Ship***, 668 F.2d 811 (5th Cir. 1982). A person who is not a seaman entitled to the traditional seaman's lien for wages may be entitled to a lien under 46 U.S.C. § 31342 for furnishing "other necessaries," but in that case he will not have the same priority. *See, e.g.,* ***Mercereau v. M/V Woodbine*** 1983A.M.C. 554 (N.D. Ohio 1982) (a seaman who was hired by the prospective purchaser of a vessel to perform repair and maintenance work on the vessel and then form part of the crew when it sailed was entitled to a lien for his unpaid wages under 46 U.S.C. § 971. The seaman fell within the ambit of this section since he furnished "repairs, supplies ... or other necessaries" to the vessel and the vessel was not a "dead ship" since it was being made ready to sail. Although the sale of the vessel was never consummated, the seaman was still entitled to enforce his lien against the vessel since the owner never expressly denied that the buyer had the authority to bind the vessel and the benefit of the seaman's work went to the owner); ***Ramirez v. United States*** 991A.M.C. 2462 (M.D. Fla.1991).

"Claims arising out of the seamen contract" is to be interpreted quite broadly. The lien thus covers more than just the wage and emoluments payable directly to members of the crew: it seems to extend to all financial benefits that accrue to the advantage of the crew by virtue of their contract of service.

It is important to note that the original sole condition of "wages earned on board" is no longer essential in most of nations for creating a maritime lien. There is no requirement for a seaman to have been hired by the shipowner, nor is it necessary for the seaman to belong to the "actual" crew. It is also irrelevant whether the person has been employed on a permanent basis or has merely been hired for a short time. It is not even necessary for the seaman to be particularly associated with a specific ship. For example, a seaman with a "company contract" (i.e., a contract to serve on several of the company's ships) is entitled to a maritime lien for non-payment of wages. A claim resulting from service on board ship A will be secured by a maritime lien in ship A, but not ship B.

Disputes may arise on the claims when a management company is involved. For instance, where the management company advances the payment for wages, or other remuneration, it might seem that the management company would have a claim against the shipowner, whether such a claim could be secured by maritime liens, or indeed whether such a claim is still a claim for crew's wages is at issue. Unfortunately, there is no clear answer to this question under the current *Omani law*.

2.2.3. Maritime Liens for Assistance and Salvage

Assistance and salvage, whether by contract or not, are accorded a maritime lien of high priority under ***OML 1981***. The assistance and salvage provisions in the ***OML 1981*** substantially follow the *International Convention on Salvage 1910* in both the contents and the expressions.(24)

There are three traditional conditions to the recovery of an assistance and salvage reward - that the property be in danger, that the salvage services be successful and that the services be voluntary. The danger must be real and appreciable, but need not be actual and imminent.(25) The concept of success

(24) See ***OML 1981***, Article 302 et seq.
(25) ***The Strathnaver***, 1 A.C. 58,65.

based on "no cure no pay", however, is no longer used in a strict sense, and "safety net" is given according to environmental concerns.(26) The prerequisite of voluntariness usually excludes the effort made by crew, pilot and agent, etc. when they are on duty unless their connection with the ship is dissolved *de facto* or their service exceed their proper duty.

Salvage is now given maritime lien status in English law and maritime lien for salvage can be found in both the general maritime law(27) and the statute.

2.2.3. General Average Liens(28)

General "average" means general loss and arises when extraordinary losses or expenses have been voluntarily incurred and intentionally and reasonably

(26) See the *Lloyd's Open Form 1980*, which allows the compensation of expenses plus 15% increment; also the *Lloyd's Open Form 1990* the increase is up to 100%. This exception is now provided for in Article 14 of the *1989 Salvage Convention*. Article 14 of the *Salvage Convention* provides:
"Special Compensation
(1)If, the salvor has carried out salvage operations in respect of a vessel which by itself or its cargo threatened damage to the environment and has failed to earn a reward under Article 13 at least equivalent to the special compensation assessable in accordance with this Article he shall be entitled to special compensation from the owner of that vessel equivalent to his expenses as herein defined.
(2) If, in the circumstances set out in paragraph 1, the salvor by his salvage operations has prevented or minimised damage to the environment, the special compensation payable by the owner to the salvor under paragraph 1 may be increased up to a maximum of 30% of the expenses incurred by the salvor. However, the Tribunal, if it deems it fair and just to do so and bearing in mind the relevant criteria set out in Article 13, paragraph 1, may increase such special compensation further, but in no event shall the total increase be more than 100% of the expenses incurred by the salvor."

(27) ***The Two Friends*** (1799) 1 C. Rob. 271 at p. 277; ***The Eleanora Charlotta*** (1823), 1 Hagg. 156; ***The Gas Float Witton****, No. 2* 1896, P. at p. 50.

(28) ***Liens and Mortgages Convention 1926***, Article 2(3); Note, however, that the Liens *and Mortgages Convention 1993* does not provide a maritime lien for general average contributions. Such a lien could nevertheless be granted by national legislation, as permitted by Article 6, but it could not last more than six months (unless the vessel concerned was arrested or seized in that period) or more than sixty days from the sale of the vessel to a purchaser in good faith; and such a national lien would be inferior in ranking to a ship mortgage or *hypotheque* (Article 6(b) and (c)).

made by the master to the common venture for the benefit of all the parties.(29) The fundamental principle is that those who have benefited from such losses or expenses must contribute in proportion to the value of their property saved.

2.2.4. Cargo Damage Lien

The claims arise out of both the execution of a contract of carriage and out of tort (i.e. collision damage lien). Both seem to be covered without distinction as to whether the claim is against the carrying or the colliding ship. The property lost or damaged, however, may not necessarily be on board the ship, but could be on board other ships or at sea, so long as the loss of or damage to property is sustained or caused in connection with the operation of the ship.(30)

Property damage have been accepted as maritime liens in English law., where the House of Lord found in ***Currie v. McKnight*** that:(31)

> "*The Bold Buccleugh*(32) is the earliest English authority which distinctly establishes the doctrine that in a case of actual collision between two ships, if one of them only is to blame, she must bear a maritime lien for the amount of the damage sustained by the other."

(29) ***OML 1981***, Article 246 provides:
'General average shall be deemed to be every sacrifice or exceptional expenditure intentionally made by the master in a reasonable manner for the security of the mutual interest against any damage treating the ship or its cargo.'
"يقصد بالخسارة المشتركة كل تضحية أو مصاريف استثنائية تؤدي ارادياً ما يبررها من أجل السلامة الجماعية ويقصد حماية الأموال المشتركة في مشروع بحري من خطر يهددها أو يعتقد الربان لأسباب معقولة أنه يهددها".

(30) *Ibid*. Article 292 of the ***OML 1981*** provides:
'(Free translation) *Where a collision occurs between sea-going vessels or between sea-going vessels and vessels of inland navigation, the compensation due for damages caused to the vessels, or to any things or persons on board thereof, shall be settled in accordance with the provisions contained in this section without regard to the legal system of the water in which the collision takes place.'*
"إذا وقع تصادم بين سفينة بحرية أو بين سفين بحرية ومراكب ملاحة داخلية تسوى التعويضات المستحقة عن الأضرار التي تلحق بالسفن والاشياء والأشخاص الموجودة على السفينة طبقاً للأحكام الواردة في هذا الفصل بصرف النظر عن المياه التي حصل التصادم فيها.'

(31) (1987) A.C. 97.

(32) (1851) 7 Moo. (P.C.) 267 13 E.R. 884.

2.2.4. Oil Pollution

Pollution from a ship may cause substantial damage to a wide range of persons. The owner of the ship (and others) has wide-ranging liability for such damage. Claims of this type are secured by a maritime lien in so far as there is damage to property or personal injury. If, for example, a beach is damaged by a ship discharging oil, a claim by the owners of the beach will be secured by a maritime lien.

2.2.4. Maritime Lien for Personal injury and death

Under ***OML 1981*** personal injury but not death gives rise to maritime liens. Personal death claim is not awarded with maritime liens in Oman. It is difficult to understand why damage done to a person's property should give rise to rights of a higher nature than his death.

The drafting of the Omani text would seem to contain the same lacuna as the *1926 Convention* in respect to third persons.(33) Injuries to a third person on a pier, a shore, or on a non-ship afloat (e.g. a drilling rig) would not be covered although caused by collision with a ship. A swimmer struck by a ship would not have a maritime lien.

In the English law claims for personal injury or death will only give rise to a statutory right *in rem* or *in personam*,(34) but never a maritime lien.

(33) ***Liens and Mortgages Convention 1926***, Article 2(4) provides a maritime lien for personal injury to passengers or crew. *The Liens and Mortgages Conventions 1967* solves many of the problems of the *1926 Convention*. Article 4(1) of the *Convention 1967* reads: shall be secured by maritime liens on the vessel: (iii) claims against the owner in respect of loss of life or personal injury occurring, whether on land or on water, in direct connection with the operation of the vessel .
This makes clear that the personal injuries may be inflicted either on land or water and although the damage must arise from the "operation" of the vessel, it need not be due to direct "contact" with the vessel. There is no restriction on personal injury claims arising from contract. Thus a personal injury claimant may be a passenger carried on the ship in virtue of a passenger ticket. A third party on land, or afloat on a non-ship (a log boom, a raft or a drilling rig) would have a maritime lien against the ship which caused the collision (see also *Liens and Mortgages Convention 1993*, Article (4) (1) (b)).

(34) ***The Beta*** (1869) L.R. 2 P.C. 447.

2.2.5. Maritime Lien for Supplies

Article 156/5 of the Omani Maritime Law 1981 provides a maritime lien for supplies, identical to the lien at Article 2(5) of the 1926 Convention(35).The general character of "supplies" may be defined as including those items or services which a prudent owner or master would deem to be reasonably required to facilitate the use of the ship, save her from danger and enable her to perform those acts currently demanded of her.(36) Such "supplies" are not merely those things incorporated into the ship or used on board which are absolutely essential to her existence or preservation, but also those things which a careful and provident owner would provide to enable her to perform well the functions for which, as a maritime agent, she has been designed and engaged. Thus, these things may encompass money, medicines, labor and skill, personal services as well as materials. It is the present, apparent want of the ship, not the character of the thing supplied, which makes it a necessary. Accordingly, anchors and cables are, in the general sense, necessaries; but if the ship is fully supplied with them, another anchor or cable is not necessary. Simply stated, what is not furnished to fulfill a want of a ship cannot constitute repairs, supplies or services for which the ship can be held liable *in rem.*

It should be noted that Article 156/2, just as Article 2(5) of the *1926 Convention*, states that the claims arising from transactions described in the text are privileged without distinguishing whether the particular claim and its accessory, the lien, belongs to the master or to the supplier. In other words, Article 156/5 is the basis of the master's disbursements lien in cases when it is the master who claims against the shipowner. It is also the basis of the lien benefitting suppliers when it is they who have a claim against the shipowner.

Requirements for Lien for Supplies

There are four requirements for lien for supplies:

(35) Necessaries liens were not included among the maritime liens listed in the *Liens and Mortgages Conventions of 1967* and of *1993*.

(36) The rule that contracts for building vessels are not maritime, and therefore no lien may attach for work rendered, includes all of the outfit which goes into the vessel's original construction and which is necessary to her completion.

a) that the contract must have been entered into by the master;

b) that the contract must have been entered into, or the services rendered, while the ship away from its home port;(37)

c) that the master must have been acting within his legal authority; and

d) that the supplies or service must have been necessary for the preservation of the ship or the continuation of the voyage.

Problems sometimes arise, especially when the goods are delivered or services rendered pursuant to a single contract covering several ships, as to what acts satisfy the statutory mandate that necessaries be "furnished" to the ship. It is an absolute rule that a ship may not be held responsible for anything which it does not in fact receive. But even if the ship ultimately benefits from certain goods and services, it is not automatically liable. The supplier may have relinquished his lien by acts evidencing a total failure to look to the ship for payment; his burden of proving that the materials reached the ship as a part of the transportation begun by him is in no way lessened by the statutory presumption that credit is given to the ship.

In English law, it is interesting to note that the rule that a lien existed for necessaries was held by the Admiralty Court for a long time.(38) However, it was finally overruled by the House of Lords in ***The Neptune***(39)where Sir J. Nicholl found:

> "If every person who supplied any necessary to a ship had the right at any time to arrest her, ships would hardly ever be able to sail and would be exposed to the most extortionate demands."

(37) Where the supplies were ordered in the "home port" of a ship, they are customarily furnished on the personal credit of the shipowner, as ordinary goods are furnished, and not on the security of the ship herself. On the other hand, when necessaries are provided to a "foreign" ship, that is, a ship in a port where the owner is absent or has no credit, the rebuttable presumption is that the materialman looked to the credit of the ship and not the owner.

(38) ***The Zodiac*** (1825) 1 Hagg. 320, 326.

(39) (1834) 3 Hagg. 130, 146.

2.3. UNDER ENGLISH LAW

There is no English statute which lists the maritime liens.(40) They are to be found in the decisions of the Admiralty Court. English law today recognizes a very limited number of maritime liens, and these are: damage done by a ship; salvage; wages of seamen; master's wages and disbursements; bottomry.(41) Most other types of maritime claims in English law are secured by only a statutory right *in rem*. Such other claims include contractual claims for "necessaries", such as repairs, towage, stevedoring, goods and materials needed for the ship's operation, as well as claims arising out of contracts of carriage (e.g. cargo damage claims against the carrying ship) and charterparties (e.g. charterers' claims).

2.3.1. Lien for Damage done by a Ship

The lien for damage done by a ship arises when damage is done by the ship to another ship or property, whether on the high sea or within the limits of a port,(42) through some wrongful act of navigation of the ship from want of skill or from negligence of the persons by whom she is navigated, being at the time of the damage her owners or the employees of her owners, or having the possession and control of her by their authority.(43)

Prerequisites for Damage Claim and Maritime Lien

The maritime lien for damage done by a ship arises where there is fault on the part of the person in charge of the ship, and the ship, or part of her, causes

(40) See Chorley & Giles' Shipping Law, 8th ed. 1987, p.71.

