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ADMIRALTY LAW IN SOUTH AFRICA

Section 6 of the Admiralty Jurisdiction Act – an analysis, comparison and case law examination

by

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Abstract

Admiralty Law in South Africa:
Section 6 of the Admiralty Jurisdiction Act – an analysis, comparison and case law examination

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Under South African Admiralty law the Courts are to apply two different systems of law depending upon whether the matter could have been heard under the old jurisdiction held by the Colonial Courts of Admiralty as at 1890. If the matter does involve this old jurisdiction then English law as it was in 1983 must be applied by the Courts to the matter. If the matter involves a new jurisdiction, which was unknown in the old courts, then Roman-Dutch law must be applied to the matter.

These dual systems of admiralty have resulted in interesting judicial application, with certain judges correctly applying the statute, while others have ignored or chosen not to follow its directives.

This paper investigates how admiralty law has developed in South Africa resulting in the dual system and analyses the mechanism established through legislation. The application through case law of the section is analyzed to discover how the section has been utilized by the South African courts. Thereafter a comparison is made of other jurisdictions with a similar admiralty source to discover how they have resolved the juxtaposition of admiralty law with domestic law. Suggestions for legislative reform are suggested and debated.

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Numill Marketing CC	1994(3) SA 460 CPD
Owners of MV Motoria v Omnipex Overseas SA	1979 (3) SA 616 CPD
Peca Enterprises (Pty) Ltd and Another v Registrar of the Supreme Court, Natal NO and others	1977 (1) SA 76 (N)
Peros v Rose	1990(1) SA 420NPD
Primesite Outdoor Advertising	1999(1) SA 868WLD
Schlesinger v Commissioner for Inland Revenue	1964 (3) SA 389 (A)
Smith v Davis	(1878) 8 Buch 66.
Tharros Shipping Corp SA v The Golden Ocean	1972 (4) SA 316 NPD

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The Achilleus	1992 (1) SA 324	NPD
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The Karibib .... 1984 (2) SA 462 .... CPD
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The Prosperous	1996 (2) SA 155	AD
The Recife	1997 (4) SA 852	CPD
The Rosario Del Mar	1995 (1) SA 716	CPD
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The Lottawanna	88 U.S. (21 Wall.) 558, 22 L.Ed. 654
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Sandford Pty Ltd v NZI Insurance Limited and Lumley General Insurance Limited	No.QG 183 of 1995 FED No. 279/96 (reported on-line)
The Iran Amant.	[1996] 664 FCA 1 (23 October 1996)
The Iran Amant.	[1999] HCA 11 (24 March 1999)
The Shin Kobe Maru	(1992) 110 ALR 463; (1992) 38 FCR 227.
The Shin Kobe Maru	F.C. 94/013 (unreported High Court of Australia)
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The Skulptor Konenkov	[1997] 361 FCA (14 May 1997)

1. INTRODUCTION

"The 1983 s 6 was a jurisdictional nursemaid, necessary perhaps in the early years of the Act to effect a compromise between the English law pragmatists and the Roman-Dutch purists. In the decades since the Act came into force, South African law has been much changed by statute, and the courts have shown a continued willingness to have recourse to appropriate foreign decisions in expanding notions of shipping law. To limit only certain areas of the law to English sources is to ignore the wealth of court-made law with which shipping law is being continuously developed in jurisdictions with similar modern colonial roots such as the United States, Canada, and Australia...The South African courts are showing the courage to set broader Admiralty horizons in shaping the law. As will be seen in relation to many heads of jurisdiction in South Africa today, s 6 stultifies South African admiralty law. It conflicts with the freedom given to judges by our common law system to shape the law. And it often introduces absurd results. It is as potentially inequitable as it is ubiquitous. The legislature should waste no time in amending it, allowing South African admiralty law to come of age by standing on the considerable foundations of its rich legal history."[1].

Admiralty law has enjoyed a long and diverse position in South African law. It held this unique position due to colonial developments and policies adopted by the British Empire which stifled colonial court reforms. The broad imperial policy not to infringe upon existing conquered legal systems further meant that the South African Supreme Court, now the High Court, existed alongside an Admiralty Court and depending upon which court a litigant chose, so the result could vary, usually to the disadvantage of the defendant whose opponent would have calculated the effects before approaching the favoured forum. This legacy was not abandoned after the Union of South Africa was created and in fact remained even after South Africa left the commonwealth. Anticipated admiralty reform appeared in the guise of the Admiralty Jurisdiction Regulation Act of 1983[2] which managed to ensure that all maritime claims were at least heard in the same forum, the (then) Supreme Court sitting in Admiralty. While many novel reforms occurred, the issue of divergent systems of law would still remain divided, with English law being applied in certain circumstances and Roman-Dutch law being

[1] Hare, John. Shipping Law & Admiralty jurisdiction in South Africa 1st ed. Juta & Co.Ltd.1999. p.27.
[2] Act 105 of 1983 as amended

applied in others. The reforming legislation, through a quirk of drafting, also managed to peg the date applicable for English law at November 1983, which created yet another artificial barrier for this field of law.

This dissertation will examine the problems associated with the currently legislated admiralty system of law[3] and will examine its application in reported judgments while further comparing the options chosen in other jurisdictions. Finally suggestions as to possible reform will be made.

[3] This mechanism is established under section 6 of the Admiralty Jurisdiction Regulation Act 105 of 1983.

2. HISTORY OF DIFFERENCE

It would appear that since ships began sailing and plying their trade in the Mediterranean, they have had their own system of law which has remained different and set apart from their domestic law. This different system of admiralty had then, and to a certain extent retains its own rules, codes and civil law tradition. However, much of the jurisprudence which has dominated admiralty law holds its roots in English law and more specifically the English Admiralty law as developed from its civil law basis. As Elizabeth I, Queen of England wrote to the Chief Justice of England in 1584: "in all other like matters concerning the admiraltie, that the same being triable by mere civill lawe be not admitted to triall before you at the common law."[4] As the British Empire expanded and shipping increased so a body of maritime jurisprudence developed which was applied on a global rather than on a domestic level. Throughout this century, moves have been made to establish international conventions in order to ensure universal application of maritime principles. This was necessary given that certain principles found under the jurisprudence of maritime law were unknown in many domestic systems. An example of this would be the action *in rem*. In essence maritime law has been divergent from the domestic law found in countries in that it enjoys certain idiosyncrasies – *inter alia* it allows hearsay evidence, it has rapid prescription, it hears global actions with several jurisdictions often being involved in the matter.

In recent years there has been a continued erosion of the international face of admiralty law as reform has occurred in various Commonwealth jurisdictions[5]. Furthermore an increase in national sovereignty has resulted in a greater increase of national diversity as more legislation is passed favouring the national interest.[6] Examples of this sentiment are reflected in the Australian Law Reform Commission's Report on Civil Admiralty Jurisdiction[7] where it is pointed out that: "Australia has distinct interests in admiralty and maritime jurisdiction, in the view of its position as a country of shippers rather than shipowners, and as a country dependant on foreign shipping for much of its import and export trade."[8] South Africa has also adopted this approach of altering its admiralty law

[4] Burrell 231-32, 167 E.R. 550

[5] Admiralty reform took place in England in 1951 and 1981,Canada in 1979, New Zealand in 1973, South Africa in 1983 and Australia in 1988.

[6] see C Forsyth 'The Conflict between Modern Roman-Dutch Law and The Law of Admiralty as Administered by south African Courts' (1982) 99 SALJ 255.

[7] ALRC 33 1985

[8] ALRC 33, Ch 6 par 96.

to act in its national interest[9]. As the Report of the South African Law Commission states: "It has not been thought desirable merely slavishly to follow the statement of the jurisdiction of the English Court...consideration has been given, not only to United Kingdom legislation, but to the rules prevailing in other jurisdictions."[10]

Apart from national differences, the reluctance of many powerful sea trading countries to sign certain significant international treaties, which attempted to create and preserve a uniform international shipping system,[11] has slowed the development of a fully international shipping system. Many jurisdictions have preferred to promote their own national interest over that of a uniformed global admiralty system. Examples of this would be the ranking differences found in the USA which ensures all of its claimants rank above foreigners, the six months opposed to twelve months prescription found in some jurisdictions, the sister, surrogate and associated ship arrest provisions and the recognition and ranking of liens. The South African courts have recognised this trend as demonstrated by Marais J in The Andrico Unity[12] case: "The truth is, unpalatable as it may be to some, that there are no internationally accepted criteria for the conferment of a maritime lien and that each country goes its own way in that regard. As long as that continues to be so, a domestic Court may be forgiven for insisting upon its own law's criteria being satisfied."[13]

An interesting trend has developed since 1983 in respect of our Admiralty judgements. As the jurisprudence of the subject has matured and grown, so judges have been able to rely on previous South African, post 1983, judgements rather than relying wholly on English judgments, as a source of law (not in the context of a choice of law but persuasive as to the content of our common law.) As these later judgements are followed, so their original English influence is absorbed into the common law. In essence except for a few bizarre cases which will be discussed below, there is little practical difference in effect between relying on an English case as persuasive authority

[9] The South African use of the associated ship concept is an example of a method of making our jurisdiction highly desirable and our different ranking legislation with Necessaries trumping the Mortgage bank further attracts litigation to our shores but is problematic for banking institutions. Current proposals for reform which would alter this situation are being discussed and debated.

[10] South African Law Commission Project 32: Report on The Review of the Law of Admiralty, 1982 at p. 12.

[11] The 1952 Arrest Convention has only 6 of the 20 largest shipping countries as signatories. See the Australian Law Reform Report on Admiralty at Ch. 6 par. 94.

[12] 1987 (3) SA 794 (A) at 819C.

and applying English law directly. In both cases reliance is usually made on any local cases, and in some diligent judgements, on Australian and American cases.

The crisp point is that admiralty law in general would appear to be developing more domestic characteristics, and as different jurisdictions reform their admiralty law so they often break with their colonial legacy and absorb admiralty law into their domestic system.[14]

This begs the question as to why a separate admiralty system developed at all and why admiralty was not initially incorporated into domestic systems.

2.1 Ancient Admiralty

Admiralty law is one of the oldest areas of law that can trace its development back to the times of the Greeks, Phoenicians, Romans and Egyptians. Certain doctrines from this time still exist today such as general average and jettison and to a lesser extent, bottomry. [15] The island of Rhodes dominated the ancient world of shipping in around 500 B.C. and gave rise to much litigation and codification. Unfortunately this primary source no longer exists, but many secondary references are made by both Roman and Greek writers. Academic debate has raged as to whether the Rhodean sea laws influenced Roman law[16]. In any event in Justinian's Digest the *Lex Rhodia de Jactu* records the laws of General Average which are from a Rhodian origin, along with shipowner's responsibilities, ownership issues, charterparties, freight, collision, salvage and maritime loans.[17]

Various maritime codes developed in different maritime centres which reflected the legal admiralty needs of the population. The Rhodian Sea Laws are the earliest code to have survived the ancient period and can be attributed to the 7th or 8th Century A..D.[18] A

[13] For a discussion and analysis of the Andrico Unity Case see Hilton Staniland "Foreign Maritime Liens not to be recognised in South Africa." [1990] 4 LMCLQ. 491.

[14] This will be discussed in more detail below.

[15] Ship and cargo owners all contribute towards jettisoned cargo owners' loss so that all share in the value of the loss. Jettison involves throwing cargo overboard to save the ship and or other cargo. Bottomry involves a personal loan secured by the vessel which is cancelled if the vessel is lost.

[16] See R. Benedict, *The Historical Position of the Rhodean Law*, 18 Yale L.J 223 (1909) and Lobinger, *The Maritime Law of Rome*, 47 Jurid.Rev. 1 (1935). See also: G Hofmeyr, *Admiralty Jurisdiction in South Africa*, Acta Juridica 1982. At 31.

[17] See: John Hare. Shipping Law 7 Admiralty jurisdiction in South Africa. 1st ed. Juta & Co. Ltd. 1999 at p.5. See also ftn.14.

[18] See: Hare (Supra) at §1-2.

significant aspect of this ancient period is that the judgements of the courts were recorded and the codes were followed as precedent.

2.2 Medieval Admiralty

As. trade increased during medieval times around 1000 A.D. beyond the central Mediterranean to western Europe and Scandinavia further codes were developed centred around various trading ports.[19] The influence of these codes often extended beyond their own jurisdiction which created an overlap of jurisdiction and influence.

One of the most significant codes from this time which influenced English admiralty law was the "Laws of Oléron"[20] which exerted influence over the area which was located on the wine trade route to Britain. The code is said to have been taken to England in the 1100's by the bride of King Henry II, Eleanor of Aquitaine.[21] Other important sea codes from this time are the Law of Wisby[22] and the Laws of Hansa Towns.[23]

Healy and Sharpe[24] made the interesting point that in Europe the development of admiralty law was stifled through its incorporation into domestic law.

2.3 English Admiralty

One of the dominant sources of England admiralty was the Rolls of Oleron from the end of the 12th Century and the Black Book of Admiralty which is estimated to be dated from 1332 to 1357[25]. The Book set out the practice and procedure to be followed in the Court and was still quoted up until 1896[26]. The Court of the Lord High Admiral focused on naval discipline and piracy with a slow introduction of commercial jurisdiction that was soon curbed by Richard II in 1389[27] and 1391[28]. Henry IV ensured that the jurisdiction was kept in check through an Act passed in 1400 which allowed for

[19] Examples of these codes are the "Tablets of Amalfi" and the "Consolato del Mare" from Barcelona which was dated to approximately 1494. See: Smith, *The Libre del Consolat de Mar: A Bibliography*, 33 L.Lib.J 387 (1940), Also see Hofmeyr (supra)

[20] A French Island located on the Atlantic coast near the river Gironde.

[21] Benedict Admiralty (6th Ed. By Knauth 1940) Vol 4 350 to 355.

[22] A port found in the Baltic region.

[23] Derived from three sources being Baltic, Flemish and Dutch. See Hofmeyr at 33.

[24] N.J. Healy and D.J. Sharpe Cases and Materials on Admiralty 1974. West at p.4.

[25] Holdsworth A History of English Law. 7th Ed. 1956, 545, see also Hare (supra) at § 1-4.

[26] see The Gas Float Whitton No2. [1896] P 42 (C.A.) at 51.

[27] The Act decreed that the Admirals and their Deputies could only meddle on things done on the sea as in the time of Edward II. This had the effect of preventing commercial contractual jurisdiction.

[28] This Act went further and specifically excluded contracts, pleas and quarrels and all things arising on land and wrecks from admiralty jurisdiction.

double damages claimed against the plaintiff who incorrectly proceeded in an admiralty court.[29] The court then endured several conflicts with the common law courts resulting in its jurisdiction expanding and deflating until it was practically only a court of prize.[30]

The English Admiralty Court in ascertaining its position to a particular maritime issue referenced many of these maritime codes.[31] The Admiralty court was able to cross-reference and compare other civil law jurisdictions precisely because its lawyers and judges were trained in the civil law tradition at the Doctors' Commons.[32] This difference initially prevented a certain seepage of common law into the admiralty field and was reinforced the common law courts not having the power to manipulate the civilian doctrine.[33]

Reform occurred when the first Admiralty Court Act was passed in 1840 followed by the second in 1861. These Acts expanded the court's jurisdiction and even after the court was made a division of the High Court of Justice,[34] civil law was still applied in the court[35] and is indeed still referred to in modern day judgments.[36]

2.4 South African Admiralty

With the growth of jurisdiction and empire, Vice-Admiralty Courts were established in the various British colonies by virtue of The Vice-Admiralty Courts Act 1863.[37] Both the Cape[38] and Natal[39] colonies had these courts established. While these courts applied English Admiralty law, they held concurrent jurisdiction with local courts which applied the law of the relevant jurisdiction, which in the case of the Cape and Natal colonies,

[29] 2 Henry IV, C 11.
[30] See Holsworth (supra).
[31] For example in the case of The Aquila (1798) 1 C. Rob. 37, 165 E.R. 87 the court examined the codes of Selden, Loccenius, Consolato del Mare, Antoninus and the laws of Rhodes amongst others.
[32] The Collage of the Civilians. Fellows were only admitted after reading civil law at Cambridge or Oxford University thereby becoming doctors. See Wiswall chapter three.
[33] This was expressly set out by the Privy Council in The Neptune (1835) 3 Knapp. 94, 12 E.R. 584.
[34] The Supreme Court of Judicature Act 1873 made admiralty part of the High Court under the division of Probate, Divorce and Admiralty. The Administration of Justice Act 1970 scrapped this division and incorporated admiralty under the Queen's Bench Division. Admiralty jurisdiction in England is currently legislated under The Supreme Court Act 1981.
[35] See The Milford (1858) Swab 362, 166 E.R. 1167, The Riga (1872) L.R. 3 A & E. 516, The Ripon City [1897] P. 226.
[36] The Goring [1987] 2 Lloyd's Rep. 12 (C.A.), The Sennar (No.2.) [1984] 2 Lloyd's Rep. 142 (C.A.) and the Halcyon Isle [1981] A.C. 221 (P.C.) amongst others.
[37] 26 Vict, C 24. The Vice-Admiralty Courts were first established in the American Colony in 1697 and thereafter applied to other English colonies.
[38] As seen in the case of Smith v Davis (1878) 8 Buch 66.
[39] As seen in the case of In Re the Ship Myvanwy (1883) 4 NLR 43.

was Roman-Dutch Law. This created the situation of advantageous forums for litigants who understood the differences in applying different legal systems. The matter came to a head in the Cape Colony in the case of Smith v Davis[40] which resulted in legislative reform in 1879[41] which modified the Cape Colony Supreme Court's jurisdiction to apply English law in all questions relating to Shipping and Maritime Law.[42] This attempt to block dual systems of law applying in the Courts was also introduced in the Orange Free State,[43] but was not introduced in the Transvaal or Natal. Upon unification in 1910, no further steps were taken in this regard until repeal of the 1879 Act and 1902 Ordinance in 1977[44] which officially removed English Law from Supreme Court application in matter of an admiralty nature.[45]

While Hofmeyr correctly describes the impact of the 1879 Act as of merely academic interest[46], the Act clearly attempted to ensure that only one system of law was applied to Shipping and Maritime law. This is demonstrated in its preamble:

> "Whereas the existing general law of the colony is in several instances unsuited to the advancing of trade and the altered circumstances of the country: And whereas, also, many portions of such law are uncertain, and partly if not entirely, obsolete: And whereas it is desirable to alter or amend such laws as are in conflict or in consistent with modern principles of legislation…"

It should be noted that De Villiers CJ, who gave the judgment in the Smith v Davis case, was also the chairman of the Commission on Law Reform and was responsible for the drafting of the Act. He was no doubt aware of the difficulties in the application of two legal systems to the same problem. In Smith v Davis two ships collided in the roadstead

[40] supra

[41] General Law Amendment Act No. 8 of 1879

[42] §1 of the Act stated: In all questions relating to maritime and shipping law in respect of which the supreme court has concurrent jurisdiction with the vice admiralty court, the law of this colony shall hereafter be the same as the law of England, so far as the law of England shall not be repugnant to or inconsistent with any Ordinance of Parliament, or any other statute having the force of law in this colony..

§ 2 of the Act: In every suite, action, and cause having reference to questions of fire, life, and marine assurance, stoppage *in transitu*, and bills of lading, which shall henceforth be brought in the supreme court, or in any other competent court of this colony, the law administered by the High Court of Justice in England for the time being so far as the same shall not be repugnant to, or in conflict with, any Ordinance, Act of Parliament, or other statute having force of law in this colony, shall be the law to be administered by the said supreme court or other competent court."

[43] Ordinance 5 of 1902.

[44] Pre-Union Statue Law Revision Act No.43 of 1977

[45] For a discussion on the impact of the ousting of domestic law in favour of English law in terms of the statute see J.P. Van Niekerk in Southern Cross at 446 to 460, and Booysen `Admiraliteitshowe in die Suid-Afrikaanse Reg' (1973) 36 THRHR 241; Bamford 'Admiralty Courts: A Short Reply' (1973) 36 THRHR 4501; Booysen `Admiralty Jurisdiction' (1975) 38 THRHR 387; Hofmyr 1982 Acta Juridica 43;

of East London. While the Vice-Admiralty Court had jurisdiction, and would have applied English maritime law, a damages action was brought in the Supreme Court which applied the domestic Roman-Dutch law, and had a different result in respect of apportionment of damages, with Roman-Dutch law having the principle that the loss would be borne by both parties and under English admiralty law the loss fell where it lighted. In his judgment De Villiers CJ, examined why Roman-Dutch law should not apply to the matter: the learned Chief Justice cited among his reasons the undeveloped rules and customs of the law of Holland, the existence of English maritime law already in the colony and the fact that British ships in British waters should not have foreign law applied to a dispute between them. In light of the submission of the defendant to the jurisdiction of the Supreme Court and its acceptance that Roman-Dutch law would govern the dispute the court felt bound to apply that system of law. Given the legislative changes introduced by the Act it would appear ironic that South African lawyers are still dealing with the question of applying different systems of laws to different maritime and shipping matters.[47] Van Niekerk remarks that:

> "The far reaching changes and the "brutal injection of English law" effected by the General Law Amendment Act were for obvious reasons widely welcomed as highly practical and necessary. Not only did the view that Dutch commercial law was singularly deficient have "considerable justification" but the provisions of the act were not intended to effect a revolution but merely give legislative sanction to an existing practice."[48]

By ousting Roman-Dutch law the legislature had ensured that English maritime law would govern all shipping and maritime issues. Much of the case law surrounding the Act focused on whether English law was elevated to the position of Roman-Dutch law. While English law was examined, Roman-Dutch law was often compared resulting in a debate as to whether English law could be persuasive or binding authority.[49]

It is submitted that in light of the decision of Crooks & Co v Agricultural Co-Operative Union Ltd,[50] where the Appellate division held that the Colonial Courts of Admiralty

[46] Hofmeyr.(supra) See Fn.14.
[47] While the Admiralty Jurisdiction Regulation Act sought to regulate the application of legal system to different disputes, no unification has yet been achieved - as will be discussed below.
[48] Van Niekerk (supra) at 448. See Anon (1901) 18 SALJ p.1, 5; Lee 'What has become of Roman-Dutch Law?: A Vanished Friend' (1930) 47 SALJ p.278; and Halo & Kahn, The Union of South Africa: The Development of Its Laws and Constitution (1960) at 670 and 18 .
[49] Van Niekerk (supra) at 450.
[50] 1922 AD 423

were substituted for Vice-Admiralty Courts, and the case of Trivett & Co. (Pty) Ltd. and Others v WM. Brandt's Sons & Co. Ltd. and Others[51], where the Appellate Division held that the several divisions of the Supreme Court had the status and jurisdiction of Colonial Courts of Admiralty and had survived constitutional changes,[52] the application of the General Law Amendment Act of 1879 should have continued until its repeal in 1977[53] resulting in a uniform approach of law, English maritime law, but with a limited geographical application in only the Cape and Orange Free State.[54]

The attempts of De Villiers CJ to achieve a uniform system of shipping and maritime law accordingly failed which ultimately resulted in a complex application of either Roman-Dutch law or English maritime law according to the jurisdiction exercised over the type of dispute.[55]

Apart from the Supreme Court's choice of law issue as raised above, the Vice-Admiralty Courts became Colonial Courts of Admiralty on 1 July 1891. [56] Hofmeyr describes the impact of this new legislation as merely perpetuating the divergence of choice of law found in the ordinary courts and those of admiralty. The most severe effect of the 1891 Act was that admiralty became pegged as at 1890 as a result of the decision of the Privy Council in The Yuri Maru, The Woran[57] where Lord Merrivale declared that the true intention of the 1891 Act was to define the jurisdictional limits of the courts as those found in the High Court of England exercising its admiralty jurisdiction as at the passing of the 1891 Act. Local challenges to this decision in the cases of The Golden Ocean[58] and Beaver Marine[59] failed and the jurisdiction of the Colonial Courts of Admiralty was

[51] 1975 (3) SA 423

[52] It is submitted that the same logic for the preservation if the Cape Act and Orange Free State Ordinance applies here and the fact that they were later repealed adds strength to the argument.

[53] See Hare at 654: "Until 1977... the Cape Province... and Orange Free State, were arguably still subject to English law. Natal and the other provinces continued to apply the pre-1879 Roman-Dutch sources."

[54] Being land locked not many shipping cases have ever passed through the doors of the courts in this province.

[55] The problems of jurisdictional conflicts are demonstrated in the Natal case of Peca Enterprises (Pty) Ltd and Another v Registrar of the Supreme Court, Natal NO and others 1977 (1) SA 76 (N) where a direct conflict arose between the Admiralty Court and Supreme Court and demonstrated the need for a unified Court for admiralty matters.

[56] The Colonial Courts of Admiralty Act 1890 (53 and 54 Vict.)

[57] 1927 AC 906 (PC)

[58] Tharros Shipping Corp SA v The Golden Ocean 1972 (4) SA 316 (N)

[59] Beaver Marine (Pty) Ltd v Wuest 1978 (4) SA 363 (A)

set as at 1890. The law applied in these courts was therefore English maritime law as found at 1890.[60]

Ultimately the rules, practice and procedure of the admiralty court were discovered to be too antiquated to deal with modern issues of shipping, an example of which was the cost implications in respect of the tariff charged for fees which was set as at 1890 and became unworkable. Reform was not an immediate option for the colonies which had to endure the effects of The Yuri Maru judgment as they were unable to pass legislation which would be repugnant to British law.[61] England however had long since embarked on reform where in 1875 the English Admiralty Court became a division of the High Court in terms of The Supreme Court of Judicature Act, 1873.[62] The Administration of Justice Act, 1928[63] ensured that all divisions of the court shared both civil and admiralty jurisdictions so that one Court effectively applied one law. Later admiralty law in England thus held a narrow band of jurisdiction compared with other countries.

Brief mention should be made of the attempt of admiralty reform through the Admiralty Jurisdiction Act of 1972 which was passed by the South African parliament but which never came into effect, before its repeal by the 1983 Act.

In 1982 The South African law Commission published its reform report which set out the three chief areas which needed reform.

