

## SHIP MORTGAGE IN NIGERIA: AN ANALYSIS OF CONTEMPORARY ISSUES

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### ABSTRACT

*The true value of the mortgage is the assurance that, in the event of the borrower having no money to repay the loan, there will be an asset which allows him to claim rights over property and which will allow him to realise the full amount that was loaned. Consequently, a ship can be used to secure the release of funds as collateral. The hub of this work is largely on the legal position and issues in ship mortgage in Nigeria with correlated references to ship mortgage in other jurisdictions. The underlying aim is to identify issues in mortgage of ship, in a bid to ascertain the importance and protection, or otherwise, of a major financing option utilized in the Nigerian shipping industry. This paper identified that there has developed a general rule that the validity and priority of mortgages are determined by flag law as well as modern principles. From creation to perfection, discharge, and priority of claim issues, mortgagees of ships are faced with several issues whether customary or alien; some of which are common to most jurisdictions, and other concerns; peculiar, based on legal and non-legal frameworks and which more often than not, lead to disputes over property in the ship, claims and settlements.*

Keywords: Mortgage, Ship, Security, Property rights

### 1 INTRODUCTION

It is common knowledge that maritime businesses are usually capital-intensive ventures.<sup>1</sup> Thus engaging in maritime business or ship ownership may require the borrowing of funds. On the other hand, an owner of ship or other roving assets may need funds for other investments and may be willing to borrow such funds without the use of realty as collateral, but the lender is unwilling to lend without a substantial security, and rightly expressed is the fact that:

The potential consequences for the lender are obvious and, especially where the amount of the loan is substantial .... a lender will normally refuse to accept the risk of exclusive reliance on the personal obligation of the borrower. Instead, he will require the borrower to provide some security for the repayment of the loan. Such security may be personal or real.<sup>2</sup>

The principal security which mortgagee of a ship looks into, *inter alia* are a first priority mortgage over the ship or ships concerned, an assignment of all insurances of that ship, an assignment of all earnings of the ship, including of a particular charter party, and any compensation of the ship, a personal or parent company guarantee and indemnity, a charge over or pledge of the shares of the borrower<sup>3</sup> etc. In this article, basic concepts shall be defined in line with research context.

#### a) Ship

Ship under s 25 Canada Marine Liability Act (MLA) 2001 refers to 'any vessel or craft designed, used or capable of being used solely or partly for navigation, without regard to method or lack of propulsion.'<sup>4</sup> Ship in Canada includes a ship in the process of construction, from the time that it is capable of floating. A ship is a roving asset. Roving assets can be described as property not physically attached to land, and capable of mobility. They are properties in the form of mobile objects used for transportation. This will include assets such as Ships, Aircrafts, Railway Rolling Stocks<sup>5</sup> and Space Assets. They are moveable assets made for, and capable of travelling.

Ship is generally any structure whether completed or in the course of completion, launched and intended for use in navigation and not propelled by oars.<sup>6</sup> It includes any boat, vessel, battery or craft, whether wholly or partly constructed, which is intended

<sup>1</sup> Kashimana-Tsumba, 'Resolving Maritime Disputes in Nigeria.' [2013] (1) *NIALS Maritime Law Journal*; 166 at 167

<sup>2</sup> Gravells, N., *Land Law: Text and Materials* (Sweet & Maxwell, 1999) 807

<sup>3</sup> Harwood, S., *Shipping Finance* (3<sup>rd</sup> ed. Euromoney Institutional Investor Plc. 2008) 31.

<sup>4</sup> s 2 HK MSO 1990; 1 US Code s3, 46 US Code s115; Hay, D., *Words and Phrases Legally Defined* Vol 2 (4<sup>th</sup> ed, L-Z LexisNexis Butterworths, 2007) 972; *Ecodrill (Nig.) Ltd v A.B.I.R.* (2015) 11 NWLR (Pt 1470) 303

<sup>5</sup> Rolling Stock includes waggons, trucks, carriages of all kinds and locomotive engines used on railways.

<sup>6</sup> *PandurongaTimblo Industries v Union of India* (1992) 2 SCC 635; *Steedman v Scofield* (1992) 2 Lloyd's Rep 163; *Perks v Clarks* (2001) 2 Lloyd's Rep 431; In *R v Goodwin* (2006) 1 Lloyd's Rep 432, the court held that a jetski is not a vessel because it is not seagoing. Navigation under the act doesn't mean having fun on the water without the goal of going anywhere.

to float or is capable of floating on water. It also means a vessel of any type whatsoever not permanently attached to the seabed and includes dynamically supported craft, submersibles, or any other floating craft.<sup>7</sup>

**b) Security**

Aiyar<sup>8</sup> describes a security as anything that makes the money more assured in its payment or more readily recoverable as distinguished from e.g. a mere IOU which is only evidence of a debt. The word is not confined to a document which gives a charge on specific property but includes personal securities for money. The concept of security varies widely from jurisdictions.<sup>9</sup> Essien opined that in every security transaction, there is both a contract for security and the security interest created thereunder.<sup>10</sup> Generally, the financial system rests on hidden foundations of property rights, rule of law, basic political order, and predictable legal mechanism for debt enforcement.<sup>11</sup> Whatever affects the financial system negatively will likewise afflict the availability of credit within that system.<sup>12</sup>

**c) Mortgage**

An essential feature of a mortgage is that it is only a security transaction. Thus, the mortgagee is deemed not to be the owner of the ship in ship mortgage.<sup>13</sup> A mortgage is referred to as a disposition of property as security for a debt. It may be effected by a demise or sub demise of land, by a transfer of chattel, by an assignment of a chose or thing in action, by a charge on any interest in real or personal property or by an agreement to create a charge, for securing money or money's worth. The security being redeemable on repayment or discharge of the debt or other obligation.<sup>14</sup>

Lindley M.R described mortgage as a conveyance of land, or an assignment of chattels as a security for the payment of a debt or the discharge of some other obligation for which it is given.<sup>15</sup> This description brings out the essential features of a mortgage; the provision of security by a transfer of property rights. Mortgage of a roving asset such as a ship is a common way of financing its construction or purchase, or provision of security for the repayment of a loan.<sup>16</sup>

**2 MORTGAGE OF SHIP**

Generally, a ship may have one, two or several owners, and a mortgage may be taken over all the shares or over one or more shares in the ship. It is usually shares in the registered ship that are mortgaged. The mortgagor takes possession of the shares by giving notice to the managing owner of the ship, putting the mortgagee in the shoes of the mortgagor.<sup>17</sup> In the UK, a vessel under construction cannot be registered under the Merchant Shipping Act (MSA) 1995, and as a result no mortgage of it can be registered under the act, until the vessel is complete and is accompanied by a builder's certificate as evidence of title.<sup>18</sup> Notwithstanding this, a valid legal or equitable mortgage, may still be taken in respect of a vessel under construction.