(41) see Thomas, D.R. Maritime Liens (1980) at p. 5; Chorley & Giles' Shipping Law, at p. 72.

(42) ***The Merle*** (1874) 2 Asp MLC 402; ***Mersey Docks and Harbour Board v Tuner, The Zeta*** [18931 AC 468, 7 Asp MLC 369, HL (damage to a ship by collision with a pier-head); *The Veritas* [1901] P 304, 9 Asp MLC 237 (damage to a landing stage); ***The Tolten*** [1946] P 135, sub nom ***United Africa Co Ltd v Tolten (Owners), The Tolten*** [1946] 2 All ER 372, CA (damage to a wharf).

(43) When the owners let out the ship on demise charter, it is the demise charterer who appoints the crew: they are his servants and not the owners. If a collision occurs through their negligence the demise charterers are treated as 'disponent' owners: they will be liable and a maritime lien arises.

the damage, although there need not be physical contact. These prerequisites are considered below.

a) Maritime Lien found upon Fault

For the maritime lien for damage done by a ship to arise, the ship must do a wrongful act.(44) Such an act may either be due to the lack of skill, or to the negligence of the persons navigating the ship. When the damage is done, such persons must either be the shipowners or their servants, or have the possession and control of the ship by the authority of the shipowners.(45) In other words, the maritime lien is established through the fault of the person in charge of the ship when the wrongful act is committed.(46) The maritime lien is, therefore, not an absolute lien which arises from the mere fact that damage is done by a ship. Where the person in charge or possession of the ship has no such authority, express or implied, no lien arises. Thus, there is no lien for wilful damage by the master, or for his wilful acts,(47) or for an act of a person in possession of the

(44) Thomas D.R., *Maritime Liens*, paragraph 208.

(45) Thus, charterers who have the control, or any persons who are allowed to have possession, of a ship for the purpose of using or employing her in the ordinary manner are deemed to have authority to subject her to liens, and so to make her liable for their negligence (see ***The Ripon City*** 11897] P 226 at 244, 8 Asp MLC 304 at 311. See also ***The Ticonderoga*** (1857) Sw 215 (where damage was done by a ship when in the possession and under the full control of charterers); but the presumption is not absolute and may be rebutted by showing that the person navigating the ship did not derive any authority from the owners (see ***The Sylvan Arrow*** [19231 P 220, 16 Asp MLC 244 (where damage was done by a vessel requisitioned and controlled by the United States government), or that the injured party is precluded by the terms of a contract from recovering against them (see ***The Tasmania*** (1888) 13 PD 110 at 118.

(46) ***The Druid*** (1842) 1 W. Rob. 391; ***The Castleqate*** [1893] A.C. 38; ***The Utopia*** [1893] A.C. 492; in ***The Parlement Belqe*** (1880) 5 P.D. 197 the court said that 'in a claim made in respect of a collision the (ship) is not treated as the delinquent "per se". Although the ship has been in collision and has caused injury by reason of negligence or want of skill of those in charge oh her, yet she cannot be made the means of compensation if hose in charge of her were not the servants of her then owners, as if she was in charge of a compulsory pilot. That conclusive to show that the liability to compensate must be fixed not merely on the (ship), but also on the owner through the property."

(47) ***The Druid*** (1842) 1 W. Rob. 391

ship done in asserting a right claimed by him not as an employee or on behalf of the owner.(48)

The "fault" requisite in the case of a damage lien creates one particular problem in the case of strict liability for ship-source oil pollution damage in terms of the *International Convention on Civil Liability for Oil Pollution Damage 1992*. The latter *Convention* is implemented into English law by the *Merchant Shipping Act 1995*. It can be said that a cause of action based on strict liability for oil pollution damage does not give rise to a maritime lien; on the other hand, there is a statutory right of action *in rem* in this case on the basis of the *Supreme Court Act 1981*. Pursuance of such a claim without relying on the proof of causative direct or vicarious liability based on negligence of the shipowner would rule out the attachment of a maritime lien. In ***The Utopia***,(49) the Privy Council had stated:

> "The foundation of a maritime lien is the negligence of the owners or their servants at the time of the collision and, if that is not proved, no lien comes into existence and the ship is no more liable than any other property which the owners at the time of the collision may have possessed."

Fault is not necessary, however, in the case of some damage claims such as wreck removal. Section 74 of the Harbours, Docks, and Piers Clauses Act 1847 establishes an absolute liability against the owner of a ship for any damage done by that ship to "the harbour, dock or pier, or quays or work connected

(48) ***Yeo v. Tatem, The Orient*** (1871) LR 3 PC 696, I Asp MLC 108*;* ***Morgan v Castlegate SS Co, The Castlegate*** [18931 AC 38 at 52,7 Asp MLC 284 at 288, HL per Lord Watson. See also ***The Hailer*** (1868) LR 2 PC 193). See Article 169 of the ***OML 1981*** which provides that:
'(Free translation) *The provisions of the law relating to maritime liens shall apply to the vessels operated by party not being the actual owner (but to whom the owner has assigned the operation of the vessel) or by the original charterer. The said provisions, however, shall not be applied if the owner looses the possession of the vessel as a result of an illegal act and that the creditor was in bad faith.'*
"تسري أحكام هذا الفرع على السفن التي يستغلها المجهز غير المالك أو المستأجر الأصلي. ومع ذلك لا تسري الأحكام المذكورة إذا فقد المالك حيازة السفينة بفعل غير مشروع وكان الدائن سيء النية".

(49) (1893) A.C. 492,499.

therewith". This provision also gives a right of detention. Sir Robert Phillimore held in ***The Merle***(50) that Section 74 created a maritime lien against the ship, even though the damage resulted from an inevitable accident with no fault on the part of the shipowner.(51)

b) The Ship or Part of her must be the actual Instrument of Damage

For the maritime lien for damage done by a ship to arise, the ship, or part of it, must be the actual instrument which causes the damage. In the leading case of ***Currie v. M'Knight*** (52) the crew of the *Dunlossit*, in order to enable their ship to get to sea, unlawfully cut the cables of the *Easdale* which was consequently driven ashore and damaged. The House of Lords held that a maritime lien did not arise in these circumstances because the *Dunlossit* itself was not the instrument of damage. Lord Halsbury, L.C., observed:

> "…the phrase that it must be the fault of the ship itself is not a figurative expression, but it imports, in my opinion, that the ship against which a maritime lien for damages is claimed is the instrument of mischief and that in order to establish the liability of the ship itself to the maritime lien claimed some act of navigation of the ship itself should either mediately or immediately be the cause of the damage."(53)

Lord Watson explained the matter further:

> "I think it is the essence of the rule that damage in respect of which a maritime lien is admitted must be either the direct result or the natural consequence of a wrongful act or manoeuvre of the ship to which it attaches. Such an act or manoeuvre is necessarily due to the want of skill or negligence of the persons by whom the ship is navigated, but it is, in the language of the maritime law, attributed to the ship, because the ship in their negligent or unskilful hands is the instrument which causes the damage ... the

(50) (1874) 2 Asp. Mar. Law Cas. 402
(51) Thomas D.R., *Maritime Liens*, paragraph 209 .
(52) [1897] A.C. 97.
(53) *Ibid.* at p. 101.

> injuries sustained by the *Easdale* were not owing to any movement of the *Dunlossiti* they were wholly occasioned by an act of the *Dunlossit's* crew, not done in the course of her navigation, but for the purpose of removing an obstacle which prevented her from starting her voyage."(54)

The phrase "damage done by a ship" connotes that only part of the ship need be the active cause of the damage. It is, for instance, sufficient if the damage is done by the anchor or the propeller of the ship. In ***The Minerva***(55) the plaintiff's grain elevator barge was damaged by a portion of the elevator falling on to the deck owning to the breaking of a wire on the derrick of the defendant's steamship. It was held that this amounted to "damage done by a ship" and that, therefore, the Admiralty Court had jurisdiction.

The damage done by the ship must not be too remote.(56) In ***The Eschersheim***(57) a salvage tug, the *Rotesand* took the ship, the *Erkowit* in tow and later beached her in a sinking condition. The actual beaching caused neither the *Erkowit,* nor her cargo any damage, but the ship was subsequently broken up by winds and waves. Although Edmund Davies, L.J., considered this to be a borderline case, he held that the intervening failure of the owners of the *Erkowit* to take steps to avert the risk of damage did not prevent the *Rotesand* from remaining the actual instrument by which the damage subsequent to the beaching was done. In other words, it was held that there was an unbroken chain of causation between the *Erkowit* and her subsequent damage.

c) Physical Collision between two Ships is not necessary

In ***Currie v. M'Knight***,(58) Lord Hershell held that maritime liens have been asserted in cases in which the damage did not result from a collision with the ship in fault, but in which, some to the negligent navigation of that ship, the injured ship was driven into collision with some other ship or object. The

(54) *Ibid*. at pp. 106-107.
(55) [1933] P. 224.
(56) Thomas D.R., *Maritime Liens*, paragraph 217.
(57) [1974] 2 Lloyd's Rep. 188; [1976] 1 Lloyd's Rep. 81; [1976] 2 Lloyd's Rep. 1 [H.L.].
(58) [1897] A.C. 97 at p. 108.

precise manner in which damage is done by a ship is, therefore, of no material significance to the creation of the maritime lien. A maritime lien may, therefore, arise where a ship negligently causes, a wash by which some property onshore is damaged.(59) Also, it may arise where a ship negligently navigates so as to cause another ship to incur expenses, (60)or sustain, damage(61) in avoiding a collision with the negligent ship; or where salvors cast a ship off so that she is beached and subsequently suffers damage to ship and cargo.(62) It would also appear that the damage need not be done only to another ship. So, a maritime lien may arise where, for instance, damage is done to a wharf [or injury to] a person, on the wharf,(63) pipe line,(64) oyster-bed,(65) landing-stage,(66) pier,(67) telegraph ,cable,(68) cargo, dock,(69) the personal effects or goods of the crew or a ship(70) or merchandise on a wharf.(71)

2.3.2. Salvage Liens

The lien for salvage is created by the rendering of salvage services to a maritime property, that is ship, apparel, cargo or wreckage. In 1862 Dr.

(59) ***The Eschersheim*** 1[1976] 2 L1oyd's Rep. l at p. 8.
(60) In ***The Port Victoria*** [1902J P. 25 in seeking to avoid a collision, the innocent vessel incurred expenses, due to the consumption of coals and stores.
(61) In ***The Industries*** (1871) L.R. 3 A. & E.303 the innocent ship, in seeking to avoid the collision, ran against a dock; and in ***The Sisters*** (1876) 1 P.D. 177 the innocent ship collided with a third ship.
(62) ***The Eschersheim*** [1976] 2 Lloyd's Rep. I. See also *The Chr. Knudsen* [1932] P. 153 at p.156 where Bateson, J., said that there were numerous cases in which claimants had recovered by actions *in rem* although there had been no physical ,contact between the damaged ship and the wrongdoing ship.
(63) ***The Tolten*** [1946] P. l35 at p. 147; *The Excelsior* (1868) L.R. 2 A. & E. 268.
(64) ***The Golaa*** [1926] P. 103.
(65) ***The Swift*** [1901] P. 168.
(66) ***The veritas*** [1901] P. 304.
(67) ***The Mary Moxham*** (1876) L.R. 1 P.D. 107.
(68) ***The Clara Killam*** (1870) L.R. 3 A. & E. 161.
(69) ***The Chr. Knudsen*** [1932] P. 153.
(70) ***The Stream Fisher*** [1927] P. 73. While goods were not explicitly mentioned in this case a maritime lies was recognized in respect of damage done to the personal effects of the master of one of the innocent ships involved in the collision.
(71) ***The Tolten*** [1946] P. 135 at p. 147.

Lushington[72] observed that "beyond all doubt, from the earliest times, salvage has been deemed a lien on the ship."[73]

The salvage lien is reinforced by Section 20(2)(j) of the *Supreme Court Act 1981* which gives jurisdiction to the Admiralty Court over "any claim in the nature of salvage .. .".

i) Definition of Salvage

The classic definition of a salvor is given by Lord Stowell as follows:

> "A person who, without any particular relation to a ship in distress, proffers useful service, and gives it as a volunteer adventurer, without any pre-existing convenant that connected him with the duty of employing himself for the preservation of that ship."[74]

A salvage operation is described by Kennedy as:

> 'A service which saves or helps to save a recognised subject of salvage when in danger, if the rendering of such service is voluntary in the sense of being solely attributable neither to pre-existing contractual or official duty owed to the owner of the salved property nor to the interest of self-preservation.'[75]

(72) ***The Gustaf*** (1862) Lush. 506 at p. 508. See also *The Grusader* [1907] P 15 at p. 26.

(73) Salvage liens became a part of established law in England by the end of the eighteenth century and the remedy could only be claimed before the Admiralty Court. ***Tranter v.Watson*** **(**1703)6 Mod.11. 87 E.R. 776 seems to have been the earliest recorded case where the arrest of cargo in an action for prize salvage was upheld as a lawful process within the Admiralty jurisdiction and in the result an application for prohibition failed. In the nineteenth century, the Admiralty Court Act 1840 at sect. VI gave the court jurisdiction in respect to "all Claims and Demands whatsoever in the Nature of Salvage for Services rendered to ... any Ship or Seagoing Vessel .... whether such Ship or Vessel may have been within the Body of a County or upon the High Seas, at the Time when the Services were rendered..."

(74) ***The Neptune*** (1824) 1 Hag. Adm. 227 at p. 236.

