A COMPARATIVE ANALYSIS OF MARITIME AND STATUTORY LIENS UNDER CANADIAN AND NIGERIAN ADMIRALTY LAW – SUGGESTIONS FOR IMPROVING THE NIGERIAN REGIME

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The difference between li: n and li: en lies in the pronunciation by two different people from the coastal worlds of Canada and Nigeria, but there is more to it than the diction differences.

I) INTRODUCTION

A "ship" is an instrument of the world maritime trade. In the course of undergoing her primary assignment, it is possible she would offend a natural or artificial person. Alternatively, though certain benefits have been conferred on her, she may fail to discharge her obligations. In these instances, a maritime claim may arise against her. Some of these claims cling to the ship wherever she may go, even when her possession or ownership has changed. These are claims which give rise to maritime liens.¹ Others, which

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¹ See generally Christopher J S Hill, Maritime Law, 6th ed (London: Lloyd’s of London Press, 2003), especially at 119 where the author discusses what a maritime lien is. See also Edgar Gold, Aldo Chircop &
may cling to the ship, if ownership changes, sometimes metamorphose to a claim against the owner of the ship at the time the claim arose.

This paper examines the practices in Canada and Nigeria with respect to claims which give rise to maritime and statutory liens. The focus of discussion would be how an aggrieved party may enforce his rights before the courts that have jurisdiction to entertain and determine the action. In particular, the paper considers those instances where there is more than one creditor and whose claims together outweigh the proceeds of sale of the ship. The question then is: in what order should they be paid? The paper will examine whether the procedure for resolving this issue is the same in Canada and Nigeria; if not, what lessons can Nigeria learn from Canada and vice-versa, and what steps can each of the countries take to incorporate an acceptable procedure into their systems.

The paper is divided into six parts. Part I introduces the paper. Part II examines the concept of a “ship” and the constituents of maritime claims. Here, we discuss the definitions of the word “ship” as defined under the admiralty law of Canada and Nigeria, and different claims identified as maritime claims. Part III deals with discussions on maritime and statutory liens wherein we examine the types of admiralty claims which give rise to maritime and statutory liens and their applications. Part IV deals with judicial authorities conferred with powers to enforce maritime and statutory liens in both jurisdictions. The question arises here, whether all these bodies have the power to enforce both in rem⁴ and in personam⁵ actions. This leads us to Part V where the enforcement of maritime claims is considered. In this part, actions in rem and in personam are thoroughly examined, pointing out the rules applicable to both of them in Canada and Nigeria, and the courts empowered to enforce them. Part VI examines the order of priority of claims and discusses how maritime claims are prioritized where proceeds of sale from the arrested ship or property are insufficient to be shared or distributed among creditors. Who is to be paid first, and how is a claimant under maritime or statutory lien to be ranked? Also discussed in this part is the ranking of foreign maritime liens. Are the laws on this subject applicable in Canada entirely the same? What lesson or lessons, if any, could Nigeria learn to


² The term in rem is explained in Part V. A. of this paper.
³ The term in personam is explained in Part V. B. of this paper.
enhance its admiralty law on this issue? The paper concludes in Part VII with the recommendation that there should be uniformity in what constitutes maritime liens in all coastal states and that Nigeria should borrow a leaf from Canada by statutorily determining in what order its maritime claims, in particularly, its maritime liens, must be prioritized.

II) THE CONCEPT OF A SHIP AND CONSTITUENTS OF MARITIME CLAIMS

A) The Concept of a Ship

Shipping is the key subject of admiralty law and its instrument is the "ship." So, it is pertinent to know the meaning of the word from both jurisdictions. Under Canada’s Marine Liability Act, a ship 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.” The vessel or craft that falls under this definition includes a ship in the process of construction from the time it could float, as well as a stranded, wrecked or sunk ship and any part of the ship that has broken up. Excluded from the scope of a ship under Canada’s Marine Liability Act are vehicles or a floating platform constructed for the purpose of exploring or exploiting the natural resources or the subsoil of the seabed.