1. "Enough has been said above to indicate the undesirability of there being two inconsistent systems of law, the one administered by the ordinary courts and the other by the admiralty courts. This, however, is not the only undesirable feature of the existing situation.
2. As has been mentioned, the admiralty law in South Africa is the English law as it stood in 1891 together with any amendments to that law by virtue of statutes having force in South Africa.
3. Since 1890 there has been a period of great development in maritime law."[64]

[60] Section 2(2)of The Colonial Courts of Admiralty Act 1890; Crooks & Co v Agricultural Co-operative Union 1922 AD 423; Trivett & Co. (Pty) Ltd. and Others v WM. Brandt's Sons & Co. Ltd. and Others 1975 (3) SA 423

[61] The repugnance issue dissolved with the Statute of Westminster, 1931.

[62] 36 & 37 Vict. , c. 66

[63] 18 & 19 Geo. 5, c.26

[64] South African Law Commission Project 32 , September 1982

These criticisms can be summarised as follows:

a) Two types of law are not desirable

b) Artificial pegged dates are not useful

c) The law develops and should not be restricted in its growth.

All of these problems ironically still exist today as a result of the legislation introduced to resolve them.[65]

[65] The Admiralty Jurisdiction Regulation Act 1983 allows for the application of both English and Roman-Dutch law, with English law being applied in terms of 1890 jurisdiction as at 1983.

3. ANALYSIS OF SECTION 6

The Admiralty Jurisdiction Regulation Act of 1983[66] introduced extensive reforms to the South African field of admiralty. The colonial courts of admiralty were abolished and admiralty courts were established within the Supreme Court of South Africa which would then exercise its admiralty jurisdiction when dealing with shipping and maritime matters. The Act therefore attempted to removed the issue of two separate forums as all admiralty and shipping claims could be only heard in the court of admiralty.[67] Extensive lists of defined maritime claims were promulgated[68] and new concepts were introduced and legislatively recognised such as *forum non conveniens* and associated ship arrests.

From a choice of law perspective, the system used in the colonial courts of admiralty was preserved in that English admiralty law could be applied to a maritime problem in certain circumstances, but in others Roman-Dutch law would be applied.

Section 6 of the Act reads as follows:

> 6(1) Notwithstanding anything to the contrary in any law or the common law contained a court in the exercise of its admiralty jurisdiction shall –
>
> (a) with regard to any matter in respect of which a court of admiralty of the Republic referred to in the Colonial Courts of Admiralty Act, 1890, of the United Kingdom, had jurisdiction immediately before the commencement of this Act, apply the law which the High Court of Justice of the United Kingdom in the exercise of its admiralty jurisdiction would have applied with regard to such a matter at such commencement, in so far as that law can be applied;
>
> (b) with regard to any other matter, apply the Roman-Dutch law applicable in the Republic.

[66] For a concise overview of the Changes introduced by the Act see: Staniland, Hilton. "Developments in South African Admiralty Jurisdiction and Maritime Law." 1984 Acta Juridica 271; Staniland, Hilton. "The Implementation of the Admiralty Jurisdiction Regulation Act in South Africa." [1985] 4 LMCLQ. 462 and Rycroft, Alan. "Changes in South African admiralty Jurisdiction." [1984] 3 LMCLQ. 417.

[67] There is however a dispute as to whether maritime claims could be heard in municipal courts if the issue was not raised by either party. The Courts have held, as discussed below, that should neither party raise the question of forum, that the matter may proceed in the Civil court. With respect, this position is criticised as the Appellate Division has on two occasions, when not sitting as a Court exercising its admiralty jurisdiction, requested additional heads of argument to be filed on the point of whether the matter should be heard in admiralty. It is submitted that this indicated that the Court itself can and should raise the issue of jurisdiction should a maritime claim be heard in the ordinary High court. This issue is discussed below in more detail.

[68] Section 1 (a) to (ff) Act 105 of 1983 (as amended)

6(2) The provisions of subsection (1) shall not derogate from the provisions of any law of the Republic applicable to any of the matters contemplated in paragraph (a) or (b) of that subsection.

6(5) The provisions of subsection (1) shall not supersede any agreement relating to the system of law to be applied in the event of a dispute.

3.1 Analysis of S 6(5) – Contract based Choice of Law

As a point of departure the most startling aspect of the section is that it allows an agreement made between parties in respect of a choice of legal system to trump the legal system mechanism of the Act. As most shipping claims and cases involve contracts of some sort, be it carriage, charterparty, insurance, salvage or towage, and so on, it should be noted that most of these contracts provide for a choice of law clause besides a submission of jurisdiction. In the light of this, many maritime claims should technically establish their own choice of law and section 6(1) need not be debated nor be in issue.

3.2 Analysis of S 6(2) – Statute based ouster of choice of law mechanism

Section 6(2) ensures that in areas where existing statute governs an area of admiralty jurisdiction that the Act will prevail as the dominant application of law. It is argued that legislation must supersede all other application of choice of law mechanisms. In other words, a contractual choice to apply French law could not oust the application on any statute governing the matter replacing it with French law. As parliament passes more shipping legislation to effectively codify the common law, so the influence and necessity of section 6(1) is minimised. But it is argued that section 6(1) would still hold significance in the interpretation of the common law found within the statute. For example, in a salvage matter, The Wreck and Salvage Act[69] would ultimately govern the dispute but if a court needed to examine the meaning of a section or analyse a problem in the context of case law, the question then arises as to which law to follow. Assuming there was no contractual agreement to follow a system of law (which would end the quest there) the court would have to have regard to section 6(1). As salvage services and damages were matters which a colonial court of admiralty had jurisdiction as at 1890[70] so English maritime law, as found before 1 November 1983, should be used in discovering the common law which may lie behind the meaning of the statute. This argument may be attacked on the basis that procedural questions of statute are governed by the

[69] No. 94 of 1996

common law (South African law) and that this system should be applied to all questions linked to the interpretation of South African statutes. The Appellate division however has held that if a common law context was required for a shipping related Act, (as envisaged by 6(2)), S 6(1) would need to be applied.

In The MV Bos Energy[71] Grosskopf JA held:

> "The application of English law is of course subject to South African statute law on the subject. See 6(2)of the Act. In the present case the matter in issue is regulated by S 11 of the Act and, to the extent of its application, it would supersede the English maritime law. However, the ranking of maritime claims against a ship and, in particular, what expenses are to be included in the costs of procuring the judicial sale of a vessel were clearly matters in respect of which an Admiralty Court had jurisdiction under the Colonial Courts of Admiralty Act. If a common-law context were required for the interpretation of S 11, this would accordingly have to be found in English law."[72]

Additional support for this argument can be found in the case of The Great Eagle [73] where Howie, J, as he then was, came to a similar finding where he held that the English law to be applied in terms of section 6(1) and 6(2) would not only include the substantive law but also procedural provisions of the law. As the learned judge stated:

> "Had the Act, for instance, omitted any reference to the remedies by which maritime claims were to be enforced, one would look at the relevant English law and not merely to determine substantive questions but also, without doubt, to determine the procedural question as to what remedies were available."

Here the Court is stating two different things. First, that when examining a statute an analysis of section 6 needs to be done in order to be able to apply English law. This is opposed to the normal interpretation of statute analysis which would insist on South African law being applied; Second, when applying English law one should not only apply the substantive law but also give effect to the remedies found under English law. In other words give substance to the common law found stated or applied by the statute. This would result in both English substantive and procedural law being applied. It is

[70] Through The Wreck and Salvage Act 1846 and Admiralty Court Act 1840 section 6.
[71] National Iranian Oil Co v Banque Paribas (Suisse) SA and Another 1993 (4) SA 1.
[72] At 8 C to D.
[73] Great River Shipping Inc. v Sunnyface Marine Ltd 1994 (1) SA 65 at 68H to 69A.

interesting to note that the Court concludes that the effective result would be the same even if one were to disregard the provisions of the Act.[74]

The position in South African admiralty law is then that S 6(2) does not oust the entire S 6(1) mechanism, as the subject area of the statute would have to be examined in order to apply the correct common-law based system to the common law behind the statute.

Whilst it is argued that the Appellate division followed the correct approach, its application may invoke some difficulties which might, with respect, result in a direct conflict with existing South African common law. It should be noted that S 6 does appear to deal with this eventuality by confirming that its mechanism would only operate "as far as it may be applicable". However it is argued that the language used in the Act to escape application is too vague. And the existence of an alternative common law application through S 6 should not be ousted simply because a conflict may exist.

For example, imagine a situation with a maritime claim before the court where the nature of the claim was found under the pre-1890 jurisdiction such as Pilotage, where a claim for damages had been lodged against Portnet, the Governmental harbour authority. This matter would be examined in terms of section 6(2) governed by The Legal Succession to South African Transport Services Act[75]. But if the court needed to examine common-law aspects underlying the Act it would need to apply English maritime law. In this case Portnet would attempt to exclude itself from liability in terms of the abovementioned Act and the real problem would develop should the Plaintiff point out that the section might violate its constitutional right to equality. This would be based on the premise that a pilot in a non-Portnet controlled harbour would have no exclusion of liability, due to the protectionist nature of the legislation. In this case the equality clause of the constitution would need to be examined having regard to the common law, which would be English maritime law.[76] While the results may well be the same, in that English maritime law also protects liability of certain pilots, the process followed would be clearly unfortunate. The common law underlying the Statute would be English law while the equality and constitutionality of that section would be examined in terms of the South Africa Law. The constitutionality and common law found in

[74] at 70B.
[75] No.9 of 1989

respect of the equality clause would further need to be examined in light of English law, which, even through the Courts can have regard to foreign law in constitutional interpretation, would produce an incurious result. The previous position before the introduction of s6 was that the South African legislation would have to be interpreted in accordance with south African law regardless of the underlying subject of the case. In the Case of Shell Tankers, Ltd v S.A.R. & H[77] the Court decided a pilotage liability issue through the interpretation of the Railways and Harbour Control and Management (Consolidation) Act[78] (which became The Legal Succession to South African Transport Services Act[79]) Here the court interpreted the matter according to the Roman-Dutch common law.[80].While there were references to English cases, the matter was clearly not decided on the basis of English Admiralty law. Should section 6 have operated when the matter was heard, due to pilotage falling under section 6(1)(a), the interpretation of the scope of liability, test of causation and principles of damages (to give effect to the meaning of the statute) would have to be determined in accordance with English admiralty law.[81] This situation would clearly not be desirable.

The underlying uncertainty of the application of section 6(1) in respect of legislation through its common-law interpretation role is evident when examining judgments of the admiralty court which, in matters of legislative interpretation, have ignored the choice of common-law mechanism and have simply applied South African law, often with English law in a persuasive role.[82] While this approach may be criticised for ignoring the application of the Act as set out by the Appellate division, it is submitted that it highlights the unworkable problems associated with two choice of law systems operating in one court and suggests that further reform is needed.

[76] Of course the Constitution allows for the use of foreign law and cases for interpretation by virtue of section 39 (1)(c): "When interpreting the Bill of Rights, a court...may consider foreign law."

[77] 1967 (2) SA 666 (E).

[78] No. 70 of 1957.

[79] No. 9 of 1989.

[80] The Court held:" It seems to me that in accordance with the *lex aquilia* if the *damnum* is caused by two concurrent wrongdoers it is the result of the separate *injuria* of each of them. The consequence is that each becomes liable to the plaintiff for the whole of the damage caused, who may sue either or both for the recovery thereof...in order to prove liability it must be proved that the pilot's conduct was the sole and proximate cause of the damage." At 673.

[81] For negligence of Pilots see McKerron. R. G. "Compulsory Pilotage: effect of Statutory Provisions Excluding Liability for Negligence of Pilot. (1967) 84 SALJ 394.

[82] Besides the of The MV Bos Energy no reported judgments since 1983 dealing with legislative interpretation have referred to section 6(1) in deciding the choice of common-law to be followed.

3.3 Analysis of S 6(1) – Application of Law Formula

English maritime law (as found at 1983) would be applied in the admiralty court but only if the matter concerned was one in respect of which the old Colonial Court of Admiralty had jurisdiction in July 1891.

The first issue of construction of the section relates to exactly when the jurisdictional bench mark should be taken, either from the date when the Colonial Courts of Admiralty Act 1890 came into force[83] or when it was passed.[84] Corbett CJ, held in The Vallabhbhai Patel[85] that the date to be_applied was the date when the Act was passed, 1890.[86] The next step in ascertaining exactly what jurisdiction the High Court of Admiralty held in England in 1890 is, as Hare points out, "an almost impossible task."[87] Any point of departure in this regard would be the 1840 and 1861 Admiralty Court Acts, however some flexibility existed as the jurisdiction of the court was expanded and contracted through writs of prohibition issued from the Courts of Common Pleas protecting their jurisdiction and letters patent to the admirals[88]. Evidence through case law and academic texts of the time further assist in discovering the elusive quality of the 1890 jurisdiction.[89] Should a matter before court then be identified as a matter which fell under the 1890 jurisdiction, then English Admiralty law would be applied to the dispute.

This situation is highly unsatisfactory. On the one hand lawyers are required to examine 1890 jurisdiction to determine the legislative mechanism to govern the dispute[90] but on the other hand, the Act sets out the jurisdiction which the court must follow.[91] The Act sets up the exact jurisdiction that the court holds in that it can "hear and determine any maritime claim"[92] and further, in spectacular detail, defines what it considers to be a maritime claim.

83 The Act came into force in South Africa on 1 July 1891

84 The Act was passed by the British parliament on 25 July 1890.

85 The Shipping Corporation of India Ltd v Evdomon Corporation and Another 1994 (1) SA 550 (A)

86 At 560B Corbett CJ, follows the judgment of the Privy Council in The Yuri Maru, The Woron (supra) as authority for his view and rejects the submission carried by Staniland in Shipping Law, Vol.25 The Law of South Africa (ed. Joubert) at par.114 note 8.

87 Hare Shipping Law & Admiralty Jurisdiction in South Africa. 1999, Juta & Co, Ltd.Cape Town, at 19.

88 Hare (supra) at 20.

89 The problems associated with jurisdiction is closely linked to the choice of law problem but not directly relevant here. As Corbett CJ stated in The Andrico Unitty: "Section 6(1) deals not with jurisdiction, but the system of law to be applied." At 224H.

90 i.e. Section 6 of Act 195 of 1983

91 Section 2(2) read with section 1(1) (a) to (ff) of Act 105 of 1983

92 Section 2(2) of Act 105 of 1983

The crisp point is that section 6(1) could have been structured so that lawyers examine the maritime jurisdiction inside the Act, for example by applying English maritime law to maritime claims "a" to "k" and South African law to the other maritime claims. It is submitted that this sort of approach would remove the mysticism of applying 1890 jurisdiction with its imprecise nature. It would also ensure that the Court is forced up-front to consider whether a different system of law needs to be applied. The determination as to the category of maritime claim, and hence whether jurisdiction was held under the Admiralty Jurisdiction Regulation Act, could then determine which system of law applied.

The matter of The Fidias[93] examined the link between Section 6 and definition of a maritime claim. Here the Plaintiff tried to demonstrate that the reference to any law in section 6(2) read with section 6(1) which also refers to any law, meant that one could have regard to any provisions of the act. As the Act contained references to a maritime lien it was argued that recourse need not be had of English law as the statute itself could provide assistance in determining the issue. Nienaber J, as he then was, held that the reference to any law did not refer to provisions found elsewhere in the Act as the Act needed to be considered as a whole with each provision playing its own role. The court found that it would be superfluous for the Act to introduce a saving clause for its own provisions.[94] While the court correctly found that S6(2) ensures that English admiralty law, in terms of S6(1) remains subject to South African statute, it demonstrates a reluctance to utilise other sections of the Act for assistance when determining the application of law. Section 6 therefore must be examined in its own context.[95]

As the question whether a matter is a maritime claim needs to be asked in any event for the court to exercise its admiralty jurisdiction, it would appear to make more sense to link this question to the applicable law mechanism as it would be guaranteed to be asked and answered[96]. Essentially section 2 sets out the jurisdictional limits of the Act, yet section 6 ignores this and for historical reasons focuses its jurisdictional examination on 1890. From a practical perspective the structure of section 6 warrants reform in light of

[93] Oriental Commercial Shipping Co Ltd v MV Fidias 1986 (1) SA 714 (D).

[94] at 717B.

[95] See: Staniland, H. "The Admiralty Jurisdiction Regulation Act and The Maritime Claim of a Saudi Arabian Necessaries Man." (1986) 103 SALJ p.350.

[96] In any event, the definition of a maritime claim provides for matters which the High Court of Admiralty held jurisdiction before 1890 which would act for a catch all for any obscure jurisdiction which needed to be considered and argued.

its artificial pegging to English 1890 jurisdiction rather than reliance on its own jurisdictional limits which set out the various heads of jurisdiction and could be easily divided into old and new, with the old applying English maritime law and the new applying South African law.

A further construction complication arose from the use of the words: "immediately before the commencement of this Act" in section 6(1). This has been interpreted as meaning that the English maritime law applied would be that found on or before 1 November 1983, which was the commencement date of the Act. [97] This has the effect of limiting the application of English maritime law to an arbitrary date. While many developments have occurred in English admiralty law since 1983, none of them may be utilised by a South African court except as persuasive authority.

The English law which is then applied by the Court does not need to be set out in affidavit and is not considered foreign law.[98]

It should be further noted that the courts were given an out through the use of the words: "in so far as that law can be applied."[99] This subjective element allows the law to be disregarded on the basis that it would be impractical to apply; or that the result could possibly be repugnant to the common law of South Africa. In any event, the drafting of this judicial option appears to allow a further misapplication of choice of law questions as ambiguity exists as to whether full argument would need to be addressed as to why section 6(1) could not be applied or whether it may be ignored because of the inherent inability to apply the section in a particular case.[100] It is submitted that if the choice is made to submit that S6(1) is unable to be applied then this should be specifically set out by the Court. It is further submitted that this application can ensure that a formalistic approach to English law application may be avoided as English admiralty law need not

[97] See the appellate division cases of The Andrico Unity at 334H; The Vallabhbhai Patel at 562H; and The Wave Dancer at 1176D which all held that the English maritime law to be applied was that found as at 1 November 1983.

[98] See The Tigr 1995 (4) SA 49 (C) at 57F where Farlam, J, as he then was, stated that affidavits setting out the position in English law need not be filed.

[99] Section 6(1) of Act 105 of 1983 (as amended)

[100] Many examples exist of our court not following the application of 6(1). A significant aspect of this is the failure to mention why 6(1) was not followed or applied. This will be discussed in more detail below.

be blindly applied. The court is granted a limited discretion in the application of English admiralty law.[101]

Regarding the type of English law to be applied, the Act sets out that the law which the High court of Admiralty of justice of the United Kingdom in the exercise of its admiralty jurisdiction would have applied. This application has been interpreted by the courts as being not only substantive English admiralty law but also procedural in that English choice-of-law rules are also included.[102] Paul Myberg argues that only a substantive approach should be followed. "It is at least arguable that the reference to English law in S6(1)(a) only includes *substantive* English law. Indeed the general rule of statutory interpretation, that statutes must be interpreted in such a way as to alter the South African common law as little as possible, supports such a proposition."[103] While Myberg does concede that Roman-Dutch law has no choice-of-law rules to govern maritime liens leaving little option other than to apply English procedural law, with respect, as the English law is applied it becomes South African admiralty common law through the application of section 6. Put another way, interpreting the Act without disrupting the common law, would mean applying Admiralty common law, which includes English law, and should the dispute fall under one of the old heads of jurisdiction, then indeed English admiralty law would be the South African common law in that instance.[104]

Section 6(1)(b) establishes that in all other matters where 1890 jurisdiction of the Colonial Courts of Admiralty did not exist, (in other words the new jurisdictional heads as set out in the definition of a maritime claim) Roman-Dutch law must prevail. It is argued that the "Roman-Dutch law applicable in the Republic" is the common law as refined and reformed by the courts.[105] In the case of The Morning Star[106], Friedman J, applies the provisions of this section remarking that the principles of Roman-Dutch law

[101] See: Myberg, P. "Recognition of Foreign Maritime Liens" (1989) 106 SALJ p.263 at p.268 where this issue is discussed in relation to Leon J's judgment in The Kalantiao (1987 (4) SA 250 (D)).
[102] The Khalij Sky (1986 (1) SA 485 (C)) where the minority of the Halcyon Isle was followed, which supported the choice-of-law approach.
[103] Myberg, P. "Recognition of Foreign Maritime Liens" (1989) 106 SALJ p.263 at p.267.
[104] See further Staniland, Hilton. "The Halcyon Isle Revisited: a South African Perspective." [1989] 2 LMCLQ. 174 at 175 to 179. See also comments above under analysis of S6(2)
[105] See Hare (Supra) at p. 23 an 24.
[106] Shooter's Fisheries v Incorporated General Insurances 1984 (4) SA 269 (D) at 273A.

must be applied to the matter[107]. The court however held strong regard to English maritime insurance law and remarked that while it was not obliged to follow English law, that "any statements in English judicial decisions relevant to the matter will be of great persuasive authority, more particularly as the words to be interpreted are of long and ancient pedigree."[108] While the principles of Roman-Dutch law are therefore applied to certain new heads of jurisdiction, the court will clearly examine English authority on point and will examine the interpretation arrived at by the English courts. The fact that Roman-Dutch principles should be applied to a case is therefore overshadowed by the practical solutions found in English case law where appropriate and in many cases the same result is achieved be it based on binding or greatly persuasive English authority. The fact remains that the principles being examined in 6(1)(b) situations, such as Insurance or Charterparty disputes, are often English, yet the section ousts the application of English law principles through its peremptory manner. In any even many English law concepts shave been adopted and absorbed by Roman-Dutch law. As Professor Beinart points out:

> "The South African legal system today is a mixed or hybrid system, Roman-Dutch and English. If one were to speak in terms of percentages, the English portion were probably larger, but both sectors have been enriched in the process of amalgamation."[109]

This sentiment was also set out during the debate on the role of English law in South Africa in the 1960's where it was pointed out:

> "Thus, numerous intermarriages took place between Roman-Dutch doctrines and English ideas, giving birth to offspring which were neither English nor roman-Dutch. The result was that during the nineteenth and twentieth centuries a third layer was added to the two-layer cake known as Roman-Dutch law – English law. ... By the addition of English law, a hybrid system of law has been created, for which 'South Africa law' is the only real appropriate name. [To] say that Roman-Dutch law is the law of South Africa today, is nothing but a sentimental fiction. It is South African law made by South Africans for South Africans."[110]

[107] It is interesting to note that Juta in its classification of this case did not label it under shipping law but under insurance.
[108] At 275A.
[109] Beinart, B. "The Legal Contribution in South Africa: the Interaction of Civil and Common Law" 1981. Acta Juridica. At p.7. See also Hare (supra) at p. 23 and 24.
[110] Proculus Redivivus (annon.) "South African law at the crossroads or what is our common law?" (1965) 82 SALJ p.17., See further: Anon. "What has become of Roman-Dutch law? – A vanished friend" (1930)

On the whole an unworkable situation has entrenched itself in our law whereby certain types of jurisdiction are heard in terms of English maritime law as it stood on 1 November 1983 and other types of jurisdiction are heard in accordance with Roman-Dutch principles. The uncertain jurisdictional pegging at 1890 was further cause for concern. However Section 6(1) was hailed as a great compromise between the tensions evident at the time between English law and Roman-Dutch law.[111] Purists were trying to ensure that no pollution from English law tainted their pure Roman-Dutch law and the so reliance from English law was heavily discouraged.[112] Judge David Friedman however showed much foresight when he pointed out: "As with all compromises, however, it may perhaps have created more problems than it has resolved."[113]

47 SALJ p.274.; Mathews, A.S. & J.R.L. Milton "An English Backlash?" (1965) 82 SALJ p.31, Boberg, P. Q. R. "Oak tree or Acorn? – Conflicting approaches to our law of Delict. (1966) 83 SALJ p.150; Zimmermann, R. "Synthesis in South African Private Law: Civil Law and Common Law and Usus Hodiernus Pandecrarum (1986) 103 SALJ p.259.

[111] Bamford, B. R. The Law of shipping and Carriage in South Africa. 3rd Ed. Juta & Co.Ltd. 1983 at fn. 1 p.195

[112] see fn. 98, 99 and 100 above.

[113] Friedman, D. B. "Maritime Law in the Courts After 1983." (1986) 103 SALJ p.678.

4. APPLICATION OF SECTION SIX

"The true test of the efficacy of the provisions of the Act [AJRA] is to be found in how well it works in practice."[114] These sentiments expressed by Judge Friedman clearly demonstrate that it is the use of the statute in Court that would be testimony to its success. Section 6 has not worked well in practice, in fact it has either been ignored or left out of all but a handful of reported judgments. As section 6 must be examined in each and every admiralty case, as should whether the matter was a maritime claim, one would expect extensive reference to the section. As will be demonstrated below, Section 6 has been applied in a limited form by only a few judges.

Section 6[115] has no such corresponding legislation in any other jurisdiction. Its complicated drafting is further not found in any other Country. This section will examine precisely how the section has been applied by our courts and whether any problems have been associated with its application or misapplication. Before dealing with the types of judicial application of the section it is useful to examine how the Court has been comprised. To discover which judges have been applying the section in which divisions of the High Court in order to ascertain whether any significant correlation exists.

4.1 Statistical Application

Since 1983[116] there have been 117 reported decisions involving shipping and maritime law[117] which give an insight into exactly how section 6 is being applied by the High Court[118] exercising its admiralty jurisdiction. Of these cases, four have dealt with the legal position prior to the 1983 Act but have been included in the examination of which courts and judges have handed down reported decisions.

At the outset a technical observation of the application of Section 6 demonstrates some fascinating results. From a geographical perspective, 48 cases were from the Cape of Good Hope Provincial Division, 31 from the Durban and Coastal Local Division with 11 from the Natal Provincial Division, 2 Witwatersrand Local Division and 2 from the

[114] Friedman, D. B. "Maritime Law in the Courts After 1983." (1986) 103 SALJ p.678.
[115] A general reference to Section 6 obviously excludes the hearsay and evidence part of the clause which are rather removed form the choice of law subsections.
[116] When the AJRA was passed.
[117] As at 30 June 1999 reported in the South African Law Reports Juta & Co, Ltd.

Namibian High Court. The highest appeal court has 20 cases as the Appellate Division and 2 as the Supreme Court of Appeal (as it is now known). It is interesting to note that while it is generally considered that the Durban High Court has a greater volume of shipping work as it has the busiest harbour in Africa, most of the reported decisions are being delivered from the Cape High Court.

Figure 1 demonstrates which judges have delivered reported shipping decisions since 1983 to the present:

Figure 1.