(75) Kennedy's Law of Salvage (1985) at p. 5. See also Brice, Maritime Law of Salvage (1983) at p. 1.

ii) Prerequisites for a Salvage Claim and Maritime Lien

That a maritime lien secures a salvage claim is trite. But to determine whether a maritime lien attaches to the claim, it has to be determined whether the prerequisites for a salvage claim are fulfilled. There are five such prerequisites.(76) It is however only the last four prerequisites mentioned below which are generally considered to be the "classic ingredients" of salvage.(77)

a) Services must be performed intentionally

The salvage services must be intentionally performed(78) with the motive of benefitting the owners of the maritime property (i.e., the ship) or the life at risk.(79)

b) Salvor must be volunteer adventurer

The salvor must act as a volunteer adventurer,(80) that is, neither in pursuance of any pre- existing contractual,(81) public(82)or other legal duty; nor from an instinct of self-survival.(83) The universal moral obligation laid upon

(76) Thomas D.R., *Maritime Liens*, paragraph 244 .
(77) ***The Goring*** [1988] 1 All E.R. 641 at p. 642.
(78) ***The Annapolis*** (1861) Lush. 355.
(79) ***Simon v. Taylor*** [1975] 2 Lloyd's Rep. 338.
(80) ***The Neptune*** (1824) 1 Hagg. Adm. 227 at p. 236;***The Goring*** [1988] 1 All E.R. 641 at p. 642.
(81) ***The Zephyr*** (1827) 2 Hag. Adm. 43; ***The Solway Prince*** [1896] P. 120; ***Clan Steam Trawling Co. Ltd. v. Aberdeen*** **Steam** ***Trawling and Fishing Co. Ltd.*** (1908) S.C. 651; ***The Egypt*** (1932) 44 LI. L. Rep. 21.
(82) ***The Cayo Bonito*** [1904] P. 310; ***The Mars and other Barges*** (1948) 81 Ll. L. Rep. 452; ***The Africa Occidental*** [1951] 2 Lloyd's Rep. 107. Section 6 of the *Maritime Conventions Act 1911* provides: "(1) The master or person in charge of a vessel shall, so far as he can do so without serious danger to his own vessel, her crew and passengers (if any), render assistance to every person, even if such person be a subject of a foreign State at war with [Her] Majesty, who is found at sea in danger of being lost, and, if he fails to do so, he shall be guilty of a misdemeanour. (2) Compliance by master or person in charge of a vessel with the provisions of this section shall not affect his right or the right of any other person to salvage."
(83) ***Towle v. The Great Eastern*** (1864) 2 Asp. M. L. C. 148; ***The Vrede*** (1861) Lush. 322; ***The Le Jonet*** (1872) L.R. 3 A. & E. 556; ***The Lomonosoff*** [1921] P. 97.

mariners to render assistance to those in danger at sea does not deprive an act of its voluntary character for this would mean that no salvage claim could properly be made.

c) Property or Life must be in Danger

The property or life which was salved must be in danger(84) or distress.(85) What sort of danger does the law require in order to turn an act of assistance into a salvage service? The answer has been summarized thus:(86)

> 'On the one hand, [the danger] must not be either fanciful or only vaguely possible or have passed by the time the service is rendered. On the other hand, it is not necessary that distress should be actual or immediate or that the danger should be imminent; it will be sufficient if, at the time at which assistance is rendered, the subject-matter has encountered any misfortune or likelihood of misfortune which might possibly expose it to loss or damage if the service were not rendered ... [T]here must be such reasonable, present apprehension of danger that, in order to escape or avoid the danger, no reasonably prudent and skilful person in charge of the venture would refuse a salvor's help if it were offered to him upon the condition of his paying a salvage reward.'

Even if there is no danger at all, but the master wrongfully displays distress signals, or private signals which are liable to be mistaken for such, and another ship goes to the rescue she is entitled to compensation for labour, risk or other loss, and the master of the ship displaying the signals is punishable by fine.(87)

(84) ***The Charlotte*** (1848) 3 W. Rob. 68; *The Liverpool* [1893] P. 154; ***The British Inventor*** (1933) 45 LI. L. Rep. 263; ***The Oceanic Grandeur*** [1972] 2 Lloyd's Rep. 396; ***The Goring*** [1988] 1 All E.R. 641 at p. 642.

(85) *Merchant Shipping Act 1894*, Section 546 provides: "Where any vessel is wrecked, stranded, or in distress . . .and services are rendered to it, a reasonable amount of salvage is payable."

(86) Kenndy (1985). P. 130.

(87) *Section 21 of the Merchant Shipping (Safety Convention) Act 1949*.

d) Services must be successful

On the basis of the fundamental maxim of "no cure no pay" the salvage services must achieve a meritorious degree of success in saving life or property in distress.(88) Lord Phillimore in ***SS Melanie v. SS San Onofre***(89) expressed the following view:

> "Success is necessary for a salvage award. Contributions to that success, or as it is sometimes expressed meritorious contributions to that success, give a title to salvage reward. Services, however, meritorious, which do not contribute to the ultimate success, do not give a title to salvage reward. Services which rescue a ship from one danger but end by leaving her in a position of as great or nearly as great danger though of another kind, are held not to contribute to the ultimate success and do not entitle to salvage reward. In considering these questions wherever the service has been meritorious, the court has lent towards supporting a claim for salvage."(90)

(88) ***The Renpor*** (1883) 8 P.D. 115; ***The Cheerful*** (1885) 11 P.O. 3; ***The Melanie (Owners) v. The San Onofre (Owners)*** [1925] A.C. 246. Salvors are liable for negligently causing damage to the salved property (***The Tojo Maru*** [1972] A.C. 242). *Lloyd's Open Form of Salvage Agreement 1980 [LOF 1980]*, the *Salvage Convention 1989*, *Lloyd's Open Form of Salvage Agreement 1990 [LOF 1990]*, *Lloyd's Open Form of Salvage Agreement 1995 [LOF 1995] and LOF 2000* contain an exception to the rule of "no cure, no pay" also normally applicable in the case of the general rules of maritime salvage. The *Salvage Convention* is now incorporated in Schedule 11 of the *Merchant Shipping Act 1995*. This exception is now provided for in Article 14 of the *1989 Salvage Convention*.

(89) (1925) A.C. 246, 262.

(90) *Ibid.*, at p. 262. In ***The Tequila*** [1974] AMC 860 where a salvor claimed a maritime lien in respect of a salvage operation in attempting to free from a strand in Honduras the motor ship *Tequila*. The claim was opposed by the holder of a foreign preferred mortgage which had been obtained four months after the alleged salvage. Held: that where the salvage was hired at a daily rate under a contract which did not contain a 'no cure – no pay' provision, the owner of the salvage vessel was entitled to a maritime lien for salvage.

e) Property must be proper subject of Salvage

The property salved must be a proper subject of salvage.(91) The Admiralty Court does not have jurisdiction to award salvage in respect of every object no matter what which, being in danger at sea, is saved from that danger.(92) Property subject to the maritime lien for salvage must be maritime property.(93) And not every property in tidal waters is maritime property. This quality does not extend to buoys or other like structures, but only to ships used in navigation. Thus, unregistered ships such as barges and rafts are included. But in ***The Gas-Float Whitton (NO.2)***(94) it was held that a form of unmanned lightship, though shaped like a boat and moored in tidal waters, could not be salved as it was neither intended nor fitted for navigation. It was said that:

> "It is not constructed for the purpose of being navigated or of conveying cargo or passengers. It was, in truth, a lighted buoy or beacon. The suggestion that the gas stored in the float can be regarded as cargo carried by it is more ingenious than sound." (95)

2.3.3. Seamen's Wages

Seamen have had and still have a high priority maritime lien under the general maritime law in English law.(96) It is a lien which follows the ship no matter who is the owner. *The Supreme Court Act 1981* at sect. 20(2)(o) provides

(91) ***The Goring*** [1988] 1 All E.R. 641 at p. 642.
(92) ***The Gas Float Whitton No. 2*** [1897] A.C. 337 at p. 343.
(93) Thomas D.R., *Maritime Liens*, paragraph 244.
(94) *Ibid.*
(95) *Ibid.* at p. 344.
(96) ***The Sydeny Cove*** (1815) 2 Dods.11. In ***The Fairport***, (1966) 2 All E.R. 1926, it was held that the master and crew were entitled to receive, out of the proceeds of the funds in Court, their wages accruing before and after the issue of the writ. In ***The Ever Success***, (1999) 1 Lloyd's Rep. 824, at p. 830, it was held that where a master or seaman renders service to the ship, he is entitled to a maritime lien in respect of wages irrespective of "whether or not the owner of the vessel has authorised his service unless he is guilty of some fraud or knows that he is not authorised to act as master or seaman, as the case may be."

the High Court with jurisdiction in Admiralty in respect to:

> "any claim by a master or member of the crew of a ship for wages (including any sum allotted out of wages or adjudged by a superintendent to be due by way of wages)"

i) Meaning of "Seamen"

The definition of seaman is rarely limited. Section 742 of the *Merchant Shipping Act 1894* (as amended by the *Merchant Shipping Act 1970*, sect. 100(1) and schedule 3 para.4) gives the following definition:

> "Seaman includes every person (except masters and pilots), employed or engaged in any capacity on board any ship."

It would appear that the original practice of the Admiralty Court was to allow every person employed on board the ship, except the master, to sue for wages.(97) In other words, the meaning of "seaman" was widely construed. So, for instance, a woman working as a cook and steward;(98) a surgeon;(99) a carpenter(100); a purser;(101) a butcher(102); a baker;(103) a steward;(104) a stevedore;(105) a storekeeper and(106) a cook(107) have all been held to be seamen.

(97) ***The Prince George*** (1837) 3 Hag. Adm. 376 at p. 378.
(98) ***The Jane and Matilda*** (1823) 1 Hag. Adm. 187
(99) (1761) 3 Hag. Adm. 148; ***The Prince George*** (1837) 3 Hag. Adm. 376.
(100) ***The Bulmer*** (1823) 1 Hag. Adm. 163.
(101) ***The Prince George*** (1837) 3 Hag. Adm. 376.
(102) *Re* ***The Great Eastern S.S. Co.*** (1885) 5 Asp. M.L.C. 511 at p. 513.
(103) *Ibid.*
(104) *Ibid.*
(105) ***R. v. Judge of City of London Court and Owners of S.S. Michigan*** (1890) 23 Q.B.D. 339. In this case the mate, after being paid, remained on board by the direction of the shipowner in order to superintend the off-loading and loading of the ship. And, when the ship was taken into dock for repairs, the mate, again by the direction of the shipowner, continued on board to superintend the repairs. Willis, J., held that: "The right to proceed in rem for services rendered on board a ship apparently extends to every class of person who is connected with the ship as a ship, as a sea-going instrument of navigation, or of transport of cargo from one place to another, and to services rendered by such persons in harbour just as much as to services rendered by them at sea.' Accordingly, the mate was allowed to claim as a seaman for his wages.

They would, therefore, all be entitled to a maritime lien for unpaid wage. What is more, claimants were regarded as seamen with a claim against the ship even before the voyage for which they were engaged actually commenced.(108)

ii) Meaning of "Wages"

Wages have been "very broadly interpreted"(109) so as to include virtually any benefits which can "be fairly said to have been earned by his [a seaman's] services"(110). In ***The Elizabeth***, Sir William Scott, for instance, awarded wages to seamen until their arrival home, although they had been discharged some four months earlier in a foreign country. He said that, in order to make this award, he

(106) ***Thomson v. Hart*** (1890) 18 R. (Ct. of Sess.) 3.

(107) ***Thompson v. H. & W. Nelson Ltd.*** [1913] 2 K.B. 523, 528.

(108) ***Re The Great Eastern S.S. Co.*** (1885) 5 Asp. M.L.C. 511.

(109) ***The Halcyon Skies*** [1977] Q.B. 14 at p. 22.

(110) ***The British Trade*** [1924] P. 108 at p. 109 per Sir Henry Duke. In ***The Tacoma City*** [1991] 1 Lloyd's Rep. 330, the extent of the crew wages maritime lien was considered by the Court of Appeal. In 1985 the world shipping group, Reardon Smith Line, became insolvent and ceased trading. The Tacoma City was owned by a subsidiary company and mortgaged to a London bank. The vessel was arrested and the bank was required by court order to pay the crew all the sums due to them under their contracts of employment except those which in the opinion of the bank did not qualify as wages. The vessel was sold by the court subsequently and the Master and officers claimed severance pay against the sale proceeds. The officers had been employed under a contract which incorporated the National Maritime Board Agreement. These contracts provided that an officer with 'a minimum of two completed years of company service' would qualify for severance pay in the event of his becoming 'surplus to requirements'.
The Court of Appeal decided that the officers had no contractual entitlement to severance pay. If severance pay had been due, would this have qualified as a maritime lien? The officers contended that severance pay accrued due as a result of service aboard a ship and was therefore within the definition of 'wages'. The Court of Appeal disagreed. When a maritime employment contract includes an entitlement to pension payments upon retirement the sums due as a pension could not possibly be regarded as 'wages'. Modern contracts of employment provided for such matters as bonuses, sick pay and notice of termination of employment, all of which represented the value of the current service on the ship by the seafarer. Severance pay, on the other hand, was a payment in respect of earlier service aboard the ship or different ship. Severance pay was compensation for the termination of employment and not wages.

was prepared to "go quite as far as the partiality of the law for this class of men will carry me."(111) And, where the construction of the mariner's contract was doubtful, the well-known principle which was applied by Dr. Lushington was that the benefit of the doubt should go to the seaman.(112) Accordingly, it has been held that in doubtful cases the Admiralty Court should adopt, as in the past, "a rather benevolent attitude to seamen's claims."(113) The Admiralty Court has, therefore, interpreted the statutory use of the word wages "in a large sense so as to include, not only what a master gets as a wage, but what he obtains in the course of his service as recompense for the execution of his duty."(114)

iii) Master's Wages Lien

In early law, there would appear to have been no lien on a ship for the master's wages and disbursements.(115) There were some cases, however, which would support the possibility of the existence of a maritime lien in relation to disbursements.(116) Legislative intervention, presently enshrined in section 41 of the Merchant Shipping Act of 1995 puts the master's wages and disbursements on a par with a traditional maritime lien.(117)

iv) Emoluments

The maritime lien for seamen's wages attaches to wages and emoluments.(118) what, then, does emoluments mean? The consistently liberal construction accorded to seamen's wages is presently enshrined in s. 742 of the *Merchant Shipping Act, 1894* which provides that "wages includes emoluments." The word emoluments would appear to indicate that the seaman may claim as his wages any "profit or advantage" or, indeed, anything which is

(111) ***The Elizabeth*** (1819) 2 nods. 403 at p. 411.
(112) ***The Nonpareil*** (1864) B. & L. 355 at p. 357.
(113) ***The Arosa Star*** [1959] 2 Lloyd's Rep. 396 at p. 400.
(114) ***The Elmville*** (No. 2) [1904] P. 422 at p. 428 per Sir Francis Jeune in construing s. 167 of the *Merchant Shipping Act 1894*.
(115) Price, G., *The Law of Maritime Liens* [Sweet and Maxwell, London, 1940], p. 63.
(116) *Ibid*.
(117) Section 41 of the *Merchant Shipping Act 1995* provides: "The master of a ship shall have the same lien for his remuneration, and all disbursements or liabilities properly made or incurred by him on account of the ship, as a seaman has for his wages."
(118) ***The Lyrma No. 2*** [1978] 2 Lloyd's Rep. 30 at p. 31.

a direct benefit from his employment.(119) Hence, the notion of a wage is wider than a net sum of money earned by a master or seaman in consideration for the services which he rendered to the shipowner or, as the case may be, the charterer.(120) In ***The Elmville No. 2,***(121) for instance, the master claimed a bonus which had been promised to him in consideration that he remained with the ship and satisfied the shipowners that he had done all in his power to promote the interests of the ship. Sir Francis Jeune was inclined to consider the bonus as a conditional wage, adding that if it was not a wage, he was nevertheless satisfied that it was an emolument. In ***The Halcyon Skies*** (122) Brandon, J., observed that claims which extended the concept of wages have been held to include payments other than wages in the strict sense, which were payable direct to seamen, such as victualling allowances and bonuses. Employer's contribution to a pension fund were, he held, to be considered in the broad sense of wages, that is, as emoluments, regardless of whether the cause of action was in debt or in damages.