The Canada Shipping Act has a broader definition. It uses the word "vessel" rather than "ship" to conceptualize the term. In fact, section 274(4) of the Act says that “[e]very reference to ‘Canadian ship’ or ‘Canadian ships’ ... shall be read as a reference to ‘Canadian vessel’ or ‘Canadian vessels’.” In detail, the definition section of the Act defines a vessel as “[a] boat, ship or craft designed, used or capable of being used solely or partly for navigation in, on, through or immediately above water, without regard to method or lack of propulsion, and includes such a vessel that is under construction. It does not include a floating object of a prescribed class.”

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4 SC 2001, c 6 s 25 [Marine]. The same definition is given by the Federal Courts Act, RSC 1985, c F-7 at 2, only that the last piece of the definition is not included, that is “but does not include an air cushion vehicle or a floating platform constructed for the purpose of exploring or exploiting the natural resources or the subsoil of the sea-bed.”
5 Ibid.
6 SC 2001, c 26 s 2 [Canada].
7 Canada, supra note 6 at s 2.
Under Nigerian law, a “ship” refers to “a vessel of any kind used or constructed for use in navigation by water, however propelled or moved and includes a barge, lighter or other floating vessel, including a drilling rig.” The definition also includes a hovercraft, an offshore industry mobile unit, and a sunk or stranded vessel and its remains. A vessel under construction that has not been launched is, however, excluded. The *Admiralty Jurisdiction Procedure Rules* simply describe a ship as including any description of vessel used in navigation.

The Nigerian *Merchant Shipping Act* provides a broader definition, thus: “ship” “means a vessel of any type whatsoever not permanently attached to the seabed, including dynamically supported craft, submersibles of any other floating craft which shall include but not be limited to Floating Production Storage and Offloading (FPSO) platforms as well as Floating Storage and Offloading (FSO) platforms.”

In both Canada and Nigeria, and generally among seafaring nations, for a vessel to qualify as a ship, it must be used for navigation. However, while Canada includes any vessel under construction, Nigerian law restricts a vessel to such boats, ships or crafts only when it is launched.

Beyond the slight difference in the definitions, both jurisdictions have stipulated under their different maritime regimes matters which can give rise to maritime claims. The various categories of these claims will hereunder be discussed.

**B) Constituents of Maritime Claims in both Canada and Nigeria**

The constituents of maritime claims in both jurisdictions are almost the same, but with slight differences. In Canada, the following are regarded as maritime claims: claims relating to title, possession, ownership or earning of ships; mortgage, bottomry or respondentia; damage, loss of life, or personal injury either in collision or otherwise; and damages sustained by a ship. Others include claims for towage, salvage, pilotage, general average, supplies of necessaries and services to a ship, claim for construction, repair or equipping of ship, dock, port fees, and charges for use of facilities, claims

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9 (Nigeria) 1993, Order 1, Rule 3 [Rules].
10 (Nigeria) No 27, 2007, s 445 [Merchant].
involving carriage of goods, loss of passengers' bags, contract of marine insurance, and master's disbursements.\textsuperscript{11}

In terms of what constitutes maritime claims in Nigeria, section 2 of the Admiralty Jurisdiction Act\textsuperscript{12} provides an answer. Going by the section, maritime claims are divided into two: the proprietary maritime claim and the general maritime claim. The proprietary maritime claim is a claim relating to possession, title, ownership of a ship or earning of a ship; mortgage of a ship or its freight; a claim for the enforcement of a judgment given by the Federal High Court Nigeria and a foreign court against a ship or other property in an in rem action; and a claim for interest in respect of any of the claims.

On the other hand, the general maritime claim applies to claims for damage received or caused by a ship (whether by collision or otherwise); loss or damage to goods; agreement relating to the carriage of goods or persons; claims relating to salvage, general average, pilotage, towage, bottomry, port charges or dues; and claim for loss of life or personal injury arising out of an act or omission of the owner or person in possession of the ship. For the claim for loss of life or property arising from an act or omission to be successful, the act or omission in question must relate to the management of the ship including an act or omission in connection with the loading and unloading of goods onto or from a ship; the embarkation and disembarkation of persons onto or from a ship; and the carriage of goods or persons on a ship.\textsuperscript{13}