Mortgage in a ship or a share in a ship may be legal or equitable and may give rise to maritime claims under the jurisdiction of the Federal High Court in Nigeria.<sup>19</sup> It must be recognised that a ship is not merely a physical asset but also a legal person and an entity in law which can sue and be sued in her own name to protect or enforce her legal rights. It bears a name, which along with other particulars of the ship are registrable in a chosen port of registry.<sup>20</sup> Such registration confers nationality on the ship and

<sup>7</sup> Biswas, A. R. *Encyclopaedic Law Dictionary: Legal and Commercial* (3<sup>rd</sup> ed. Wadhwa and Company, 2008) 1343; Hay (n5) 970; Garner, B. A., *Black's Law Dictionary* (9<sup>th</sup> ed. Thomson Reuters, 2009) 1503; s 127 of the Nigerian Ports Authority Act Cap. N126 Laws of the Federation of Nigeria 2004. By s 445, offshore drilling rigs do not fall within the definition of a vessel under the Nig. Merchant Shipping Act (MSA) 2007 which governs ship registration. Cf., s 56 of the Coastal and Inland Shipping (Cabotage) Act of 2003; s 26 of the Nigerian Admiralty Jurisdiction Act (AJA) 1991; per Atkinson J. in *Polpen Shipping Co Ltd v Commercial Union Assurance Co. Ltd* (1948) 1 KB 161

<sup>8</sup> Aiyar, K. J., *Judicial Dictionary* (14<sup>th</sup> ed. Butterworths India, LexisNexis, 2007) 978

<sup>9</sup> Hapgood, M., *Paget's Law of Banking* (13<sup>th</sup> ed. LexisNexis Butterworths, 2007) 3

<sup>10</sup> Essien, E. E., *Law of Credit and Security in Nigeria* (2<sup>nd</sup> ed. Top Law Publishments Ltd. 2012) 53; *Bristol Airport Plc. v Powdrill* (1990) Ch. 744, 752; Bray, J., *Unlocking Land Law* (Hodder & Stoughton Educational, 2004) 353

<sup>11</sup> ss 2, 5 Nig. AJA 1991; Olawoyin A. A.: *Contemporary Developments in Nigerian Maritime Law*. [2014] (2) *NIALS Maritime Law Journal*; 1 at 23

<sup>12</sup> Onamson, F. O., *Law and Credit Protection in Nigeria* (Malthouse Press Limited, 2017) 2

<sup>13</sup> s 58(1) Nig. MSA 2007; s 68 CSA 2001; sch 1, para 10 UK MSA 1995; s 46 Hong Kong MSO 1990

<sup>14</sup> Hay (n4) 241

<sup>15</sup> *Santley v Wilde* (1899) 2 Ch. 474

<sup>16</sup> E. Gold and Others, *Maritime Law* (Irwin Law, 2003) 242

<sup>17</sup> To be entitled to mortgagors share of earnings and other distributions, chargeable against the share. See D. Osborne and others, *The Law of Ship Mortgages* (2<sup>nd</sup> ed. Informa Law from Routledge, 2017) 63

<sup>18</sup> Parsons, T. N., *Lingard's Bank Security Documents* (5<sup>th</sup> ed. LexisNexis, 2011) 451

<sup>19</sup> ss 1(1), 2(2) AJA 1991; See Meeson, N., *Ship and Aircraft Mortgages* (Lloyds of London Press, 1989) 392

<sup>20</sup> ss 21- 27 Nigerian MSA No.27 2007. s 17(2) (b) of the MSA prescribes that a person shall not be entitled to be registered as owner of a fractional part of a share in a ship; but any number of persons not exceeding five may be registered as joint owners and of a ship or a share in them. s 53 CSA 2001- 64 Parts, *compare*, s 12 (a) Hong Kong MSO 1990- Any number of shares or parts.

entitles it to fly the national flag of that country where it is registered. It also confers the right to diplomatic protection and consular assistance.<sup>21</sup>

Mortgage of a ship is a form of modern security wherein the ship owner or holder of a share in a ship, gives an interest in such ship, as security for a loan, via a deed and same is discharged upon repayment of the money advanced.<sup>22</sup> The term common law mortgage of a ship is used to refer to a legal mortgage *i.e.*, a mortgage involving a transfer of legal title. Where a legal mortgage of a registered ship can only be created by registration in the statutory form, a common law mortgage can only be created in respect of an unregistered ship.

Thus an unregistered mortgage of a registered ship is not common law mortgage but an equitable mortgage; the primacy of statutory mortgage being registration.<sup>23</sup> Legal systems of the former British Empire have statutory mortgage systems based on prescribed forms under the Act.<sup>24</sup> However there exists preferred mortgages systems applicable in the US, not based totally on English law, which allow the parties to dictate their own form of mortgage.<sup>25</sup> This practice has led to other jurisdictions - including the UK, Canada and Nigeria adopting a separate agreement known as a Deed of Covenants, or Mortgage Deed.<sup>26</sup> Omaka expressed that an action in rem is an action that can lie against the ship,<sup>27</sup> and mortgage claims remain statutory liens.