2.3.4. Masters' Disbursements

The *Merchant Shipping Act 1970* at sect. 18 gives the master the same lien for his disbursements as the seaman has for his wages:

> The master of a ship shall have the same lien for his remuneration, and all disbursements or liabilities properly made or incurred by him on account of the ship, as a seaman has for his wages.

(119) ***The Acrux*** [1965] P. 391 at p. 396.

(120) Thomas D.R., *Maritime Liens*, paragraph 320.

(121) [1904] P. 422 at p. 428.

(122) [1977] 1 Q.B. 14 at p. 22 citing ***The Tergeste*** [1903] P. 26 and ***The Elmville*** **(No. 2)** [1904] P. 422. In ***The Halcyon Skies***, X was employed under a special contract, not being an ordinary mariner's contract, as a deck officer and crew member of the tanker Halcyon Skies. Y, his employer, failed to pay agreed contributions to the pension fund, and subsequently went into liquidation.
It was held: that his claim was a claim by a crew member for wages within the meaning of the Administration of Justice Act 1956, for he had a good claim in debt for those wages, so that the damages recoverable were protected by a maritime lien despite the fact that the employment was under a special contract.

Masters' disbursements have been defined as expenses 'By the master, which he makes himself liable for in respect of necessary things for the ship, for the purposes of navigation, which he, as master of the ship, is there to carry out - necessary in that they must be had immediately - and when the owner is not there, able to give the order, and he is not so near to the master that the master can ask for his authority, and the master is therefore obliged, necessarily, to render himself liable in order to carry out his duty as master.'(123)

Requirements for a Master's Disbursement Lien

There are six requirements for a master's disbursement lien:(124)

a) The goods or services acquired must be necessaries, *i.e.* what a prudent person would have ordered for the ship in the circumstances.(125)

b) The goods or services must be for the ship and common venture and not for the master's own benefit.(126)

c) The master must have disbursed his own money or incurred his own personal liability. In other words the credit must have been given to the master personally. ***The Orienta*** is particularly succinct:(127)

> "The real meaning of the word "disbursements" in Admiralty practice is disbursements by the master, which he makes himself liable for in respect of necessary things for the ship ... and he [the owner] is not so near to the master that the master can ask for his authority, and the master is therefore obliged, necessarily, to render himself liable in order to carry out his duty as master."

In ***Orienta,***(128) even when the master drew bills of exchange on shipowners to pay for coals, a debt was not said to be incurred by the master. The debt on

(123) ***The Orienta*** [1895] P. 49, per Lord Esher MR, at p. 55.
(124) Thomas D.R., *Maritime Liens*, paragraphs 342-3490.
(125) See ***Webster v. Seekamp*** (1821) 4 B. **&**. Aid. 352 at p. 354. 106 .ER. 966 at p. 967.
(126) ***The Limerick*** (1876) I P.D. 411 at p. 413. ***The Elmville No.* 2** [1904] P. 423; ***Tire Feronia*** (1868) L.R. 2 A. **&** E. 65 at p. 75.
(127) [1895] P. 49 at p. 55. See also ***The Ripon City*** [18971 P. 226 at p. 234; ***Brisow v. Whitmore*** (1861) 9 H.L.C.. 391. 11 E.R. 781.
(128) ***The Orienta*** *[18*95] P. 49 at p. 55.

the bills of exchange was the shipowners while the master was not liable for the cost of the coals. Only if the bills of exchange were dishonoured was the master as drawer obligated on the bills. This decision illustrates how restrictively the statute was interpreted.

d) The disbursement must be by the master. The lien does not benefit seamen or agents or the mate.(129) Nor can the disbursement be made by the master in his capacity as owner. The master who is also owner may nevertheless bind the ship when he acts solely in his capacity as master in making the disbursement.(130)

e) The disbursements must have been "properly made or incurred", as stated in sect. 18 of the *Merchant Shipping Act 1970, i.e.* that the master had authority to pledge the owners' credit. This means either:

(i) that the captain in so acting was within his traditional and historical authority as master.(131) This authority is both as a senior servant of the owner and as agent of the owner; or

(ii) that the captain acted within his specific and implied special instructions from owners. Explicit special instructions could be the standing orders of a particular steamship line affecting all its masters. Implicit special instructions could be the practices and traditions of the steamship line. In ***The Castlegate***(132)the master ordered coals for the ship but he did not have authority from the owners to bind their ship. The ship had been chartered and under the terms of the charterparty the charterers were to pay for coals. The master who was aware of these terms was held to have been acting, in ordering the coals, as the agent of the charterer, not of the owner, and consequently he was denied a maritime lien for his disbursement since the shipowner was not personally liable for the disbursement. Relied on was sect.1 of the *Merchant Shipping Act 1889*(133) which is similar to the modern statute, the *Merchant Shipping Act,*

(129) ***The Victoria*** (1867) 37 L.J. (N.S.) Adm. 12.
(130) ***The Feronia*** (1868) L.R. 2 A. & E. 65.
(131) ***Beldon v. Campbll*** (1851) 20 L.J. (N.S.) Ex. 342; ***Anderson v. Ocean S.S. Co.*** (1884) 10 App. Cas. 107: ***The Sara*** (I889) 14 App. Cas. 209.
(132) [1893] A.C. 38. See also ***The Ripon City*** [1897] P. 226.
(133) (1889) 52 & 53 Viet. C. 46.

1970 at sect. 18.(134)

f) The master must be unable to communicate with the owners,(135) whether or not the ship was in foreign waters or home waters(136)or even in the home port.(137)

2.3.5. Bottomry

Ships' masters in foreign ports have to be given authority to act on behalf of their owners when in an emergency they could not communicate with them. They might have had to order repairs quickly to bring a perishable cargo home and had no money or credit in those distant parts. In such circumstances, the master, as agent of necessity, could borrow money, to be repaid with if the ship arrived safely at her destination. The ship - the ship's bottom, hence the name 'bottomry' and possibly also cargo and freight, were mortgaged by a bond given to the lender. The bond provided security only while the property mortgaged remained in existence. The bond itself and also the borrower's personal obligation, were discharged if ship was afterwards lost, the lender's risk being the completion of the adventure.(138)

Prerequisites for Bottomry Bond as Maritime Lien

There are three prerequisites for a bottomry bond.(139) First, there must be the presence of an immediate and unforeseen necessity in the form of distress to the ship or cargo, and the absence of personal credit or alternative finance. Secondly, there must be an assumption of a maritime risk - sea risk - by the money lender so that the repayment of the money depends upon the safe arrival of the ship. Thirdly, the master must communicate with the shipowner so as to obtain his consent to hypothecate the ship, alternatively all possible efforts must be made to achieve such communication. On the other hand, the locality of the place where the bottomry bond is granted is not conclusive as to the validity of the instrument. Nor is there any special form which the instrument has to take.

(134) 1970 U.K. c. 36.
(135) ***The Orienta*** [1895] P. 49 at p. 55.
(136) ***Arthur v. Barton*** (1840) 6 M. & w. 138, 151 E.R. 355.
(137) ***Symes v. The City of Windsor*** (1895) 4 Ex. C.R. 362 and 400 at p. 409 (Canada).
(138) Thomas D.R., *Maritime Liens*, paragraphs 371-373.
(139) Thomas D.R., *Maritime Liens*, paragraph 387.

These matters are now considered seriatim

a) Necessity (140)

The power to effect a bottomry bond arises when there is necessity, and not otherwise.(141) In the words of Lord Stowell "it is that state of unprovided necessity that alone supports these bonds: the absence of that necessity is their undoing."(142) The requirement of necessity has frequently been stressed as being of cardinal importance.(143) Because of the presence of necessity the bottomry bond is considered to be essential to the preservation of the property: without it the ship would be lost totally,(144) or the voyage could not be completed.(145) The necessity must be unforeseen.(146) Also, it must be absolute, strict(147) or imperious(148) in the sense that it is impossible for the master to meet the necessary (disbursements; and he must have no means of procuring money but upon the credit of the ship.(149) As Sir John Nicholl puts it:

> "Hypothecation, therefore, can only be valid if bottomed on. necessity, and that necessity must be two-folds: first, a necessity of obtaining supplies in order to prosecute the voyage; and, secondly, the impossibility of obtaining those supplies in any other way than by an hypothecation of the ship itself: for if they can be procured upon the credit either of the master or of the owners, or by advance on the freight, or by passage –money, or upon any other credit than the hypothecation of the ship, the bond of hypothecation is absolutely void."(150)

(140) Thomas D.R., *Maritime Liens*, paragraph 388.
(141) ***The St. George*** [1926] P. 217.
(142) ***The Nelson*** (1823)1 Hag. Adm. 169 at P. 175.
(143) ***The Hersey*** (1837) 2 Hag. Adm. 404; The St. George [1926] P. 217.
(144) ***The Rhadamanthe*** (1813) 1 Dods. 201 at p. 204.
(145) ***The Prince of Saxe Cobourg*** (1838) 3 Moo. P.C. 1 at p. 9.
(146) ***The Tania Maria*** [1975] 1 Cyp. L.R. 162 at p. 180.
(147) ***Boddingtons*** (1832) 2 Hag. Adm. 422 at p. 425.
(148) ***The Zodiac*** (1825) 1 Hag. Adm. 320 at p. 325.
(149) ***The Trident*** (1839) 1 W. Rob. 29 at pp. 31-32.
(150) ***The Hersey*** (1837) 3 Hag. Adm. 404 at p. 408.

b) Maritime Risk (151)

The inherent jurisdiction of the Admiralty Court in respect of bottomry bonds is founded, *inter alia*, upon a sea risk(152) also styled a maritime risk. (153) Where there was no such risk the Admiralty Court was in hazard of prohibition.(154) According to Dr. Lushington the very term "bottomry" implies a sea risk.(155) And, in the view of Lord Stowell, "such bonds are founded upon a sea risk, and are defeasible by the destruction of the ship in the course of her voyage, on which account alone the high interest is allowed."(156) Thus, it is essential to the validity of a bottomry bond that a sea risk should be incurred by the lender, and that the pledge upon the ship should only take effect in the event of its safe arrival.(157)

c) Duty of Communication with the Shipowner

In order to hypothecate the ship, the consent of the shipowner must always be obtained by the master where it is possible to communicate with him.(158) Even where there is merely a "reasonable expectation" that effective communication can be made, the master must endeavour to obtain the shipowner's instructions.(159) The purpose of the communication is to give the shipowner an opportunity to advance the requisite funds and to unload the cargo.(160) The master is only relieved of the duty of communication if it is impossible, or would result in an inordinate delay.(161)

Where it is thus impossible or impracticable for the master to communicate with the shipowner, then the authority of the master to enter into a bottomry

(151) Thomas D.R., *Maritime Liens*, paragraph 394.
(152) ***The Royal Arch*** (1857) Swab. 269 at p. 281.
(153) ***The Tania Maria*** [1975] 1 Cyp. L.R. 162 at pp. 181-184.
(154) ***The Atlas*** (1827) 2 Hag. Adm. 48 at p. 53.
(155) ***The Royal Arch*** (1857) Swab. 269 at p. 281.
(156) ***The Atlas*** (1827) 2 Hag. Adm. 48 at pp. 52, 53, 58.
(157) ***Stainbank v. Shepard*** (1853) 13 C.B. 418 at p. 442; *The James W. Elwell* [1921] P. 351 at p. 365.
(158) ***The Royal Arch*** (1857) Swab. 269 at p. 275.
(159) ***Australasian Steam Naviagtion Co. v. Morse*** (1927) L.R. 4 P.C. 222 at p. 232.
(160) ***The Lizzie*** (1868) L.R. 2 A.&E. 254 at p. 259.
(161) ***The Cargo Ex Sultan*** (1859) Swab. 504 at p. 512.

bond is founded upon that impossibility.(162) In such emergences, the authority of agent of necessity is necessarily devolved upon the master.(163) In other words, the master is invested by a presumption of law with the authority to enter into a bottomry bond on the ground that the shipowner has no means of expressing his wishes.(164)

It is also the general duty of the master to communicate with the cargo owners - before entering into a bottomry bond.(165) The object of such communication is, of course, to afford the cargo owners the same means of protecting their interests as have the shipowners.(166) If the ship is a general ship, the fact that the master cannot communicate with all the cargo owners does not relieve him of the duty of communicating with any of the cargo owners. Nevertheless, the difficulty of communicating with the cargo owners may be taken, into account when estimating the conduct of the master.(167) And, where the master does not know who the owners of the cargo are, it is not imperatively necessary that he should somehow communicate with them.(168)