Other general maritime claims are claims for necessaries supplied or to be supplied to a vessel, master's disbursement, insurance premium, wages of master or member of the crew, forfeiture or condemnation of a ship, interest in respect of any of the general claims, and enforcement of an arbitral award including foreign award in respect of any of the maritime claims.\textsuperscript{14}

C) Classification of Maritime Claims

Maritime claims may be classified in various ways. First, such claims could arise in three different ways: as a maritime lien, proprietary claims, and general maritime claims or statutory liens.\textsuperscript{15} Some classified maritime claims

\textsuperscript{11} See generally Federal Courts Act, RSC 1985, c F-7, s 22(2) [Federal].
\textsuperscript{12} Admiralty, supra note 8, s 2.
\textsuperscript{13} Ibid, ss 2(3)-(4).
\textsuperscript{14} Ibid.
\textsuperscript{15} Ibid, s 2(1).
that may attach to the ship include costs for bringing the vessel for sale, maritime liens, ship's mortgages, statutory liens, possessory liens and non-liens claims. In *Comeau's Sea Foods Ltd. v. Frank and Troy (The)*,\(^{16}\) the court's classifications were as follows: maritime liens, possessory liens, and statutory liens. Basically, whatever form the claims are classified into, recognition is given to maritime and statutory liens.\(^{17}\)

**III) MARITIME AND STATUTORY LIENS**

**A) Maritime Liens**

Generally speaking, a lien is any sort of charge or encumbrance against property or a part of property which secures the payment of a debt or performance of some other obligation. It is the right to hold the property of another as security for the performance of an obligation.\(^{18}\) It is a right in one man to detain that which is in his possession, belonging to another, until certain demands of him, the person in possession, are satisfied.\(^{19}\) According to Jones\(^{20}\):

> A lien at law is an implied obligation whereby property is bound for the discharge of some debt or engagement. It is not the result of an express contract; it is given by implication of law.

The owner of the property (or part of it) is referred to as the "lienor" while the person upon whom the benefit is conferred is called the "lienee." There are various definitions of a maritime lien.\(^{21}\) Sir John Jervis in *The Bold Buccleugh*\(^{22}\), the *locus classicus* in this area, says that it is:

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\(^{16}\) 1971 FC 556, CarswellNat 251 [*Comeau*].

\(^{17}\) Although some have argued that these are not liens but rights that are analogous to liens. See William Tetley, *International Conflict of Laws: Common, Civil, and Maritime* (Montreal: International Shipping Publications, 1994) at 539 [Tetley, *Conflict*]. Tetley refers to them as "statutory rights in rem." See also *Webster's Online Dictionary, sub verbo "lien"* <http://www.websters-online-dictionary.org/definitions/lien?cx-partner-pub0939450753529744%3Ax0qd01-tdlq&cof-FORID%3A9&q=lien&sa=Search#922>.


\(^{19}\) See *Hammonds v Barclay*, [1802] EngR 107, 2 East 227 at 235.


\(^{22}\) Harmer v Bell, *The Bold Buccleugh*, [1852] 7 Moo PC 267, 13 ER 844 [*Buccleugh*].
claim or privilege upon a thing to be carried into effect by legal process ... This claim or privilege travels with the thing, into whosesoever possession it may come. It is inchoate from the moment the claim or privilege attaches, and when carried into effect by legal process, by a proceeding in rem, related back to the period when it first attached.23

In a recent case before the Federal Court of Canada, the court, quoting Tetley24 in the case of JP Morgan Chase Bank v. Lanner (The) (F.C.), reaffirmed the above when it stated thus:

A maritime lien according to Carver is “the foundation of a proceeding in rem, a process to make perfect a right inchoate from the moment the lien attaches.”26 In the Nigerian case of Mercantile Bank of Nigeria Ltd. v E. R. Tucker & ors., The Bosnia,27 Karibi-Whyte J (as he then was) defines maritime lien as “a claim or privilege upon a maritime res in respect of service done to it or injury caused by it” and “attaches to the res and travels with it into whosesoever possession the res comes.”28 The lien is thus a proprietary interest in the res (the ship) or property which attaches to the latter and immediately thereafter the cause of action arises and travels with it, even into the hands of third or subsequent parties. This is irrespective of whether such

23 Ibid, at 284-85.
24 Tetley, Maritime, supra note 21 at 59-60.
27 NGA [1978], 1 NSC 428 [Bosnia].
28 Ibid at 430.
parties are aware of the lien or not. According to Peter Heathcote, "maritime liens represent a legal charge against a ship for a debt unpaid by the owner for services rendered to the ship, or a tortious act occurring on, or committed by a ship." 