The ship mortgage practice in the US is referred to as Preferred Ship Mortgage. Preferred mortgage is a type of mortgage with a lien status. In the occasion of default, it is given a certain priority. A preferred ship's mortgage is recorded against a vessel documented. The vessel is protected under the Ship's Mortgage Act of 1920. A preferred ship mortgage is defined as a mortgage that includes the whole vessel and is filed in compliance with 46 USC ss 31321, 31322.<sup>28</sup>

The legal framework for credit protection is concerned with protecting the creditor against those threats that an informed, rational creditor would not accept when going into a debt transaction. In Nigeria, despite the expectation of seeming legal components, there is high incidence of credit risk, as creditors, the banks and other financial institutions and mortgagees continue to be direct recipients of managerial excesses, debtor misbehavior, inadequate laws and unstable local and international policies.<sup>29</sup>

Unlike aviation, the shipping world is yet to have a global regime governing the challenges faced with respect to recognition and enforcement of mortgages.<sup>30</sup> Conflict of laws issues relate also to enforcement of Foreign Judgments in a jurisdiction. Other issues in ship mortgage include *inter alia* identifying existing interests in a ship, ship valuation, proper documentation and registration of ship and mortgage, covenants and breach of covenants, problems with equitable interests, conflict of laws, enforcement of rights, adjudicatory proceeding, process of arrest of ship, sale of ship, priority of mortgagee's interest, transfer of ship mortgage<sup>31</sup>, self-help remedy, and discharge of mortgage.

### 3 LEGAL CONCERNS IN MORTGAGE OF SHIP

By its nature, ship mortgage as security differs from other types of mortgages as ships naturally move between jurisdictions, but there exists certain risks in ships as security which set ship mortgages apart from other property of comparable value and commercial worth. For instance, some privileged claims<sup>32</sup> could have a higher ranking over mortgage against the ship, a ship is

<sup>21</sup> By article 90, 91 of the 1982 UN Convention on the Law of the Sea (UNCLOS), ships have the nationality of the state whose flag they are entitled to fly, and there must be a genuine link between the state and the ship. See Harwood (n3) 3

<sup>22</sup> Cousins, E. F., *The Law of Mortgages* (3<sup>rd</sup> ed. Thomson Reuters Limited, 2010) 336

<sup>23</sup> Osborn and others (n17) 43, 63; Harwood (n3) 126

<sup>24</sup> English MSA 1995, Nigerian MSA 2004; 2007, Canada SA 2001, Indian MSA 1958 and Merchant Shipping (Registration of Indian Ships) Rules 1994, Hong Kong Merchant Shipping (registration) Ordinance Cap. 415 1990

<sup>25</sup> Liberia, Greece, Cyprus, USA, Panama etc.

<sup>26</sup> Harwood (n3) 126

<sup>27</sup> C. A. Omaka; *Fundamentals of Maritime, Admiralty and International Water Law* (Princeton & Associates Publishing Co. Ltd, 2018) 353

<sup>28</sup> See the Commercial Instruments and Maritime Liens Act, 46 USC ss 31301 – 31343; *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) The recodified Ship Mortgage Act, ss 31301-30, consistently refers to the mortgage lien as a preferred mortgage lien, or a mortgage lien. S 31325 expresses that a preferred mortgage is a lien on the mortgaged vessel. The Act does not refer to it as a maritime lien. Undeniably, S 31326 recognizes that a mortgage lien is not a maritime lien, but based on its priority ranking, it is also described as a lien.

<sup>29</sup> Onamson (n12) 7

<sup>30</sup> P. Coggins and others, 'Current status over the recognition of registered ship mortgages in Brazil' (July 2017) *Norton Rose Fulbright* <<http://www.nortonrosefulbright.com/knowledge/publications/154792/current-status-over-the-recognition-of-registered-ship-mortgages-in-brazil>> accessed 20 September, 2017

<sup>31</sup> In Nigeria, if the mortgagee transfers its interest to another party, a copy of the instrument creating the transfer must be filed at the NSRO in accordance with section 58(2) of the MSA. Upon receipt of the transfer instrument the Registrar shall record the transfer by entering in the register the name of the transferee as the mortgagee. Where the mortgagor is a company and the mortgage is registered at the CAC, the instrument effecting the transfer shall also be filed at the CAC: s 197(1) (2) CAMA 2004; para 11, sch 1 UK MSA 1995

<sup>32</sup> *United States v ZP Chandon* 889 F. 2d. 233 (9<sup>th</sup> cir. 1989)

of a fluctuating but ultimately depreciating capital value, it does not automatically generate income yet it incurs heavy operating costs whether kept idle or running, it is subject to the perils of the sea, and conflict between the operating interests (of ship owners, and crew) and financial interests of lenders continue to pose some difficulty over ship mortgage in Nigeria. A mortgagee who takes ship as a form of security would not only be interested in its affairs, but on enforcement upon breach of the mortgage contract, thus parties to a ship mortgage in any jurisdiction are faced with several issues. This paper shall discuss a select few.

#### a. Documentation and Registration

A ship registered in Nigeria may be the subject matter of a mortgage within or outside Nigeria. Upon registration of ship, the vessel is issued with a Nigerian registration certificate, acquires the status of a Nigerian ship and is entitled to fly the Nigerian flag. Legal ownership of a vessel registered under the laws of Nigeria can be established with the vessel's certificate of Nigerian registry issued by the Nigerian Ship Registration Office (NSRO). The NSRO is a department within the Nigerian Maritime Administration and Safety Agency.

A person can determine whether there are security agreements, liens, charges or other encumbrances granted by a vessel owner by conducting a search at the NSRO. S 26 of the MSA 2007 requires the NSRO to keep a record of liens, mortgages and charges existing over a vessel. This can also be determined by conducting a search at the Corporate Affairs Commission (CAC) if the vessel owner is a company.<sup>33</sup> Ship mortgages in Nigeria are in the form of a statutory mortgage. The obligations secured by a ship mortgage may be a loan or other valuable consideration. A standardized mortgage form obtainable from the NSRO is accompanied by the deed of mortgage.