The master must endeavour to hold the balance evenly between his two principals (i.e. shipowner and cargo owner). The ship must not be sacrificed to the cargo, or vice versa.(169) But, it is almost always the case that what benefits the ship is also in the interests of the cargo. Where this is so, then the master can, of course, hypothecate the ship together with the cargo, even though he is not able to communicate with the cargo owner.(170) In ***The Constancia***(171) Dr. Lushington put it thus:

> "Where a bond is given [in the interests of the ship] affecting a cargo, the ship and freight, whether named in the bond or omitted,

(162) ***The Oriental*** (1851) 7 Moo. P.C. 459 at p. 473
(163) ***The Gratitudine*** (1801) 3 C. Rob. 240 at p. 259; ***Australasian Steam Naviagtion Co. v. Morse*** (1927) L.R. 4 P.C. 222 at p. 228.
(164) ***The Hamburg*** (1864) 141 R.R. 77 at p. 97.
(165) ***The Bonaparte*** (1853) 8 Moo. P.C. 459 at p. 473 reaffirmed in *The St. George* [1926] P. 217.
(166) ***The Hamburg*** (1864) 141 R.R. 77 at p. 99.
(167) ***Australasian Steam Naviagtion Co. v. Morse*** (1927) L.R. 4 P.C. 222 at p. 235.
(168) ***The Bonaparte*** (1851) 8 Moo. P.C. 459 at p. 474.
(169) ***The Onward*** (1873) L.R. 4 A. & E. 38 at p. 58.
(170) ***The Gratitudine*** (1801) 3 C. Rob. 240 at p. 261.
(171) (1846) 4 N.C. 512 at p. 517.

must in the first instance be applied in satisfaction of the bond, and this whether the bondholder desires it or not: it is a right belonging to the owners of the cargo, against whom there is no claim except for any deficiency which may remain after the application of the ship and freight in discharge of the bond . . . this principle does not apply to a bond on the ship only, for if a bondholder chooses freight or cargo, he must abide by his own act; he has no right to demand more than he has stipulated for, and the owner of the ship has no right to require the freight or cargo to be brought in relief of the demand against the ship. The ship is primarily benefitted by the repairs and primarily liable; the bondholder has in no case a right to demand more than is due by the terms of his bond; where other funds are brought in to discharge the bond, it is the act of the law for the benefit of the owner of the cargo, and not for the benefit of the bondholder."

3. PROPERTY SUBJECT TO MARITIME LIENS

3.1. UNDER *OML 1981*

In *Omani law*, maritime liens attach to the ship,(172) and the freight.(173) The lienee's rights over a ship extend to accessories of the ship. For this purpose,

(172) Article 9 of the ***OML 1981***, defines the vessel as following:
'(Free translation) *A vessel shall mean any structure which is seaworthy by itself normally working or prepared to be working in maritime navigation and it includes all the accessories needed for its utilization.'*
"السفينة هي كل منشأة تعمل عادة او تكون معدة للعمل في الملاحة البحرية. وتشمل على جميع الملحقات والتفرعات الضرورية لاستثمارها."

(173) Article 156 of the ***OML 1981*** provides:
'(Free translation) *The privileged rights (maritime liens) shall be on the vessel, on the freight for the voyage during which the claim giving rise to the lien arises, and on the accessories of the vessel and freight accrued since the commencement of the voyage'.*
"يعد ديناً ممتازاً ويشمل السفينة وأجرة النقل لرحلة نشأ اثنائها الدين الممتاز وما يلحق بالسفينة وبالأجر المستحق منذ بدء الرحلة من توابع..."
The *International Convention for Unification of Certain Rules Relating to Maritime Liens and Mortgages 1926* stated that the freight contained on the voyage during which the claims arose, and the accessories of the ship and the freight which accrued from the commencement of the voyage might also be attached with maritime liens. The *International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages 1967* and the *1993 Convention* stating that only the ship is the subject matter of maritime liens.

items listed in the ship's inventory list are presumed to be accessories. The freight referred to here is limited to freight for the voyage during which the claim giving rise to the lien has arisen. However, a lien in favour of a person in the ship's service extends over the total amount of freight due for all voyages made during the subsistence of his employment contract.(174) A lien on the freight, however, may only be enforced when the freight is due but unpaid, or when the sum paid for the freight is still held by the master or an agent on behalf of the shipowner.(175)

Accessories of the ship and freight include compensation due to a shipowner for damage sustained by the ship or for loss of freight, general average contributions due to a shipowner in respect of damage to a ship or loss of freight, and any remuneration due to a shipowner for assistance and salvage services.(176)

(174) Article 156/6 of the ***OLM 1981*** provides:
"(Fee translation) However, the privilege (lien) in favour of master, seamen and persons hired on board extends, to the total amount of freight due for all voyages made during the subsistence of the same contract of engagement".
"ومع ذلك يترتب الامتياز المنصوص عليه في الفقرة (2) من المادة البند الثاني من المادة (156) على أجور النقل المستحقة على جميع الرحلات التي تتم خلال عقد عمل واحد".

(175) Articlee 160 of the ***OML 1981*** provides:
'(Free Translation) *A privileged right (lien) on freight may be enforced so long as the freight is still due or the amount of the freight is still in the hands of the master or the agent of the owner. The same principle applies to a privilege(lien) on ship and freight accessories.'*
"يبقى حق الامتياز على أجرة النقل قائما ما دامت الأجرة مستحقة الدفع أو كانت تحت يد الربان أو ممثل المالك، وكذلك الحال بالنسبة إلى الامتياز على ملحقات السفينة والأجرة".

(176) Article 158 of the ***OML 1981*** provides:
'(Free translation) *1-The following shall be considered the accessories of the ship and of the freight*
i) Compensation due to the owner for material damage sustained by the ship and not repaired, or for loss of freight;
ii) General average contributions due to the owner, in respect of material damage sustained by the ship and not repaired or in respect of loss of freight;
iii) Remuneration due to the owner for assistance and salvage services rendered at any time before the end of the voyage, any sums allotted to the master or other persons in the service of the ship being deducted.

Payments made or due to the shipowner on insurance policies or bounties and subsidies are not deemed to be accessories of the ship or of the freight.(177) This rule must be distinguished from the rule on the right over substitutes, the problem of which arises only after a lien is attached to a ship. Once a lien is attached to a ship, the rights of a lienee extend to things that come into existence in substitution for the ship. The thing here includes payment to be made under the contract of insurance.

3.2. UNDER ENGLISH LAW

Section 21(3) of the *Supreme Court Act 1981*, provides that an action *in rem* may be brought where there is a maritime lien "on any ship, aircraft or other property for the amount claimed." Beyond that the Act does not define the subjects to which a maritime lien may attach.

3.2.1. Ships

All maritime liens may, depending upon the circumstances in which the claim arises, attach to a ship. Section 21(4) of the *Supreme Court Act 1981*states that ship:

> "... includes any description of ship used in navigation ... and ... includes, subject to section 2(3) of the Hovercraft Act 1968, a

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Notwithstanding anything in the opening words of Article 2, (2), the lien in favour of persons in the service of the ship extends to the total amount of freight due for all voyages made during the subsistence of the same contract of engagement.'

"يعتبر من ملحقات كل من السفينة وأجرة النقل ...ما يلي:

1- التعويضات المستحقة للمالك عن الأضرار المادية التي لحقت بالسفينة ولم يتم إصلاحها أو عن خسارة أجرة النقل.

2- التعويضات المستحقة للمالك عن الخسائر المشتركة إذا نشأت عن أضرار مادية لحقت بالسفينة ولم يتم إصلاحها أو عن خسارة أجرة النقل.

3- المكافأة المستحقة للمالك عن أعمال المساعدة أو الإنقاذ التي حصلت حتى نهاية الرحلة بعد خصم المبالغ المستحقة للربان والبحارة وغيرهم ممن يرتبطون بعقد عمل على السفينة ***".***

(177) Article 159 of the ***OML 1981*** provides:*:*

'(Free translation) *Payments made or due to the owner on policies of insurance, as well as bounties, subventions, and other national subsidies are not deemed to be accessories of the ship or of the fre*ight'.

"ولا تعتبر من ملحقات السفينة أو أجرة النقل التعويضات المستحقة للمالك نظير عقود التأمين أو المكافآت أو الإعانات أو المساعدات التي تمنحها الدولة".

hovercraft."

Section 546 of the *Merchant Shipping Act 1894*, states that where services are rendered by any person in assisting "any ship" or saving the "...cargo or apparel of that ship or any part thereof, "salvage is payable by the owner of the ship, cargo, apparel or wreck." In s. 742 of the *1894 Act* "ship" is defined to include "any ship or boat, or any other description of ship used in navigation;" while "ship" is stated to mean "every description of ship used in navigation not propelled by oars." A pleasure craft is a proper subject of salvage since it is capable of being used in navigation.(178) Likewise, a hopper-barge or mud-barge which is used for dredging up mud and gravel and which is towed away with men on board is used for navigation.(179) A dumb-bare fitted with a rudder and managed by a crew which carries cargo and is towed also falls under the section.(180) A floating and stationary landing-stage is manifestly not a ship;(181) nor is a gas float moored in tidal waters to assist the navigation of ships.(182)

3.2.2. Hovercraft

Section 2(2) of the *Hovercraft Act 1968*, provides that:

> "...the law relating to maritime liens shall apply in relation to hovercraft and property connected with hovercraft as it applies in relation to ships and property connected with ships, and shall so apply notwithstanding that the hovercraft is on land at any relevant time."

Because the apparel, cargo and freight of a ship may be subject to a maritime lien it is probable that the apparel, cargo and freight of a hovercraft are similarly subject to a maritime lien.

3.2.3. Sister Ships

In the absence of legislation to the contrary a maritime lien which attaches to

(178) ***The Goring*** [1988] 1 All E.R. 641 at p. 650.
(179) ***The Mac*** (1882) 7 P.D. 126.
(180) ***The Harlow*** [1922] P. 175.
(181) ***The Craighall*** [1910] P. 207.
(182) ***The Gas Float Whitton*** *No. 2* [1897] A.C. 337.

a ship probably cannot (in accordance with the personification theory) be extended or transferred to another ship. This contrasts with the statutory lien. In ***The Beldis***(183) Sir Boyd Merriman explained the contrast thus:

> "... a maritime lien arises the moment the event occurs which creates it; the proceeding *in rem* relates back to the period when it first attached: 'the maritime lien travels with the thing into whosesoever possession it may come' . . . and the arrest can extend only to the ship subject to the lien. But, on the contrary, the arrest of a ship under the statute is only one of several possible alternative proceedings *ad fundandam jurisdictionem*; no right in the ship or against the ship is created at any time before the arrest; it has no relation back to any earlier period; it is available only against the property of the person who owes the debt for necessaries; and the arrest need not be of the ship in question, but may be of any property of the defendant within the realm."

Under the *Administration of Justice Act 1956*, s. 3(4) provision was made for the arrest of sister ships.(184) Was it possible for the maritime lien to be transferred to the sister ship in the same beneficial ownership as the particular ship in respect of which the claim arose? In the absence of explicit legislation to the contrary there would appear to be no such extension.(185)

(183) [1963] P. 51 at p. 64.

(184) The Act was passed to enlarge the jurisdiction of the Admiralty Court and to give effect to the 1952 *Convention for the Unification of Certain Rules of Law relating to the Arrest of Sea-going Ships*. In ***The St. Elefterio*** [1957] 2 All E.R. 374 at pp. 376-377, Willmer, J., said that the purpose of s. 3(4) was: "... to confer for the first time in England the right to arrest either the ship in respect of which the cause of action is said to have arisen or any other ship in the same ownership. That is an entirely new right so far as the law of England is concerned, although it previously existed in other countries including Scotland. The reason for conferring that right now is for the purpose of bringing this country into line with other countries as a result on an international convention." This was cited with approval **in *Soteris P. Paschalis v. The Ship Tania Maria*** [1975] 1 Cyp. L.R. 162 at p. 175; ***The Banco*** [1971] 1 All E.R. 524, See also ***The Goring*** [1988] 1 All E.R. 641 at p. 648.

(185) In *The Leoborq* No. 2 [1964] 2 Lloyd's Rep. 380 at p. 382 it was argued but not decided that the lien does not attach to the sister ship for the purpose of ranking. See also Thomas

3.2.4. Freight

Freight may be subject to a maritime lien. In general freight is payable to the shipowner by the cargo owner upon delivery of the cargo in a merchantable condition at its destination. Freight that is payable to a charterer may also be liable to the lien.(186) The law governing the payment of freight falls outside this work. However, it should be noted in passing that payment of freight is, *inter alia*, dependent upon: ownership of the cargo, the type of freight (for example, lump sum freight, advance freight., back freight, pro rata freight and dead freight) and delivery of the cargo. Maritime liens for wages, disbursements, damage, bottomry and salvage may attach to freight. But, it must be added that there is no lien against the freight except as a consequence of the lien on the ship.(187) There would appear to be no precedent where there is no power to arrest the ship and yet there is a maritime lien on the freight. Indeed, "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."(188) Payment of freight is obtained by the arrest of the cargo.(189) Once payment of freight is made as in advance freight, there can be no lien on the freight. As discussed below, different considerations may apply to the manner in which freight is subjected to the individual liens.

3.2.5. Property subject to Individual Maritime Liens

i) Property Salvage

D.R., *Maritime Liens*, paragraph 34: "it would appear to be *i*mpossible to argue that the effect or section 3(4) is to create, at the moment when service is rendered or damage is done, a maritime lien not only against the particular ship concerned but also against all other ships in the same beneficial ownership."

(186) ***The Castlegate*** [1893] A.C. 38.

(187) ***The Castlegate****, supra* at pp. 48, 54.

(188) ***The Castlegate****, supra* per Lord Watson at p. 54.

(189) "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," per Lord Watson in ***The Catlegat*****e** *supra* at p. 54. But by R.S.C. Order 75 rules 8(1) and 10 (5) the lien on freight is asserted by the service of a writ *in rem* or a warrant of arrest (or both) on the cargo or the ship.