In sum, a maritime lien is a secured claim against a ship for services done to her, or damage caused by it, and attaches to the whole ship wherever it goes notwithstanding that ownership or possession of the erring ship has passed to another person. Summing up the essence of maritime lien and compulsion to arrest the erring vessel, and not any other one, Lord Denning, M.R. said:

The right to arrest was conterminous with the maritime lien. Where there was a maritime lien, the right to arrest the ship existed. Where there was no maritime lien, there was no right to arrest the ship. A maritime lien, of course, existed only in respect of the offending ship. It lay for such claims as salvage, wages and collision damages. The claimant had a right to arrest the offending ship for his claim, wherever he could get hold of her.

This was also the purport of the decision of the Federal Court of Canada in the recent case of I.C.S. Petroleum (Montreal) Ltd. v. Polina 3 (The) (F.C.). The attachment of the lien on the offending ship was recognised by the International Convention on Maritime Liens and Mortgages when it provides that "[T]he maritime liens securing the claims ... follow the vessel, notwithstanding any change of ownership or of registration." The Convention makes it clear that maritime liens would attach in respect of claims for the wages of the master and crew; salvage, port and pilotage dues; claims against the owner in respect of loss of life or personal injury; or those

29 See Gbadebo, supra note 26 at 321.
31 Owners of the motor vessel Monte Ulia v Owners of the ship Banco and others, [1971] 1 All ER 524 at 531 (CA) (Ulia).
33 International Convention on Maritime Liens and Mortgages, 6 May 1993, UNTS vol 2276, p 39; Doc A/CONF 162/7 [ICMLM]. Earlier conventions on maritime claims also make similar provisions. For instance, the International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages, 27 May 1967, SD No 12 (1967) 3. This convention replaced and abrogated a previous convention under the same name that was signed at Brussels on 10 April 1926, in force June 2, 1931.
34 Ibid, art 8.
35 "Owner" in the context includes the demise charterer or other charterer, manager or operator of the vessel.
Comparative Analysis of Maritime and Statutory Liens

that are based on tort in respect of loss of or damage to property which are in direct connection with the operation of the vessel.\(^{36}\)

The Convention is presently in force with seventeen members.\(^{37}\) While Canada is not a party, Nigeria acceded to it on March 5, 2004, as the tenth member.\(^{38}\) Canadian law in relation to maritime and statutory liens is provided under the Federal Court Act, the Canada Shipping Act, the Marine Liability Act, and the received English maritime law as developed through judicial pronouncements.\(^{39}\) Canada also applies law that is most closely connected with the transaction or occurrence.\(^{40}\) It may either be the *lex loci contractus* or the *lex loci delictus*.\(^{41}\) However, the Convention has a significant impact on maritime law as both parties and non-parties to the convention formulate their maritime liens in similar track with the convention. Of all the grounds for maritime claims in Canada and Nigeria enumerated above, only four can give rise to maritime liens in those two countries. They include:

a) Claims to salvage including life, cargo or wreck found on land;

b) Claims for damages caused by a ship;

c) Claims by the master or crew member of a ship for wages, and

d) Claims by the master in respect of disbursement on account of a ship.\(^{42}\)

In modern days, vessels are owned not by individuals but by corporations, thus, master's disbursements to ships are not practically visible. In *Phoenix Bulk Carriers Ltd. v. “M/V Swift Fortune” (The)*,\(^{43}\) Nadon J. A. quoted Tetley as saying "[M]aritime liens are limited to salvage, damage, seamen's and

\(^{36}\) ICMLM, *supra* note 33, art 4(1)(a)-(c).


\(^{38}\) Neither Canada nor Nigeria was a party to the preceding convention. See *ibid*.

\(^{39}\) Tetley, *Maritime, supra* note 21.

\(^{40}\) That is, the law of the jurisdiction where the claim arose.