The NSRO issues a mortgage certificate upon registration. The register of mortgages is maintained by the Registrar of Ships and contains particulars of the mortgagee and details of the mortgage debt. Disclosure in writing to the mortgagee of the existence of any maritime lien, prior mortgage, or other liability in respect of the ship to be mortgaged in which he is aware of prior to the execution of any mortgage is required of a mortgagor by law.<sup>34</sup>

There is no legal requirement to register a ship under the UK ship registry but from a lender's perspective, registration is required in order to ensure that a mortgage can be duly registered. Ship mortgage in the UK is created under the Merchant Shipping Act (MSA) 1995. Pursuant to the 1988 MSA registration was no longer mandatory, thus under the 1995 MSA the test is that a majority of the shares in the ship must be owned by someone with a British connection, opening the ship's registry to all comers and creating the common expression of 'flag of convenience' as obtainable in countries with the largest fleet. So given that in the UK a mortgage over a vessel cannot be registered unless the vessel is registered, a registered mortgage over a vessel under construction is unfeasible.<sup>35</sup> In USA Documentation of a vessel<sup>36</sup> under US law requires a certificate of documentation to be issued. Mortgage of a documented vessel or a part must be filed with the secretary of commerce to be valid.<sup>37</sup>

The statutory form contains little more than a bare charge and needs to be supplemented by a deed of covenants.<sup>38</sup> Each flag State has a duty to produce documentation as proof of a ship having the right to fly a State flag.<sup>39</sup> This principle was affirmed in *The Merritt* case in which the U.S. Supreme Court stated that '*...documents a vessel carries furnish the only evidence of her nationality.*'<sup>40</sup> The most crucial benefit of registration for the mortgagee is obtaining priority, with priority ranking solely decided by the date of registration.<sup>41</sup>

Cousins<sup>42</sup> expressed that such registered mortgages must be registered in the order in which they are produced to the registrar for the purposes of registration, and the rights of unregistered mortgages are postponed to those of registered mortgages.<sup>43</sup> The law

<sup>33</sup> s 197(1) of the Companies and Allied Matters Act (CAMA) Cap. C20 Laws of the Federation of Nigeria 2004 - within 90 days. *Slavenburg's Bank NV v Intercontinental Natural Resources* (1980) 1 WLR 1076, (1980) 1 All ER 95; Harwood (n3) 32

<sup>34</sup> Pursuant to ss 54, 55(1)(2)(3) Merchant Shipping Act 2007 providing for statutory ship mortgage registration; 46 US Code s 31323

<sup>35</sup> See para 9, sch 1 UK MSA 1995; regulations 7,8 UK Merchant Shipping (Registration of Ships) Regulation 1993 No 3238; s 49 CSA 2001

<sup>36</sup> 46 USC s 106

<sup>37</sup> 46 USC ss 31321(a)(1)(a), 31322

<sup>38</sup> Parsons (n18) 450; Mandaraka-Sheppard, A., *Modern Maritime Law Vol. 2: Managing Risks and Liabilities* (3<sup>rd</sup> ed. Informa Law from Routledge, 2013) 176. Unregistered ships are not common in modern times but *British Credit Trust Ltd v The Owners of The Shizelle (The Shizelle)* (1992) 2 Lloyd's Rep 444 is an example of the risk to an innocent purchaser who buys an unregistered ship which may be subject to an unregistered mortgage with no public register for it. In this case, the legal mortgage was enforceable against the purchaser.

<sup>39</sup> The Geneva Convention on the High Seas 1958, article 5(2); UNCLOS article 91(2).

<sup>40</sup> *The Merritt* (1873) 84 U.S. 582 at 586.

<sup>41</sup> *National bank of Nigeria Ltd v Okafor (Supra)*; See ss 54, 57 Nig. MSA 2007; ss 65, 67 CSA 2001; Pt VI, ss 43, 44, 45 Hong Kong MSO 1990; para 8, sch 1 UK MSA 1995; s 22 Indian MSA 1958

<sup>42</sup> (n22)

<sup>43</sup> Parsons (n18) 450

allows the creation of successive mortgages to a ship, and priority, notwithstanding any express, implied or constructive notice, shall be in accordance with the date in which each mortgage is recorded in the register.<sup>44</sup> Where such mortgage on a ship is produced to the Registrar at the ship's port of registry, the Registrar is obligated to record the mortgage in the register.<sup>45</sup> Where mortgagor defaults or jeopardises the security, the court in *National Bank of Nigeria Ltd v Okafor Lines Ltd (No. 3)*<sup>46</sup> expressed that the mortgagee of a controlling number of shares may take possession of the ship, using the ship within limits<sup>47</sup> or, may sell her.

#### b. Rights of Parties

A ship mortgage remains the cornerstone upon which lenders build a ship finance transaction, despite the availability of other security.<sup>48</sup> The Mortgagee has right to take possession,<sup>49</sup> power to appoint a receiver,<sup>50</sup> right to charter the vessel out, to repair or alter the vessel, to discharge the master and the crew and appointments and to direct the course of the vessel (to ensure amenable jurisdiction for arrest),<sup>51</sup> to have it sold,<sup>52</sup> and to retain the proceeds of sale to the extent necessary to satisfy the debt and reasonable expenses, right of arrest of vessel etc.