The Shipping Judges

One Reported Judgment	Two Reported Judgments	Three Reported Judgments	Four Reported Judgments	Five or more Reported Judgments
Aaron AJ	Bristowe J	Alexander J	Foxcroft J	Berman J
Booysen J	Burger J	D Freidman J	G Freidman J	Corbett CJ
Combrink J	Howard JP	Levinsohn J	Leon J	King JP
Conradie J	Howie JA	Milne JP	Thirion J	Scott JA[120]
Didcott J[119]	Hugo J	Shearer J		Thring J
Eksteen JA	Hurt J			
EM Grosskopf JA	Marais JA			
Farlam J	Olivier JA			
Fitzgerald AJ	Rose Innes J			
Gauntlett AJ	Van Heerden J			
Hannah J	Van Schalkwyk J			
Hoberman AJ	Wilson J			
Hofmeyr AJ				
Joubert JA				
Levy J				
Magid J				
McLaren J				
Meskin J				
Miller JA				
Munnik JP				
Nestadt JA				
Nicholas AJA				
Nienaber J				
Niles-Duner AJ				
Page J				
Selikowitz J				

[118] The Supreme Court became the High Court on the adoption of the final Constitution in 1996. The erstwhile Appellate Division then became the Supreme Court of Appeal.

[119] Minority judgment

[120] One minority judgement.

Squires J
Van Der Westhuizen AJ
Van Heerden J (AH)
Williamson J
Willis AJ

At the outset it should be recognised that many shipping cases are settled before reaching Court and even more judgments are not necessarily reported. The Registrar of the Cape High Court estimates that there are approximately 160 Admiralty matters each year. It is submitted that most of these are settled and that only about 70 cases are heard in applications or trials.

Having regard to the reported judgments, it would appear that a small number of judges are creating the case law in this subject. Corbett CJ, through his nine judgments has 7.69% of reported judgments and 40% of the Supreme Court of Appeal judgments in this area of the law. The top five judges with the most reported shipping cases have created approximately 28% of the case law. If regard is then had to those judges with four reported judgments, the percentage becomes 42.24% and if one considers all judges with three or more shipping judgments one discovers that not only are they only 14 judges, but their contribution to case law represents 55.17%. It is submitted that this statistic clearly demonstrates that shipping case law since 1983 has been very specialised, with more than half the judgments being handed down by 14 judges. By way of comparison, in 1983 the Cape High Court had 19 judges and in June 1999 there were 24 Judges with 7 Acting-Judges. While 23 judges have reported admiralty decisions from the CPD out of the 49 reported since 1983, it is submitted that certain judges have been utilised for their skills and expertise in the subject. Given the specialised knowledge required in shipping law the trend of experienced admiralty judges hearing shipping matters is to be encouraged. Some judges are even candid about their knowledge of shipping law. Didcott J in his only reported shipping judgment, (where he held the minority view) stated: "I am insufficiently steeped in shipping matters to take sides with confidence."[121] He was not the only judge to ever express such a sentiment. Many years

[121] 1984 (3) SA 261 (NPD) at 269C.

before Sir James Rose Innes remarked that admiralty law was a "subject so special that I express my views with diffidence."[122]

Besides there being few shipping judges, few judges disagree with their learned brothers. There have only been three reported decisions where dissenting judgments have been given. These cases are, The Wave Dancer[123], The Berg[124] and The Paz[125]. Only one of these cases is from the Supreme Court of Appeal. There are however only 35 reported appeal cases (22 from the Supreme Court of Appeal) where dissent could have occurred, yet the existing number of dissent represents only 8.6% from possible dissents. It is argued that this figure is too low to suggest an arbitrary situation. From this it would appear that judges are happy to follow the decisions of their peer and do not add further comment or demur. By way of comparison, many English judgments dealing with shipping and maritime matters have judgements from more than one of the judges hearing the matter, even if they concur. However as has been pointed out: "In recent years the quality of the Appellate Committee of the House of Lords has been as high as it has ever been. Moreover, it is by no means inevitable in a specialist area of law for their Lordships simply to agree with a member of the panel with the greatest expertise in that area. But it is not uncommon. And it is regrettable that, especially when other Lords of Appeal in Ordinary have equivalent expertise, the panel is not constituted to include them."[126]

It is argued that, with respect to the Supreme Court of Appeal, one dissent in 17 years in shipping matters, out of 22 cases, represents a lack of judicial debate. This comment invokes the conflict found in our law between simply applying the law in strict accordance with the legislature in a true positivist fashion or adopting a more flexible approach of examining the previous law and moulding the law through judicial comment and *stare decisis*. It furthermore raises the possibility as expressed above that other judges have been agreeing with specialist judges in the field.

[122] Crooks & Co v Agricultural Co-operative Union Ltd 1922 AD 423 at 427.
[123] 1996 (4) SA 1167 (A): Olivier JA gave the majority judgment which Van Heerden JA and Smallberger JA concurred and Scott JA gave the minority judgement which Howie JA concurred .
[124] 1984 (4) SA 647 (NPD): Milne JP gave the majority judgment to which Van Heerden J concurred, while Didcott J, as he then was, gave the minority judgment.
[125] 1984 (4) SA 261 (NPD): Friedman J gave the majority judgment which Kriek J concurred while Didcott J, as he was, gave the minority judgment.
[126] F.D. Rose "The Nature of Admiralty Proceedings [The Indian Grace (No2)]" [1998] LMCLQ_P. 27 AT fn. 7.

If one examines the 22 decisions of the Supreme Court of Appeal, Corbett CJ, has handed down judgment in 9 of the cases representing over 40% of the reported Supreme Court of Appeal judgments for the past 17 years.

Figure 2, set out below demonstrates which Supreme Court of Appeal judges have sat in reported shipping appeal cases and indicates further from which region in South Africa they have originated in order to attempt and find a correlation between the coastal regions and the inland regions, which have little or no shipping matters heard in their divisions. The table further indicates the percentage of shipping cases they have heard out of the total reported Appeal Division, as it was then, cases since 1983 to the present. The bold typeface indicates which judges have reported judgments during this period.

Figure 2.

Shipping Judges of the Supreme Court of Appeal

Sat in one reported appeal	Sat in two reported appeals	Sat in three reported appeals	Sat in four reported appeals	Sat in five or more reported appeals
Friedman AJA	**Joubert JA**	**Eksteen JA**	**Howie JA**	**Botha JA**
Galgut AJA	Kumleben JA	Goldstone JA	**Marais JA**	**Corbett CJ** *
Harms AJA		F H Grosskopf JA	**Scott JA**	**EM Grosskopf JA**
Kriegler AJA		Hoexter JA	Van der Heever JA	Hefer JA
Schutz JA		**Miller JA**		**Nestadt JA**
Trengrove JA		Milne JA $		**Nicholas AJA**
Van Coller AJA		**Olivier JA**		Nienaber JA $
Viljoen JA		Van Heerden JA		Smalberger JA
Vivier JA				
6 Gauteng judges 2 W Cape judges 1 Free State Judge	2 Gauteng 1 KwaZulu-Natal (KZN) judge	2 KZN judges 2 Free State Judges 2 Gauteng judges 1 Eastern Cape judge	4 W Cape judges	3 Gauteng judges 2 KZN judges 2 W Cape judge 1 Eastern Cape judge
Have sat in **4.5%** Of SCA cases	Have sat in **9%** of SCA cases	Have sat in **13.6%** of SCA cases	Have sat in **18.2%** of SCA cases	Have sat in **22.7%** of SCA cases. **27.3%** for six SCA cases. Corbett CJ has sat in **72.7%** cases

Bold = Reported judgment given by judge in shipping matter in Supreme Court of Appeal since 1983.

$ = Reported shipping judgment given in lower division.

* = Corbett, CJ, has heard 16 cases.

Botha, JA; Corbett, CJ; EM Grosskopf, JA; Hefer, JA; Nestadt, JA; Nicholas AJA; and Smallberger JA have heard six or more reported appeals.

From the above table interesting results appear. It is suggested that there is a premier grouping of shipping judges in the Supreme Court of Appeal in that seven judges have sat in over 27% of the cases before the court since 1983. These seven judges only represent about 30% of the bench[127]. It is also interesting to note that Smallberger JA[128] and Hefer JA have sat in six shipping appeals and have never given a reported judgment. The overwhelming conclusion to be drawn from the above table is that Corbett CJ, has sat in 72.7% of SCA cases since 1983. This influence cannot be underestimated, and it is submitted that, aside from his judgments, his influence in the field by sitting on the bench of 16 of the 22 appeals has been considerable.[129]

Figure 3 Sets out the regional origins of the Supreme Court of Appeal judges who have heard admiralty matters since 1983 in order to establish a correlation between the region where they practised as advocates and judges. The assumption made is that coastal judges would have been exposed to more shipping matters as advocates and judges and would therefore have sufficient confidence to deliver the written judgment over other judges with no shipping experience or exposure. The results of figure 3. demonstrate that judges sitting on the Supreme Court of Appeal from the Western Cape are most likely to hand down the written judgment in a shipping matter. The results from the Kwa-Zulu-Natal region, which has arguably the most legal shipping work in the country, do not support the premise as these judges are least likely to hand down the written judgment in a shipping matter. It is argued that all the figure can show is that the

[127] In 1983 there were 23 judges sitting on the Supreme Court of Appeal bench, including acting appointments. In 1999 there were 20 judges sitting on the Supreme Court of Appeal bench including acting appointments. (Source: South African Law Reports. Juta & CO.)

[128] To be fair to Smallberger JA, he did give the majority judgment in the SCA case of The Heavy Metal as delivered on 31 May 1999 and as yet unreported. This case is historic in having not only Smallberger JA, but Farlam AJA and Marais JA deliver their reasoning. It should be noted that both Farlam AJA and Marais JA hail from the Cape Provincial Division. The unreported SCA case of The Cape Spirit , which was delivered on 1 June 1999 also had a minority dissenting judgment from Farlam AJA while Olivier JA gave the majority judgment. Because these cases have remained unreported since September 1999 they have not been included in the above figures, however again there are judges from the Cape involved in the delivered judgment.

Western Cape is producing judges which have defined the parameters of shipping law more than any other region even though the volume of work in that region is less than KwaZulu-Natal.[130]

Figure 3.

COURTS OF ORIGIN OF JUDGES OF SCA WHO HAVE HEARD ADMIRALTY MATTERS SINCE 1983

Western Cape	KZN	Gauteng	Free State	Eastern Cape
Corbett CJ *	Hefer JA»	**Botha JA »**	**Olivier JA**	**Eksteen JA**
Friedman AJA	Kumleben JA	Galgut AJA	Van Coller AJA	Smalberger JA »
Vivier JA	**Miller JA**	Goldstone JA	Van Heerden JA $	
E M Grosskopf JA	Milne JA $	F H Grosskopf JA		
Howie JA	Nienaber JA $	Harms AJA		
Marais JA		Hoexter JA		
Scott JA		**Joubert JA**		
Van der Heever JA		Kriegler AJA		
		Nestadt JA »		
		Nicholas AJA »		
		Schutz JA		
		Trengrove JA		
		Viljoen JA		
16 judgments from judges from this region. Corbett CJ - 9 Scott JA - 3	1 judgment from judges from this region.	4 judgments from judges from this region.	1 judgment from judges from this region.	1 judgment from judges from this region.
5 Judges delivering judgments	1 Judge delivering judgment	5 Judges delivering judgments	1 Judge delivering judgment	1 Judge delivering judgment
2 judges heard the matter but did not deliver a judgment	4 judges heard the matter but did not deliver a judgment	9 judges heard the matter but did not deliver a judgment	2 judges heard the matter but did not deliver a judgment	1 judges heard the matter but did not deliver a judgment

[129] He retired on 31 December 1996.

[130] The volume of legal shipping work being higher in Durban rather than Cape Town is supported by the larger number of shipping firms operating in Durban opposed to Cape Town. Durban is also a far busier port than Cape Town according to Portnet, the harbour authority.

Cape judges appointed to the SCA most likely to give judgment.	KZN judges appointed to the SCA least likely to give judgment.

From the above, 72% of SCA shipping judgments were from judges who had come from the Cape of Hood Hope Provincial Division. The lack of judgments and low ratio of sitting on appeals and delivering judgments from the Natal region is surprising given the regions strong shipping links. It would appear the judges from the Transvaal tend to hear shipping appeals but do not give written judgments.

The use of relying on statistics to trace a judicial trend is difficult given the secrecy surrounding the pervious appointment of judges. Even through judges are now appointed on the recommendation of the Judicial Services commission, it remains unclear whether a provincial allocation of judges to the Supreme Court of appeal exists. It is submitted that it does not. Given that most shipping work falls under the Cape Town or Durban High Court's jurisdiction, many advocates and judges from those divisions have experience in shipping matters and some may even be considered to have specialised in the field. A further statistical problem is that it may be argued that the allocation of judges to a particular case may be purely arbitrary. While this may be true in many cases it is submitted that in a shipping appeals one would expect to find judges of appeal with a background in shipping. While there were almost an equal number of judges hearing shipping appeal in the Supreme Court of Appeal from shipping and non shipping divisions,[131] most of the judges who heard four or more appeals were from shipping divisions. It is submitted that as 75% of these judges were from shipping divisions[132], with only 3 judges from non-shipping based divisions, a clear inference could be made that judges who originated from shipping divisions hear shipping appeals. It is further submitted that the allocation process of the Supreme Court of Appeals can not be arbitrary but rather selective.

A further statistical problem relates to the secrecy surrounding the reporting of judicial decision, or rather the marking of judgments as not reportable by the bench. In light of

[131] Eastern cape included in Shipping division even though its volume of work is much smaller than Cape Town and Durban. 16 Judges were from non-shipping divisions and 15 were from shipping divisions.
[132] With 50% of these judges from the Cape of Good Hope Division.

the subjective elements at play in this decision, the conclusions made may be altered by the number of unreported judgments which may indicate a contrary trend[133] and it could even be argued that the above findings are merely arbitrary and accidental.

The inferences which, it is submitted, may be drawn are that there is an elite group of shipping judges on the SCA. Their regional background is not highly significant although judges from the Western Cape have been found to be more likely to deliver the leading written judgment. This is because (besides Corbett CJ and Scott JA) no other SCA judge has given more than one judgment. The domination of Corbett CJ, over the entire court is evident when the above tables are examined.

From a language perspective it is fascinating to note that out of all 117 cases, only one was reported in Afrikaans with 116 in English. It is submitted that given the international nature of maritime law and of the number of *peregrini* using the courts, it would follow to expect many judgments to be in English, but to have only 0.8% of cases in Afrikaans is rare in any field of South African law. The sole written Afrikaans judgment was delivered by Joubert JA in the The Antipolis[134] with Hefer JA, Nestadt JA, Eksteen JA, and F H Grosskopf JA all concurring. It is submitted that our reported admiralty common law may easily be referred to in other jurisdictions which also rely on the English language. This has enchanted the international character of our admiralty common law and has allowed it to play a role in international admiralty law.

4.2 Judicial application of Section 6(1),(2) and (5)

An examination of the 117 reported shipping matters since 1983 reveals three ways in which the court deals with the application of different law.

[133] Some judgments which are parked not reportable are available on the internet so any future analysis may be able to include these judgments. An example would be the case of Dorbyl Marine (Pty) Limited v Department of Trade and Industry. (Heard on 31 May 1999) which was marked non-reportable and yet is available on the Law Publisher Web Site. The matter involved whether certain statements made by an arbitrator in his award were binding on the Respondent. The case involved an export incentive scheme whereby a subsidy could be could be awarded from the sale of ships constructed in South Africa. One of the main areas on arbitration related to "the FOB issue; the imported inputs issue"; the design costs issue; and The Hermes [insurance] issue." It is argued that the matter was therefore be viewed as a maritime claim in terms of S1(aa) and that this issue may well be debated by the Court. The judgment was handed down by Streicher JA, and was decided upon the facts of the matter with no law being cited. It should be noted that none of the bench has ever handed down a shipping judgment, other than Smallberger JA who did so on the same day. The case raises an interesting question as to why it was marked non-reportable. It is assumed that this was done on the basis that only the facts of the matter were decided.

[134] 1990 (1) SA 751

a) It ignores § 6(1), (2), (5) and simply applies South African law with Roman-Dutch principles without having regard to the broader international principles of admiralty law found under English law and elsewhere; or

b) It applies South African law or English law and possibly refers to the 'other system' as persuasive authority but fails to discuss §6(1); (2) or (5); or finally

c) It applies §6(1) and reaches a decision as to which legal system ought to be used and then applies that system, often with the "other system" being used as persuasive authority.

4.3 Application of type A – S 6 ignored

Before discussing cases which fall under this category, mention should be made of the judgment of Olivier JA in the case of The Wave Dancer[135] where the learned judge stated that unless the question of jurisdiction was raised "before the Court", it was not precluded from exercising its ordinary jurisdiction. As Olivier JA remarked that: "[e]ven assuming the claim to be a maritime claim…"(1188H) it apparent that a court would be prepared to enact ordinary jurisdiction in respect of matters which directly fell under the admiralty court's jurisdiction. As was held in The Wave Dancer[136], if the parties do not invoke the maritime jurisdiction of the Court then the matter may be heard in the High Court exercising its common law jurisdiction. It is argued, with respect, that the court itself should have regard to the existence of its admiralty and ordinary jurisdiction and should raise the *issue mero motu.*

It is further interesting to note that while the south African Courts have held that if admiralty jurisdiction is not raised it may be ignored, the South African courts have on occasions requested additional heads of argument to be filed thereby invoking questions of admiralty. As the Court stated at 1174A:

> "Having regard to the nature of the claim and the provisions of the Act counsel were requested prior to the hearing in this Court to submit heads of argument to the question whether or not the Transvaal Provincial Division had jurisdiction to entertain the action."

[135] 1996 (4) SA 1167 (AD)

The problem with the approach adopted by the Court is that it flies in the face of the criticism of the system found before the 1983 reform, which attempted to remove the dual court system. The minority judgment of Scott JA in the Wave Dancer case even highlights this issue:

> "The ordinary parochial jurisdiction of the Supreme Court and its jurisdiction as a Colonial Court of Admiralty overlapped to a certain extent. The result was that in such an event, whether the dispute between the parties was determined in accordance with Roman-Dutch law or English law depending upon the Court in which the plaintiff decided to bring his action. In practice, however, problems associated with the concurrent jurisdiction arose most frequently in connection with the ranking of competing claims. *One of the objects of s 7(2) was no doubt to remove this undesirable state of affairs.*"[137](my emphasis).

The decision by Olivier JA, with which Van Heerden JA and Smallberger JA concurred, effectively allows for admiralty jurisdiction to be ignored and for ordinary civil jurisdiction to be followed. It is submitted that this was not the intention of the legislature when enacting the 1983 Act and if one merely has regard to the Law Commission's report, their intention was to remove the dual court jurisdiction.

The Wave Dancer is important because it allows parties and the court itself to bypass the Admiralty Jurisdiction Regulation Act and apply ordinary jurisdiction. In this case section 6(1) would not come into play as the matter would not be heard in admiralty but in terms of the common law. The Admiralty Jurisdiction Regulation Act does to a certain extent endorse this through section 7 which allows a Court to decline to exercise its admiralty jurisdiction. When the question arises as to whether the matter is an admiralty claim the court then decided upon the issue and either transfers the matter to the High court exercising its admiralty jurisdiction or continues to exercise its normal jurisdiction. It is submitted that the Court itself should ask the question if it suspects the matter to be a maritime claim, rather than allow the parties to continue under normal jurisdiction.[138]

136 1996 (4) SA 1167 (AD)

137 1176B-D

138 For a detailed discussion in respect of jurisdictional issues and the role of the Magistrate's Court (Lower Courts) in admiralty see Hare (Supra) at §1-8.

A different approach was adopted in the Case of Peros v Rose[139] where Page J held that where a maritime claim existed, the admiralty court had exclusive jurisdiction. The learned judge neatly summarises the position:

> "The English maritime law, that `special body of legal principles and practice' (as it was described *in Crooks & Co v Agricultural Co-Operative Union Ltd* 1922 AD 423 at 428), differs substantially from the common law of this country; but was, in my view, nonetheless retained as the law applicable in the Colonial Court of Admiralty because it is peculiarly adapted to the resolution of maritime claims. This created an anomalous situation whilst the Supreme Court in its capacity as such retained concurrent jurisdiction with the Supreme Court sitting as a Colonial Court of Admiralty: for the system of law applicable to the claim depended upon the choice of forum by the *dominus litis,* and this in turn could well influence the result. See *Peca Enterprises (Pty) Ltd and Another v Registrar of the Supreme Court, Natal No and Others* 1977 (1) SA 76 (N) at 81 and cases there cited. *This anomaly has, however, now been removed by s 7 of the present Act, the effect of which is to confer exclusive jurisdiction to determine maritime claims upon the Supreme Court exercising its admiralty jurisdiction.*"[140] (my emphasis)

With respect, it is submitted that this approach, while contrary to the current wording of the Admiralty Jurisdiction Regulation Act (which allows matters to proceed under normal jurisdiction should the question not arise), is correct and that the decision of the Supreme Court of Appeal in The Wave Dancer has the undesirable effect of allowing admiralty matters to be heard in a non-admiralty court where the issue has not been raised by either party.

The case of The Antipolis[141] involved the very issue discussed above. The matter concerned a dispute of ownership over condenser pipes salvaged from a wreck. When the case came before the Cape Provincial Division, no mention was made of admiralty law or of the Admiralty Jurisdiction Regulation Act. The case was decided upon pure Roman-Dutch laws, with extensive reference to the Digest and wounded animals. Burger J stated as follows:

> "For a discussion of the law, it is best to start with the relevant text of the Digest: `It has been asked whether a wild animal which has been wounded in

[139] 1990 (1) SA 120 (N)
[140] 423J to 424C
[141] Reck v Mills and Others 1990 (1) SA 751 (AD) and Mills v Reck and Others 1988 (3) SA 92 (CPD).

> such a way that it can be captured is understood immediately to become our property."[142]

The Court then examined various texts regarding the capture of wounded animals, ending with a rather splendid commentary on whale capture:

> "A whale, mortally wounded so as to render it incapable of keeping the sea, and so mastered as to make it impossible for it to escape from the person who has mortally wounded it, is the property of that person. Assistance given in such circumstances does not entitle the person assisting to share in the whale."[143]

Unfortunately the whale reference is the closest the court came to admiralty law. It is submitted that criticism of this judgment should not only centre on the logic followed in the judgment of applying the Roman-Dutch law, for in that regard it is well researched and fully developed. The concern lies in the complete disregard for the field of admiralty law, which is not even discussed so that it could be distinguished or disregarded, perhaps on a Wave Dancer type basis. Issues of ownership and salvage are governed in terms of s 6 by English law.[144] One would have expected some debate as to whether the vessel was a ship or not in order to determine whether a maritime claim existed, thereby invoking admiralty jurisdiction. If admiralty jurisdiction has been found then the section 6(1) debate would have occurred and the court may well have decided that issue in favour of Roman-Dutch law given that the jurisdiction of wreck was removed from English admiralty law by the statutes of Richard II, however if it was defined as a 'ship' then English law would apply.[145] Regardless as to what system of law the court would have applied, it is submitted that the court should have had regard to Admiralty law in its judgment and should have justified its basis for using Roman-Dutch law where English law controls the law of salvage. This brings into question the issue set out by King J, as he then was, in The Tigr[146]:

> "This Court has applied English Admiralty law for over 100 years; and is in fact obliged to do so – see s 6 of the Act and *see Marchard Stein & Co v Port Marine Contractors (Pty) Ltd and Others* 1995 (3) SA 663 (A) at 667C; this Court and the practitioners who appear before it in shipping matters are experienced in the field and the procedures which it follows are unobjectionable."

[142] 95I and J
[143] at 97D, quoting Kraise's commentary on Voet.
[144] S 4 of the 1840 Act grants jurisdiction to questions of ownership as to title in any ship in causes of possession, salvage, damage, wages or bottomry.
[145] See above for comment on Richard II statutes. Section 4 of the Admiralty Courts Act 1840 Act could confirm English maritime law jurisdiction to the extent that the wreck was still a ship.
[146] 1998 (4) SA 740 (C) at 744.H and I

The case of The Antipolis went on appeal to the Supreme Court of Appeal. It should be noted that where the court has believed that matters of admiralty should have been raised in the papers it has in the past requested additional heads of argument to be filed so that the matter of jurisdiction and choice of law may be debated and resolved.[147] Unfortunately the Court of Appeal in the present case decided that while the court *a quo* had incorrectly decided the matter, they extensively discussed the *mandament van spolie,* another pure Roman-Dutch principle, but failed to discuss whether Roman-Dutch law should have been applied to the matter. In fact the court never discussed whether admiralty law should even governed the dispute in any way. The Admiralty Jurisdiction Regulation Act was never referred to in the judgment. Professor Staniland[148] argues, it is submitted correctly, that the matter should have been decided according to English maritime law through determination of s 6(1) in respect of the matter.

It is submitted that the case should be criticised on a broader level for not even debating which system of law should have been applied.[149]

Other cases which fall under this section are those cases decided simply on the facts and those decided on strict interpretation of the wording of a statute.

One example of a case decided upon the facts is The Ocean King[150] where King J, as he then was, decided that the granting of security for the preservation of a vessel fell under the Court's discretion. The matter was decided purely upon the facts of the matter.