A salved ship and its apparel are proper subject of lien for salvage. Apparel must include all property closely associated with the ship such as sails, rigging, boats, furniture and equipment.

Freight is also a proper subject of salvage.(190) Where there is advance freight, the recipient of the freight is not liable for salvage because no benefit is conferred upon him by the salvage services. However, where the freight is not prepaid, it should be borne in mind that the cargo, once it has safely arrived after salvage operations, has its value increased to include the amount of freight. Accordingly, the freight should either be included in the valuation of the cargo,(191) or it should be deducted from the value of the cargo and treated as a separate item.(192) Whether one course or the other is adopted, it makes no difference to the cargo owner.(193)

ii) Bottomry Bonds

The ship is the prime subject of the bottomry bond,(194) while it is settled law that a cargo with ship and freight may also be so hypothecated.(195)A bottomry bond on the ship extends to the sails and rigging where these are detached for safe keeping.(196)

A master cannot hypothecate the cargo until it is on board because until then he has no control over the cargo and no right to interfere or deal with it directly or indirectly.(197) Since the ship and freight are benefitted by a bottomry bond, it follows that where ship and freight belong to different persons, the demand of a bottomry bondholder must be paid pro rata by both ship and freight.(198) Where ship, freight and cargo are hypothecated the latter cannot be resorted to until

(190) ***The Charlotte Wylie*** (1846) 2 W. Rob. 495 at p. 497; ***The Westminister*** (1841) 1 W. Rob. 229 at p. 233; ***The Fleece*** (1850) 3 W. Rob. 278 at p. 282; ***The Goring*** [1988] 1 All E.R. 641 at p. 643.
(191) See generally Kennedy's Law of Salvage (1985) at pp. 279-230.
(192) ***The Charlotte Wylie*** (1846) 2 W. Rob. 495 at p. 497
(193) ***The Fleece*** (1850) 3 W. Rob. 278 at p. 282.
(194) ***The Atlas*** (1827) 2 Hag. Adm. 48 at p. 56.
(195) ***Cargo Ex Sultan*** (1859) Swab. 504 at p. 510.
(196) ***The Alexander*** (1812) 1 Dods. 278 at p. 282.
(197) ***The Jonathan Goodhue*** (1858) Swab. 355 at p. 357.
(198) ***The Dowthorpe*** (1843) 2 W. Rob. 73 at p. 85.

ship and freight are exhausted.(199) Where in terms of a bottomry bond only the ship and freight are pledged as security, the cargo is not liable on the bond. But where a bottomry bond is given on the security of the cargo, both ship and freight become liable before the cargo in respect of any claim on the bond.(200)

iii) Wages and Disbursements

The lien for the master's wages and disbursements and seamen's wages attaches to the ship and to every part of it - even in the event of the ship being wrecked it attaches to the parts and fragments of the ship which are preserved.(201) It was stressed that "a seaman's claim for his wages was sacred as long as a single plank of the ship remained"(202) and, similarly, that "a seaman had a right to cling to the last plank of his ship in satisfaction of his wages or part of them."(203) It does not affect the right to the lien that the master and crew were engaged by some person who had no right to engage them, so long as they have earned the wages on the ship. The lien for wages travels with the ship into whosesoever possession it may come.

On the basis of natural justice the lien also attaches to the freight which is regarded as the product of the exertion, energy and skill of the master and crew. This lien is not dependent on the earning of freight, but, if it does not attach to the ship, it cannot attach to the freight, for a lien on freight is consequential to the lien on the ship.

iv) Damage done by a Ship, Personal injury and loss of Life

The maritime lien for damage attaches to the whole of the offending ship, and its appurtenance which is special to her particular employment is liable to the lien.(204)

The lien also attaches to the freight which is earned by the ship. Where the ship is earning freight at the time of the collision this is subject to the lien, even

(199) ***The Priscilla*** (1859) Lush. 1.
(200) ***The Constancia*** (1846) 4 N.C. 512 at p. 517.
(201) ***The Neptune*** (1824) 1 Hag. Adm. 227 at p. 233.
(202) ***The Sydney Cove*** (1815) 2 Dods. 11 at p. 13.
(203) ***The Neptune*** (1824) 1 Hag. Adm. 227 at p. 239.
(204) ***The Dundee*** (1823) 1 Hag. Adm. 109 at p. 127.

though the freight can never be completely earned.(205) The cargo is not subject to a lien because it is said to be the ship which causes the damage and not the cargo. However, where the freight (which may, for instance, be freight outward and freight homeward)(206) is due to the shipowner the cargo may be arrested so as to compel payment of the freight into court which can then be used to defray the claim for damages.(207) The arrest of the cargo in order that freight might be brought into court is established procedure,(208) and the cargo is liable to arrest for no other purpose whatever.(209)

4. THE RANKING OF MARITIME LIENS

4.1. Introduction

Priority of payment for maritime claims is always an important issue especially when the value of the ship can not satisfy all of the claims. When the funds are insufficient, various maritime claims will stand in rivalry and the relative priority between the various liens and claims will assume an essential significance because the success or failure of a particular claim will greatly be determined by its relative position in the priority.(210)

4.2. UNDER *OML 1981*

Under Omani law, there is one source that provides legal authority regarding the priority of maritime liens, *i.e.*, the ***OML 1981***. Articles 156 and 161(211)

(205) ***The Orphans*** (1871) L.R. 2 A.&E. 308 at p. 312.
(206) ***The Dundee*** (1823) 1 Hag. Adm. 109 at p. 128.
(207) ***The Leo*** (1862) Lush. 444 at p. 446.
(208) ***The Roecliff*** (1869) L.R. 2 A. & E. 363 at p. 364.
(209) ***The Flora*** (1862) L.R. 1 A. & E. 45 p. 48.
(210) The term "priority" can be used in two senses: a narrow sense and a broad sense. The narrow sense usually means the priorities between maritime claims. The broad sense encompasses other non-maritime claim. Here, the narrow sense is used.
(211) The *Lines and Mortgages Convention 1926*, arts. 2 and 5.Ranking under the *1967* and *1993 Conventions* is quite similar: a) costs of arrest and sale (*Convention 1967*, Article 11(2); *Convention 1993*, Article 12(2) and *custodia legis;* b) maritime liens granted under Article 4 of each Convention; c) mortgages, hypothecs and similar charges; and d) liens and rights of retention granted by national law (The *Liens and Mortgages Conventions 1967* and *1993*, Article 6 permit contracting states to create, by national law, maritime liens securing claims other than those enumerated in Article 4 of each Convention).
The liens rank in the order in which they are enumerated in Article 4 (Article 5(2)) and among themselves rank pari passu (Article 5(3)), except for the liens for salvage, wreck

establish the following ranking for the maritime liens relating to the same voyage(212):

1) Judicial costs incurred in order to preserve the ship and to procure its sale and the distribution of the proceeds of sale; tonnage dues, light or port dues, and other taxes and charges of the same character; pilotage dues; indemnities for damage caused to works forming part of harbours, docks, and navigable ways; expenses for wreck removal; cost of watching and preservation from the time of the entry of the ship into the last port;

2) Claims arising out of the contract of engagement of the master, seamen, and other persons hired on board.

3) Remuneration for assistance and salvage, and the contribution of the ship in general average;

4) Indemnities for collision or other accidents of navigation; indemnities for personal injury to passengers or seamen; indemnities for loss of or damage to cargo or baggage;

5) Claims resulting from contracts entered into or acts done by the master, acting within the scope of his authority, away from the ship's home port, where such contracts or acts are necessary for the preservation of the ship or the continuation of its voyage.

Liens falling under the same category share the proceeds *pro rata* in the event that the available funds are insufficient to discharge all the liens in full (Article 161, second paragraph). Liens falling under the assistance, salvage and

removal and general average contributions under the *1967 Convention* (Article 4(1), and the lien for salvage under the *1993 Convention* (Article 4(1)(c)). These rank before other liens which attached previously (Article 5(2)) and *inter se* rank in the inverse order of their accrual.

Under the *1993 Convention* (Article 12(3)), wreck removal effected in the interests of safe navigation or the protection of the marine environment may be granted a special legislative right by national law, in which case it will take priority over Article 4, *i.e.* maritime liens.

(212) The same voyage here means, in the case of a liner, the voyage from the loading port to the discharging port, and in the case of a tramp, from the commencement of the voyage contemplated to the time when the discharge is completed at the final port of destination:

general average contribution shall take priority in the inverse order of the dates on which they came into existence (Article 161, third paragraph.). For example, a maritime lien for salvage in February defeats a maritime lien for salvage from January. The special rules for salvage liens can be explained by the fact that a salvage operation «salves» the security for holders of older maritime liens. Without the salvage effort, the security would have been lost. It is to encourage salvage operations, and save values from which all claimants would benefit. Liens arising from one and the same occurrence are deemed to have come into existence at the same time (Article 161, fourth paragraph).(213)

Where claims relate to different voyages, those attaching to the last voyage prime those attaching to previous voyages, except that wage claims arising out of the same contract of engagement and covering several voyages, rank with claims of the last voyage (Article 162).(214)

Maritime liens always outrank the maritime mortgage.(215) In other words, in deciding priorities amongst privileged creditors, the maritime mortgagee rank

(213) '*Maritime liens relating to the same voyage rank in the order in which they are set out in Article (156).*
Liens under anyone heading share concurrently and rateably in the event of the fund available being insufficient to pay the claims in full.
Liens mentioned in paras 3 and 5 rank, in each of the two categories, in the inverse order of the dates on which they came into existence.
Liens in respect of one accident shall be considered to have resulted on the same date.'
"ترتب الديون الممتازة المتعلقة برحلة واحدة طبقا لترتيب الامتياز ذاته الوارد في (المادة 156).
وتكون الديون الواردة في كل فقرة من المادة المذكورة في مرتبة واحدة وتشترك في التوزيع بنسبة قيمة كل منها.
ترتب الديون الواردة في الفقرتين الثالثة والخامسة بالنسبة الى كل فقرة على حدة طبقاً للترتيب العكسي لتاريخ نشوئها.
وتعتبر الديون المتعلقة بحادث واحد ناشئة في تاريخ واحد."

(214) *'(Free translation) Liens attaching to the last voyage have priority over liens attaching to the previous voyage.*
Liens arising on one and the same contract of engagement extending over several voyages, all rank with claims attaching to the last voyage.'
الديون الممتازة الناشئة عن أية رحلة الديون الممتازة الناشئة عن رحلة سابقة.
ومع ذلك فالديون الناشئة عن عقد عمل واحد يشمل عدة رحلات تأتي كلها في المرتبة مع ديون آخر رحلة."

(215) Article 178 of the ***OML 1981*** provides:
'A mortgage shall rank directly behind the maritime liens.'
"يكون الرهن تالياً في المرتبة للامتياز .."

after the maritime lienee.

4.3. UNDER ENGLISH LAW

Ranking of maritime liens under English law is not fixed by rigid rules; nevertheless, certain general rules of ranking, enunciated by the courts have been accepted and in particular: that liens arising *ex delicto* (i.e. damage liens), usually rank ahead of liens arising *ex contractu* (*i.e.* master's wages, disbursements and liabilities, seamen's wages, bottomry and salvage)(216) which latter rank between themselves in the inverse order of attachment to the ship,(217) although as between themselves masters' wages and seamen's wages rank *pari passu*, *i.e.* equally.. On the other hand, liens arising *ex delicto,* in the absence of laches, rank *pari passu* between themselves.(218)

4.3.1. Damage Maritime Liens

A general principle long established is that the maritime lien for damage done by a ship ranks ahead of other earlier maritime liens arising *ex contractu*. The principle finds its classical exposition in ***The veritas***.(219) Here, Gorell

(216) ***The Aline*** (1839) 1 Wm Rob 111; ***The Veritas*** [1901] P. 304. The reason for giving damage lien holder higher priority then holders of contractual liens is that a contractual lien holder, being a claimant who has a cause of action in his favour arising from breach of contract by the other party, is a person who originally entered (presumably) quite voluntarily into the contract and with his eyes open and thus is deemed to have been aware at the time, as any reasonable person should be, that there were risks involved and inherent in entering any agreement. Thus, in a sense, he had some forewarning of the possibilities of suffering loss, harm or damage.

The damage lien holder, on the other hand, being a person who has suffered loss or damage by reason not of a broken contract but as a result of another's wrongful or tortious act has not, by the very nature of the incident, this benefit of such forewarning or foreknowledge of the likelihood of such loss or damage; the innocent, injured passenger after a collision at sea is an obvious example. That damage lien holders should rank for priority, generally speaking, before the holders of contractual liens is not only logical but also is the basic rule.

(217) ***The Hope*** (1873) 1 Asp MLC 563. See also ***The Veritas*** [1901] P. 304.

(218) ***The Stream Fisher*** [1926] P. 73, 26 Ll L Rep. 4.

(219) [1901] P. 304. See also ***The Inna*** (1938) 60 LI. L. Rep. 414 at p. 415 where it was held to be common ground that the damage lien is preferred to prior salvage liens.

Barnes, J., said:

> "... it is also clear that liens arising ex delicto take precedence ever prior liens arising *ex contractu*... The principal [reason] ... appears to be that the person having a right of lien *ex contractu* becomes, so to speak, a part owner in interest with the owners of the ship. He has chosen to enter into relationship with the ship for his own interests, whereas a person suffering damage by the negligent navigation of a ship has no option. Reparation for wrongs done should come first; otherwise the injured party might be unable to satisfy his claim out of the res without paying off prior claims which arise in such circumstances that the claimants may be considered to have chosen to run the risk of subsequent events affecting their claims . . .There is a right to arrest a ship to obtain reparation for damage done by her which is not affected by prior claims against her arising from hypothecations, which create interests in her along with those of her owners."(220)

Gorell Barnes J. added that to accord a subsequent damage lien priority over a salvage lien is "in the best interests of careful navigation."(221)

Damage liens are, as a general rule, all "on an equal footing".(222) Where several claimants seek to satisfy liens for damage against a ship, whether arising out of the same collision or out of several collisions, their respective liens, in the absence of laches, rank *pari passu* without regard to the various times when they attached. Such were the facts in ***The Stream Fisher***(223)where Bateson J. held:

> "If it be true that all maritime liens for damage attach at the moment of the damage occurring, it follows that when the ship gets into the hands of the Court she has all the several liens attaching to her. One would think that the proper thing to do under the circumstances would be to see that everybody was equally treated."