In *NBN Ltd v Okafor Line Ltd (no 3)*<sup>53</sup> the court confirmed the mortgagee's right enumerated above including the right of mortgagee to institute an *in personam* action against the ship owner. A mortgagee has a duty of good faith to an owner or third-party creditors. By virtue of section 58(2) of the MSA 2007, a registered mortgagee has power to sell the mortgaged vessel or a share thereof without notice and give effectual receipts for the purchase money.<sup>54</sup>

A limitation on rights of self-help by a mortgagee is that the powers of sale can only be exercised for the purpose of realizing its security when the mortgagor is in default. Where there are more persons than one registered as mortgagees of the same ship or share, a subsequent mortgagee shall not, except by the order of a court of competent jurisdiction, sell the ship or share in it.<sup>55</sup>

Upon creation of mortgage however, the owner or mortgagor has the right to retain possession and use the vessel without interference from the mortgagee so long as there is no default,<sup>56</sup> and has an owner's right to receive any excess proceeds of sale of the vessel, or the share in it. Mortgagor owes the obligation to insure the ship, to maintain the ship in good condition and repair, to notify the mortgagee, to discharge claims or liens, to ensure legal trading, not to sell or grant a charge on the ship, to ensure prudent charterparty etc.<sup>57</sup>

The effect of delay in admiralty court proceedings or on enforcement of a right challenged in court will depend on the rules of the legal regime of which the court is part.<sup>58</sup> The effect of a time bar may be to destroy the claim or merely to prevent the remedy. The period within which an action must be brought or steps in an action taken may be imposed by statute, by the civil procedure rules or by contract. Delay has several aspects that affect the rights of the mortgagee.<sup>59</sup>

Generally, maritime liens rank above mortgage claims. The jurisdiction of the Federal Court<sup>60</sup> to hear maritime lien claims was considered by the Supreme Court of Canada in *Holt Cargo Systems Inc. v ABC Container line NV (Holt Cargo Systems)*.<sup>61</sup> The

<sup>44</sup> ss 54, 57 MSA 2007; ss 65, 67 CSA 2001; Pt VI, ss 43, 44, 45 Hong Kong MSO 1990; para 8, sch 1 UK MSA 1995.

<sup>45</sup> s 54(2) MSA 2007

<sup>46</sup> (1967) NCLR 285, (1967) 1 NSC 110

<sup>47</sup> To consider the interests of the mortgagor and succeeding mortgagees. *Mercantile Bank & Others v Adalma Tanker and Bunkering Services Ltd* (1990) 5 NWLR (Pt 153) 747; Admiralty Jurisdiction Procedure Rules (AJPR) 2011.

<sup>48</sup> It allows the lender to sell the ship to realize funds to satisfy the debt- see sch 1, para 9(1) English MSA 1995, it enables possession upon default by mortgagor, it gives lender priority over unsecured creditors of the shipowner, and gives lender in rem rights against the mortgaged vessel etc. see Harwood (n5) 125, 127-128

<sup>49</sup> *Marriot v The Anchor Reversionary Co* (1861) 2 Giff 457

<sup>50</sup> N. Meeson and J. A. Kimbell, *Admiralty Jurisdiction and Practice* (4<sup>th</sup> ed. Informa Law and Finance, 2011) 383

<sup>51</sup> Harwood (n3) 136

<sup>52</sup> See Or 16 R 1, 3 Nigerian Admiralty Jurisdiction Procedure Rules 2011

<sup>53</sup> *Supra* (n46)

<sup>54</sup> See s 69(1) CSA 2001

<sup>55</sup> S 58(2) Nigeria MSA 2007

<sup>56</sup> *St. Anthony Seafood's Ltd. Partnership v FV Independence* (2010) FC 634

<sup>57</sup> Mandaraka-Sheppard (n38) 181

<sup>58</sup> Jackson, D. C., *Enforcement of Maritime Claims* (4<sup>th</sup> ed. Informa Professional Ltd. 2005) 281

<sup>59</sup> *Ibid.*, 283.

<sup>60</sup> s 3 AJA 1991; *Mobil Prod. (Nig.) Unltdv Ayeni* (2010) 4NWLR (Pt 1185) 586 C.A.; *Fidelity Bank Plc v The M. T. "Tabora"* (2009) 8 NWLR (Pt 1142) 83 C.A.; *Deros Maritime Ltd v "M.V.C Apapa"* (2015) 1 NWLR (Pt 1439) 51 C. A;

<sup>61</sup> (2001) 3 S.C.R 907. Here, an American creditor had commenced the proceedings in Canada, while the bankrupt shipowner and the trustee in bankruptcy were located in Belgium. Many of the creditors were located in other countries, as were the owner's assets. The only connection to Canada was that the ship was arrested in Halifax. Binnie J. held that the 'real and substantial connection' test must account for the transient nature of ocean-going

importance of jurisdiction and its impact on priorities was illustrated in *Bankers Trust International v Todd Shipyards Corporation (The Halcyon Isle)*<sup>62</sup> where it was held that unless the claim had maritime lien status under Singapore law, the Singapore court would not recognise or enforce it. Accordingly, the mortgagees had priority over the repairer's claim.

This position is contrasted with the decision in *Shipyards Corp. v Altema Compania Maritima S.A. (The Ioannis Daskalelis)*<sup>63</sup> where on almost similar facts; the Supreme Court of Canada took a different approach. Here, the repairers claim had maritime lien status, having arisen in the USA. The ship was arrested and sold in British Columbia, and in that jurisdiction, the repairers' claim did not have maritime lien status. The SC of Canada gave recognition to the maritime lien status of the repairers, although it was acquired under foreign law. The repairers thus had priority over the mortgagees. Thus (favourable) jurisdiction affects the rights of an enforcing mortgagee, as well as a mortgagee.

Parties have the right to sue for remedies and enforcement of their rights. Where the claim is one in respect of a proprietary maritime claim an admiralty action in rem may be brought against the ship or property in connection with which the claim arises. In this instance, the ownership of the vessel is not material.

### c. Conflict of Laws

Matters relating to the creation and perfection of a mortgage are usually governed by the law of the state of registration, as the legal *situs* of the ship but when it concerns matters relating to enforcement, without uniformity in international practices, does it require the law of the state of enforcement? Or treated as substantive (law of the ship's registry, or place of contract), or as procedural and determined by the *Lex Fori*? Could there be a solution to conflicting judicial decisions from different jurisdictions? Even the 1993 Convention<sup>64</sup> leaves unsettled the issue between ship-repairers and mortgagees.