Other cases have been decided upon interpretation of statute. An example of this would be The Alka where Hugo J, decided the matter upon strict interpretation of S 3 of the Carriage of Goods by Sea Act[151]. Many other examples may be found of cases which

[147] See for example The Wave Dancer.
[148] Hilton Staniland "Admiralty Jurisdiction Over Wrecks" 108 SALJ P.594-598. 1991.
[149] For more discussion on this case see Carole Lewis "How Reck Lost the Wreck" (1988) 18 Businessman's Law 16. which analyses the Roman-Dutch elements of the case and introduced a case involving a wounded Kudu where judge Dendy Young held that wounding an animal did not grant rights over that animal. (R v Mafohla 1958(2) SA 373 (SR). Unfortunately Lewis argues the distinctly non-maritime approach followed by both the court *a quo* and the appeal court. See further for a comprehensive analysis of the case: Bruk An Analysis of the Law governing the Acquisition of Shipwreck LLM Dissertation (Unpublished) University of Cape Town 1996. For a detailed analysis of the case see Hare (Supra) § 4-2.
[150] MV Ocean King: Den Norske Bank ASA v MV Ocean King (No 1) 1997 (4) SA 345 (C)
[151] No. 1 of 1986.

have interpreted various provisions of the Admiralty Jurisdiction Regulation Act without citing or examining any foreign case law or English law. Initially one may argue that there is nothing wrong with South African judges using their skill of interpretation in respect of South African statutes. Criticism may be levelled at these cases on the basis that in interpreting the statute, they ought to have regard to the common law surrounding the meaning of certain words or phrases, many of which hold an international admiralty meaning. Many security[152] and ranking[153] matters appear to be decided upon the facts of the matter. In such a case it is obvious that section 6(2) is being applied as the security or raking provisions are being applied to the facts of the matter, yet none of the security or ranking cases make mention of the clause. It is furthermore interesting to note that some ranking and security cases, which dealt with the interpretation of the Act, do have regard to foreign law [154]

The matter of The Tao Men[155] also falls under this category of cases. Here the Court discussed the question of the transfer of ownership on the basis of fraudulent misrepresentation in respect of the contract of sale. No mention is made in the judgment as to which system of law is applicable in examining the issue and even though certain ownership disputes are governed by Roman-Dutch law in terms of S 6(1)(b), nothing is mentioned in this regard. The issue is further compounded by the different result found under English law which does not require delivery for ownership to pass. This issue became central to the matter which was firmly decided along Roman-Dutch principles with no reference being made to English law or section 6[156]. Mention should

[152] For examples of security matters: see The Crna Gora 1994 (2) SA 563 (A) where the test to be applied for security for a claim was set out. The Georg Lurich 1994 (1) SA 857 (C) where the court found that Respondent was not unreasonable in refusing to accept another vessel for security; The Cape Spirit 1998 (2) SA 952 (C) where meaning of arrest in terms of s 3(10)(a)(I) was examined. Levinsohn J stated at 956C: "The distinction drawn between a deemed arrest and an actual arrest is the cornerstone of his argument." Yet the Court failed to examine in any detail the meaning or distinction found in other jurisdictions. Nor does the court, with respect, realise that when it was stated at 956I that; "At common law this principle is equally well established." That this common law would be English admiralty law and not Roman-Dutch common law as the interpretation of an arrest would fall under section 6(1)(a).

[153] For examples of Ranking matters: See The Pacific Trader 1996 (1) SA 1 (A) where the court interpreted parts of s 11 of the Admiralty Jurisdiction Regulation Act but had no regard to English law, despite debating the difference between 'a ship' and 'the ship' and its effect on the legislation. No mention was made of section 6(2) at South African law was directly applied to the matter; In The Golden North 1999 (1) SA 144 (D&CLD) one of the issues was when the claim arose, when it came into existence or became due, the Court examined the ranking provisions of S 11(4)(c) and held it was when it came into existence. It is submitted that section 6 should have been mentioned in this enquiry in order to establish the basis of law being applied.

[154] These are dealt with in the next section below.

[155] 1996 (1) SA 559 (C).

[156] The Colonial Courts of Admiralty has jurisdiction to hear matters in respect of ownership disputes in terms of the 1840 Admiralty Act, section 4.

further be made of another case by Foxcroft, J, The Snow Delta, which involved a time charterer and its rights and use of the vessel. While the matter was correctly decided by the application of South African law, nothing was set out in the judgment confirming why such a choice of law had been made. While counsel brought certain English decisions to the attention of the Court, they were not taken into account. The Court held that:

> "in my view this authority *does not afford any help* in deciding whether the incorporeal right with which we are concerned in this case is localised within this jurisdiction, or whether it is attachable at the hands of some outsider to the contract between the Respondent and the owner of their vessel." [157] (my emphasis)

The case of The Lina[158] involved an arrest of the vessel to found jurisdiction for an application for damages as a result of an alleged breach of contract. While the matter involved charterparty contracts, and was correctly decided in terms of South African law, nothing was stated as to the basis for such a finding.[159]

4.4 Type B - Partial Application of S 6

This category of cases involves the application of one of the systems with the other being used in a persuasive role.

At the outset mention should be made of the cases which apply foreign law by contractual agreement in terms of section 6(5). None of the cases which made use of foreign law through contractual clauses made any mention of section 6(5). In The Spartan-Runner[160] the court stated that: "the fact that in terms of their agreement the parties chose the English Courts and the English law as the medium for the resolution of their disputes is certainly material to a consideration of whether such Courts should be the appropriate forum."[161] While reference was made to English law in establishing the law where a dispute had been referred to a foreign tribunal, nothing was stated in connection with section 6 and how it ought to be applied to the matter.[162] In The Al

[157] At 724F.
[158] 1998 (4) SA 633 (NPD)
[159] The colonial Courts of Admiralty had no jurisdiction in respect of charterparty contracts.
[160] 1991 (3) SA 803 (NPD)
[161] At 806C.
[162] The Lapitan Solyanik, 1999 (2) SA 926 (NmHc) also applied foreign law, that of the Ukraine, but does not state why or on what grounds such an application is made. Even though the Admiralty Jurisdiction

Kaziemah[163] it was agreed by Counsel to apply Greek law to many of the issues yet nothing was stated in connection with the mechanism in place to allow that choice of law to be applied by the court.[164]

Most of the shipping judgments heard since the Act came into being fall under this category: they apply South African law, examine the wording of the relevant statute and refer to English case law for persuasive assistance. Yet all of these cases ignore section 6 by not referring to it. It is submitted that although many of them reach correct decisions and a reference to the section would not have necessarily altered the result, these decisions would have employed a sounder jurisprudential process in reaching that result. The fact that 50 out of 117 cases[165] are decided on this basis indicates either a reluctance on the part of the court to mention or directly apply section 6 or perhaps a lack of judicial application of the peremptory nature of S 6. This represents almost 43% of the cases examined and it is submitted that it indicates that the bench prefers applying South African law, with English law, (and other systems where need be), on a persuasive basis. As the majority of cases have applied South African law the effect of any misapplication of section 6 has been minimal with a "correct" result being achieved (the right system of law) while an "incorrect process" was followed (S 6 was ignored). While most of the cases under this category were decided on the basis of Roman-Dutch law the relevance of English law was however strong as it was referred to in almost all of the cases found in this category of cases, even though the basis of the use of this system was not disclosed.

4.5 Type C - Correct Application of Section 6

"The effect of this section [6] has been frequently analysed by the south African High Court: And rightly so, because it is the second question a court should always ask itself [once jurisdiction is established.]"[166]

Regulation Act does not apply in that country some mention should be made as to the legal basis for the application. In The Great Eagle 1992 (2) SA 653 (C), it was common cause that law of Hong Kong was to be applied to the dispute, yet nothing was set out in terms of section 6(5).

163 1994 (1) SA 570 (D&CLD)

164 see at 572C-E.

165 Inclusive of those decided before the Act but reported after the time period as well as those of Namibia.

166 John Hare Shipping Law and Admiralty Jurisdiction in South Africa, Juta & Co. 1999, 18.

On the assumption that section 6 ought to be mentioned in most judgments it is interesting to note that only 23% of shipping cases made reference to the section at all, either in direct discussion or as a basis for a finding. It is submitted, with respect, that this confirms a reluctance or ignorance by the court to apply the choice of law section on a formal basis as set out in the Act.

Nevertheless it is interesting to note exactly who has correctly applied the section and where they are located. Judge Thring of the Cape Bench is unique from an admiralty perspective in being the only judge who has the most cited section 6 reported decisions, namely four out of his six reported shipping judgments[167]. The only other judges who have more than one reported decision which makes mention of section 6 is Corbett CJ, and King JP who each have two cases in this regard.

From a geographical perspective the Cape of Good Hope division exercising its admiralty jurisdiction has correctly referred to section 6 more times than any other division, with 40.7% of Section 6 cited cases coming from this division. The Supreme Court of appeal has 22.2%, while the Durban and Local Coastal division has 25.9% with the Natal Provincial division holding 7.4% and surprisingly the Namibian High Court with 3.7% for their one case which makes mention of the application of the section.

Figure 4 demonstrates which judges have applied section six and shows which region they have originated from. The table reflects that 40.7 percent of decisions which mentioned section six were from the Western Cape High Court while KwaZulu Natal had 33.3% of the decisions. It should be noted that all of the judges of the Supreme Court of Appeal were from the Western Cape except from Miller, JA who was from KwaZulu Natal. It is submitted that this demonstrates a strong correlation between Western Cape judges, who are either still in that division or have moved on to the Supreme Court of Appeal and those of Natal. The absence non-shipping division judges who have correctly applied section six cannot be ignored. It is submitted that a background in shipping through the coastal divisions of the Western Cape and KwaZulu Natal may have ensured that these judges correctly apply section 6.

[167] The Midhavid & Three Others * 1994 (4) SA 676 (C); The Tigr 1996 (1) SA 487 (C);The Sea Joy 1998 (1) SA 487 (C); The Snow Delta 1998 (3) SA 636 (C); The Heavy Metal * 1998 (4) SA 479 (C); The Fortune 22 1999 (1) SA 162 (C). * indicates that S6 was not discussed.

Figure 4.

Table of Section 6 Judicial Application[168]

Western Cape	KwaZulu Natal	Supreme Court of Appeal	Namibia
11 decisions (40.7%)	9 decisions (33.3%)	6 decisions (22.2%)	1 decision (3.7%)
Farlam J	Alexander J	Corbett JA	Levy J
Hofmeyr AJ	Friedman J	Friedman AJA (G)	
Howie J	Leon J	Grosskopf JA (EM)	
King DJP	Milne JP	Miller JA	
Marais J	Nienaber J	Scott JA	
Thring J	Page J		
Van der Westhuizen AJ	Thirion J		
	Wilson J		
	Van Heerden J		

Section 6 has been applied in either of two ways: as a reference supporting a contention or more fully set out and discussed.

Ten cases simply make reference to section six where setting out the choice of law used in the matter.[169] It is significant to note that even where the choice of law was common cause between the parties, reference was still made to the subject in certain cases. An example of this can be found in The Sanko Vega where Wilson J stated: "It was common cause between the parties that by virtue of the provisions of s 6(1)(b) of the Admiralty Jurisdiction Act 105 of 1983, the law that was applicable to deciding whether the 'Himalaya clause' in the bill of lading was effective would be the Roman-Dutch law applicable in the Republic."[170] Three other cases make mention of the law to be applied in a matter where the issue was common cause between the parties.[171]

[168] Note that all Judges are cited as they were when their decisions were reported.

[169] Of these ten cases where only reference was made to section six only five dealt with situations were the choice of law was not explained to be by common cause. See MV Fortune 22 1999 (1) SA 162 (C) at 165F; MT Tigr 1998 (4) SA 740 (C) at 744I; The Snow Delta 1998 (3) SA 636 (C) at 650A; MV Great Eagle 1992 (2) SA 87 (C) at 90G; The Atlantic Victory 1989 (1) SA 164 (D&CLD) at 166B; and The Berg 1986 (2) SA 700 (AD) at 710J.

[170] Santam Insurance Co Ltd v SA Stevedores Ltd 1989 (1) SA 182 (D&CLD) at 189H.

[171] Friedman, AJA, as he was then, made the same point in the Appellate judgment of Inter Maritime SA v Companhia Portuguesa DE Transportes EP 1990 (4) SA 850 (AD) at 960J. Also see Ultisol Transport

Seventeen cases apply Section six in a more detailed manner, often setting out the precise wording of the section. Many of these cases further use section six as their departure point for the judgment.[172] It is submitted that these cases are model examples of how the section should be used or referred to in judgments. Unfortunately only 14% of reported cases since the Acts inception have set out the dynamic of the choice of law mechanism contained in the Act. Out of this group of cases which have correctly made use of the section by setting it out and discussing it, 6 cases were each from Kwa-Zulu Natal and the Western Cape, with 4 from the Appellate Division and one from Namibia.

Of these judgments comments made by only two judges highlight the problems associated with the section. In The Andrico Unity, Marais J, was he was then, stated:

> "I, a South Africa lawyer, am faced with the invidious task of examining the respective judgments of the majority and the minority in that case [The Halcyon Isle] and deciding which of them truly reflects the law of England."[173]

Nienaber J, as he then was, also makes reference to this frustrating problem:

> "By the strange legislative quirk of S 6(1)(a) of the Act I am now called on to resolve the conflict [of the Halcyon Isle] within South African territorial waters, so to speak (and not simply to express a preference for the one view or the other as being the more persuasive, as Munnik JP appears to have done in the Khaliji Sky[174]) by declaring as a matter of fact what the High Court of Justice of the United Kingdom would apply in the given circumstances."[175]

These comments reinforce concerns surrounding the broad application of the section which requires South African judges to pronounce on points of law from other legal systems, rather than apply South African admiralty law. Judge Nienaber decided to opt out of answering the question in terms of English law and effectively decided the matter without applying section 6 as he stated:

> "That conclusion [not proving the case on balance of probabilities] renders it unnecessary to analyse the English cases and to determine which line of

Contractors Ltd v Bouygues Offshore 1996 (1) SA 487 (C) at 492H and see further Owners of MV Lash Atlantico v Owners of MV Maritime Prosperity 1994 (3) SA 157 (D&CLD) at 160B.

172 See Annexure "A", the attached database for the list of these cases.

173 Transol Bunker BV v MV Andrico Unity and Others 1987 (3) SA 794 (C) at 803G.

174 Southern Steamship Agency Inc and Another v MV Khaliji Sky 1986 (1) SA 485 (C).

175 Oriental Commercial and Shipping Co Ltd v MV Fidias 1986 (1) SA 714 (D&CLD) at 719D,

authority states the law which the English High Court of Justice would have applied if the present dispute had arisen before an English tribunal."[176]

4.6 Conclusions as to the Application of Section 6

"[T]he Act [AJRA] is, and is intended to represent, a pragmatic approach to the real problem of real people in the actual world of shipping. As I shall indicate a little later, this is something so often overlooked not only by academics but also by a large number of legal practitioners, including, I suppose, many judges."[177] Unfortunately the real people in the real world of shipping and especially the judges have appeared to have adopted their own pragmatic approach to Section 6 by ignoring or failing to mention the section at all. The basic assumption made in this regard is that, due to the confusion which could arise through the use of different legal systems, Courts should have regard to the choice of law mechanism contained in the Admiralty Jurisdiction Act. This information should be explicitly raised in the judgment, even if the choice of law is common cause between the parties. Where reference is made to the parties' agreement on a choice of law to govern the matter, the allowance of such a common cause should be confirmed through the application, mention and use of Section 6(5). Furthermore where the parties fail to raise the issue the Court should refer to the ramifications of section 6.

In other words, section 6 should be discussed in each and every judgment involving a maritime claim or in cases where such a claim may be in dispute.[178] This would be inclusive of cases dealing with the interpretation of a shipping statute given that the Supreme Court of Appeal has held that Section 6 should be applied when interpreting the common law aspects of Shipping statutes.

It should be noted that different types of law could apply to different aspects of the judgment which gives further assent for the setting out of the choice of law mechanism.

An interesting observation of all the cases shows that while Section 6 was only mentioned in 27 out of 117 cases, English law was widely referred to by either the Court or counsel, in almost all but a handful of cases. Clearly while English maritime law is

[176] The Fidias *supra* at 721I.
[177] Friedman, D. "Maritime Law in the Courts After 1 November 1983." (1986) 103 SALJ p.678 at 679.
[178] See John Hare Shipping Law and Admiralty Jurisdiction in South Africa (supra) at 18.

being widely used as a reference material, the net result is that South African admiralty law has become infused with English law. This occurs as later cases cite the earlier South African case as precedent for a point of law, while that earlier case based its reasoning on English law. The situation, while pragmatic, needs to draw criticism for its failure to clarify the legal system being applied, regardless of how bizarre or artificial. The High court in the exercise of its admiralty jurisdiction has therefore not expressed certainty by defining the basis for its reliance on English Admiralty law. As Was pointed out by Judge David Friedman in The South African Law Journal:

> "If any forum is to achieve recognition and popularity for the resolution of disputes – the same holds true for all disputes – it must, first of all, be a forum which is acceptable to the prospective litigants, secondly, it must be a forum which acts predictably and with a fair degree of certainty, and thirdly its proceedings must be conducted with expedition. In south Africa, given the framework of the Admiralty jurisdiction Regulation act, I believe we can meet these criteria to a substantial extent."[179]

It is submitted that the admiralty court has failed the second requirement due to the lack of foundation given for the use of English admiralty law. This is not to state that English law should not have been used, as persuasive or binding, but that the reason or status of its use was never properly disclosed by the court.

From the above it is submitted that reform is needed. South African admiralty law has developed extensively since 1983 where the application of different systems may have been felt necessary to ensure that any purist Roman-Dutch attack on the system did not destroy international admiralty concepts such as the action *in rem*. This fear can no longer become a reality, for since 1983 various text books have been written on the subject, numerous articles have appeared in a large number of law journals and law schools have continued to expand their courses on shipping and maritime law.[180] Furthermore the strong need for common law use has been minimised through legislation, although it should be stressed that the interpretation of this would still require a choice of law analysis.

[179] Friedman, D. "Maritime Law in the Courts After 1 November 1983." (1986) 103 SALJ p.678 at 681.
[180] The University of Cape Town Shipping Web site has been rated one of the best shipping sites in the world and is found as a link at almost every legal shipping site. It has done much to further the understanding of South African shipping both domestically and internationally and can be accessed at www.uctshiplaw.com.

It is furthermore submitted that allowing South African admiralty law to stand on its own feet by not tying it to a specific legal system will ensure that further legal systems could be referenced and used as support for conclusions and our courts would not have to follow certain English admiralty precedents which other jurisdictions have chosen to disregard, such as the recognition of foreign liens. Should our law hold a solution to the judicial problem then the court should have access to such a mechanism. A good example of this would be the case of contracts made for the benefit of third parties, which is an issue which often occurs in shipping practice. English law constructs an artificial judicial structure to circumvent the problem that such a contract can not be allowed in their legal system.[181] South African courts allow the doctrine of *stipulatio alteri* which allow for such contracts to be made. An example of the reverse situation would be the transfer of ownership. South African courts require delivery for ownership to pass and often in shipping practice delivery could never occur. Our courts have thus followed Roman principles which have allowed for artificial delivery under certain conditions which from a legal perspective results in judicial contortion to attempt to demonstrate delivery. English law on the other hand does not require delivery generating an easier transfer of ownership. The crisp point is that legal systems develop and change and borrow from each other where solutions appear. For example many South African lawyers would confirm that the *stipulatio alteri* principle, cited above, is from Roman-Dutch law, yet it holds Spanish origin. It is accordingly submitted that it is unduly restrictive to tie the court's hand. Of course legal certainty is important in any legal system, but enough South African admiralty common law exists for the system to rely on Constitutional jurisdiction and application. Indeed the new Constitution does change the common law in its allowance of international law and concepts of equity to be taken into account in judicial decisions. International maritime law may thus be used as an integral aid rather than the slightly derogatory "mere persuasion" so often heard repeated by the Courts in the past.[182]

A further point is that through the use of English law as either persuasive or authoritative, the same result is ultimately reached. In practice little would dramatically

[181] Law Commission for England and Wales. "Privity of Contract: Contracts for the Benefit of third Parties." Law Commission Report No. 242, Cm 3329. 1996.

[182] This is discussed below in more detail.

change the current position, yet perhaps more reliance would be made on jurisdictions other than England.[183]

It is submitted that the most important point is that the actions of the court have essentially spoken for themselves and have demonstrated just how unworkable the section is : Few have relied upon section 6. The actions of the court in refusing to apply or failing to apply section 6 should perhaps not be criticised. This action should perhaps rather be lauded as it highlights the solution to the problem. Perhaps the legislature should let the judges to their job and do not tie their hand to a different legal system, let alone one as it existed in 1983.

The comments made by Dillion and Van Niekerk in 1983 in South African Maritime Law and Marine Insurance: Selected Topics are as relevant today as they were sixteen years ago:

> "It should be clear that the current state of admiralty courts, jurisdiction and law in South Africa is in urgent need of reform. Such reform should, *inter alia*, be aimed at eliminating the unsatisfactory conflict of jurisdiction and at modernising the law and practice so as to bring it into line with modern needs. Further, it is important that allowance should be made for the development of an independent South African admiralty law and practice."[184]

South African admiralty law has clearly moved into a position where it can sustain its own admiralty jurisprudence, free from any artificial constraints.

[183] Judge David Freidman makes the point that through the application of s6, references to foreign systems need not be excluded as they can be a great resource. ("Maritime Law in Practice and in the courts" (1985) 102 SALJ p.45.) While this has often been the case, most of the foreign law referred to has only been English with little American, Australian or Canadian cases or articles referred to.
[184] At 20.

5. COMPARITIVE LAW

Before suggesting any reform of the existing choice of law mechanism, as applied in Section 6, it is useful to examine other erstwhile British colonial jurisdictions which have encountered a similar historical link to English Admiralty. These jurisdictions have all had to deal with either Vice-Admiralty Courts or Colonial Courts of Admiralty and have embarked on reform at different times and in different ways, often with a strong focus on admiralty jurisdiction rather than on which type of law should be applied to a dispute.

5.1 UNITED STATES OF AMERICA

The first jurisdiction to rid itself of the Vice-Admiralty Courts was the United States of America when it became independent from Britain on 3 September 1783.[185] These Courts of Admiralty were highly unpopular in the American States due to their strict enforcement of customs laws, which was one of the factors that instigated the American Revolution.[186] After the revolution, the United States Constitution specifically extended the Federal Court's jurisdiction to all cases of admiralty and maritime law.[187] It has been argued that due to the various state admiralty systems which developed after the Declaration of Independence, but before the Constitution was drafted, a unified admiralty system was needed to reform the divergent and uncontrolled state admiralty tribunals. This resulted in one admiralty federal court rather than the continuance of the independent state tribunals and further led to the specific mention of admiralty in the constitution itself.[188]

The Judiciary Act of 1789 ensured that the Federal Court held exclusive jurisdiction of admiralty matters with limited jurisdiction given to the state courts to hear maritime matters. All appeals were heard by the Supreme Court. English law and procedures were adopted in practice until changed or modified by American law.[189] The Federal Court

[185] At the Treaty of Paris, of course the Declaration of Independence was passed by the American congress on 2 July 1776. The American Constitution was however only ratified in 1788.
[186] C.f The Boston Tea Party which was a protest against British taxes on tea. See S.E. Morison, H. S. Commager and W. E. Leuchtenburg, The Growth of the American Republic Vol 1. (7th Ed.) Oxford University Press (1980) and E. Wright, A History of the United States of America Volume One - *The Search for Liberty From Origins to Independence*. Blackwell, (1995). For Admiralty Courts see D.R. Owen & M.C. Tolley, Courts of Admiralty in Colonial America, The Maryland Experience, 1634-1776 Carolina Academic Press (1995)
[187] Article III, § 2.
[188] See D. Robertson Admiralty and Federalism (1970) at 103 and T.J. Schoenbaum Admiralty and Maritime Law (1987) West at 17.
[189] See Elizabeth Brown, British Statutes in American Law 1776-1836(1984) at 23 onwards.

worked out its own jurisdictional limits due to the abandonment of the English Court structures and ensured that Admiralty remained part of the national law. The early case of Thompson v Catharina recognised that while maritime codes were not in place, there was a general body of admiralty law which was recognised by all maritime states. And so Judge Peters' pointed out:

> "If by our own municipal laws, there are rules established, our courts are bound exclusively to follow them. But in cases where no such rules are instituted, we must resort to the regulations of other maritime countries, which have stood the test of time and experience, to direct our judgments, as rules of decision... But the change in the form of our government has not abrogated all the laws, customs and principles of jurisprudence, we inherited from our ancestors, and possessed at the period of our becoming an independent nation. The people of these states, both individually and collectively, have the common law, in all cases, consistent with the change of our government, and the principles on which it is founded. They possess, in like manner, the maritime law, which is part of the common law, existing at the same period; and this is peculiarly within the cognizance of courts, invested with maritime jurisdiction; although it is referred to, in all our courts on maritime questions. It is, then, not to be disputed, on sound principles, that this court must be governed in its decisions, by the Maritime Code we possessed at the period before stated; as well as by the particular laws since established by our own government, or which may hereafter be enacted....Whatever may, in strictness, be thought of their binding authority, I shall always be ready to hear the opinions of the learned and wise jurisprudents or judicial characters of any country....I am not so confident in my own judgment, as not to wish for all the lights and information, it may be in my power to obtain, from any respectable sources."[190]

The American Courts then allowed customary admiralty law to assist and aid them in reaching their decisions. In the matter of Mason v Blaireau[191] the Court found that there was a pre-existing body of admiralty law which it had to follow. Here the court found that it had a right and duty to apply the pre-existing law salvage.[192]

[190] F. Cas. 1028, 1029-31 (D. Pa. 1795)
[191] 6. U.S. 240, 249. (1804)
[192] See: Theis, William, H. "United States Admiralty Law as an Enclave of Federal Common Law." (1998) 23 *Tul. Mar. L.J.*

By 1850 the subject matter of American admiralty jurisdiction was confirmed in the case of New Jersey Steam Navigation Co. v Merchants' Bank.[193] Whilst American admiralty law looked to English law for assistance, it clearly wiped the slate clean by introducing new court structures which allowed the system to develop its own mechanisms. Essentially American law was always applied regardless of whether foreign law was adopted to a problem or not. Certain English law concepts were allowed to permeate into American admiralty but English admiralty was never adopted as a *system per-se* as occurred in South Africa. As a result, American admiralty law has developed in its own national interest although recognising international concepts such as actions *in rem* and maritime liens, while ensuring that American banks and "necessaries men" ranked above those of foreign jurisdictions. In the 1875 case of The Lottawanna[194] the U.S Supreme Court discussed the national differences found in admiralty law. As Justice Bradley said: "Whilst it is true that the great mass of maritime law is the same in all commercial countries, yet, in each country peculiarities exist either as to some of the rules, or in the mode of enforcing them." The Court found that while other countries had general principles of admiralty law, they could manipulate these to suit local conditions and needs and, that these modifications could be as the country saw fit. The protectionism of American admiralty became evident when the Court stated: "The government of one country may be willing to give to its citizens who supply a ship with provisions at her home port where the owner himself resides, a lien on the ship; whilst that of another country may take a contrary view as to the expediency of such a rule." American admiralty law therefore developed along its own lines of interpretation through the opinions of the law as expressed by its judges and reformed by the legislature.[195]

[193] 47 U.S. (6 How.) 335, 12 L.Ed. 465 (1848)
For early admiralty cases which dealt with the adoption English law would have over the court and the limits of jurisdiction see – Stevens v The Sandwich 23 Fed.Cas 29 (No. 13,409) (D.Md.1801) where Judge Winchester stated" ...that the statutes of Richard II, have received in England a construction, which must at all times prohibit their extension to this country...that no principles can be extracted from the adjudged cases in England, which will explain or support the admiralty jurisdiction, independent of the statutes or the works of jurists, who have written on the general subject." – see also Contra, Hurry v The John & Alice, 12 Fed.Cas. 1017 (No. 6923) (C.C.D.Pa.1805) which involved district courts viewing their admiralty jurisdiction as broad and based upon specific subject matter; See further Waring v Clarke, 46 U.S. (5.How.) 441, 12 L.Ed. 226 (1847) which extensively discussed the adoption of English admiralty law and where Judge Wayne asked the question: "Is there not a surer foundation for a correct ascertainment of the locality of marine jurisdiction in the general admiralty law, than the designation of it by the common law courts in England?"