\(^{42}\) *Admiralty, supra* note 8, s 5(3)(a)-(d).

\(^{43}\) 2006 FCA 1 at para 42, [2006] 3 FCR 475 [Phoenix].
master's wages, master's disbursements, bottomry, and respondentia (the last two being virtually obsolete)."

In Canada, the aforementioned four claims constitute maritime liens, and these are reflected in the applicable legislation. Section 86(1) of the Canada Shipping Act makes provision for a maritime lien with respect to the wages of a master and/or crew of the ship, thus:

> The master and each crew member of a Canadian vessel has a maritime lien against the vessel for claims that arise in respect of their employment on the vessel, including in respect of wages and costs of repatriation that are payable to the master or crew member under any law or custom.

The right to wages is also protected where a foreign jurisdiction confers the right of maritime lien on wages and such right can be enforced against the vessel. With regard to the disbursements, the section further provides that "[t]he master of a Canadian vessel has a maritime lien against the vessel for claims that arise in respect of disbursements made or liabilities incurred by the master for necessaries on account of the vessel."  

As a result of the ranking problem between Canada and the US, Canada enacted Bill C-7, Marine Liability Act in 2009, which has the effect of classifying the supply of necessaries to foreign vessels as claims giving rise to maritime lien. This means that all maritime claims by Canadian suppliers of goods and services against foreign vessels will be classified as maritime lien. It should be noted that this applies only against foreign vessels.

In Nigeria, the grounds set out by various conventions on maritime claims have become part of its law by virtue of the application of the decision in the English Court of Appeal in Nigeria. Thus, the claims that will give rise to maritime liens in Nigeria are salvage, damage done by a ship, wages of the master or a member of the crew, and master's disbursements. Nigerian courts utilize these principles to interpret the law. In M.V. Nikos, the captain

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44 Ibid at para 42.
45 Canada, supra note 6.
46 Ibid, s 86(2.1).
47 An act to Amend the Maritime Liability Act, SC 2009, c 21, s 12 amending SC 2001, c 6, s 139 [Amendment].
48 Ibid, s 139(2).
49 United Africa Co Ltd v The Tolten, (1946), 79 Lloyd's R 349.
50 Admiralby, supra note 8, s 5(3).
and 18 crew members of the defendant's vessel brought an action in rem claiming jointly and severally from the defendant outstanding wages for 8-24 months. The defendant, as owner of the vessel, neither filed any pleading nor appeared at the trial to contest the claim. It was held that by section 2(3)(r) of the Admiralty Jurisdiction Decree, a claim by a master or a member of the crew of a ship is classified as a maritime lien within the jurisdiction of the Federal High Court of Nigeria.\(^5\)

In contrast to the classification of supplies of necessaries and services as claims giving rise to maritime lien against a foreign vessel under Canadian law,\(^5\) Nigeria still maintains its position by classifying the claims as non-maritime lien. This position is based on the fact that Nigerian courts follow the precedence in *The Halcyon Isle*.\(^5\) In this case, the English Court held that maritime lien is a procedure that should be governed by the *lex fori*, the effect being that where a foreign maritime lien is not recognized by the *lex fori*, it will rank after all secured claims. As Nigeria is not faced with a ranking problem, the necessity to alter its position in this area does not arise as no foreign claim on supply of necessaries and services to the ship can rank above its own established maritime liens. The supply of necessaries is, however, classified under claims giving rise to statutory liens which shall be discussed next. That being said, in both jurisdictions a maritime lien cannot be enforced against a vessel that is owned or operated by a foreign state for public purposes.\(^5\)

B) Statutory Liens

Certain statutes provide for a passive right to retain property against its owner as security for obligations. Statutory liens are claims which are created pursuant to a law or statute and arise from the day of the arrest of the ship. Statutory liens are recognised under Article 6 of the *International Convention on Maritime Liens and Mortgages*. The provision allows a State Party to create other maritime liens under its national law. By implication, these liens are statutory liens as they rank after maritime liens created under Article 4 of the Convention.