As the 1993 convention is yet to be globally ratified and domesticated, foreign maritime lien holders still depend on their taking necessary steps to enforce the remedies under the law of their contract (substantive) and mortgagee control the jurisdiction to which the ship may proceed, in order to enforce security there. The issue of recognition and enforcement of foreign maritime liens involves conflict of Laws<sup>65</sup> as was the contention in '*The Halcyon Isle*' and '*The Ioannis Daskalelis*'.

But in *Transol Bunker BV v MV Andrico Unity (MV Andrico Unity)*<sup>66</sup> the South African court followed the position in the former case. Conflict of laws problems which arise in respect of maritime securities involve *inter alia*, the issue of whether the security is recognized, the issue of jurisdiction regarding the court's ability to permit the arrest of the vessel and to hear the case, what law should be applied to determine the validity of a foreign security, and should a court recognise a foreign security that would not be recognised under the law of the forum (*lex fori*)? There exists also, the challenge of ranking of securities and which law should determine the priority afforded to the various security interests.

A universal tenet of maritime law is the cardinal importance of the law of the flag. This principle is elaborated in the 1982 United Nations Convention on the Law of the Sea (UNCLOS).<sup>67</sup> The law of the flag has enjoyed a particular status in private international law issues of a maritime nature.<sup>68</sup> Art 87(2) UNCLOS requires that the freedoms of the high seas be exercised by all states with due regard for the interests of other states in their exercise of the freedoms. Under English law, the method of determining priority was governed by the law of the forum (the court)-raising the need for favorable jurisdiction.

Mortgages on foreign-flagged vessels are recognized in Nigeria. The foreign mortgage has the same priority as those on vessels registered under the laws of Nigeria where the mortgage is enforced in Nigeria. As the present focus is on ship mortgages, it is sufficient to note that validity and priority should, in theory, be determined by the law of the state of registration. This approach is justified either by the principle of the freedom of the high seas (where a ship is on the high seas at the time security is created) or by the general rule that flag law should govern ship mortgages (where a vessel has entered the waters of another jurisdiction).

However, as will be seen, these principles are not always applied in practice. Since there is yet no international uniform approach, the international conventions on maritime liens and mortgages having caused no real consensus, the question of where to arrest internationally remains a challenging issue for the mortgagee.<sup>69</sup>

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vessels. Thus, the location of the res in Canada is sufficient to establish the jurisdiction of a Canadian court grounded in rem.

<sup>62</sup> (1981) AC 221, 235, (1980) 3 All ER197.

<sup>63</sup> (1974) SCR 1248, (1974) 1 Lloyd's Rep 174

<sup>64</sup> International Convention on Maritime Liens and Mortgages 1993

<sup>65</sup> Mandaraka-Sheppard (n38) 181

<sup>66</sup> (1989) (2) 325 SA (A)

<sup>67</sup> There must exist a genuine link between the State and the ship. See *Naim-Molván v Attorney-General of Palestine (The Asya)* (1948) A.C. 351; *United States v Marino-Garcia* (1982) 679 F.2d 1373; *Chartered Mercantile Bank of India V. Netherlands India Steam Navigation Co. Ltd* (1883) 10 QBD 521

<sup>68</sup> Abou-Nigm (*infra*) 147, 148

<sup>69</sup> Harwood (n3) 130-131.

#### d. Concerns on Priority of Interests and Claims

Priority of registered mortgages is a matter of registration.<sup>70</sup> In today's maritime claims, the determination of priorities is an equitable jurisdiction.<sup>71</sup> In practice, the court follows the well settled order of priorities<sup>72</sup> and considers whether there are any particular circumstances so that justice require it to disturb that prima facie order, especially where maritime liens and other *in rem* claims are involved.<sup>73</sup> A British ship which is registered may be mortgaged by registered mortgage, as obtainable in Nigeria, Canada, Hong Kong and USA etc.<sup>74</sup> English law priority seems to differ *in rem* and *in personam* claims, creating different rules on registrability and priority consequences.<sup>75</sup>

*In rem* claims gives the mortgagee a special priority status as a statutory lien<sup>76</sup> and between categories of lien, a definitive ladder has been built but uncertainties persist particularly in respect of the relevance of the order of creation of interests and the effect of conducts as between maritime liens, possessory liens, and statutory liens in admiralty, and priority relationship between action *in rem* and *in personam* proprietary interests.<sup>77</sup> Uncertainty about maritime liens has not decreased by legislative inaction, or lack of consideration of them by the courts.<sup>78</sup>

Under English law it is recognized that the ranking of registered mortgages, hypothèques or charges as between themselves, and all matters relating to the procedure of enforcement shall be regulated by the law of the state where enforcement takes place, without prejudice to the provisions of the convention.<sup>79</sup> Despite this, legal mortgagees are faced with the problem of maritime liens ranking over their security<sup>80</sup> and subsequent mortgagees are mortgagees of the equity of redemption, as the legal title to personal chattels cannot be divided. Thus it is impracticable to create a mortgage of ship by demise or sub demise.<sup>81</sup>

The US has its own original ranking system different from other jurisdictions with preferred US ship mortgage liens ranking below preferred maritime liens but above necessaries liens, foreign ship mortgages, contract liens, non-maritime liens and unregistered mortgages.<sup>82</sup> Because ship mortgages give rise to a lien that is enforceable *in rem* in admiralty, the statutory preferred mortgage lien is often confused with a maritime lien.<sup>83</sup>

Because of these different systems of priorities, national conflict of law rules differ radically as between countries, and notably as between the United Kingdom, on the one hand, and the United States and Canada, on the other. As a result of the Privy Council's decision in *The Halcyon Isle*, it is now settled that the *lex fori* alone governs the recognition and ranking of foreign maritime liens in the United Kingdom.<sup>84</sup>

The *Halcyon Isle* has had an unfortunate effect on judicial thinking outside the UK, particularly in some of the countries of the Commonwealth and in some former British colonies, where English admiralty law still prevails<sup>85</sup> e.g., South Africa. Canada has been affected by American thinking in its characterization of maritime claims. Canadian courts have consistently followed *The*

<sup>70</sup> See Meeson (n19) 219; Jackson (n58) 561; *The Bold Buccleugh* (1851) 13 Eng. Rep 884.