[194] 88 U.S. (21 Wall.) 558, 22 L.Ed. 654

[195] See comment by Chief Justice Taney in The St. Lawrence (66 U.S. 526) "To ascertain, therefore, what the maritime law of this country is, it is not enough to read the French, Gemam, Italian, and other foreign works on the subject, or the codes which they have framed; but we must have regard to our own legal history, constitution, legislation, usages, and adjudications as well. The decisions of this court illustrative of these sources, and giving construction to the laws and Constitution are especially to be considered; and

The position may be best summarised by Justice Story, recognised as one of the most prominent judges in U.S. admiralty matters,[196] in his judgment in De Lovio v Boit: "But whatever may in England be the binding authority of the common law decisions upon this subject, in the United States we are at liberty to re-examine the doctrines, and to construe the jurisdiction of admiralty upon enlarged and liberal principles."[197]

The test which was developed under American law as to whether a matter was a maritime claim was then whether a matter had a significant relationship to traditional maritime activity.[198] This test therefore determined whether admiralty principles as developed by the Courts and common law principles on an international level could be applied to the matter.

5.2 CANADA

Vice-Admiralty Courts were established in Canada through English legislation with the earliest reference to the court being in relation to the fees to be charged in the Court in 1780.[199] The Court was thought to have begun operating prior to this legislation as a judge was appointed to the Quebec Court of Vice- Admiralty in August 1764.[200]

In 1891 The Canada Admiralty Act adopted the maritime law of England and conferred upon the Exchequer Court of Canada the jurisdiction of the High Court of Admiralty. The Admiralty Act of 1934 again adopted English admiralty jurisdiction as part of Canadian Law. This was the last reception of English admiralty law into Canada.

The current jurisdiction found in Canada vests in the Federal Court of Canada in terms of the Federal Court Act.[201] Section 42 of the Act states:

> "Canadian maritime law as it was immediately before June 1, 1971 continues subject to such changes therein as may be made by this Act of Parliament."

when these fail us, we must resort to the principles by which they have been governed. But we must always remember that the court cannot make the law, it can only declare it."

196 Gerald T. Dunne, Justice Joseph Story and the Rise of the Supreme Court (1971). See also Healy and Sharpe Cases and Materials on Admiralty (1974)

197 7 Fed.Cas. 418 (No.3776)

198 See Sisson v Ruby 497 US 358 (1990); Exxon Corporation v Central Gulf Lines Inc. 500 US 603 (1991); Jerome B Grubart Inc. v Great Lakes Drege & Dock Co. 130 L ed 2d. 1024 (1995)

199 See 20 George III c.3 (1780).

200 NAC, RG68, Commission and Letters Patent, Vol. 1. See D. Fyson, E Kolish, V Schweitzer, The Court Structure of Quebec and Lower Canada, 1764-1830, Montreal History Group, 1994.

Maritime law is defined under section 2 of the Act:

> " 'Canadian Maritime law' means the law that was administered by the Exchequer Court of Canada on its admiralty side by virtue of the Admiralty Act, chapter A-1 of the revised Statutes of Canada, 1970, or any other statute, or that would have been so administered if that Court had had, on its admiralty side, unlimited jurisdiction in relation to maritime and admiralty matters, as that law has been altered by this Act or any other Act of Parliament."

This section has been held, by McIntyre J, in The Buenos Aires Maru [202] as being operative law in that it ousts the application of private law and applied in both Federal Courts as well and in Provincial Courts.

Sections 22 and 42 of the Act then set out the jurisdiction of the Court in relation to maritime and shipping matter[203] and the Action *in personam and rem.*[204]

A rather familiar debate has thus occurred in Canadian maritime jurisprudence as to whether English admiralty law had been wholly adopted and must then be referred to in a pure form as pegged in 1971 or whether Canadian Maritime law should be applied to the matter.[205] The case of Orden Estate v Grail[206] in examining the scope of section 2, found that it was not limited to English Admiralty law at the time of its adoption into Canadian law in 1934 but that "maritime law" should be interpreted within the modern context of shipping and maritime law and that the only limitation should be the division of powers as set out in the Constitution Act of 1867. The court then found that the test for deciding whether the matter was within maritime law was "a finding that the subject matter was so integrally connected to maritime issues as to be legitimate Canadian maritime law within federal competence."[207] Therefore once a matter was decided to be maritime, so Canadian Maritime law, as developed from English Admiralty law, would be applied to the matter.

201 Federal Court Act, R.S.C. 1970 (2nd Supp.), c. 10 and Federal Court Act , R.S.C. 1985, c. F-7
202 International Terminal Operators Ltd. v Miida electronics Inc. [1986] 1 S.C.R. 752 See also Ontario (Attorney General) v Pembina Exploration Canada Ltd. [1989] 1 S.C.R. 206
203 Section 22
204 Section 42.
205 This debate began with the Yuri Maru, The Woron [1927] AC 906 see Hare (supra) § 1-5.
206 [1998] 3 S.C.R. 437
207 See also The Buenos Aires Maru (supra) at 774. and Monk Corp [1991] 1 S.C.R. 779 at 795.

The case of Porto Seguro[208] in 1997 confirmed that English procedural law was not adopted in Canada and that only English statute and common law had been adopted in relation to admiralty matters[209]. The court nevertheless pointed out that even of English procedures had been adopted, that they could be subject to judicial reform and treated in exactly the same way and any Canadian rules of procedure, in other words little turned on the distinction. This demonstrated the notion of adoption of law, which is then manipulated by the courts as they interpret principles and prior cases.

In the case of Chartwell Shipping Limited v Q.N.S. Paper Company Limited[210] Counsel for the Respondent tried to claim that the provincial Court of Quebec could apply Quebec civil law which would be different from Federal law. La Forest J, of the Canadian Supreme Court, held that "I cannot believe Parliament intended to delegate to those courts the authority to apply law different from that administered by the Federal Court." The Court thus felt that Canadian maritime law was unified and different systems could not be applied on different occasions or in different courts.

As L'Heureux-Dubé J. stated in the Chartwell case, "Not only is admiralty jurisdiction broader in Canada than in England, but the federal organisation of courts in Canada means that the interrelation between admiralty law and the general private law works differently in this country." The learned judge is referring to a similar problem found in South Africa;[211] in his case the civilian law of Quebec, to be applied in certain cases, and the English Admiralty law as applied federally to be applied in others. The issue in question involved a stevedores contract, which at first glance could fall under the law of contract, as it would in England, or under maritime law in jurisdictions with a broad admiralty jurisdiction. The court found that maritime law was that found in England and as incorporated into Canada and that it did not include the law of the provinces. However the Judicial Committee of the Privy Council found that in matters of Marine Insurance, the Quebec Civil Code, which had been held to be governing private law, should be viewed rather as a comparative source of the civilian principles which made

[208] Porto Seguro Companhia De Seguros Gerais v Belcan S.A. [1997] 3 S.C.R. 1278.
[209] This decision was based by and large on the decisions in Oy Nokia Ab v The ship Martha Russ [1973] F.C. 394 and the case of Antares Shipping Corp v The Ship Capricorn [1977] 2 F.C. 274.
[210] [1989] 2 S.C.R. 683.
[211] In South Africa as discussed above be have the issue of a civilian system of Roman-Dutch law for certain cases and English Admiralty law for others.

up the general body of maritime law.[212] The Civilian law has then been regarded as a tool for interpretative assistance of the common law.

In the Charwell case L'Heureux-Dubé J clearly sets out the Canadian choice of law situation:

"[W]here admiralty jurisdiction expanded to apply to certain contracts concluded on land, the civil law was reintroduced to help develop this new domain. Thus,

(1) where Canadian maritime jurisdiction has expanded to include matters that would not have fallen within the jurisdiction of the High Court of Admiralty in 1934, [this is the last date upon which UK admiralty law was received in Canada] as is true of stevedoring contracts in the instant case, and

(2) where the point in issue is not subject to a specific federal statutory regime, as is true of the agency problem in the instant case, the civil law remains an important aspect of comparative analysis necessary to determine the state of Canadian maritime law on the question in issue."

This demonstrates that whilst Canada does have civil law, maritime law is uniform and that even though the jurisdiction of the court may have been extended, uniform Canadian maritime law is always applied with sufficient regard being had for the civilian law principles where needs be.

It should also be pointed out that Canadian judges do not apply strong positivist judicial principles but appear to follow a rather more flexible approach which allows for the necessity and possibility to reform and update law. The test applied in these situations was examined in the case of Bow Valley Husky (Bermuda) Ltd. v Saint John Shipbuilding Ltd.[213] where McLachlin J, who held the minority but not on this point, that the Court had taken a flexible approach to the development of common law. As she stated:

> "Judges can and should adapt the common law to reflect the changing social, moral and economic fabric of the country. Judges should not be quick to perpetuate rules whose social foundation has long since disappeared. Nonetheless, there are significant constraints on the power of the judiciary to change the law."

[212] Provincial Insurance Company v Joel Léduc (1874), L.R. 6 P.C. 224.
[213] [1997] 3 S.C.R. 1210

As McLachlin J. indicated in the Watkins[214] case;

> "in a constitutional democracy such as ours it is the legislature and not the courts which has the major responsibility for law reform; and for any changes to the law which may have complex ramifications, however necessary or desirable such changes may be, they should be left to the legislature. The judiciary should confine itself to those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society."

In this case the learned judge decided that she could remove the contributory negligence bar which had been the source of considerable judicial criticism in Canada. Judicial reform of the common law has been discussed in a number of Canadian cases.[215] As was pointed out by Lacobucci and Major JJ, of the Canadian Supreme Court in Orden Estate v Grail,[216] judicial reform has to take cognisance of not only of Canadian Admiralty law but also the body of international admiralty law.

The Canadian approach would appear to be one of unified admiralty law, but unlike the American system, they have had to contend with the Civilian code in Quebec, which may be used for the benefit of interpretation, in the application of admiralty law which exists on a federal level only. Again as with the Americans, the law form England has been adopted and pristine principles or applications of law through the English cases have been handled by the Canadian Court in its development of Canadian admiralty jurisprudence. As this development continues so Canadian solutions are found to different maritime issues and on occasion the court takes a contrary admiralty view from that found in the English jurisdiction such as in the recognition of foreign liens, for example.

5.3 AUSTRALIA

The Admiralty Act of 1988[217] dramatically reformed the Australian admiralty law which prior to the Act[218] had existed in Colonial Courts of Admiralty and applied English Admiralty law as at 1980.[219]

214 Watkins v Olafson [1989] 2 S.C.R. 750
215 Orden Estate v Grail (Supra), Bow Valley Husky, (supra) at 1261, Porto Seguro [1997] 3 S.C.R. 1278 at 1292, The Buenos Aires Maru (Supra) at 774.
216 supra at par 79.
217 No. 34 of 1988 (as amended)
218 The Australian Law Reform Committee produced a comprehensive report prior to the drafting of the reform legislation which has been recognised by the court in the case of Owners of the ship "Shin Kobe Maru v Empire Shipping Co. Inc. (1994) 125 ALR 1, (Full H.C.) as a useful explanatory document. While the Act brought Australian Admiralty law into the modern age, many of the new mechanism of the

The new Act set out a list of maritime claims and heads of jurisdiction and should the matter fall under the exhaustive list, then the matter would be heard under admiralty, should this not prove to be the case then normal common law jurisdiction would be applied to the matter. Section 14 of the Act ensured that matters are heard under the Act by stating that: "In a matter of admiralty or maritime jurisdiction, a proceeding shall not be commenced *in rem* against a ship or other property except as provided by this Act."

Section 9 of the Act confers jurisdiction on the Federal Court to hear actions *in personam* in respect of a maritime claim or on a claim for damage done to a ship.

The Act limits the expansion of maritime rights in that it specifically states in Section 6 that no new maritime liens are to be created, and furthermore it confirms that no further causes of action are created unless they would have existed had the Act not been passed. The Australian Court has examined this section and has held that while the Act may create new remedies it does not create new rights.[220]

It is interesting to note that the Australian Act neither makes mention of English law or of any mechanism to be used for the adoption of foreign law, inclusive of English law and, whether English law was now to be considered as foreign or not.

In Australia the question of adoption does not arise as clearly as in Canada because nothing has been adopted, but rather redrafted from an Australian perspective and in a similar mould to the English Supreme Court Act of 1981. The Law Commission's Reform Report discussed the validity of looking back to old jurisdiction and concluded that it would not be useful or beneficial to have a broad and general clause allowing one to revert to the jurisdiction of the Colonial Courts of Admiralty as at 1890. As the report

act cannot be discussed here, only the jurisdictional and conflict of law issues. For a concise overview see J Crawford, The Australian Admiralty Act: Project and Practice. 5th Ebsworth & Ebsworth Maritime Law Lecture, See also the Australian Law Reform Commission Report on Civil Admiralty Jurisdiction at http://www.austlii.edu.au/au/other/alrc/publications/reports/33/ALRC33.html

[219] Letters patent were issued on 30 April 1787 appointed judges to the vice-admiralty courts. By 1863 when the Vice Admiralty Courts Act of 1863 (UK) was passed, Vice Admiralty Courts were established in each of the Australian Colonies. Concurrent jurisdictional problems were resolved with the introduction of the Colonial Courts of Admiralty Act of 1890 (UK) which developed a separate Court. This Act remained in force until reformed in 1988.

stated: "The effect of this type of 'sweeping up' provision is to force anyone wishing to know the full scope of the admiralty jurisdiction to be familiar with, or to search through, all the old cases which have a bearing on the inherent jurisdiction of the old Admiralty Court. A major point of the proposed legislation is to avoid the uncertainty, not to mention the work, which this creates."[221] The position adopted in Australia was therefore one of certainty and the report frankly stated that should an obscure and unlisted head of jurisdiction exists then it should be dealt with through amending legislation rather than allow legal uncertainty by having an open ended list of jurisdiction.

This has the effect in the legislation of a defined list of jurisdiction that derives its original jurisdiction from the Australian Constitution which specifically provides for admiralty and maritime jurisdiction under section 76(iii). The result is that Australia does not look back to English maritime law for assurance of its jurisdiction or application of law. As the Australian High Court has ruled: "Once it is accepted that 'Maritime' in s.76(iii) serves to equate the jurisdiction there referred to with that of maritime nations generally, there is no basis for any qualification or limitation based on jurisdictional divisions peculiar to English law."[222]

While English maritime law is widely referred to in shipping matters the Australian Courts have allowed themselves the independence to develop and apply Australian law. The case of Sandford (Pty) Ltd v NZI Insurance Limited and Lumley General Insurance Limited[223] demonstrates this new found independence where the Federal Court holds: "These sorts of claims have long been recognised as within the admiralty jurisdiction in the United States and Scotland...There is no need to read down s. 9(1)(b) to exclude such claims because they are not regarded as being within the jurisdiction of the Admiralty Court in England." From this it is clear that the establishment of Australian admiralty jurisdiction in terms of their reform act has allowed Australian admiralty law to be applied which is then independent of another legal system. In the case of Patrick

[220] Re: The Owners of the ship "Shin Kobe Maru" v Empire Shipping Company Inc. No. G702 of 1991 FED 698; (1992) 38 FCR 227.

[221] ALRC 33, Ch 9 par 193. Also see The Aifanourios [1980] 2 Lloyd's Rep. 403 where before the court could deny admiralty jurisdiction it had to consider whether the matter could have fallen under the jurisdiction which the Admiralty Court held before 1875.

[222] See: Re: The Owners of the ship "Shin Kobe Maru" v Empire Shipping Company Inc. F.C. 94/013 (Reported on the High Court of Australia Web Site] - www.austlii.edu.au/au/cases/cth/high_ct/unrep196.html)

[223] No. QG 183 of 1995 Fed No. 279/96 (Reported on the Federal Court of Australia Web Site – www.austlii.edu.au/au/cases/cth/federak_ct/unrep8277.html)

Stevedores No.2 (Pty) Ltd. & Ors v The Proceeds of the Sale of Vessel MV "Skulptor Konenkov"[224] the Court however decided that English law should be utilised in a matter where a *lacuna* had since appeared: "Neither the provisions of the Admiralty Act nor those of the Admiralty Rules deal generally with the priority of claims against the proceeds of the sale of a vessel arrested and sold by the Court. The English practice should be followed in Australia."

The Courts have also applied the principle found in many jurisdictions of examining other legal systems where the enacted legislation is similar. In the case of Iran Amanat v KMP Coastal Oil Pty Limited[225] the High Court of Australia held: "When Parliament has enacted legislation, affecting the subject of international shipping, and followed a statutory precedent from overseas which has by then received a settled construction, there is every reason to construe the statutory language in the same way in this country unless such construction is unreasonable or inapplicable to Australian circumstances." Foreign law is then used to assist the judges in their interpretation of the section in question.

Since reform, Australia has developed and applied its own admiralty law, and where need be has borrowed from other jurisdictions. Its Admiralty Act is similar to the Supreme Court Act found in England, in respect of admiralty matters, and because of this Australian judges have continued to refer to English judgments, especially where the same wording appears in both Act and where the matter has been settled before in the English Courts.

5.4 FOREIGN CONCLUSIONS

From an examination of foreign jurisdictions one can conclude that each system has developed its own national admiralty law and has moved English (and other foreign) admiralty law to a place of persuasive value. The principles of English law as a source have been retained in each case but have been altered as different legal solutions are found by each court. South African admiralty has not been allowed to develop or reform in the way expressed above.

[224] [1997] 361 FCA (14 May 1997)

[225] [1999] HCA 11 (24 March 1999)

6. REFORM

"The provision [of s 6] is somewhat controversial and may be amended." [226]

It is submitted that the need for reform in this area of law is great and obvious. The Courts have been unable to correctly apply the choice of law section under admiralty and it will be argued that the need for the current wording of the section no longer exists in our law.

6.1 OBSTICLES TO REFORM

"Inasmuch as English law is foreign law, our Courts cannot take judicial notice of it. Foreign law is a question of fact and must be proved."[227] This statement by Van Wyk JA of the Appellate Division, as it then was, clearly indicated that if admiralty law was to be reformed that some mechanism needed to be enshrined to allow English law to be used and referenced in South African admiralty to prevent a complete return to Roman-Dutch principles which might then exclude English law.

The mistrust towards English law is further demonstrated in the second reading of the Admiralty Jurisdiction Regulation Bill in parliament where it was stated:

> "On balance, we would have preferred South African law to have applied to all matters. In other words, we would have preferred the Roman-Dutch law, as amended over the years, to apply to south Africa. This would then have had two advantages. Firstly, the situation would have been more consistent and no disputes or doubts could ever arise as to which law was applicable at any given time in relation to any claim. Secondly, South African law sources are more readily accessible to us in our country than are the authorities and sources of English law. However, we accept that since the Supreme Court was first established in southern Africa 150 years ago, a large number of cases applying English law have been decided and these have built up an authoritative and understood body of precedent in this country. In this respect we appreciate the drafter's dilemma."[228]

[226] Staniland, H. "Can an Indemnity issued in consideration for a misrepresentation in a bill of lading be enforced in the Admiralty Court?" (1988) 105 SALJ p.322 at p.324.
[227] Schlesinger v Commissioner for Inland Revenue 1964 (3) SA 389 (A) at 396G.
[228] Hansard Thursday, 11 August 1983. Col 11177.

The drafter's dilemma appeared to resolve itself in what Bamford described as the "ingenious compromise between pro-admiralty and pro-Roman-Dutch lobbies."[229]
At the outset it should be stressed, with respect, that the compromise has not worked in that it has been ignored or misapplied by our courts as set out above.

The concerns echoes in parliament are agreed with in that South Africa needs a unified admiralty law. The writer however, must disagree with the statements made by Mr Dalling in parliament to the extent that a direct Roman-Dutch application over admiralty law would destroy the very nature of the field. Given that maritime liens and the action *in rem* are entrenched in international maritime jurisprudence, the Admiralty Jurisdiction Regulation Act, and our admiralty common law, it is submitted that it would be almost impossible to remove them from our admiralty law and would require express legislation to that effect.

Secondly, while Mr Dalling does recognise the role played by English admiralty law and the infusion of that system through judicial precedent, it is argued that the very existence of judicial precedent, even of an English admiralty nature, entrenches the position and principles set out by the binding case. Hence the English law already used by our courts and infused in our admiralty decisions may not need any special statutory enactment to remain in the law as it is already part of the common law.

The attitude expressed towards English law at 1983 can best be described by the Minister of Justice, who introduced the Bill: " We would have abdicated the supremacy of this Parliament if we had opted in favour of the complete application of English law."[230]

English law has however greatly permeated into our admiralty common law since 1983. It is submitted that our courts, when they apply English law through section 6, apply South African admiralty law and that these principles are then adopted into our law. English admiralty law no longer needs to be proved by way of affidavit and many of the judgments which cite English law wither as binding authority through section 6 or as persuasive authority are then later referred to by the Court as binding authority. As the body of admiralty jurisprudence has grown so the reliance of primary English authority

[229] Bamford The Law of Shipping and Carriage in South Africa. 3rd Ed. Juta & Co.Ltd. 1983.

has been weakened as South African cases on point have been handed down so relieving the necessity to only cite English authority.

It is therefore argued that the original need for section 6 is no longer as binding as it was in 1983. English admiralty law has so entrenched itself in our admiralty law that the removal of section 6 will be unable to remove the many varied cases which have used English admiralty law in arriving at its decision.

6.2 TWO SYSTEMS OF LAW?

From an academic perspective the question should be raised regarding the need for dual systems of law operating in our courts. It is submitted that in light of the new constitution, that while other systems do still exist, such as Customary Law, unification needs to be achieved. While Roman-Dutch law remains the basis of the law, Commonwealth law, foreign law and international law are also being used by the courts to assist in their decisions. In light of this, traditional English admiralty law should hold a similar position. Many of the principles which it sets out, which may be in conflict with Roman-Dutch law, are largely already in place and settled in our current law. South African admiralty law has developed its own jurisprudence and has moved away from purist Roman-Dutch law and purist English Admiralty law as local statutes have been examined and legal principles applied. As the legislature enacts further Acts to codify the common law areas of shipping law, such as wreck and salvage, so the issue of applicable law become less significant. This approach of a single national admiralty law has been applied in England as well as in the other jurisdictions set out above and it is suggested that this approach should be followed in South Africa in the future.[231]

6.3 REFORM OPTIONS

Various reform approaches may be adopted to either unify the choice of law options as set out in section 6 or update the current position so that a workable solution may be found.

230 Hansard Friday, 2 September 1983. 13106.
231 Admiralty procedures and court rules should however be retained as has occurred in other jurisdictions.

6.3.1 Option One – amend to Broad Principles – Competition Act model

The Competition Act[232] has a unique formula which allows for consideration of other legal jurisdictions. Section 1(3) states: "Any person interpreting this Act may consider applicable foreign law and international law." This short section allows for the Court to import and regard foreign decisions and developments. Given that much competition law has been developed in the United States and Australia, such a provision would assist any court in interpreting provisions of the Act and the common law. The removal of such a section would mean that this foreign consideration could be overruled by Roman-Dutch common law which would clearly be an unsatisfactory result. Nevertheless the section is useful in demonstrating a simply way in which regard can be had for more international elements of legal issues. From an admiralty perspective, one could suggest that section 6 of the Admiralty Jurisdiction Regulation Act be amended so that regard could be had for the consideration of the applicable foreign and international law on point.

The amended section could read: "Any person interpreting this Act or any maritime claim may consider applicable foreign law and international law."

6.3.2 Option Two – delete and use the Constitution

One could amend the Constitution so that matters of admiralty could be included. While it could be argued that this situation already exists through the current wording of the constitution, the vague way in which jurisdictional power is set out could allow for any system of law to be applied to maritime matters.

Section 233 of the Constitution reads:

> "When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law."

It is submitted that through this section, our courts need to have regard to the body of international maritime jurisprudence. It could however be argued that the section related more to public law issues, between states and individuals than between individuals in a private law capacity, as the word "international" was used instead of "foreign". This

[232] No. 89 of 1998.

section does not appear to have yet been used in an admiralty context but could be used for support of foreign references.[233] The Canadian, American and Australian constitutions all make specific reference to admiralty and ensure that it is enforced by the courts on a national basis.

A further section could then be added to the constitution such as :

> "When interpreting any admiralty legislation or maritime claim, every court must prefer any reasonable interpretation of the legislation that is consistent with international and foreign admiralty law over any alternative interpretation that is inconsistent with international and foreign admiralty law."

The use of international and foreign could ensure that both public and private law developments in foreign jurisdictions are considered. The use of such a proposed section would mean that English law could be referred to and used where needed.

6.3.3 Option Three – delete and rely on common law to determine choice of law

A further method of reform would be to simply delete the choice of law mechanism. As so much of English admiralty law has been used by the Courts in a non-section 6 application, its use may continue. English admiralty concepts that have already been referred to could maintain their position and new concepts could be referred to and utilised as persuasive authority which may later become binding. This approach might then follow the *Anton Piller Order* method of slow infusion into our law.[234] A problem with this option is that the infusion of English law may easily be challenged in the courts and uncertainty could result. It is argued that much of our admiralty common law is currently an infusion of both systems through judicial application. It is further submitted that a certain unification may be achieved (which would remove the necessity of specifying the different systems) by allowing the South African admiralty common law to find its own balance. Basil Markesinis has demonstrated in his work, Foreign Law and

[233] At the time of writing no reported cases could be found which mention this section.