(220) *Ibid.* at pp. 313-314.
(221) ***The Veritas*** [1901] P. 304 at p. 314.
(222) ***The Countess*** [1923] A.C. 345 at p. 381 per Lord Sumner.
(223) [1927] P. 73 at p. 87.

However, the general principle that the maritime lien for damage prevails over subsequent maritime liens does not apply to salvage liens.(224) It is implicit in the inverse order principle that salvors who render salvage services subsequent to damage done by a ship are entitled to priority over the damage lien as their services preserve the property for the benefit of all interested in it.(225) So, a subsequent salvage lien ranks ahead of a prior damage lien.(226)

Similarly, a subsequent bottomry bond granted bona fide for the purpose of repairing the ship after damage is done has priority over the damage lien because the damage lienor is benefitted by the bottomry bond in that it increases the value of the ship against which he can proceed.(227) Otherwise, the bottomry bondholder would be put to great inconvenience - he would have to calculate not merely future contingencies, but would also have to inquire into all past transactions concerned with the ship.(228)

4.3.2. Salvage

The lien for salvage ranks before all other liens which attached before the service was rendered, because the salvage service has saved the property for the benefit of the persons interested. Thus, it has priority over earlier *ex contractu* or *ex delicto* maritime liens because without the exertions of the salvor the other creditors of the ship would have nothing at all upon which to draw.(229) In ***The Veritas***(230)Gorell Barnes J. explained the principle thus:

> "It is almost obvious that liens of the latter class must in general rank against the fund in the inverse order of their attachment to the res. They are liens in respect of claims for services rendered, and it is reasonable that services which operate for the protection of prior interests should be privileged above those interests."(231)

(224) ***The Inna*** (1938) 60 Ll.L. Rep. 414 at p. 416.
(225) This is implicit in the inverse order principle as set out in *The Veritas* [1901] P. 304.
(226) ***The Inna*** (1938) 60 Ll.L. Rep. 414.
(227) ***The Aline*** (1839) I W.Rob. 111 at pp.
(228) *Ibid.*
(229) ***The Mons*** [1932] 43 Ll.L.Rep. 151 at p. 152.
(230) [1910] P. 304.
(231) *Ibid.* at pp. 312-313.

Thus a maritime lien for salvage is, in accordance with the principle of inverse order, superior to earlier maritime liens for wages for both seamen and master,(232) for property salvage(233). Because the salvage preserves the ship for later claimants, the principle is grounded in equity. This was pointed out by Brandon J. in ***The Lyrma (No. 2)*** (234) when he said:

> "It has long been an established principle that a maritime lien or a ship for salvage has priority over all other liens which have attached before the salvage services were rendered. The basis for the principle is an equitable one, namely that the salvage services

(232) ***The Mons*** supra at pp. 152-153.

(233) ***The Veritas*** [1901] P. 304 at pp. 312-313.

(234) [1978] 2 Lloyd's Rep. 30 at p. 33. ***The Lyrma***, illustrates the relative priorities of wage claimants and salvors against the proceeds of sale of a vessel. Whilst on a cargo-carrying voyage from Antwerp to the Republic of Ireland the *Lyrma* developed steering trouble. Her cargo shifted and she took on a list. Her Master sent distress signals. A tug came to her aid off the south-west coast of England in atrocious weather conditions and towed the ship, already abandoned by her crew, to safety. The vessel was subsequently arrested to secure the tug-owner's claim for salvage and, in default of an appearance by her owners, was ordered to be sold. She fetched £32,000. This was thought to be considerably less than her salved value after her ordeal which was put at £55,000. The court viewed the tug-owner's claim for salvage in a most favourable light. It had been a difficult operation, involving much skill and the ship and her cargo had undoubtedly been saved from almost certain total loss. A salvage reward was assessed at £22,000.
The next problem was that out of the proceeds of sale, there were other claimants seeking satisfaction-the ship's Master and crew, for their unpaid wages, and the Master additionally, for disbursements. Wages claimed were earned before and after the salvage operation and the crew also sought to recover repatriation expenses. The wages claimants' aggregate claim was for £17,000. Thus £17,000 and £22,000 were sought from the net proceeds of sale which worked out at just under £25,000. The court was therefore asked to determine priorities. Obviously the delay in sale meant that the ship lying idle deteriorated and thus fetched far less than it should have done. The award of salvage, as it happened, itself almost swallowed up the net proceeds of sale leaving practically nothing for the wage claimants. Even this seeming injustice did not influence the court to depart from the established principle that a salvor's lien took precedence over a wage claimant's lien regardless of whether those wages were earned before or after the salvage service.

> concerned have preserved the property to which the earlier liens have attached, and out of which alone, apart from personal remedies against the shipowners, the claims to which such liens relate can be satisfied."

The principle is applied in relation to prior wages(235) and to earlier damage done by a ship.(236) It makes no difference to the principle that the earlier lien secures a claim for salvage.(237) Again, it is considered equitable that a second set of salvors are preferred to the first because the first share in the later benefit conferred on the common subject of all the liens.(238) Thus, competing maritime liens for salvage are ranked in accordance with the inverse order principle.(239)

4.3.3. Wages

In the past the Admiralty Court treated seamen as favoured litigants(240) and enabled them to recover their wages ahead of the master.(241) Today, however, and, because section 18 of the *Merchant Shipping Act 1970* gives the master the same lien for his remuneration . . . as a seamen has for his wages" it is implied that the seamen's and master's liens should rank equally.

(235) ***The Mons*** (1932) 43 Ll.L.Rep. 151.
(236) ***The Inna*** (1938) 60 Ll.L.Rep. 151.
(237) ***The Veritas*** [1901] P. 304. See, however, *The Tequila* [1974] AMC 860 where the court decided that where tow salvors were involved, the initial salvor has the burden of proving that his efforts contributed to the second salvor's ultimate success in freeing the vessel and that the salvor's failure to remove the vessel from the strand was not excused either by adverse weather or by the alleged ineptitude of the stranded vessel's Master, but, although the salvor's efforts to free the stranded vessel were unsuccessful, he would be allowed an award for bringing food and supplies to the crew who might otherwise have abandoned ship. £5,000 was awarded.
(238) *Ibid.* at p. 313.
(239) ***The Stream Fisher*** [1926] P. 73 at p. 82. It was true that, in the absence of a salvage agreement, the court would never make a salvage award swallowing the entire salved value. Where, however, as in this case, a valid agreement for fixed remuneration had been made, the salvors were entitled to the full amount, even if this meant leaving nothing for other claimants.
(240) See *Staniland* (1986) 7 Industrial Law Journal 451.
(241) ***The Salacia*** (1862) Lush. 545*;* ***The Jack Park*** (1802) 2 Rob. 308Rob. 3 08; ***The Mons*** (1932) 43 Ll.L.Rep. 1151.

Wage claims have priority over a bottomry bonds entered into before,(242) and after(243) the wages are earned. Indeed, no distinction should be drawn between wages earned before or after the bond - in either case the liens for wages are upheld "with peculiar tenacity,"(244) as "sacred liens."(245) Again, the claims of a master for his wages and disbursements are to be preferred to that of a mortgagee.(246)

However, the master's and seamen's liens for wages are postponed to damage lien, to salvage rendered after the wages are earned, to a bottomry bond given after the wages earned.

Claims for successive wages by different master's may rank *pari passu*.(247) And, the claims of individual seamen for wages earned on the same voyage rank *pari passu*.(248)

4.3.4. Master's Disbursements

Master's disbursements and master's wages rank *pari passu*.(249) Master's disbursements are subordinated to subsequent salvage. Although the parties may agree that a distinction is to be drawn between disbursements made before as opposed to after salvage,(250) where there is no such agreement, no such distinction is to be drawn.(251) In either event, the salvage lien ranks ahead of the disbursement lien.(252) Claims for successive disbursements by different masters may rank *pari passu*.(253) Otherwise, it was said "it would be a new terror to a person supplying a ship if he knew that a subsequent supplier could take

(242) ***The William F. Safford*** (I860) Lush. 69 at p. 71; *The Sydney Cove* (1860) Dods. 11 at p. 13.
(243) ***The Union*** (1860) Lush. 128 at pp. 136-137.
(244) *Ibid.* at p. 136.
(245) ***The Madonna D'Idra*** (1811) 1 Dods. 37 at p. 40.
(246) ***The Hope*** (1873) 1 Asp. M Law Cas. 563 at p. 567.
(247) ***The Mons*** [1932] 43 Ll.L.Rep. 151 at pp. 152-153.
(248) ***The Mons*** *supra* at pp. 152-153; ***The Stream Fisher*** [1927] P. 73 at p. 82.
(249) ***The Mons*** *supra.*
(250) ***The Mons*** *supra* at pp. 152-153.
(251) ***The Lyrma No. 2*** [1978] 2 Lloyd's Rep. 30 at p. 35.
(252) ***The Lyrma No. 2*** supra at p. 35.
(253) ***The Mons*** *supra* at pp. 152-153.

precedence over him."(254) Master's claims for disbursements and wages rank *pari passu* where the claimant is one and the same person.(255)

4.3.5. Bottomry Bonds

Liens for bottomry take precedence in the inverse order of the dates of execution except that, where several bond-holders acting in privity and concert give bonds on different dates, the bonds will be paid *pro rata*. A bottomry bond takes precedence over a master's lien for wages earned and disbursements incurred on a previous voyage to that during which the bottomry bond is given, prior salvage and over prior damage to the extent only of the increased value of the ship when the money has been advanced to effect the repair of such damages.

All bottomry bonds are postponed to demands for salvage and wages which subsequently arise on the ground that such demands are for services rendered to the benefit of the bottomry bond holder.(256) Bottomry bonds are also postponed to maritime liens for master's wages earned and disbursements made after the bond is given on the basis that contractual or quasi contractual liens rank in the inverse order of their attachment.(257) Finally, it should be noted that persons who take the ship for security must take it subject to the lien of the bottomry bondholder.(258)

(254) Per Lanton, J., *in* ***The Mons*** *supra* at p. 152.

(255) *Ibid.*

(256) ***Cargo Ex Galam*** (1863) B & L. 167.

(257) ***The Hope*** (1873) 1 Asp. Mar. Law Cas. 563. See, however, ***The Lyrma No. 2*** [1978] 2 Lloyd's Rep. 30 at p. 34 where The Hope is criticised as applying the inverse order principle in a "mechanical fashion," and that the decision should not be applied by analogy to claims by salvors.

(258) ***The Dowthorpe*** (1843) 2 W. Rob. 73 at p. 79. In ***The Janet Wilson*** (1857) Swab. 261 it was held that where a bottomry bond has been given and the ship sold in accordance with the bond, the shipowner cannot, without leave of the court, advance seamen's wages out of the proceeds of the sale. In ***The Aline*** (1839) 1 W. Rob. 111 at p. 120 it was held that where repairs have been effected to a vessel, which was damaged in a collision, by a stranger upon the security of a bottomry bond, such a bond does not give way to prior claims for damage done by the ship.

5. THE EXTICTION OF MARITIME LIENS

As maritime liens are always referred to as secret charge against a particular ship, it will certainly affect a third party in the ship's sale if there is any maritime lien that has already attached to her. In order to facilitate regular commercial activities, it is therefore extremely necessary to prevent an accumulation of maritime liens attached to the ship.

This section will discuss the issues in extinguishment of maritime liens under Omani law in comparison with the English law.

5.1. UNDER *OML 1981*

Under ***OML 1981***, a maritime lien can be extinguished in three different ways; [1] by the expiry of the statutory limitation period; [2] by a forced sale; or, [3] by a voluntary sale.

5.1.1. Statutory Time Limitations

The maritime liens, except liens for supplies, shall be extinguished after a period of one year(259) from the time when the claim arose,(260) unless, prior to

(259) Article 166 of the ***OML 1981*** provides:
'(Free translation) *The privilege rights (liens) cease to exist at the expiration of one year, and, in the case of liens for supplies mentioned in para 5 of Article (156), shall continue in force for not more than six months'.*
" تنقضي حقوق الامتياز على السفينة بمضي سنة ما عدا حقوق الامتياز الضامنة لديون التوريد المشار إليها بالفقرة الخامسة من المادة (156) فإنها تنقضي بمضي ستة أشهر."

(260) Article 167 of the ***OML 1981*** provides:
'(Free translation) *The periods for which the lien remains in force:*
1- In the case of liens securing claims in respect of assistance and salvage run from the day when the services terminated.
2- In the case of liens securing claims in respect of collision and other accidents and in respect of bodily injuries from the day when the damage was caused.
3- In the case of liens for the loss of or damage to cargo or baggage from the day of the delivery of the cargo or baggage or from the day when they should have been delivered.
4- In the case of liens for repairs and supplies and other cases mentioned in para 5 of Article (156) from the day the claim originated.
In all the other cases the period runs from the enforceability of the claim.'
"2- يبدأ سريان المدة المشار إليها في المادة السابقة كما يأتي:

the expiry of such period, an arrest or distraint of the ship has been secured, provided that such action leads to a forced sale.(261) The said period shall be subject to suspension or interruption.

It is required that the security becomes effective, i.e. the ship is arrested in order to stop the time from running. On the other hand it is not required that the auction is held within the one year period. Only a forced sale would interrupt the time and if the sale instead is made voluntarily the time would continue to run. Time would stop to run also in such a case where a sale had been requested and the ship had been condemned and taken out of operation.

5.1.2. Effects of a forced Sale of the Ship

If a ship is sold by a forced sale in Oman, any lien upon the ship shall cease to attach to it after the sale has become final and the price has been paid. Creditors are entitled to payment out of the proceeds in the order applicable to distrained property. If the sale price does not cover the full claim, security for the remaining claim will cease. Also claims which were not known or noted at the forced sale will thereafter lose all right to security in the proceeds (and the ship). A claimant having a right to retention in the ship would also lose his rights after the sale and be limited to obtain payment from the sale proceeds.