<sup>71</sup> See ss 54, 57 NMSA 2007; ss 67(1) CSA 2001; s 45 HK MSO 1990; para 8, sch 1 UK MSA 1995; ss 47, 49 IMSA 1958

<sup>72</sup> In theory the court exercises its discretion afresh in the circumstances of each case. See Meeson (n19) 229

<sup>73</sup> *Ibid.*; *The Pacific Challenger* (1960) 1 Lloyd's Rep 99; Abou-Nigm (*infra*) 145

<sup>74</sup> ...under the UK MSA 1995, and MS (ROS) R 1993, though an unregistered mortgage of a registered ship will be treated as an equitable mortgage. See s 53 HK MSO 1990. The court in '*The Shizelle*' (*Ibid*) held that the statutory power to create equitable interests could not be read to mean that a mortgage of an unregistered ship which would otherwise be legal was converted into an equitable interest.

<sup>75</sup> Jackson (n58) 578-581

<sup>76</sup> *Ibid.*, 582

<sup>77</sup> *Ibid.*, 597

<sup>78</sup> *The Indian Grace (No. 2)* (1998) 1 Lloyd's Rep; Mandaraka-Sheppard (n38) 27

<sup>79</sup> As provided under article 2 of the International Convention on Maritime Liens and Mortgages 1993. See also articles 5, 6, 7

<sup>80</sup> *Ibid.*, article 5

<sup>81</sup> Cousins (n22) 336.

<sup>82</sup> Abou-Nigm, V. R., *The Arrest of Ships in Private International Law* (Oxford University Press, 2011) 139

<sup>83</sup> In *Security Pacific National Bank v. Pacific Pride*, 549 F. Supp 53, 54-55 (W.D. Wa. 1982), the court purported to apply the maritime lien rule to a ship mortgage without acknowledging or discussing that it might not be applicable

<sup>84</sup> *Ibid.*, 13

<sup>85</sup> *Ibid.*, 18; See the Cyprus Supreme Court decision in *Hassanein v. The Hellenic Island* (1989) 1 C.L.R. 406; the New Zealand's Court of Appeal in *Betty Ott v. General Bills Ltd.* (1992) 1 N.Z.L.R. 655; Australia Federal Court decision in *Morlines Maritime Agency Ltd. & Ors v The Skulptor Vuchetich*, 1998 AMC 1727 (Fed. Ct. Aust. 1997); Singapore - *The Andres Bonifacio* (1993) 3 S.L.R. 521 (Singapore C.A.), as well as Malaysia have also referred to *The Halcyon Isle* in recent decisions.

Ioannis Daskalelis in preference to *The Halcyon Isle*, thus standing somewhat alone in comparison with courts in other Commonwealth countries such as Australia, New Zealand, South Africa and Singapore.

**e. Mortgagees Powers under Enforcement**

A lender can enforce his security as soon as the borrower is in default of the mortgage.<sup>86</sup> Most mortgagees are faced with enforcement issues which create various challenges though a ship mortgagee has the principal remedies of possession and right to sell the vessel, as well as the right to sue the mortgagor. Where arisen, mortgagee can either take possession and then sell the ship under its power of sale, or can arrest the ship and apply to court for a judicial sale. Ship mortgage enforcement is for any lender, an option of last resort, as the borrower's default can be resolved by a consensual restructuring of the loan, an orderly open market sale process through brokers, an MOA<sup>87</sup> sale with the borrower's cooperation etc.

**i. Entering into possession.**

Statutory Mortgages as well as Deeds of Covenants give this right to the mortgagee. However by doing so, the mortgagee becomes liable to perform the contracts of the ship owner (e.g., the Charterparty) and also becomes personally liable for all future debts of the vessel.<sup>88</sup> There can also of course be practical difficulties in taking physical possession if for example the ship is not in port at the time or the Master on instructions from the borrower refuses to co-operate.

**ii. Issues in Arrest of Ship.**

Arrest of ship is a provisional measure. The arrest is not by itself a means of security but the mechanism to obtain or enforce such security.<sup>89</sup> In English law arrest is a component part of an action in-rem. Arrest of ship includes in English law, all its attached parts and removal of any part for repair or safekeeping will not result in exclusion from in-rem and arrest liability. The function of arrest as a means of security under English law is simply an early step ensuring physical retention of asset in enforcement process.

On the necessity of admiralty jurisdiction on arrest of ship, the Canadian Supreme Court in *The Capricorn (Antheres) Shipping Corp. v Delmare Shipping and Portland Shipping Co. Inc.*,<sup>90</sup> stated thus:

Ships are elusive. The power to arrest in any port and found thereon an action in rem is increasingly required with the custom of ships being owned singly and sailing under flags of convenience....

A ship can be arrested irrespective of its flag as long as it is within Nigerian territorial waters. Prior to applying to the court for an order to arrest a ship, the applicant must conduct a search of the caveat book to ascertain whether there is a caveat against arrest in force with respect to that ship. Where such a caveat exists, the applicant must inform the court of same. Once an applicant has ascertained that his claim falls within the meaning of a maritime claim as defined by the Act and that there are no caveats registered against the ship, he may commence proceedings by filing an action in rem at the Federal High Court in the judicial division covering the port or area where the ship is located. He may at the same time file an ex-parte application disclosing a strong prima facie case for the arrest of the ship.

If arrest and judicial sale is the mortgagee's preferred or only option, the mortgagee may then have to decide in which jurisdiction(s) to strike. Thus most mortgagees engage in forum shopping by tracking the mortgaged ship over a period until they call at ports in favourable jurisdictions for arrest and sale, or such ship(s) is controlled (or persuaded to sail) to such favourable jurisdictions.

Jackson observed that judicial sale is the final blunt instrument ensuring that the security for judgement obtained by a claimant through arrest is finally reflected in funds.<sup>91</sup> The admiralty jurisdiction of the FHC is well stated in the AJA 1991. The process of applying for the arrest of a ship requires that the claimant possesses a Maritime Claim under s 2 of the Act.