[234] As Prest, C. B. Interlocutory interdicts, Juta & Co. Ltd. 1993.points out: "The Anton Pillar procedure has become part of the south African law. It has not always been an easy passage. Moreover, in the application of the procedure, the practice and principles of the English law have not always been readily observed or conscientiously applied. None the less, the Appellate Division has placed its seal of approval on the remedy and the likelihood of it now being successfully argued that the procedure does not form part of South African law is remote indeed."

Comparative Methodology: a Subject and a Thesis[235], that there has been a dramatic unification between the English and European legal systems. He lists (in an ascending order of importance) the factors which he believes have contributed to this unity.

1. Academic work in universities.
2. Judges and practitioners
3. International Conventions
4. EC Directives
5. The Case law of the Luxembourg court.

In the South African context, it is submitted that parallels may be drawn. The decisions of our High court exercising its admiralty jurisdiction produce South African admiralty common law, not English admiralty law and not Roman-Dutch admiralty law. Our rules of Court bind both choice of law option creating a unified admiralty practice from a procedural perspective. Our admiralty and shipping statutes bind both choice of law options. Our judges have constantly used English admiralty common law in many of their decisions and our academics have in recent years written extensively on the subject. It is submitted that these factors have all resulted in a high degree of unification in the field which gives this option a reasonable measure of success.

6.3.4. Option Four – amend to original working of first draft of bill.

One of the easiest suggestions would be to follow the original wording of the Admiralty Jurisdiction Regulation Bill[236] as introduced by the South African Law Commission and drafted by Advocate D. Shaw which allows for the court to have regard to foreign systems of law and have regard to international developments in admiralty.

The section 7 of the bill states as follows:

" 7.(1)(a) Subject to the provisions of this Act and of any other law and admiralty court shall apply the law as set forth in subparagraphs (i) and (ii) below, namely –

(i) with regard to matters in respect of which the courts of admiralty in the Republic had jurisdiction immediately prior to the commencement of this Act, the law in force in the said courts;

(ii) with regard to any other matter, the relevant rules of the Roman-Dutch law as applicable in the Republic.

[235] Markesinis, B. S. Foreign Law and Comparative Methodology: a Subject and a Thesis. Hart Publishing. 1997.

[236] Notice 258 of 1982, Admiralty Courts Act 1983 Bill (8168-2)

(b) An admiralty court shall take cognizance of any modification since the coming into force of the Colonial Courts of Admiralty Act, 1890, of the law applicable under the said act, and may, to arrive at a proper decision, take account of and apply to such extent as appears expedient –

(i) any such modification with regard to any matter referred to in subparagraph (a)(i);

(ii) the laws, past or present, and decisions of courts of maritime states with regard to maritime matters and the views of writers with regard to such matters; and

(iii) the provisions of any international convention, whether or not the Republic is a party to such convention.

(c) The provisions of paragraphs (a) and (b) shall not lessen the effect of any valid provision in any agreement relating to the choice of law which is to apply."[237]

This reform approach was criticised for binding South Africa to conventions which parliament had not ratified or adopted.[238] It was therefore modified and revised into the current wording of section 6. Section 7.(b) attempts to allow the court to have regard to modern developments and changes in the law since the 1890 Act but goes further than the current Act by allowing regard to be had to foreign maritime states. It is submitted that it is significant that the section does not specifically mention English Admiralty law which creates an assumption that the law applied is South African and that Admiralty law before the reform was also South African, albeit from a different historical source other than Roman-Dutch law. The section is a more developed version of the brief Competition Act approach but it is argued that any choice of law section need not set out extensive detail as to what the Courts shall do, such as have regard to writers *etc.*, but ought to set a defining principle, such as refer to foreign maritime law.

[237] the proposed section had further sections which are not directly relevant.

[238] See Forsyth, C. "The Conflict between Modern Roman-Dutch Law and the Law of Admiralty as administered by South African Courts." (1982) 99 SALJ 255 at 270 where the author states: "This clause [allowing the court to have regard to Convention which South Africa is not a signatory] bristles with difficulties. Has the Admiralty court been given the power to incorporate into our law the provisions of an international convention which the State President for sound policy reasons has declined to enact as law? It would be remarkable, to say the least, if this were so, but that appears to be the meaning of the words." See also Friedman, D. (supra) where the learned judge stated: "This proposal did not find favour with the powers at be, presumably, first because it was thought to be too uncertain, and secondly, because the Roman-Dutch purists, for fairly obvious reasons, disapproved of it." At 684.

Professor Staniland pointed out that the section's reference to the decisions of other maritime states was nothing new as in terms of section 2(2) of the Colonial Courts of Admiralty Act, 1890, the court could have regard to international law and comity of nations.[239]

Support for this reform option can be found with Judge David Friedman who wrote: "If there is to be a compromise on the question of choice of law, might I suggest that where maritime law as such is to be applied, the original proposals be retained – they are, and have been shown to be, a lot less uncertain than might at first blush be thought."[240]

6.3.5 Option Five – amend to academic compromise

Professor John Hare has suggested a modified version of Section 6 which reads as follows:

"6(1) (a) A Court in the exercise of its admiralty jurisdiction shall apply the law applicable in the Republic and, where appropriate, any general principle of maritime law prevailing in any maritime state.

(b) In applying (a) above the court shall have due regard to the recognition by this Act of the action *in rem* and the maritime lien and their origins.

(2) The Action *in rem* and maritime liens enforceable under the laws applicable in the Republic prior to the commencement of this Act shall be recognised and enforceable under this Act.

(5) The provisions of subsection (1) shall not supersede any agreement relating to the system of law to be applied in the event of a dispute."[241]

It is submitted that while this suggestion concisely simplifies the problem by removing references to separate systems, the specific mention of the action *in rem* and maritime liens is to ensure that they are not removed out of South African law through the removal of section 6. The South African courts have been analysing maritime liens and actions *in rem* since admiralty matters were first heard in South Africa. It is argued that they clearly form part of our admiralty common law and may be referred to and

[239] Staniland, H. "Is the admiralty court to be turned into a court of convenience for the wandering litigants of the world?" (1986) 103 SALJ p.9. See p.12.
[240] Friedman, D. B. "Maritime Law in the Courts After 1983." (1986) 103 SALJ p.678. at p.685.
[241] This suggestion is unpublished and was prepared for discussion with the Maritime Law Association in the late 1980's.

analysed in future maritime disputes. This option however does not set out the option of referring to foreign maritime law.

6.3.6 Option Six – amend to directly link with maritime claims

Under this option section 6 would refer directly to the maritime claim listed under section 1. In other words, for example, maritime claims found between sections 1(a) to (f) would result in English Admiralty law being applied, while claims under sections 1(g) to (aa) would apply South African Law.[242] The maritime claims section would have to be amended so that all of the old heads of jurisdiction, found under the Colonial Courts of Admiralty Act, were the first set of maritime claims, with the latter claims being modern heads of jurisdiction. This suggestion would also bring finality to the varied notion as to exactly what jurisdiction was held by the Colonial Courts of Admiralty. The Australian approach of a closed list in this regard should then be followed whereby unless the old claim was specifically mentioned it would be treated as a modern claim without the application of English law.[243]

6.4 RECOMMENDATION

It is accordingly suggested that section 6(1) be amended to read as follows:

> "Any High Court, exercising its admiralty jurisdiction, shall apply the law applicable in the Republic in the determination of which it shall, where appropriate, have regard to any general principle of maritime law prevailing in any maritime states.'

Section 6(2) should be deleted and section 6(5) preserved in its current form.

This suggestion is based on the assumption that South African admiralty law has developed to a position where it can rely on its own judgments for precedent and continue to utilise other systems of law for assistance and guidance.[244] The jurisprudential knowledge in respect of the field and the continued codification of the

[242] For a concise list of old and new heads of jurisdiction see Hare (supra) at 25 to 27.

[243] This would mean the deletion of section 1(1)(dd) which operates as a catch all for any old heads of jurisdiction. The deletion would generate certainty by avoiding examinations of the 1890 jurisdictions which were not clearly established.

[244] See the Annexure "A" database which sets out all shipping judgments since 1983 and demonstrates the depth of our admiralty common law.

subject has meant that admiralty lawyers in South Africa ought not to have to refer to 1983 English Admiralty law when examining old heads of jurisdiction.

Should it be felt that South African admiralty law has not yet reached the point of common law development as set out above then it is suggested that the choice of law section refer to the maritime claim section found under section 1 of the Admiralty Jurisdiction Regulation Act. It is submitted that this practical approach would ensure that the courts always apply the choice of law section as the first enquiry would relate to whether a matter was a maritime claim. If this was then found to be the case they would apply the choice of law as set out under a new section 6. A problem with this reform approach is that it further entrenches the position of dual systems of law operating in admiralty. It is submitted that this division should be closed with only South African admiralty being applied and all other systems operating as historical sources. The cornerstone of this argument rests on the well established principle of *stare decisis*, where prior judgments are binding on later cases. The 117 reported cases since 1983 demonstrate a wealth of admiralty jurisprudence and must be considered binding on later admiralty problems. The removal of section 6 cannot destroy the principles and dicta set out in these cases as they form the foundation of our modern admiralty common law.[245]

[245] It is also argued that early shipping decisions form part of our admiralty common law as even though English law was being applied, it was in a South African court applying South African law, not foreign law.

7. CONCLUSIONS

In conclusion, section six may be regarded as one of the most frustrating reform measures ever introduced into South African law. Not only did the section fail to remove the need to refer back to 1890 English admiralty jurisdiction, an arbitrary date when the Colonial Courts of admiralty were established, but it insisted on English law being applied as at 1983, thereby creating a further arbitrary date. As a result few judges have correctly applied the section and many have used English law as a persuasive authority where in some cases it ought to have been binding. Other judges have ignored the relevance of English law and have had no regard to its impact at all.

He actions of the admiralty court, with respect, should be criticised, for its failure to correctly apply the law as it stands. Yet this failure in itself suggests a strong need for reform so that the intentions of the South African parliament are followed.

Reform can operate on three levels.

1. Either the Courts correctly apply the section with no amendments. This would allow the dual system to continue;
2. The section is amended so that the dual system is retained but modified, by linking the section to the maritime claims section which would ensure correct application; or
3. The section is amended or deleted to unify South African admiralty law with all foreign maritime law rendering assistance.

It is concluded that a dual admiralty system ought to be avoided to ensure greater legal clarity with admiralty problems. Other legal systems, as discussed above, have chosen different methods of adoption and absorption in dealing with the preservation of old historical sources of admiralty infusing with domestic law. The reform of the section should further encourage the admiralty court to engage in foreign investigations on a legislated basis which would have the desired effect of enhancing the South African admiralty common law while allowing it to grow and develop without restraints imposed through legislation which forces the court to look backwards to 1983 and further to 1891. South African admiralty law needs to become independent and grow through the continued expansion of its own common law.

This sentiment can best be summarised by Professor Hare when he states:

> "South African shipping law should now be allowed to stand on its own merits, without the necessity of the artificial crutches of s 6 – the one being English law statically suspended as it was in November 1983, and the other being purist Roman-Dutch law."[246]

[246] Hare (Supra) at fn. 41.

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8. ANNEXURE "A" – CASE LAW DATABASE

This database sets out the background work to this thesis and categorizes the reported admiralty decisions since 1983 as reported by Juta & Co. Ltd.

The information contained in the database has formed the basis for the statistical information reported in the thesis.

The field "AJRA Section' is based on the information contained in Hare, John. Shipping Law & Admiralty Jurisdiction in South Africa. 1st ed. Juta & Co. Ltd. 1999. lvii. to ixiii.

This database should be available in an interactive form on the UCT Shipping Law web site in due course.

Name of vessel: **NUMILL MARKETING CC**

Year: 1994 Judge: Olivier J

Citation: (3) SA 460

Division: CPD

Subject of case: Bill of lading - evidence of title and passing of ownership

AJRA Section:

Decision: Held: copy of a bill of lading or replacement may be used to transfer title provided bill is suitably endorced and delivered.

Law applied: RSA with Uk reference

To be used:

S6 discussed: no

Criticism :

Name of vessel: **PEROS V ROSE**

Year: 1990 Judge: Page J

Citation: (1) SA 420

Division: NPD

Subject of case: Claim of construction mortgage guarantee as a maritime cliam

AJRA Section: 1(1)(q)

Decision: held not to be a martitime claim

Law applied: RSA

To be used:

S6 discussed: yes

Criticism : no UK cases referred to

Name of vessel: **PRIMESITE OUTDOOR ADVERTISING**

Year: 1999 Judge: Willis AJ

Citation: (1) SA 868

Division: WLD

Subject of case: Shippers Agent

AJRA Section:

Decision: Held: Functions of bill of lading include contract of carriage, receipt for cargo and document of title. these are co-entensive and not mutually exclusive. Delivery as per the bill of lading means proper delivery.

Law applied: RSA with many references to UK

To be used: *

S6 discussed: no - no admiralty jurisdiction discussed at all.

Criticism : Goods carried out of RSA on Bill of lading and owner sues agent for negligence for release of goods without bill being presented. - why not in AC !!

Name of vessel: **THE ACHILLEUS**

Year: 1992 Judge: Howard JP, Galgut J, Combrink J

Citation: (1) SA 324

Division: NPD

Subject of case: Jurisdiction, enforcment of clause in bill of lading, forum non conveniens, stay of proceedings.

AJRA Section: 7(1)(b)

Decision: Held: A plaintiff who sued in south Africa in breach of an agreement to refer disputes to a foreign court bore the onus if showing why the Court should not give effect to the agreement and stay the proceedings. In principle place of business means in relation to a shipping company, in the bill of lading.

Law applied: RSa with UK reference

To be used:

S6 discussed: no

Criticism :

Name of vessel: **THE AKADEMIK FYODOROV**

Year: 1996 Judge: Rose Innes J

Citation: (4) SA 422

Division: CPD

Subject of case: State immunity and evidence and proof of ownership, security arrest

AJRA Section: 5(3)

Decision: Evidence of ownership shown through construction for and delivery to the owner or purchase of ship and delivery to the purchaser. Evidence of registration shown through port of registration or lloyds registers is prima facie evidence of ownership but does not conclude proof of ownership. Russian Gov claimed immunity in terms of Foreign States Immunity Act and received protection.

Law applied: RSA

To be used:

S6 discussed: no

Criticism :

Name of vessel: **THE AL KAZIEMAH**

Year: 1994 Judge: Bristowe J

Citation: (1) SA 570

Division: D&CLD

Subject of case: Vindication of vessel, questions of ownership and appropriate forum, Action in rem

AJRA Section: 3(4)

Decision: S 3(4) did not create a numerous clausus of actions in rem. Did still have an action in rem even though it fell outside 3(4) which enabled an arrest but not an attachment. If claim lay against ship and not bunkers and supplies then could not attach them. the ship's presence in Durban overrode the claim that the matter be heard in Greece on the basis of forum rei sitae.

Law applied: Greek law and RSA

To be used:

S6 discussed: no

Criticism :

Name of vessel: **THE ALKA**

Year: 1994 Judge: Hugo J

Citation: (4) SA 622

Division: D&CLD

Subject of case: COGSA - S3 - entitled to bring action in court despite ouster.

AJRA Section:

Decision: Held: Section 3 of COGSA relating to carriage og goods in respect of a bill of lading, waybill or document, applies to any person carrying on business in RSA or the consignee or the holder of the bill of lading or document.

Law applied: RSA

To be used:

S6 discussed: no - interpretation of statute

Criticism :

Name of vessel: **THE ALKAR**

Year: 1986 Judge: Berman AJ

Citation: (2) SA 138

Division: CPD

Subject of case: Arrest and common law insolvency on same day - s 10, proceeds vest in liquidator

AJRA Section: 10

Decision: Held: winding up commenced when application presented to the Court, (i.e. when filed at office of Registrar) Even though Arrest heard and Orderred just before winding up, arrest deemed to been later and so s 10 did not apply.

Law applied: RSA

To be used:

S6 discussed:

Criticism :

Name of vessel: **THE ANDRICO UNITY**

Year: 1987 Judge: Marais J

Citation: (3) SA 794

Division: CPD

Subject of case: Arrest of vessel in rem - recognition of foreign lien

AJRA Section: 3(4)

Decision: Held no action in rem as Argentine lien not recognised.

Law applied: Uk & RDL for some parts

To be used:

S6 discussed: yes

Criticism :

Name of vessel: **THE ANTIPOLIS**

Year: 1988 Judge: Burger J

Citation: (3) SA 92

Division: CPD

Subject of case: Salvage and ownership of salvaged goods on abandoned wreck

AJRA Section:

Decision: Held: Origional salvor has preferent right for possession but neither origional savlor or intervening party have rights of ownership.
*overturned on appeal

Law applied: RSA

To be used: $

S6 discussed: no

Criticism : yes - ignored all admiralty principles and not even discussed and distinguished

Name of vessel: **THE ANTIPOLIS**

Year: 1990

Citation: (1) SA 751

Division: AD

Judge: Joubert JA, Hefer JA, Nestadt JA, Eksteen JA, F H Grosskopf JA

Subject of case: Salavage and ownership of salvaged goods from abandoned wreck

AJRA Section:

Decision: Held: regard should be had for mandament van spolie, attaching a rope to condensor did not constitute obtaining control so no right to interdict at all.

Law applied: RSA

To be used: $

S6 discussed: no

Criticism : yes - ignored all admiralty principles and not even discussed and distinguished

Name of vessel: **THE ARETI L**

Year: 1986 Judge: Berman J

Citation: (2) SA 446

Division: CPD

Subject of case: Ownership of Bunkers

AJRA Section:

Decision: Held: Where charterers have provided and paid for fuel aboad vesselchartered by them then this remained their property unless there was a clear and unequivocal agreement to the contrary or the evidence showed that the fuel was otherwise obtained. Bunkers were inseparable mixed with owners and charterers bunkers so as jointly owned capable of being attached. Application dismissed and counter-application granted.

Law applied: RSA with UK reference

To be used:

S6 discussed: no

Criticism :

Name of vessel: **THE ARGOS**

Year: 1994 Judge: Gauntlett AJ

Citation: (2) SA 700

Division: CPD

Subject of case: Ranking - s 11 - costs in consequence of arresting ship passing to sheriff, judicial sale, maritime claim of salvage, harbour dues and goods and services supplied..

AJRA Section: 1(1)(k), 1(1)(m), 1(1)(r), 9, 11 (4), 11(5)

Decision: Held: Costs of passing ship into legal custody of sheriff rank above all other claims against the fund.

Law applied: RSa with Uk reference

To be used:

S6 discussed: no

Criticism :

Name of vessel: **THE ATLANTIC VICTORY (NO1)**

Year: 1986 Judge: Van Heerden J

Citation: (4) SA 329

Division: D&CLD

Subject of case: Attachment of bunkers -s 5(4), jurisdiction, unjustified arrest

AJRA Section: 5(4)

Decision: Held: By consenting for the matter to proceed, Defendants submitted to the jurisdiction of the Court. Court had wide discretion whether or not to assist claimant with Jurisdiction.

Law applied: RSA

To be used:

S6 discussed: no

Criticism :

Name of vessel: **THE ATLANTIC VICTORY (NO2)**

Year: 1989 Judge: Van Heerden J

Citation: (1) SA 164

Division: D&CLD

Subject of case: Currency of award, definition of loss or damage subject to causation and remoteness

AJRA Section: 5(4)

Decision: Held: Loss or damage as experienced under s 5(4) no different from delictual damages under common law. Subject to causation and remoteness considerations. Currency in which loss suffered is proper currency which award should be expressed in.

Law applied: RSA with ref to UK law

To be used:

S6 discussed: yes

Criticism :

Name of vessel: **THE AVALON**

Year: 1996 Judge: Thirion J

Citation: (4) SA 989

Division: D&CLD

Subject of case: Ranking, Duties of Sheriff in preservation of vessel, judicial sale

AJRA Section: 9, 11

Decision: Held: sheriff entitled to hold arresting creditors liable for reinbursmentsof concomitant expenses. Sheriff tacitly authorising harbour authority expenses by leaving vessel in harbour administrators hands and by taking no steps itself in that regard. Arresting creditor deemed to have consented to harbour authority taking these steps. contract therefore between sheriff and harbour authority, or between sheriff and harbour auhorityauthorising them to take necessary steps to maintain and preserve the vessel thus granting them a claim which can be ranked in terms of s 11(4)(a)..

Law applied: RSA and brief UK law mention

To be used:

S6 discussed: no

Criticism :

Name of vessel: **THE AZGAD IV & THE HASHOMER**

Year: 1992

Citation: (3) SA 928

Division: AD

Judge: Nestadt JA, Corbett CJ, E M Grosskopf JA, Van der Heever JA, Howie AJA

Subject of case: Definition of Maritime Claim, Necessaries claim, attachment of property, jurisdiction, appeals

AJRA Section: 1(1)(m), 1(1)(dd), 4(4)(a), 7(2), 12

Decision: Held: Necessaries being whatever owner of the vessel, as a prudent man, would have ordered as being fit and proper for service on which vessel engaged. 3 categories of claim for necessaries: 1. Those who supply necessaries 2. those who pay for necessaries (shipowners agent) 3. Person who advances money to enable necessaries not only to be paid for but also obtained. A person who advanced money by way of reinbursment (often to agent) for necessaries already supplied will not have a maritime claim for necessaries unless he had undertaken to pay for them before their procurement. Appeal not allowed.

Law applied: RSA with UK reference

To be used:

S6 discussed: no

Criticism :

Name of vessel: **THE BERG**

Year: 1984

Citation: (4) SA 647

Division: NPD

Judge: Milne JP (Maj), Leon J (min), Van Heerden J

Subject of case: Associated ship, Nature of the Action in Rem, Ranking, Retrospective Application of AJRA, excessive security

AJRA Section: 3(6), 5(3), 5(4), 3(7), 11(11)

Decision: Held: The fact that claimant arrests associated vessel instead on vessel in respect of which the claim arose does not effect the nature, amount or enforceability of the applicant's claim. In terms of 11(8) an associated claim ranks behin the direct claims. section 3(6) of the Act is not to be applied retrospectively. Application dismissed.

Law applied:

To be used: $

S6 discussed: yes

Criticism :

Name of vessel: **THE BERG**

Year: 1986

Citation: (2) SA 700

Division: AD

Judge: Miller JA, Corbett JA, Hoexter JA, Grosskopf JA, Galgut AJA

Subject of case: Associated ship arrest, Retrospectivity of AJRA, s 3(6), 5(3)

AJRA Section: 3(6), 5(3)

Decision: Held: While claim arising before application of Act, ss 5(3) and 5(6) create new liabilities or obligations in owners of vessels were not aware of if the claims arose prior to the passing of the Act. These provisions are not merely procedural and not retrospective in operation.

Law applied: RSA

To be used:

S6 discussed: yes

Criticism :

Name of vessel: **THE BOS ENERGY**

Year: 1993

Citation: (4) SA 1

Division: AD

Judge: Grosskopf JA (EM), Hoexter JA, Vivier JA, F H Grosskopf JA, Harms AJA

Subject of case: Ranking - s 11 - question whether costs and expenses in respect of discharge of cargo from vessel to be sold are expenses incurred to procure the sale of the ship, judicial sale, .

AJRA Section: 9, 11, 11(4)(a)

Decision: Held: test as to whether costs and expenses were to procure the sale of the ship depends upon whethe rthere was sufficient connection between expenses and sale of property in question. Sale could have taken place without the removal of the cargo and so its discharge was not needed in order to procure the sale. It was argued that a ship without cargo would meet a higher price. the Court found that while there was no clear distinction between costs to procure a sale and costs to fetch a higher price, sufficient evidence was not lead in this case to demonstrate that a higher proce would be met. Appeal dismissed

Law applied:

To be used:

S6 discussed: yes

Criticism :

Name of vessel: **THE BRAZILIA (NO1)**

Year: 1985 Judge: Aaron AJ

Citation: (1) SA 787

Division: CPD

Subject of case: Ranking of claims - s 11, Arrest.

AJRA Section: 8(1), 11(1)

Decision: Held: Harbour authority cannot recover charges from a creditor who had a vessel attached to found jurisdiction in respect of claim against owner. The harbour authority's remedy lay in section 11 read with ss 1(1) and 8(1). Exception allowed.

Law applied: RSA with UK reference

To be used:

S6 discussed: no

Criticism :

Name of vessel: **THE BRAZILIA (NO2)**

Year: 1988 Judge: Hofmeyr AJ

Citation: (1) SA 103

Division: CPD

Subject of case: Salvage, Ranking, Commencement of Proceedings

AJRA Section: 9, 11(4). 11(5)

Decision: Held: Salavge occurs where vessel in distress or in danger.Service must preserve vessel from danger and the danger need not be actual or immediate but there must be a reasonable apprehension of danger which is real and sensible or well founded and needs to be established as a fact.. Fact that vessel near port and close to repair facilities does not prevent a salvage finding. Ranking section 11(1)(a) applies only to costs after arrest or attachment when vessel in custody of the marshall, although the section does not only apply to the costs of the marshall. Claims arising within one year before commencement of proceedings meaning claims which arose within one year before commencement of procedings ofr their enforcementand where no proceedings commenced prior to establishement of fund then lodging of claim marks commencment.

Law applied: Uk and RSA

To be used:

S6 discussed: yes

Criticism :

Name of vessel: **THE CAMBRIDGESHIRE**

Year: 1992 Judge: Van Schalkwyk J

Citation: (4) SA 263

Division: WLD

Subject of case: Marine Insurance and Charterparty

AJRA Section:

Decision: Held: Question as to whether clause was in fraudem legis to be determined by analysing the nature of the contract itself. application of "pay to be paid" clause would not have the effect of prefering an unsecured creditor but would have the effect of depriving an unsecured creditor of teh preference afforded to him under s 156 of the Act.

Law applied: RSA with UK referred

To be used:

S6 discussed: no

Criticism :

Name of vessel: **THE CAPE SPIRIT**

Year: 1998 Judge: Levinsohn J

Citation: (2) SA 952

Division: D&CLD

Subject of case: Security - 3(10) and prescription

AJRA Section:

Decision: held: no distinction between arrest and deemed arrest. Action may lapse within one year in terms of s 3(10)(a)(ii) of AJRA where vessel has actually been arrested to begin the action.