\(^{52}\) (Nigeria) 1991, No 59, s 2(3)(r).
\(^{53}\) Amendment, supra note 47, s 139.
\(^{54}\) *The Halcyon Isle (Bankers Trust International Ltd v Todd Shipyards Corporation), [1981] AC 221, [1980] Lloyd's LR 325 [Halcyon].*
\(^{55}\) See Pires-Filho, supra note 41 at 514.
There are two classifications of statutory liens. First, there are liens that do not travel with the res, and once the title in the vessel is transferred, the right is lost. These are called “true” statutory liens and examples are claims for towage, marine insurance, carriages of goods, master’s disbursements, losses or damage done to ship, loss of life, personal injury sustained during ship operation, etc. The second type of statutory liens are those which subsist despite the transfer of title. These are called “quasi” statutory liens and examples of claims that will give rise to them are those relating to title, possession, ownership or earnings of a ship, pilotage, general average, damage, loss of life caused by a ship, etc.\(^5\)

In Canada, the lists of claims giving rise to statutory liens are not exhaustive, as virtually all maritime claims can be typified as claims giving rise to statutory liens. One point need be noted, however, that the supply of necessaries and services to a ship and the construction, repair and equipping of a vessel are grouped as claims giving rise to maritime liens and “true” statutory liens. Where the necessaries and services are rendered to foreign vessels, as previously discussed, it will amount to claims giving rise to maritime liens. However, where they are provided to local vessels, the claims will be classified as “true” statutory liens. The latter are liable to be defeated by transfer of title as the Federal Courts Act provides that, notwithstanding the jurisdiction conferred on the Federal Court by section 22(2) of the Act, all claims relating to those mentioned under “true” statutory liens above shall not be commenced by in rem action, unless the vessel is beneficially owned by the same person both at the time the cause of action arose and at the commencement of the proceeding.\(^5\)

In Nigeria, in contrast to the operation of statutory liens in Canada, all supply of necessaries and services are classified as statutory liens whether they operate in relation to local or foreign vessels. That being said, no claim of foreign supplier classified as maritime lien shall be ranked as such in Nigeria. Barring this exception, the same claims give rise to statutory liens under the admiralty law of both jurisdictions.\(^8\)

We have discussed the claims that may give rise to either maritime liens or statutory liens in a general sense, and also the fact that these same liens occur in Canada and Nigeria, with the only difference lying in the

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56 Aldo Chircop, Maritime Claims and Admiralty Procedure: Marine Liens & Mortgages, Lecture Notes, (Faculty of Law, Dalhousie University, November 23, 2010).
57 Federal, supra note 11, s 22(2), 43(3).
58 See generally ibid, s 22(2); see also Admiralty, supra note 8, s 2(3).
classification of supply of necessaries and services. The questions that follow are: Which bodies are conferred with authority to determine the suit in respect of maritime lien or statutory lien? How have these claims been enforced and how similar or different are the enforcements in Canada and Nigeria?

IV) COMPETENT JUDICIAL AUTHORITIES

The Federal Courts are the competent authorities conferred with the jurisdiction to determine issues arising from maritime and statutory liens in both Canada and Nigeria. In Canada, the Federal Court or the Federal Court of Appeal and the provincial or territorial superior courts are vested with maritime jurisdiction as provided by the Federal Courts Act.\(^5\) This Act provides that the Federal Court has concurrent original jurisdiction in all cases in respect to a claim for relief under Canadian maritime law or other law relating to navigation and shipping, except where jurisdiction has otherwise been specially assigned.\(^6\) The Federal Court has both a Trial and an Appellate Division.\(^6\) Appeals are granted from the Trial Division to the Appellate Division, then to the Supreme Court of Canada.\(^6\) Both the Federal Court and the Federal Court of Appeal are superior courts with civil jurisdiction created by acts of parliament. They are empowered to deal only with matters specified in the federal statutes that created them, as opposed to Provincial and Territorial Superior Courts which have jurisdiction in all matters except those specifically excluded by statute.\(^6\) According to J.G. O'Connor, the Federal Courts Act of December 3, 1970, by its definition of Canadian maritime law, "gives to the Federal Courts the widest possible jurisdiction over maritime law, subject only to the constitutional limits of Parliament’s jurisdiction."\(^6\)

This jurisdiction conferred on Canada’s Federal Court is applicable not only to Canadian ships, but to all ships regardless of the residence or

\(^5\) Ibid, s 22(1); Canada, Department of Justice, Canada’s Court System (Ottawa: 2005) at 5 [Court].