Once the claimant has ascertained that his claim falls within the meaning of a Maritime Claim as listed above, he may commence proceedings against the ship at the FHC (in the judicial division covering the port or area where the ship is located).<sup>92</sup> Arrest of ship is in practice not an enjoyable process for the mortgagee who seems to have no better option in realizing his security, as legal cost, port dues, ship monitoring and maintenance, and depreciation may set in, in addition to often protracted legal proceedings.

<sup>86</sup> Circumstances which include: failure to pay any sum due under the mortgage or loan agreement, failure to observe or perform any of the covenants in the security documents, the ship becoming a total loss, the borrower, guarantor- if any, or any other related party becoming insolvent, a breach of the shipbuilding contract.

<sup>87</sup> Memorandum of Agreement

<sup>88</sup> Generally therefore this is likely only to be a fairly short term remedy to enable the mortgagee to give instructions to the Master to take the vessel to an appropriate jurisdiction for arrest and sale.

<sup>89</sup> Abou-Nigm (n82) 121- 122; Omaka (n27) 379-397

<sup>90</sup> (1997) 1 Lloyd's Rep 180; C. O. Chijioke, *Maritime Law and Practice in Nigeria* (Author House, 2016) 276

<sup>91</sup> Jackson (n58) 427, 433. Arrest differs from seizure as part of an execution of a judgement. Their functions overlap. Arrest procedure was helpfully summarised by Sheen J in *The Jonny Two* (1992) 2 Lloyd's Rep 257

<sup>92</sup> See Or 7, R 1 (1) Admiralty Jurisdiction Procedure Rules (AJPR) 2011; Or 9, R 2 (2), AJPR 2011



### iii. Power of Sale and Foreclosure

Where power of sale is granted and the vessel sold as a result, the mortgagee has a duty to account to the mortgagor for any amount realized in excess of the obligations.<sup>93</sup> Interlocutory sales are permitted in Nigeria. Where the owners of an arrested vessel fails to provide alternative security for release of the vessel within a period of six months from the date of arrest, the court may order a sale of the vessel upon the application of the arresting or any other interested party.<sup>94</sup>

The costs associated with judicial sale are mainly the expenses of the admiralty marshal. The Admiralty Jurisdiction Procedure Rules 2011 provide that the admiralty marshal's expenses from the proceeds of sale. This right of sale is usually expanded by express agreement in the Deed of covenants.<sup>95</sup> For the selling mortgagee, upon arresting in an amenable jurisdiction, a judicial sale is sought rather than selling privately. Judicial sale has the benefit of removing any requirement for any warranties, gives the purchaser a clean title free of liens and other encumbrances; a fact which will reflect on the price, avoids the possibility of a claim for damages based on the best reasonable price obtainable etc.<sup>96</sup>

Foreclosure is essentially the opposite of redemption. In the case of a mortgage of the whole of a ship, a claim for foreclosure would not be advantageous, the more straightforward remedies of possession and sale or arrest and judicial sale being effective. Enforcing a vessel mortgage by way of foreclosure in Nigeria is achieved through an action at the Federal High Court, which is the Nigerian admiralty court.

## 4 CONCLUSION

It is necessary, based on the circumstances of a case, that lien holders be expected to register their interests as required by the various shipping laws as notice of encumbrances. Thus general obligation to register liens, charges and mortgages at the ship registry should strongly apply to maritime liens, to ensure that upon due diligence, a mortgagee may be able to appreciate to a large extent, the true 'value' of its interest in the vessel.

A lender should also consider taking additional forms of security from the owner to further protect itself, as well as carrying out appropriate credit and due diligence checks against the borrower, beneficial owner and any guarantors before agreeing to lend the funds. Just like the UK, Nigeria and some other jurisdictions, mortgages of ships which would otherwise require registration as bill of sale are exempt from the statutory provisions relating to bill of sale.<sup>97</sup>

Where a ship is on international waters, the principle of 'the freedom of the high seas' takes precedence. This principle is one of the longest and best-established principles of international law, and includes the freedom of navigation, fishing, laying of submarine cables and pipelines and over flight. The principle requires that ships on the high seas fall under the exclusive jurisdiction of the flag State.

Parties are encouraged to settle disputes through other modern alternative dispute mechanisms that leave enforcement by arrest as a last resort, as the more time runs, the more parties lose income, resources and incur debt, and depreciation may set in.<sup>98</sup> More proactive approaches including Alternative Dispute Resolution (ADR) mechanisms are encouraged in resolving issues concerning mortgage security over ship. Or 25 R 1 High Court of Lagos State Civil Procedure Rules 2004 makes ADR consideration obligatory whether there exists a contractual clause to that effect or not. The federal high court is expected to include mandatory ADR exponentiation, as protracted litigation discourages investors and creditors from releasing funds in jurisdictions where quick and enforceable solutions are cumbersome.

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<sup>93</sup> *Den Norske Bank Asa V Acemex Management Co Ltd* (2003) All ER 360

<sup>94</sup> Or 9, R 6(2) AJPR 2011, Jurisdiction of district court in sale of vessel under an *in rem* action - 46 US Code, s 31326

<sup>95</sup> Sch 1, para 9(1) English MSA 1995; s 47 (1) HK MSO 1990

<sup>96</sup> Most jurisdictions now conduct hybrid sales, where mortgagee finds purchaser but the sale is carried out through the court. See *Mchugh v Union Bank of Canada* (1913) AC 299; Harwood (n3) 127- 128; *International Marine Banking Co. v Dora (No 2)* (1977) 1 FC 603; *Sea-Tee Fabricators Ltd. v Offshore Fishing Co.* (1985) FC 235; *Brotchie v "Karey T"* (1994) 83 FTR 262.

<sup>97</sup> s 30 (1) Bill of Sale Law of Rivers State of Nigeria Cap. 15 Laws of Rivers State 1999

<sup>98</sup> *Kashimana-Tsumba* (n1) 168-169

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