Law applied: RSA

To be used:

S6 discussed: no - interpretion of statute

Criticism : Arrest raised as central issue but not really discussed by Court at all

Name of vessel: **THE CATERMARAN TNT (NO.2.)**

Year: 1997 Judge: Foxcroft J

Citation: (2) SA 577

Division: CPD

Subject of case: Security - s 5(2) - appealability of decision & leave to appeal

AJRA Section: 5(2), 12

Decision: Held: Effect of directing of security, decidion is not final in effect as may be increased, its certainty not definitive of rights of parties and it does not dispose of any portion of the relief claimed. Order is therefore a ruling and not appealable. S 12 if AJRA no automatic right of appeal but rather that Admiralty Court to apply same standards as High Court for appeals.

Law applied: RSA

To be used:

S6 discussed: no

Criticism : no

Name of vessel: **THE CATERMARAN TNT (NO1.)**

Year: 1997 Judge: Foxcroft J

Citation: (2) SA 383

Division: CPD

Subject of case: Security Arrest - s 5(2)(b)

AJRA Section: 5(2(b), 5(2)(c), 5(3)

Decision: Held: Court may order that, on a genuine and reasonable need, security be provided for a defendant who intended bringing a counterclaim in respect of a peregrinus which had submitted to the jurisdiction of the court.

Law applied: RSA with UK references

To be used:

S6 discussed: no

Criticism :

Name of vessel: **THE CELTIC SEA**

Year: 1984 Judge: Milne JP

Citation: (2) SA 414

Division: D&CLD

Subject of case: Agency, s 311 MSA, arbitration

AJRA Section:

Decision: Held: S 6 of Arbitration act allows for one to stay any other legal proceedings. Liability of agent under s 311 of Shipping Act is not co-extensive with that of his appointer and it cannt be said that he is the representative recognised by law of a party to an arbitration agreement.

Law applied: RSA

To be used:

S6 discussed: before AJRA

Criticism :

Name of vessel: **THE CRNA GORA (THE KORDUN)**

Year: 1994

Judge: Corbett CJ, Joubert JA, Goldstone JA, Nienaber JA, Kriegler AJA

Citation: (2) SA 563

Division: AD

Subject of case: Security arrest - s 5(3) - sets out requirement

AJRA Section: 5(3)

Decision: Held: test: must have a claim in rem against ship or assicated ship and in alternative should have claim in personam against owner of ship or associated ship. Must show that the arrest of another ship for security of the same claim results in inadequate security for the claim. Claim for additional security set aside on factual grounds.

Law applied: RSA

To be used:

S6 discussed: no - interpretation of statute

Criticism : The AD completly ignored s 6 and had no regard to foreign law.

Name of vessel: **THE DIMITRIS**

Year: 1989

Citation: (3) SA 820

Division: AD

Judge: Botha JA, Corbett CJ, Hefer JA, Kumleben JA, Grosskopf AJA

Subject of case: Security arrest - s 5(3), hearsay evidence, weight of evidence, association criteria

AJRA Section: 3(7), 5(3), 6(3), 6(4)

Decision: Held: To effect s 5(3) arrest need to show a claim enforcable by action in rem against vessel concerned or associated vessel, must then have a prima facie enforcable case in nominated forum, must further show a genuine and reasonable need for security claimed. If above shown then order to be granted unless shipowner can demonstrate sound reasons for not granting the order. Court can hear hearsay evidence and adopt a lenient approach and only exclude hearsay statements where there is some cogent reason to do so.

Law applied: RSA with UK references

To be used: $

S6 discussed: no

Criticism :

Name of vessel: **THE EMERALD TRANSPORTER**

Year: 1985 Judge: Wilson J

Citation: (2) SA 452

Division: D&CLD

Subject of case: Ranking - s 11, Insurance claims and associated and sister ships, associated proceedings, judicial sale.

AJRA Section: 3, 9, 11(4), 11(11

Decision: Held: Insurance premiums not necessaries and not cliams which arose from the rendering of services to a ship for the employment or maintenance thereof as intended by s 11(1)(c)(v), Sister ships were not preferred and grouped as associated vessels. Claim arose when payment was due in case of goods supplied.

Law applied: RSA with UK references

To be used:

S6 discussed: no

Criticism : S 6 should have been discussed at 646.

Name of vessel: **THE EMERALD TRANSPORTER AND THE JADE TRANSPORTER**

Year: 1985 Judge: Milne JP, Leon ADJP, Howard J

Citation: (4) SA 130

Division: NPD

Subject of case: Ranking - s 11, associated ships

AJRA Section: 11(4)(c)(v), 11(11)

Decision: Held: S 1191)(c) only designed to deal with secured maritime liens over the ship whose proceeds was the fund and claims can only be direct.
*reversed in part.

Law applied: RSA with UK references

To be used:

S6 discussed: no

Criticism : USA law used for def on necessaries men and UK law for characteristics of a lien.

Name of vessel: **THE FAYROUZ IV**

Year: 1988 Judge: Shearer J, Page J, Booysen J

Citation: (4) SA 675

Division: NPD

Subject of case: Associated Ship - relevant time of association, s 3, Action in Rem

AJRA Section: 3(4), 3(6), 3(7)

Decision: Held: It was immaterial that at time of instituting proceedings no action in rem was available against guilty ship. Associated ship provisions in terms of s 3(6) and (7) were to extend circumstances in which an arrest was availableso giving alternative method of enforcing in personam claims without satisfying s 3(4). Appeal granted.

Law applied:

To be used: $

S6 discussed: no

Criticism :

Name of vessel: **THE FIDIAS**

Year: 1986 Judge: Nienaber J

Citation: (1) SA 714

Division: D&CLD

Subject of case: Def of Maritime lien, claim of necessaries man, ranking of claims

AJRA Section: 11

Decision: necessaries man cliam not necessarily a maritime lien.

Law applied: UK

To be used:

S6 discussed: yes

Criticism :

Name of vessel: **THE FORTUNE 22**

Year: 1999 Judge: Thring J

Citation: (1) SA 162

Division: CPD

Subject of case: Arrest of associated ship

AJRA Section:

Decision: Held: Associated ship can't be arrested in respect of a vessel already under arrest.

Law applied: UK

To be used:

S6 discussed: yes

Criticism : uk interps given - good

Name of vessel: **THE FRIOPESCA UNO AND OTHERS**

Year: 1992 Judge: Levy J

Citation: (2) SA 434

Division: NmHC

Subject of case: Recognition of Foreign Mortgage Bonds

AJRA Section:

Decision: Held: Law of Namibai not recognising that the mortgage bonds give rise to any rights in Namibia on application of the lex fori. Claim dismissed.

Law applied: Namibian and RSA

To be used:

S6 discussed: yes

Criticism :

Name of vessel: **THE GENERAL SANTOS**

Year: 1988 Judge: Bristowe J

Citation: (3) SA 903

Division: D&CLD

Subject of case: Jurisdiction and Definition of maritime claim, attachment discretion

AJRA Section: 1(1), 4(4)(a)

Decision: Held: Cause of action based on Respondent;s breach of contract in failing to pay the balance of the purchase price for goods sold and deliverred and that since such an obligation was to made payment elsewhere than in the jurisdiction of the court, the cause of action had not arrisen within the jurisdiction of the court and court could not entertain the claim, with both parties being peregrini. As agreement arose from purchase and sale of goods was not a maritime claim within meaning of s 1(1)(ii) of AJRA so could not have discretion to apply s 4(4)(a) of AJRA. to order attachment. Attachment discharged.

Law applied: RSA with UK reference

To be used:

S6 discussed: no

Criticism :

Name of vessel: **THE GOLDEN NORTH**

Year: 1999 Judge: McLaren J

Citation: (1) SA 144

Division: D&CLD

Subject of case: Ranking - s 11(4)(c) - when claim arose

AJRA Section: 11(4)(c)

Decision: maritime claim in terms of S11(4)(c) arrises when it came into existence and not when it fell due.

Law applied: RSA

To be used:

S6 discussed: no

Criticism : no

Name of vessel: **THE GOLDEN TOGO**

Year: 1986 Judge: Freidman J

Citation: (1) SA 499

Division: NPD

Subject of case: Jurisdiction

AJRA Section:

Decision: Held: Admiralty Jurisdiction of england neither general nor unlimited. Jurisdiction by being created by statute cannot be extended by either acquiescence or by the express consent of the parties.

Law applied:

To be used:

S6 discussed: before AJRA

Criticism :

Name of vessel: **THE GREAT EAGLE (NO.1.)**

Year: 1992 Judge: King J

Citation: (2) SA 87

Division: CPD

Subject of case: Arrest & security for arrest, increase in security

AJRA Section: 3(8), 3(10), 5(2)(d)

Decision: Held that can't re-arrest if security given, can re-arrest if no security given

Law applied: UK but RDL used in Statutory interp

To be used:

S6 discussed: yes

Criticism : none good example of correect application

Name of vessel: **THE GREAT EAGLE (NO.2.)**

Year: 1992 Judge: King J

Citation: (2) SA 653

Division: CPD

Subject of case: Application for security to be set aside

AJRA Section: 5(2)(b), 5(2)(c)

Decision: Held: that application for security dismissed as failed to establish onus

Law applied: Hong Kong

To be used:

S6 discussed: no

Criticism :

Name of vessel: **THE GREAT EAGLE (NO.3.)**

Year: 1992 Judge: Berman J

Citation: (4) SA 313

Division: CPD

Subject of case: Forum non conveniens - s 7

AJRA Section: 7(1)

Decision: Held: Principles of forum non conveniens to be applied in RSa as follows. 1. a stay will only be granted where Court is satisfied that there is some other available forum having competent jurisdiction which is more appropriate for the resolution of the matter and not merely convenient. 2. Onus on party seeking to stay the proceedings. 3. Once discharges the onus, onus then shifts onto party relying on arrest to show special circumstances exist which warrent the dispute being resolved in the local forum. 4. in examining special circumstances, Court will have regard to connecting factors and all relevant circumstances. 5. The onus of establishing the existence of these circumstances is on a preponderence of possibilities and is a heavy onus. The Spiliada applied.

Law applied: RSA with UK reference

To be used:

S6 discussed: no

Criticism :

Name of vessel: **THE GREAT EAGLE (NO.4.)**

Year: 1994 Judge: Howie J

Citation: (1) SA 65

Division: CPD

Subject of case: release from arrest - arrest of own ship - vindicatory action

AJRA Section:

Decision: Held that can arrest your own ship in rem when trying to vindicate your property and that a ship can be arrested only if the applicant can demonstrate a prima facie case which justifies the arrest. The application was granted

Law applied: RSA

To be used:

S6 discussed: yes

Criticism : none - much of case factual questions

Name of vessel: **THE GRERG LURICH**

Year: 1994 Judge: Berman J

Citation: (1) SA 857

Division: CPD

Subject of case: Security - another vessel tendered as security - 3(10)

AJRA Section: 3(10)

Decision: Held: that can refuse to accept another vessel as security as unreasonable because potential legal uncertainty arrises.

Law applied: RSA

To be used:

S6 discussed: no - decided on facts and reaonableness of action in terms of statute

Criticism :

Name of vessel: **THE GULF TRADER**

Year: 1995

Citation: (3) SA 663

Division: AD

Subject of case: Ownership

Judge: Corbett CJ, Botha JA, Nestadt JA, Nienaber JA, Marais JA

AJRA Section:

Decision: Held: In applying English law, in terms of the AJRA, the rules of English private international law dictate that one must then apply the lex situs which is the place where the property in dispute is located. RSA law applied and delivery then needed for ownership to pass. This was not porved. Appeal dismissed.

Law applied: RSA

To be used: * $

S6 discussed: indirectly 667C

Criticism : look at case UK law but then apply local law so RSA law.

Name of vessel: **THE H CAPELO, MALANGE AND LEIRIA**

Year: 1990

Citation: (4) SA 850

Division: AD

Judge: Friedman AJA, Van Heerden JA, Smalberger JA, Nestadt JA, Kumleben JA

Subject of case: Excessive Claim - s 5(4)

AJRA Section: 5(4)

Decision: Held: Claim for damages regarding excessive claim. Objective standard to be applied to s 5(4). Onus on party suffering damages to show that claim excessive. Determination to be made when main action adjudicated and when court has all information before it. Test: whether the claim was beyond what could be reasonably have been regarded by the claimant as recoverable.

Law applied: UK

To be used:

S6 discussed: yes

Criticism :

Name of vessel: **THE HEAVY METAL**

Year: 1998 Judge: Thring J

Citation: (4) SA 479

Division: CPD

Subject of case: Associated Ships Arrest - s 5(3) for security

AJRA Section: 3(6), 3(7), 5(3)

Decision: Held: In resepct of associated ship control, if a claimant could prove that the person concerned had the power to control the company directly or indirectly (even as a nominee for others), then that person would be deemed to control the company, whether or not he in fact did so. application to set aside arrest dismissed.

Law applied: RSA

To be used:

S6 discussed: no

Criticism : no uk law and interps of RSA statute, presumption of foreign law being same as ours

Name of vessel: **THE HOUDA PEARL (NO1)**

Year: 1986

Citation: (2) SA 714

Division: AD

Judge: Corbett JA, Miller JA, Botha JA, Hefer JA, Nicholas AJA

Subject of case: Jurisdiction, contracts of economic duress

AJRA Section: 16(2)

Decision: Held: when applying UK law as at 1890 may have regard to later decisions which expound the common law with retrospective effect. defence of economic duress failed.

Law applied: UK

To be used:

S6 discussed: before AJRA

Criticism :

Name of vessel: **THE HOUDA PEARL (NO2)**

Year: 1986

Citation: (3) SA 960

Division: AD

Subject of case: currency conversion

Judge: Corbett JA, Miller JA, Botha JA, Hefer JA, Nicholas AJA

AJRA Section:

Decision: Held: conversion to be determined by the Registrar where the trial heard. This would not necessarilty apply under the AJRA.

Law applied: UK

To be used:

S6 discussed: before AJRA

Criticism :

Name of vessel: **THE JADE TRANSPORTER**

Year: 1987 Judge: Leon J, Friedman J

Citation: (1) SA 935

Division: NPD

Subject of case: Currency conversion from paymnet of fund. - s 5(2)(g)

AJRA Section: 5(2)(g)

Decision: Held: s 5(2)(g) grants the court unfettered discretion to do what is just in a particular case. Date of currency conversion was the date of the Court order.

Law applied: RSA

To be used:

S6 discussed: no

Criticism :

Name of vessel: **THE JADE TRANSPORTER**

Year: 1987

Citation: (2) SA 583

Division: AD

Judge: Corbett JA, Trengrove JA, Viljoen JA, Grosskopf JA, Nicholas AJA

Subject of case: Ranking - ranking of sister ships - s 11(8), judicial sale

AJRA Section: 11(8), 9

Decision: Held: Ranking of sister ship claims follow the main ship's claims.

Law applied: RSA

To be used:

S6 discussed: no

Criticism :

Name of vessel: **THE JUTE EXPRESS**

Year: 1991 Judge: Howard JP

Citation: (3) SA 246

Division: D&CLD

Subject of case: Prescription of claim, deemded arrest, action in Rem.

AJRA Section: 3(5), 3(10)(a)

Decision: Held:Action deemed to have been instituted by the furnishing of security and therefore the action had not become prescribed. Special plea dismissed.*reversed on appeal

Law applied: RSA with Uk reference

To be used:

S6 discussed: no

Criticism : reversed on appeal

Name of vessel: **THE JUTE EXPRESS**

Year: 1992

Citation: (3) SA 9

Division: AD

Judge: Howie AJA, Corbett CJ, Botha JA, Milne JA, Goldstone JA

Subject of case: special plea in respect of one year prescription raised in action in rem for damages for short and damaged delivery into RSA port. Appeal from court a quo.

AJRA Section: 3(5), 3(10)(a), 1(2)(a)(i)

Decision: Held: that Appeal upheld and decisions of court a quo overturned. In terms of the AJRA an action in rem commences with the issue of summons and not the arrest of a vessel.

Law applied: RSA

To be used:

S6 discussed: no

Criticism : none - case used UK law as persuasive argument but court was interpreting a RSA statute.

Name of vessel: **THE KALANTIAO**

Year: 1987 Judge: Leon J

Citation: (4) SA 250

Division: D&CLD

Subject of case: arrest in rem - stevadores claim, applicable law.

AJRA Section: 6(1)

Decision: Held: Applied Uk law and followed Halcyon Isle thereby not recognising foreign liens.

Law applied: UK

To be used:

S6 discussed: yes

Criticism :

Name of vessel: **THE KAPETAN LEONIDAS**

Year: 1995

Citation: (3) SA 112

Division: AD

Judge: Nicholas AJA, Corbett CJ, E M Grosskopf JA, SMalberger JA, Van der Heever JA

Subject of case: Charterparty & Associated Ships.

AJRA Section: 3(7),

Decision: Held: For ship to be associated the controller of shares on one company must be controller of all the shares in the other company.

Law applied: UK & RSA

To be used: * $

S6 discussed: no mention

Criticism : examine this note exp 118C - demonstrates that unless full argument is given Judges may well be lost when examining UK Law. - no judgement given in this part of the case. RSA law applies to associated ships and ruling made in this regard.

Name of vessel: **THE KAPITAN SOLYANIK**

Year: 1999 Judge: Hannah J, Strydom JP, Teek J

Citation: (2) SA 926

Division: NmHC

Subject of case: Attachment of Ship and ownership of vessels and accepting foreign evidence

AJRA Section:

Decision: Appeal sucessful and ship released from arrest on basis that reasons for refusing to grant a postponment not justifiedalso prejudiced the appelants.

Law applied: Ukrain, Namibian and South African

To be used:

S6 discussed: no

Criticism : No basis for using Ukranian law is given other than mention of an ownership dispute.

Name of vessel: **THE KARIBIB**

Year: 1984 Judge: Freidman J (G)

Citation: (2) SA 462

Division: CPD

Subject of case: Arbitration for work done on shipping vessel and breach of contract

AJRA Section:

Decision: Held: court would only give opinion after arbitrator had made his final award.

Law applied: RSA

To be used:

S6 discussed: no

Criticism : no but before AJRA

Name of vessel: **THE KHALU SKY**

Year: 1986 Judge: Munnik JP

Citation: (1) SA 485

Division: CPD

Subject of case: Maritime lien

AJRA Section:

Decision: Held: Maritime lien is a right of property given by way of security for a martitime claim. If Admiralty Court can hear the claim it will not disregard the lien. A maritime lien validly conferred by the lex loci is a much part of the claim as is a martgage. Halcyon Isle approved.

Law applied: UK with small ref to RSA

To be used: $

S6 discussed: before AJRA

Criticism :

Name of vessel: **THE KYOJU MARU**

Year: 1984 Judge: Leon J

Citation: (4) SA 210

Division: D&CLD

Subject of case: Associated Ship - s 3, Discovery

AJRA Section: 3(6), 3(7)

Decision: Held: Claim arose beofre AJRA, sections 3 (6) and (7) are procedural and therefore retrospective. Able to enforce associated ships claim. Plaintiff failed to prove that associated ships. Court did not have the power to order discovery in order to determine whether there was an action before Court.

Law applied: RSA with Uk ref

To be used: $

S6 discussed: before AJRA

Criticism :

Name of vessel: **THE LACERTA**

Year: 1995 Judge: Combrink J

Citation: (3) SA 377

Division: D&CLD

Subject of case: mitigation of Damages, currency of the Award

AJRA Section:

Decision: Held: Principles of mitigation of damages set out is a question of fact not law. Award in delict principally aimed at restitutio in integrum, claim awarded in US Dollars was currency in which loss felt.

Law applied: RSA and UK

To be used:

S6 discussed: no

Criticism :

Name of vessel: **THE LADY ROSE**

Year: 1991 Judge: Scott J

Citation: (3) SA 711

Division: CPD

Subject of case: Definition of defendant - s 4 and rule 8

AJRA Section: 4

Decision: Held: Word defendant in rule 8 is to be construed as including the owner of a maritime res who appears to defend an action in rem against the res. Thius means that such an owner is entitled to bring a claim in reconvention against the plaintiff in an action in rem against a maritime res.

Law applied: RSa with UK reference

To be used:

S6 discussed: no

Criticism :

Name of vessel: **THE LAKE SUPERIOR**

Year: 1992 Judge: Magid J

Citation: (1) SA 102

Division: D&CLD

Subject of case: Associated ships - s 3(7), Discovery rule 13(1)(b)

AJRA Section: 3(7)

Decision: Held: Similar names of vessels and companies not enough to prove associated. Rule 64 of Vice-Admiralty Rules could order discovery to be made but where attachment fell to be set aside then no action before Court and so no power to force discovery. Rule 13(1)(b) not different enough from Old Rule 64 to justify a different excercise of discretion.

Law applied: RSA

To be used: $

S6 discussed: no

Criticism :

Name of vessel: **THE LERESTI**

Year: 1997 Judge: Squires J

Citation: (2) SA 681

Division: D&CLD

Subject of case: Security - s 5(2) - conditions when granted, consent to jurisdiction.

AJRA Section: 3(2)(c), 5(2), 5(3)

Decision: Held: purpose of Act to apply Courts common law procedural powers to admiralty claims and to do so as effectively as possible in order to achieve commerical convenience. Security for costs of any claim may be for a claim outside RSA. Court will order security when applicant has a genuine and reasonable need for security and where there is a prima facie case which if proven would establish the claim. On facts no need for security, Application dismissed

Law applied: RSA

To be used:

S6 discussed: no - interpretion of statute

Criticism : no - but ignores differences between Admiralty claims and ordinary common law procedure. cf. The Yu Long Shan (HurtJ 461)

Name of vessel: **THE LINA**

Year: 1998 Judge: Booysen J, Hugo J, McCall J

Citation: (4) SA 633

Division: NPD

Subject of case: Charterparty - confidentiality in negotiations

AJRA Section:

Decision: held that if wanted to enforce confidentiality should have done so before negotiations. Held further that test for evidence to be adduced in order to establish justifying an attachment to found jurisdiction was not proof on a balance of probabilities, but evidence which, if accepted, would show a cause of action.

Law applied: RSA

To be used:

S6 discussed: no

Criticism : no

Name of vessel: **THE LUIS**

Year: 1994 Judge: Rose Innes J

Citation: (2) SA 363

Division: CPD

Subject of case: Security - s 5(3) - Respondent requesting security on payment of its security for counterclaim, charterparty claim, action in personam, consent to jurisdiction.

AJRA Section: 1(1)(j), 1(1)(ff), 2(1), 3(1), 3(2), 3(3), 5(2), 5(3)

Decision: Held: Court can order security by defendant in arbitration in another jurisdiction where it submits to the jurisdcition of the Court by implication throught the use of a counterclaim. The Respondent's security claim was in terms of S 5(2)(b) for its counterclaim. Both parties were accordingly allowed claims for security.

Law applied: RSA

To be used:

S6 discussed: no

Criticism :

Name of vessel: **THE LUNEPLATE**

Year: 1986 Judge: Van Heerden J (AH)

Citation: (4) SA 865

Division: CPD

Subject of case: Towage & Limitation of Liability

AJRA Section:

Decision: Held: Foreign law was a matter of fact determined by evidence of experts. The England confirmed. The actual fault or privity on part of plaintiff on part of defendant had been shown in regard to its lack of instruction and supervision concerning the inspection, fitness for use and actual use of the tow lines.Defendant failed to establish that amount of damages should be limited in terms of s 261 of MSA, damages awarded to Plaintiff.

Law applied: RSA and German Law

To be used:

S6 discussed: no

Criticism : Why wasn't limitation of liability determined according to German Law?

Name of vessel: **THE MAHARANI**

Year: 1990 Judge: Thirion J, Bristowe J, Hugo J

Citation: (2) SA 480

Division: NPD

Subject of case: Ranking, sale and ownership of bunkers transferred, mortgage, supply of nexxessaries

AJRA Section: 11(4)(a), 11(4)(c)(v), 11(4)(d)

Decision: Held: Oil on board sold and separate fund created from vessel. Oil used to preserve the vessel while under arrest so claim for dmages in that regard ranked high (s11(1)(a)) the word expense as used in s 11 (1)(a) should be construed in a broader sense than merely meaning money out of pocket. Different forms of artificial delivery discussed and transfer of ownership held not to have taken place.

Law applied: RSA with Uk reference

To be used:

S6 discussed: no

Criticism :

Name of vessel: **THE MARIA K**

Year: 1985 Judge: Berman AJ

Citation: (2) SA 476

Division: CPD

Subject of case: Ownership of bunkers

AJRA Section:

Decision: Held: A time charterparty is a contract sui generis where these words, delivery, re-delivery, agreed to let and agreed to hire, have a well recognised international meaning in shipping circles and affairs, different from their meaqning in fields such as landlord and tennant and the law of lease. No delivery so no change of ownership. Application granted.

Law applied: RSA with UK references

To be used:

S6 discussed: no

Criticism :

Name of vessel: **THE MARITIME PROSPERITY**

Year: 1996

Citation: (1) SA 22

Division: AD

Judge: Corbett CJ, Smallberger JA, Nestadt JA, Marais JA, Scott AJA

Subject of case: Prescription and section 344 of MSA, action in rem arrest

AJRA Section: 3(5)

Decision: Held: the prescription act and s 344 of the Merchant Shipping Act are consistant in relation to actions in personam as s 344 provides for prescription periods for actions in rem. appeal dismissed

Law applied: RSA

To be used:

S6 discussed: no

Criticism : no - also extensive analysis of UK law on point

Name of vessel: **THE MARITIME PROSPERITY (THE LASH ATLANTICO)**

Year: 1994 Judge: Thirion J

Citation: (3) SA 157

Division: D&CLD

Subject of case: Security arrest where underlying cause damages from collission - prescription of claim

AJRA Section: 5(3)(a)

Decision: Held: Prescription claim failed and claim in personam continued

Law applied: RSA

To be used:

S6 discussed: yes

Criticism :

Name of vessel: **THE MC THUNDER**

Year: 1994 Judge: Scott J

Citation: (3) SA 599

Division: CPD

Subject of case: Ranking - claims by person who lent money to owner of ship for payment of wages.

AJRA Section: 1(1)(s), 9, 11, 11(4), 11(8)

Decision: Held that claim of third party who supplies money to owner ranks below necessaries claim

Law applied: RDL

To be used:

S6 discussed: no but see 607D where concept discussed although not directly referred to

Criticism :

Name of vessel: **THE MENALON**

Year: 1995 Judge: Alexander J

Citation: (3) SA 363

Division: D&CLD

Subject of case: Contract of affreightment, interp of bill of lading.