\(^6\) Federal, supra note 11, s 22(1).

\(^6\) Ibid, s 27(1).

\(^6\) Canada, Department of Justice, Canada’s System of Justice, (Ottawa, 2005) at 16-17.

\(^6\) Court, supra note 59 at 2-5.

domicile of the owners. The Act specifically provides that “[T]he jurisdiction conferred on the court is applicable in relation to all ships, whether Canadian or not and wherever the residence or domicile of the owners may be.” The jurisdiction subsists in all claims arising on the high seas or within the limits of the territorial, internal or other waters of Canada or elsewhere. In Tropwood AG v Sivaco Wire and Nail Co, the jurisdiction of the Federal Court of Canada in relation to maritime claims was challenged, and the court held that the Federal Court of Canada, as successor to the Exchequer Court, had jurisdiction by virtue of section 22 of the Federal Courts Act to adjudicate on questions of admiralty law as enshrined in the provision, and that this jurisdiction extends to foreign ships and to claims arising on the high seas or within the territorial, internal and other waters of Canada or elsewhere. In Monk Corp v Island Fertilizers Ltd, Iacobucci J restated the provisions in the Federal Courts Act with respect to the original jurisdiction of the Trial Division of the Federal Court to entertain suit in relation to Monk’s claims for demurrage, delivery of excess cargo and the cost of the shore cranes used to unload the cargo at the ports of discharge.

Despite the fact that the Federal Court’s original jurisdiction is exercised concurrently with that of the Superior Provincial Courts, the Superior Provincial Courts are incapable of enforcing maritime liens and certain claims attached to in rem action. To utilize any of the two courts, litigants must consider many factors. The proximity and access to the court is an important consideration. While the Federal Court and the Federal Court of Appeal are both based in Ottawa, judges conduct hearings across the country. Thus, in the alternative to the Federal Court, a claimant may decide to utilize any of the Superior Provincial Courts nearest his domain. In addition, enforcing a claim in the Federal Court is extremely expensive. Another important factor is the relief sought by the claimant. Lastly, jurisdictional factors must be weighed as the Federal Court of Canada and the Superior Provincial Court of British Columbia have procedural rules to

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65 Federal, supra note 11, s 22(3)(a).
66 Ibid, s 22(3)(c).
68 Federal, supra note 11, s 22.
71 With the exception of the Superior Provincial Court of British Columbia.
72 Court, supra note 59 at 5.
entertain both actions in rem and actions in personam.\textsuperscript{73} All other Superior Provincial Courts can only enforce in personam actions.\textsuperscript{74}

In Nigeria, it is the Federal High Court that has jurisdiction to hear and determine matters on maritime claims. Appeals lie from the Federal High Court to the Court of Appeal, and then to the Supreme Court. The jurisdiction of the Federal High Court covers both civil and criminal causes.\textsuperscript{75} Until recently, there was no comprehensive law setting out the jurisdiction of Nigerian courts in admiralty matters. The courts relied on received English laws of procedure, their own procedural rules, and the inherent jurisdiction of the court.\textsuperscript{76} This, however, is a thing of the past. Section 251(1)(g) of the Constitution of the Federal Republic of Nigeria provides:\textsuperscript{77}

\begin{quote}
251. (1) Notwithstanding anything to the contrary contained in this constitution and in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly, the Federal High Court shall have and exercise jurisdiction to the exclusion of any other court\textsuperscript{78} in civil causes and matters relating to:

(g) any admiralty jurisdiction, including shipping and navigation on the River Niger or River Benue and their affluents and on such other inland waterway as may be designated by any enactment to be an international waterway, all Federal ports ... and carriage by sea.
\end{quote}

In addition, the Admiralty Jurisdiction Act confirms the exclusive admiralty jurisdiction of the Federal High Court by specifically stating that "T[he] court shall ... exercise exclusive jurisdiction in admiralty causes or matters, whether civil or criminal."\textsuperscript{79} This jurisdiction extends, amongst others, to hearing and determining any question relating to proprietary interest in a ship or any maritime claim.\textsuperscript{80} Section 20 emphasizes that any

\textsuperscript{73} Gold, supra note 1 at 758; see also British Columbia, Supreme Court Rules, r55; and the decision of the Federal Court in Canada v Toney, 2012 FCA 167; Ship-Source Oil Pollution Fund v British Columbia (Finance), 2012 FC 725.