In order for the forced sale to have the above effects, the sale must have been made while the ship was within Omani jurisdiction and the provisions of

1- بالنسبة إلى حقوق الامتياز الضامنة لمكافأة المساعدة والإنقاذ من يوم انتهاء هذه العمليات.
2- بالنسبة إلى حقوق الامتياز الضامنة لتعويضات التصادم والحوادث الأخرى والإصابات البدنية من يوم حصول الضرر.
3 - بالنسبة إلى الامتياز الخاص بهلاك البضائع والأمتعة أو تلفها من يوم تسليم البضائع أو الأمتعة أو من اليوم الذي كان يجب تسليمها فيه .
4 - بالنسبة إلى حقوق الامتياز الناشئة عن الاصلاح والتوريد وسائر الحالات الأخرى المشار إليها في الفقرة الخامسة من المادة (156) من يوم نشوء الدين.
وفي جميع الأحوال الأخرى تسري المدة ابتداء من يوم استحقاق الدين."

(261) ***OML 1981***, Article 168 provides:
'(Free translation) *The prescription period mentioned in article (166) shall extend to three years if it not possible to arrest the ship which is subject to the maritime liens in the Omani territorial waters.'*
"تمتد مدة التقادم المشار اليها في المادة (166) إلى ثلاث سنوات إذا تعذر حجز السفينة المقرر عليها الامتياز في المياه الاقليمية العمانية...."

the ***OML 1981*** had been observed.

5.1.3. Effects of a voluntary Sale of the Ship

If the shipowner sells the ship, existing maritime liens shall continue to attach to the ship with unchanged priority. However, in the case of a voluntary sale of the ship the maritime liens shall be extinguished if the steps mentioned in Article 164 para 2 have been followed, thus

(i) Registeration of the contract of sale in the Ship Registery.

(ii) Placing a notice on the notice board at the Ships Registration Office containing particulars of the sale, the price, and the name and residence of the purchaser.

(iii) Publishing a summary of the contract of sale in the Official Gazette, stating the price, the name and residence of the buyer. The said publication must also be made twice with an interval of eight days, in a daily local newspaper of wide circulation.(262)

5.2. UNDER ENGLISH LAW

Maritime liens may be extinguished in several ways. In summary, the general modes of extinction may include:(263)

(1) time limitation;

(262) Article 164 of the ***OML 1981*** provides:

" تنقضي حقوق الامتياز على السفينة في الحالات الآتية:
1- عند بيع السفينة قضائيا .
2- عند بيع السفينة رضائيا بالشروط الاتية:
(أ) تسجيل عقد البيع في سجل السفن .
(ب) النشر بلوحة الإعلانات في مكتب تسجيل السفينة.
ويشمل النشر بيانات بحصول البيع والثمن واسم المشتري وموطنه.
(ج) نشر ملخص العقد يذكر فيه الثمن واسم المشتري وموطنه ويجب أن يتم هذا النشر مرتين تفصل بينهما ثمانية أيام، في صحيفة ذائعة الانتشار."

Article 165 provides in Arabic:

"وتنتقل حقوق الامتياز إلى الثمن إذا قام الدائنون الممتازون خلال ثلاثين يوما من تاريخ آخر نشر في الصحف بإنذار رسمي يوجه الى كل من المالك القديم والمالك الجديد بمعارضتهم في دفع الثمن. ومع ذلك يظل امتياز الدائنين قائماً على الثمن ما لم يكن قد دفع أو وزع."

(263) *See* Thomas, R.D., Maritime Liens, paragraph 502 *et seq*.

(2) lashes or delay in enforcement;

(3) bail;

(3) destruction of the ship;

(4) judicial sale;

(5) waver of the liens;

(6) payment of debt.

5.2.1. Statutory Time Limitations

Reference will here be made to the extinction of both maritime liens as well as statutory rights *in rem*. Section 190 of the *Merchant Shipping Act* 1995(264) provides for a two year extendable time-limit in relation to the enforcement of any claim or lien against a ship or her owners 'in respect of damage caused by the fault of that ship to another ship, its cargo or freight or other property on board that ship'. The time-bar in relation to salvage is two years from the day of termination of the salvage operations.(265) The general time-bar for tort claims is six years.(266) Claims relating to personal injury or loss of life are barred by a period of two years if the claim relates to a collision between ships,(267) or by a period of three years(268) if the personal injury arises as a result of a collision between a ship and an object which is not held to be a ship, e.g., a jet-ski.(269)

An action for wages would be time-barred after a period of six years.(270) In relation to actions for oil pollution damage based on sections 153 and 154 of the *Merchant Shipping Act 1995*,(271) section 162 provides that no action shall be

(264) (1995 c. 21). See also the provisions of the said section.
(265) Article 23 of *Salvage Convention 1989*, Schedule 11 of *Merchant Shipping Act 1995*. See, further, other provisions of Article 23.
(266) *Limitation Act 1980* (1980 c. 58), section 2.
(267) *Merchant Shipping Act 1995*, Section 190.
(268) Limitation Act 1980 (1980 c. 58), section 11. See also other provisions of the said statute, in particular sections 12, 13, 14, 28 and 33.
(269) See ***Steedman v. Schofield*** [1992] 2 Lloyd's Rep. 163.
(270) *Limitation Act 1980* (1980 c. 58), section 5.
(271) Reserved for future use.

entertained unless commenced 'not later than three years after the claim arose nor later than six years after the occurrence or first of the occurrences resulting in the discharge or escape by reason of which the liability was incurred.' The *International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage of 1992*, applied in English law by the *Merchant Shipping Act 1995*, applies a similar limitation in Article 6 thereof; however, the right of indemnification of the shipowner or guarantor is specifically made contingent on knowledge about proceedings under the *International Convention on Civil Liability for Oil Pollution Damage of 1992*,(272) , Where the Hague Rules(273) or Hague-Visby Rules are applicable in relation to a cargo claim, the time-bar is one year; where the Hamburg Rules are applicable, the period is two years. Claims to which the *Athens Convention of 1974* applies are time-barred by the lapse of two-years. Mortgage claims are time-barred by the period of twelve years.

5.2.2. Laches

Maritime liens, other than those for collisions between ships and salvage and for seamen's wages, are not limited to any time for enforcement, but travel with the ship into whosesoever possession she may come(274), but may be lost through lack of reasonable diligence in enforcing them.(275)

In considering whether delay amounts to laches and defeats a claim, the court must consider whether there has been any acquiescence on the defendant's part as a result of the plaintiff's delay. But mere delay, unaccompanied by lack of diligence and prejudice to third parties, does not usually obliterate the lien if there is reasonable diligence. The crucial element is the damage to him that has resulted from the delay rather than the actual delay. In ***The Chieftaina***(276) lapse

(272) See also section 178 of the *Merchant Shipping Act 1995*.
(273) International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading 1924.
(274) ***Harmer v Bell, The Bold Buccleugh*** (1852) 7 Moo PCC 267; ***The Charles Amelia*** (1868) LR 2 A & E 330; ***The Kong Magnus*** [18911 P 223, 7 Asp MLC 64; ***The Goulandris*** [1927] P 182,17 Asp MLC 209.
(275) ***The Jacob*** (1802) 4 Ch Rob 245 (bottomry); ***The Rebecca*** (1804) 5 Ch Rob 102 (bottomry); **The *Royal Arch*** (1857) Sw 269 (bottomry); ***The Fairport*** (1882) 8 PD 48, 5 Asp MLC 62 (master's disbursements).
(276) (1863) B. & L. 212.

of ten months was held to be no bar to a wages lien; while a delay of four years was held not to be improper with regard to the damage lien in ***The Europa***(277) even though the loss of the ship fell upon innocent parties. Here, reasonable diligence was said to mean not the doing of everything possible, but the doing of that which, having regard to all the circumstances, including considerations of expense and difficulty, could be reasonably required. Even an eleven year period between the damage done by the ship and her arrest was not sufficient to constitute laches in ***The Kong Magnus***.(278) So, no particular period is fixed by the court for laches:

> "…. in each case it is necessary to look to the particular circumstances, and see whether it would be inequitable, after the period of time, which of course is to be taken into account, and after the circumstances which nay have happened (including amongst those the loss of witnesses, the loss of evidence, and including also the change of property) ."(279)

5.2.3. Bail

Bail "represents" or is a "substitute" for the ship. It is regarded as the equivalent security in the place of the ship. To the shipowner bail has the advantage of terminating or avoiding arrest of the ship. But there are advantages to the claimant for he is guaranteed that he is to be paid up to a certain sum if the court should uphold his claim. So, the claimant does not have to compete for priority against the proceeds of the sale of the ship. Also, jurisdiction may be admitted in the bail bond. The general rule to which there may be exceptions[21] is that the court has no power to grant a re-arrest for the same cause of action after the ship is released on bail, or where the cause of action is *res judicata*. In ***The Point Breeze***(280) Bateson, J., explained the general rule as follows:

(277) (1863) B.& L. 89 at p. 93.
(278) [1891] P. 223.
(279) ***The Kong Magnus*** [1891] P. 223 per Sir Jmaes Hannen at p. 228.
(280) (1928) P. 135 at p. 142. In ***The Point Breeze***, collision took place in 1927 and on 6 December the plaintiffs issued a write in rem and security was given in the sum of 3,500. The blame was assessed entirely against the Point Breeze and the matter referred out for assessement of damages. Towards the end of December, it was decided the security was insufficient to cover the damage and a warrant for arrest was issued. Held: that a warrant for arrest of a vessel could not be properly served after liability had been

> "In this case what the plaintiffs have been trying to do is to arrest the ship after they have got bail for their claim and have released the ship, and have got judgment, but before the amount of their claim is ascertained. Under the judgment the assessment of the damages was referred to the registrar, but he has not ascertained what amount is due, and it may well be that it will be some time before he does ascertain it. If the plaintiffs are right in their contention that they are entitled to arrest this ship, it seems to me that it will open the door to the rearrest of ships, or arrest after getting bail, whenever a party thinks that his claim may be more than he originally thought it was. No immunity from arrest will be obtained by giving bail, and the result of that, on the question of maritime liens, might be very serious. The only right to arrest in c damage case is that which the party claiming has get by a maritime lien, and a maritime lien follows the ship into other people's hands. The position of people who have ships that have been released on bail - if I were to allow thi3 arrest to stand - might be very unfortunate."

5.2.4. Loss or Destruction of the Ship

Since the very basis of jurisdiction *in rem* is the presence in the forum of the ship, it seems safe to say that if the ship is destroyed, to the point where it no longer exists, then the maritime liens which might have previously existed against it are discharged, because there is no ship that can be seized in an *in rem* proceeding in order to foreclose the lien. However, few ships are totally destroyed or sunk without trace, and when they are they frequently leave behind them a claim to insurance proceeds, or sometimes a cause of action against some third party who was allegedly responsible for the sinking.

It is established that the liens for salvage and wages attach to any part or fragment of the ship which is retrieved or saved from destruction. It is probably also true of the other maritime liens that they attach to fragments of the whole as well.

determined by the court.

5.2.5. Judicial Sale

It is said that the effect of judicial or forced sale following an action *in rem* is to free the ship from all liens which are transferred to the proceeds so that title in the ship is passed to the purchaser free of all encumbrances. The title conferred by the court is valid against the whole world.(281) In ***The Optima***(282) Gorell Barnes, J., properly put the position as follows:

> " It is perfectly true that in some cases, where the proceedings are *in rem* against the property, and where the property has been arrested and sold by the court, the court, having the proceeds in its hands and having, by virtue of the sale, freed the ship from all liens and claims against it in the hands of the purchasers, who take it by virtue of the title confirmed by the court, the court retains those proceeds to answer all claims that may be made against the ship."

6. CONCLUSION

Maritime liens have been unique to admiralty law and have many characteristics that differ from other forms of liens. This uniqueness constitute of being that a maritime attaches to the property at the moment when the cause of action arises, and travels with it even if the shipowner changes. It is a privileged claim upon a ship or other maritime property in respect of services rendered to, or injury caused by that property. A maritime lien thus provides an effective method of enabling a creditor or an injured party to make the ship herself available as security for his claim and rank in priority to other maritime claim without any court action or any deed or any registration.

The most fundamental issue in the determination of the scope of maritime liens is what type of claims should be given maritime lien status. As maritime liens are privileged claims and enjoy priorities in compensation, a consideration of the balanced interests between various creditors is always the first thing that comes into the mind of jurists when they determine the scope of maritime liens. This is especially true in the enforcement of maritime claims when a number of creditors exist and the total value of the ship is insufficient to meet all the

(281) ***The Tremont*** (1841) 1 W. Rob. 163 at p. 164.
(282) (1905) 10 Asp. Mar. Law Cas. 147.

claims.

The ranking of maritime liens under Omani law has at least two distinct features which are different from English law. First, obviously ***OML 1981*** gives priority considerations to claims arising from crew wages and personal injuries. Secondly, it seems that the Omani ranking does not follow the sort of implied rule that liens *ex delicto* usually take precedence over liens *ex contractu*. This can be seen from the ranking status of maritime tort lien under Omani law. These two features make the Omani ranking differ from English law. This approach can be regarded as proper because those matters should be given top priority.

Maritime liens under Omani and English law may be variously extinguished. One of the principal differences between Omani and English law is that the ***OML 1981*** sets a fixed period of limitation within which liens must be enforced. The purpose of this provision is to provide for a quick turnover of those liens which arise by operation of law without any formality and of which future creditors have no notice. The limitation period is one year, except in the case of supply and repair liens where the period is six months. Of course, if the lien has been extinguished, the debtor continues to be liable on the underlying claim. All that the creditor loses is the right of preference and the right to follow the ship.

Under English law, there is no fixed period of limitation within which maritime liens must be enforced. Rather, the doctrine of lached applies under which the particular equitable circumstances of each case determine whether the creditor has acted with sufficient promptness to allow his claim as a lien upon the ship.

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