AJRA Section:

Decision: Held: True nature of bill of lading to be inferred from circumstances giving rise to the issue. Terms of bill evidencing and regulating contract of carriage and Plaintiff as holder entitled to sue shipowner for performance of latter's obligations as carrier. Arrest in rem falls under the ambit of seizure under legal process under rule 2(g) of the Canadian Carriage of Goods by Water Act, 1936.

Law applied: UK & RSA in part

To be used:

S6 discussed: yes

Criticism :

Name of vessel: **THE MICHALIS S**

Year: 1990 Judge: Hugo J

Citation: (3) SA 817

Division: D&CLD

Subject of case: Arrest and sale of vessel - s 9

AJRA Section: 9

Decision: Held: Object of s 9 of AJRA in relation to arrest and sales of vessel, to give maritime claimants form of security in advance of adjudication of their claim. Court has unfettered discretion in deciding whether or not to sell vessel. It must preserve that security and have regard that in issuing oder for sale of vessel it is depriving owner of its property before any judgmnet given against it. The relative values of the vessel and claims should be weighed up and primary facts such as relative values should be before the court. Value of vessel not sufficiently established, postponed sine die

Law applied: RSA with UK reference

To be used:

S6 discussed: no

Criticism :

Name of vessel: **THE MIDHAVID & THREE OTHERS**

Year: 1994 Judge: Thring J

Citation: (4) SA 676

Division: CPD

Subject of case: Arrest - attachment to found or confirm jurisdiction, interpretation of action in personam, security arrest, proceeds of sale.

AJRA Section: 3(2), 5(3), 9(2)

Decision: Held: It was normal practice to apply ex parte for the common-law attachment of property to found or confirm jurisdiction and, once an Applicant had satisfied all the requirments a court had no discretion to refuse it. Section 5(3) provided relief which was separate and distinct from relief flowing fron jurisdictional attachment.Attachment confirmed.

Law applied: RSA

To be used:

S6 discussed:

Criticism : Should have had regard to the common law when interpreting the Act.

Name of vessel: **THE MORNING STAR**

Year: 1984 Judge: Friedman J

Citation: (4) SA 269

Division: D&CLD

Subject of case: Marine insurance, applicable law

AJRA Section: 6(1)(b)

Decision: Held: any statements in English decisiond would be of great persuasive authority

Law applied: RSA

To be used:

S6 discussed: yes

Criticism : no but decision reversed on appeal

Name of vessel: **THE NAGOS**

Year: 1996 Judge: Alexander J

Citation: (2) SA 261

Division: D&CLD

Subject of case: Limitation of Liability

AJRA Section: 1(1)(w), 5(2)(a)

Decision: Held: Shipowner's entitlement to have liability determined in terms of s 261 subject to loss being caused without owner's actual fault or privity. If fault later proved then limitation order becomes academic and cargo owners would thus suffer no perjudice of declaration granted.

Law applied: RSA

To be used:

S6 discussed: no but charterparty stated arbitration in London

Criticism : good Uk law quoted but cargo owner submitting to juris becasue of use of forum.

Name of vessel: **THE NANTAI PRINCESS**

Year: 1997 Judge: Levinsohn J

Citation: (2) SA 580

Division: D&CLD

Subject of case: Winding Up of Company and ship arrest

AJRA Section: 9, 9(2)

Decision: Held: Date of winding up when application filed at Court. Any attachment of assets after winding up void in terms of s 359(1)(b) of Companies Act. Arrest of cargo void.

Law applied: RSA with UK reference

To be used:

S6 discussed: no

Criticism :

Name of vessel: THE NAUTILUS

Year: 1994 Judge: Scott J

Citation: (1) SA 528

Division: CPD

Subject of case: Sale of vessel and cession of claims, repairs

AJRA Section: 1(1)(q), 3(5), 9, 10A(2)(a), 11, 11(4)

Decision: Held: Objections relating to the second sale of the vessel and collusion in the valuation were dismissed. Cession of claims after litis contestatio did not render the cessions ineffective.

Law applied: RSA with Uk reference

To be used:

S6 discussed: no

Criticism :

Name of vessel: **THE NEFELI**

Year: 1984 Judge: King AJ

Citation: (3) SA 325

Division: CPD

Subject of case: Arrest of associated ship - 3(6) with s 7(a)(ii) and s 7(b)(ii) - test of control

AJRA Section: 3(6), 7

Decision: Held: Associated ships established by virtue of the same control being excercised over them. Control means not day to day but overall control of the assets and destiny of the company. Managing agents' control not control as in terms of Act.

Law applied:

To be used: $

S6 discussed:

Criticism :

Name of vessel: **THE OCEAN KING**

Year: 1997 Judge: King J

Citation: (4) SA 345

Division: CPD

Subject of case: Security - for costs of preservation of ship

AJRA Section:

Decision: Held : considerations of faireness not requiring parties to furnish security

Law applied: RSA

To be used: *

S6 discussed: no - decided on the facts of the matter

Criticism : No - decided upon the facts

Name of vessel: **THE OCEAN KING**

Year: 1997 Judge: King J

Citation: (4) SA 349

Division: CPD

Subject of case: Powers of sheriff in maintenance and preservation of the vessel. Rule 19

AJRA Section: 9

Decision: Held: Appointment of auctioneer to sell the vessel does not detract from the powers and duty of the sheriff in maintaining and perserving the vessel in terms of rule 19 of the admiralty court rules.

Law applied: RSA

To be used:

S6 discussed: no

Criticism :

Name of vessel: **THE OCEAN RUNNER**

Year: 1994 Judge: Van schalkwyk

Citation: (4) SA 692

Division: CPD

Subject of case: Ranking - s 11(4)(c) Def of proceedings.

AJRA Section: 9, 11(4)(c), 11(4)(f)

Decision: Held: With ranking in term sof s 11(4)(c) proceedings are not limited to RSA proceedings but extend to elsewhere.

Law applied: RSA

To be used:

S6 discussed: No

Criticism : Mention made of choice of law rules and the application of the lex fori but nothing stated in connection with section 6.

Name of vessel: **THE OSCAR JUPITER**

Year: 1998 Judge: Alexander J

Citation: (2) SA 130

Division: D&CLD

Subject of case: Foreign government & application of foreign states immunity act

AJRA Section:

Decision: Held: that where a vessed was used for commercial purposes there could be no protection of foreign immunity.

Law applied: RSA

To be used:

S6 discussed: no

Criticism : no

Name of vessel: **THE PACIFIC TRADER**

Year: 1996

Citation: (1) SA 1

Division: AD

Judge: Eksteen JA, Corbett CJ, Smallberger JA, Van der Heever Ja, Olivier JA

Subject of case: Ranking S11 - debts from other ships, marine insurance premiums, P&I calls

AJRA Section: 9, 11, 11(4)(c)

Decision: Held: to determine the proper ranking a fund must first be constituted and the order of cort authorising the sale must first be handed down before such a sale can occur. The Court found there to be no difference between 'a ship' and 'the ship'. It applied the ammended legislation in respect of ranking to the matter and dismissed the appeal and cross-appeal. .

Law applied: RSA

To be used:

S6 discussed: no - interpretion of statute

Criticism : no

Name of vessel: **THE PAZ**

Year: 1984

Citation: (3) SA 261

Division: NPD

Judge: Freidman J (Maj), Didcott J (Min), Kriek J

Subject of case: Arrest - s 5(3) and forum non conveniens

AJRA Section: 5(3)

Decision: Held: To arrest in term sof s 593) must show prima facie that have reasonable prospects of success and why the assistance of South African Courts is needed and why security is needed and that he has not already obtained security and that cannot obtain security in other contemplated or pending arbitration or proceedings. Application refused for failing to provide enough infomation, even though no appearance from Respondent.

Law applied: RSA with UK law tracing developments

To be used:

S6 discussed: no

Criticism :

Name of vessel: **THE PERICLES**

Year: 1995

Citation: (1) SA 475

Division: AD

Judge: Corbett CJ Van Heerden JA, Nienaber JA, Howie JA, Nicholas AJA

Subject of case: Associated Ships definition. application of ammendment to definition

AJRA Section: 3(6), 3(7)

Decision: Held: The AJRA is not retroactive and can not arrest a vessel on grounds of act as ammended when claim arose under the old definition of associated ship. appeal dismissed

Law applied: RSA

To be used: $

S6 discussed: no mention

Criticism : no criticism

Name of vessel: **THE PHILLIPPINE COMMANDER**

Year: 1988 Judge: Shearer J

Citation: (1) SA 457

Division: D&CLD

Subject of case: Arrest to found Juisdiction - salvage lien

AJRA Section:

Decision: Held: Applicant has prima facie case and had some prospect of success in the main action. Rule nisi confirmed.

Law applied: RSA with UK reference

To be used:

S6 discussed: no

Criticism :

Name of vessel: **THE PROSPEROUS**

Year: 1995 Judge: Levinsohn J

Citation: (3) SA 597

Division: D&CLD

Subject of case: Charterparty & Ownership of bunkers

AJRA Section:

Decision: Held: An implied term had to be used with great caution and term had to be an obvious one which was one necessary to give business efficiacy to the contract. Span Terza applied, upon cnacellation the shipowner remained the bailee if the charterer and any contractual right had come to an end. Thus no warrent for implying any term regarding transfer of ownership in bunkers resulting from an implied sale or other implied agreement. attachment of bunkers confirmed.

Law applied: UK

To be used:

S6 discussed: no but parties agreed to UK law

Criticism : no

Name of vessel: **THE PROSPEROUS**

Year: 1996

Citation: (2) SA 155

Division: AD

Judge: Scott JA, Corbett CJ, Hefer JA, Nestadt JA, Olivier JA

Subject of case: Charterparty & Ownership of Bunkers

AJRA Section:

Decision: Held: Insufficient evidence to establish agreement between owner and charter for purchase of bunkers on withdrawl of vessel from serive of charterer. Acceptance of offer is not inferred from silence of offeree except in exceptional circumstances. Span Terza applied. Appeal dismissed.

Law applied: UK

To be used:

S6 discussed: no but agreed on UK law

Criticism : no

Name of vessel: **THE RECIFE**

Year: 1997 Judge: Fitzgerald AJ

Citation: (4) SA 852

Division: CPD

Subject of case: COGSA - article IV - explosion - risks and liability

AJRA Section:

Decision: Held: A carrier can claim damages from a shipper for the damage caused by a product, even if the carrier was aware of the inherent risks involved with the product and transports the product. However the carrier can only claim damages which arrise from something other than the damages which would be expected to occur. Article IV, par 6 of COGSA applied and shipper held liable to carrier for damages.

Law applied: RSA with UK reference

To be used:

S6 discussed: no

Criticism :

Name of vessel: **THE ROSARIO DEL MAR**

Year: 1995 Judge: Van Der Westhuizen AJ

Citation: (1) SA 716

Division: CPD

Subject of case: Arrest - s 5(3) foreign claim not recognised in RSA cannot be used as basis for security arrest

AJRA Section: 5(3)

Decision: Held: Claims which cannot be enforced in RSA either in rem or personam, cannot be used as the underlying basis for a claim of security arrest in RSA>

Law applied: RSA

To be used: *

S6 discussed: yes

Criticism : Not really applied

Name of vessel: **THE SANKO VEGA**

Year: 1989 Judge: Wilson J

Citation: (1) SA 182

Division: D&CLD

Subject of case: Claim for damages to goods carried into RSA. Himalaya clause discussed.

AJRA Section:

Decision: Held: Himalaya clause applied and protection granted

Law applied: RDL & UK

To be used:

S6 discussed: yes

Criticism :

Name of vessel: **THE SEA JOY**

Year: 1998 Judge: Thring J

Citation: (1) SA 487

Division: CPD

Subject of case: Carriage - improper loading and stowage. Article III, Rule 2 of Hague-Visby Rules. Date of interest on unliquidated debt.

AJRA Section:

Decision: Held: In cases where carrier liable for loading and stowage then they are liable to shipper and owner for any improper stowage or loading of the cargo. This duty continues even when the bill of lading in respect of the cargo states that the cargo is FIOS, free in out stowed, whereby the shipper is to arrange for loading and stowage of the cargo.

Law applied: UK

To be used: *

S6 discussed: yes

Criticism : no - good example of application of S6

Name of vessel: **THE SNOW DELTA**

Year: 1996 Judge: Selikowitz J

Citation: (4) SA 1234

Division: CPD

Subject of case: Attachment of vessel, Rule 4, effect of leave to appeal on vessel

AJRA Section:

Decision: Held: That successful leave to appeal an order setting aside an attachment does not revive the attachment and the vessel may sail. Application granted.

Law applied: RSA

To be used:

S6 discussed: no

Criticism : no

Name of vessel: **THE SNOW DELTA**

Year: 1997 Judge: Foxcroft J

Citation: (2) SA 719

Division: CPD

Subject of case: Application to attach charter's rights

AJRA Section:

Decision: Held: Incorporeal rights of a charterer are found where the person who exercises the right is located and not where the vessel is located. Attachment dismissed * overturned on appeal.

Law applied: RSA

To be used:

S6 discussed: no

Criticism : no mention of section 6 made.

Name of vessel: **THE SNOW DELTA**

Year: 1998 Judge: Thring J, King DJP, Viljoen AJ

Citation: (3) SA 636

Division: CPD

Subject of case: Charterparty - time charter

AJRA Section: 3(2)

Decision: Held: Time charterer holds rights against the owner of a ship and may enforce them through an action in personam against the vessel within the courts jurisdiction as only as jurisdiction has been founded through an attachment. These rights can then be attached to found jurisdiction in an action against the time charterer. Appeal upheld and order to confirm attachment of Respondents rights confirmed.

Law applied: RSA

To be used:

S6 discussed: yes

Criticism : no

Name of vessel: **THE SPARTIAN-RUNNER**

Year: 1991 Judge: Shearer J, Howard JP, Booysen J

Citation: (3) SA 803

Division: NPD

Subject of case: Declining to excercise juisdiction - s 7(1)(a)

AJRA Section: 7(1)(a), 2(1)

Decision: Held: Respondent failed to show why UK Court should not be used as in the contract.

Law applied: UK and RSA

To be used:

S6 discussed: no

Criticism : no

Name of vessel: **THE STAVROULA**

Year: 1987 Judge: Burger J

Citation: (1) SA 75

Division: CPD

Subject of case: Associated Ships - s 3(6) - test

AJRA Section: 3(6), 5(3)

Decision: Held: Respondents failure to deal with allegations made by Applicant had to be taken into account when determining whether a prima face case had been made out and even though hearsay evidence was given by Applicant, failure to deny made it hardly unlikely that it was untrue evidence. Arrest confirmed.

Law applied: RSA

To be used: $

S6 discussed:

Criticism :

Name of vessel: **THE SWEET WATERS**

Year: 1995 Judge: Hurt J

Citation: (2) SA 270

Division: D&CLD

Subject of case: Right of Appearance in Admiralty Court, definition of rules

AJRA Section: 1(1)

Decision: Held: Right to present one's own case in a court of law does not apply to a juristic person as they cannot excercise this right. The procedural requirement that a company be represented in the High Court by a legal representative admitted to practice in that Court is not unconstitutional.

Law applied: RSA

To be used:

S6 discussed: no mention

Criticism : no criticism

Name of vessel: **THE TAO MEN**

Year: 1996 Judge: Foxcroft J

Citation: (1) SA 559

Division: CPD

Subject of case: Arrest & Ownership

AJRA Section: 3(4)

Decision: application to set adise arrest dismissed

Law applied: RSA

To be used: * 563 - 565

S6 discussed: no

Criticism : no mention of UK law yet dealing with the transfer of ownership.

Name of vessel: **THE TATIANA**

Year: 1989 Judge: ThirionJ

Citation: (2) SA 515

Division: D&CLD

Subject of case: Definition of Maritime Claim, Ranking - s 11(1)(c) and 11(1)(d)

AJRA Section: 11(1)(c), 11(1)(d), 1(1)(s), 1(1)(x), 9, 11(4)(c), 11(4)(d), 11(5)(d)

Decision: Held: Claim for pension fund monies a maritime cliam ion term sof s 1(1)(ii)(u), respondents claim for arising out of employment of seamen in temr sof s 1(1)(ii)(n). Purpose of arrest in action in rem to give plaintiff security in respect of claim and to establish Court's jurisdiction over the property. No need for further arrest as prerequisite to further claimants; introduction to procedings for distribution of the fund.

Law applied: RSA with UK references

To be used:

S6 discussed: no

Criticism :

Name of vessel: **THE TIGR (NO.1.)**

Year: 1995 Judge: Farlam J

Citation: (4) SA 49

Division: CPD

Subject of case: Towage Contract, Himalaya clause, Jurisdiction

AJRA Section:

Decision: Held: Barge Owner entitled to rescind contract with tug ownercontained in Himalaya clause as consequence of misrepresentations. Himalaya clause designed to minimise exposure of servant, agent or subcontractor of carrier from liability which carrier exempted from. In terms of rule 6(3) of Admiralty Rules, owner entering appearance to defend action in rem not regarded as having submitted to in personam jurisdiction so applicant then not precluded from attaching the vessel to found or confirm in personam jurisdiction.

Law applied: UK

To be used:

S6 discussed: yes

Criticism :

Name of vessel: **THE TIGR (NO.2. APPEAL)**

Year: 1998

Citation: (3) SA 861

Judge: Scott JA, Hefer JA, Nienaber JA, Marais JA, Schutz JA

Division: SCA

Subject of case: Joinder of third party, s 5(1) - attachment of property to join third party, hearsay evidence.

AJRA Section: 5(1), 6(3)

Decision: Held: Portnet was entitled to an attachment order and following attachment of Tigr and her bunkers, became entitled to join Caspian and Ultisol as third parties.

Law applied: RSA

To be used:

S6 discussed: no

Criticism : no - would have been nice for SCA to at least mention law to be applied given the English Law part of the towage contract.

Name of vessel: **THE TIGR (NO.2.)**

Year: 1996 Judge: Thring J, Selikowitz J, Berman J

Citation: (1) SA 487

Division: CPD

Subject of case: Ownership of Bunkers

AJRA Section:

Decision: Held: Admiralty Court should apply principles of lex situs in determining passing of ownership in movable property when case involves a foreign element and a conflict of laws exist. Bunkers properly attached and owned by Applicant - appeal dismissed.

Law applied: UK & RDL

To be used: * 492-493

S6 discussed: yes

Criticism : at 498D where meant to be dealing with UK law refers to RSA books. English law applied to transfer of ownership issue and RDL to attachment - good application but confusing for practice.

Name of vessel: **THE TIGR (NO.3.)**

Year: 1998

Judge: King J, Selikowitz J, Farlam J

Citation: (4) SA 206

Division: CPD

Subject of case: Sale of arrested ship

AJRA Section: 9(1)

Decision: Held: Court will not order sale of vessel following attachment if owner shows that grounds of arrest do not ocnstitute a good cause of action. Appeal upheld and application for sale of MT Tigr dismissed

Law applied: RSA

To be used:

S6 discussed: no

Criticism : no - good use of UK and Australian law as well as RSA law

Name of vessel: **THE TIGR (NO.4.)**

Year: 1998 Judge: King DJP

Citation: (4) SA 740

Division: CPD

Subject of case: Forum Non Conveniencs (s7)

AJRA Section: 7(1)

Decision: Special Plea re Juris dismissed - "This court has applied English Admiralty law for over 100 years; and is in fact obliged to do so - see s6 of the act and Marcard Stein 95(3)663(A)@667C; this Court and the practitioners who appear before it in shipping matters are experienced in the field and the procedures which it follows are unobjectionable.(744I-J)

Law applied: RSA

To be used: * 744I&J

S6 discussed: yes

Criticism : no

Name of vessel: **THE TRIENA**

Year: 1998 Judge: Meskin J

Citation: (2) SA 938

Division: D&CLD

Subject of case: Arrest - application for leave to appeal

AJRA Section: 5(3)

Decision: Held: That where a vessel was arrested and the decision set aside, where an application for leave to appeal had been made, vessel cannot leave and is effectively under arrest.

Law applied: RSA

To be used:

S6 discussed: no

Criticism : no

Name of vessel: **THE UNISINGAPORE AND THE UNIWORLD**

Year: 1987 Judge: Hoberman AJ

Citation: (2) SA 491

Division: CPD

Subject of case: Seaman's claim for wages, hearsay evidence

AJRA Section:

Decision: Held: Even in case where seamen had deposed to affidavit themselves it would have contained hearsay evidence due to nature of questions asked. Affidavits in reply to interrogatories could have hearsay evidence. Order giving leave to administer interrogatories required seamen to reply on oath. Attorney's affidavit therefore not complying with order. Nothing in Vice-Admiralty rules allowing Court to dismiss action due to failure to comply with order to answer interrogatories. Even if held power would only be excercised if failure due to contumacy. Court refuised to dismiss seamen's application.

Law applied: RSA with UK reference

To be used:

S6 discussed: no

Criticism :

Name of vessel: **THE VALLABHBHAI PATEL**

Year: 1994

Citation: (1) SA 550

Division: AD

Judge: Corbett CJ, Botha JA, Milne JA, Goldstone JA, Van den Heever JA

Subject of case: claim for freight against governemnt of India. attachment of ship in terms of 3(2)(b) of AJRA. Piercing the corporate veil, applicable law

AJRA Section: 3(2)(b), 6(1)

Decision: Company is a separate legal persona different from a government even if the gov is the shareholder and excercises control over the company. corporate veil not pierced and appeal allowed

Law applied: RSA

To be used:

S6 discussed: yes

Criticism :

Name of vessel: **THE WAVE DANCER**

Year: 1996

Citation: (4) SA 1167

Division: AD

Judge: Scott JA (MIN), Howie JA, Olivier JA (MAJ), Van Heerden JA, Smallberger JA

Subject of case: Marine insurance - unexplained loss, jurisdiction

AJRA Section: 7(2)

Decision: Held: With unexplained loss it is up to the insured to demonstrate that the loss was not as a result of actions excluded in the policy. On the facts Appeal allowed, (Minority dissenting)

Law applied:

To be used:

S6 discussed: yes

Criticism : yes see remarks made by Olivier in the Maj - can proceed in ordinary court if issue of juris not raised.

Name of vessel: **THE YU LONG SHAN (NO.2. A QUO)**

Year: 1997 Judge: Niles-Duner AJ

Citation: (1) SA 629

Division: D&CLD

Subject of case: Charterparty - claim arrisen before 1 July 1992 amendments and in absence of allegation that charter by demise, not sufficient allegations to support associated ship claim.

AJRA Section: 1(1), 3(7)

Decision: Held: The arbitration award resulting from a maritime claim does not generate a new cause of action. Exception upheld

Law applied: RSA

To be used:

S6 discussed: no

Criticism : no - also held that act doesn't have retroactive effect

Name of vessel: **THE YU LONG SHAN (NO.1.)**

Year: 1997 Judge: Hurt J

Citation: (2) SA 454

Division: D&CLD

Subject of case: Security - s 5(2) - for claim in reconvention

AJRA Section: 5(2), 5(3), 3

Decision: Held: Defendant who holds a counterclaim is entitled to security where a prima facie case has been made out. Security will redily be ordered where the defendant has had to litigate in RSA because of an arrest or attachment in RSA.

Law applied: RSA

To be used: $

S6 discussed: no

Criticism : no- well reasoned judgement on security - crit of MV Leresti judgement

Name of vessel: **THE YU LONG SHAN (NO.2. APPEAL)**

Year: 1998

Judge: Marais JA, Smallberger JA, Eksteen JA, Nienaber JA and Van Coller AJA

Citation: (1) SA 646

Division: SCA

Subject of case: retroactive application of act, whether arbitration award fresh cause of action, award could not be enforced before ammendments to act - unlikely that leg intended retroactive effect

AJRA Section: 1(1)(aa), 3(7)(c)

Decision: Held that the a quo judgement correct. Amendment of act not retroactive. The award could not have been a cause of action before amendment so one cannot rely on it. Exception upheld.

Law applied: RSA

To be used:

S6 discussed: no

Criticism : no

Name of vessel: **THE ZLATNI PIASATZI (NO.1.)**

Year: 1994 Judge: Williamson J

Citation: (2) SA 688

Division: CPD

Subject of case: Charterparty and arrest of cargo, Action in rem

AJRA Section: 3(4)

Decision: Held: Charterparty grants control of cargo on ship to shipowner but does not stop charterer from excercising lien over the cargo as enforced over the owner of the cargo. Arrest upheld.

Law applied: RSA with Uk reference

To be used:

S6 discussed: no

Criticism :

Name of vessel: **THE ZLATNI PIASATZI (NO.2.)**

Year: 1997 Judge: Conradie J

Citation: (2) SA 569

Division: CPD

Subject of case: Security - s 5(3). Increase of security.

AJRA Section: 5(3), 5(2), 3(10), 3(5).

Decision: Held: Security can only be called for the the value of the res and no more unlike in UK law (cf. Rule 6(3)) Where a security arrest has occurred in terms of s 5(3) one may not later increase the amount using s 5(2)(b). Application dismissed.

Law applied: RSA

To be used:

S6 discussed: no

Criticism : no

Name of vessel: **THE ZYGOS (NO 2)**

Year: 1985 Judge: Freidman J (G)

Citation: (2) SA 486

Division: CPD

Subject of case: Associated Ship Arrest - s 3

AJRA Section: 3(6), 3(7), 4

Decision: Held: Interpretation of 3(6) and 3(7) cannot be assisted by 3(4) of UK Admiralty Justice Act. To porve associated must show ownership or control over both vessels. It is a factual question whether this is present. It is competent for court to order a hearing in terms of s 4 of AJRA for viva voce evidence. Because of nature of disputes ,Court may excercise its discretion and direct a peregrinus to give oral evidence in terms of rules of court.

Law applied: RSA with UK references

To be used: $

S6 discussed: no

Criticism :

Name of vessel: **THE ZYGOS (NO1)**

Year: 1984 Judge: Friedman J (G)

Citation: (4) SA 444

Division: CPD

Subject of case: Arrest of associated ship and examination of maritime claim.

AJRA Section: 1(1)(j), 1(1)(ff), 3(7)

Decision: Held: Arbitration award did not extinguish a claim for damages. It did not matter that the association ceased before the arbitratral awards were made. Security could be granted and the defence of the exceptio rei judicatae could not be used.

Law applied: RSA with UK ref

To be used: $

S6 discussed: no

Criticism :