\textsuperscript{74} See Court, supra note 59 at 3.

\textsuperscript{75} Constitution of the Federal Republic of Nigeria, 1999 (Nigeria), s 251(1), (3) [Constitution].


\textsuperscript{77} Constitution, supra note 75, s 251(1)(g).

\textsuperscript{78} Emphasis added.

\textsuperscript{79} Admiralty, supra note 8, s 19.

\textsuperscript{80} Admiralty, supra note 8, s 1(1).
agreement by any person or party to any cause, matter or action relating to any admiralty matter cannot oust the jurisdiction of the Federal High Court over any such cause, matter or action.

To enforce both maritime and statutory liens in Nigeria, the action must be commenced not in any other court but the Federal High Court. The exclusivity of the Federal High Court’s jurisdiction is confirmed in Ming Ren Shipping Co Ltd v Amatemoso Shipping Agencies Ltd. In this case, the plaintiff sought the arrest of a ship in relation to a number of claims (including those in respect of disbursements on account of the ship sought to be arrested) in the State High Court. It was held that the State High Court lacked jurisdiction to hear the plaintiff’s claims for disbursements, and that their application for the arrest, and consequently, the proceedings in the State High Court, were void ab initio.

Only one Federal High Court exists in Nigeria with divisions spread throughout the country. In exercising the in rem right, a plaintiff may apply to any division of the court in the state in which the ship is located. In Benzenne Nigeria Ltd v Nigerbras Shipping Line Ltd, the court held that a Nigerian vessel flying a Nigerian flag could be arrested by an order of the court but the vessel must be within the jurisdiction of the court.

Similar to the Canada Federal Courts Act, the admiralty jurisdiction of the Federal High Court of Nigeria also applies to all ships, irrespective of the places of residence or domicile of their owners and where the maritime claims arise. With the foregoing in mind, the issue that arises is how an aggrieved party may enforce his claim in both Canada and Nigeria. This issue is discussed next.

V) THE ENFORCEMENT OF MARITIME AND STATUTORY LIENS

A claim giving rise to either maritime or statutory liens may either be commenced in rem or in personam. To enforce the claim in Canada, the in rem or in personam action must be commenced no later than three years from the day the claim arose. However, to enforce the same claim in Nigeria, the action must commence no later than three years after the cause of action has

81 NGA [1979], 1 NSC 462 at 466-67.
82 NGA [1993], 4 NSC 237.
83 Admiralty, supra note 8, s 3.
84 Amendment, supra note 47, s 12.
arisen or before the end of the limitation period for such a claim if it has been brought otherwise than as an action *in rem* or *in personam* or within the limitation period statutorily provided for.\(^5\) To appreciate the essence of each of these actions, they shall be separately discussed hereunder.

A) Action *in rem*

An action *in rem* is an action against a *res*. This is usually the vessel, but it may also be the cargo or freight. In *Anchor Ltd v The Owners of the Ship Eleni*,\(^6\) the Supreme Court of Nigeria remarked that an action *in rem* is one in which the subject matter is itself sought to be affected. It may also be an action against the proceeds of sale of a vessel. Where a proceeding could have been commenced as an action *in rem* against a ship or property but for the sale of the ship or property, it may be commenced as an action *in rem* against the proceeds of sale that has been paid into any of the authorised courts.

An action *in rem* is mainly employed for its convenience, as against an action *in personam*. It serves as a perfect method to bring the owner of the *res* to live up to his obligations. This action compels the appearance of the ship or cargo owners. However, this does not in itself change the nature of the proceedings to be, in form, an action against the *res*, and in substance, a proceeding against the owners. As remarked by Fletcher Moulton, L.J:

\[
\text{It is an action in which the owners may take part, if they think proper, in defence of their property but whether or not they will do so is a matter for them to decide and if they do not decide to make themselves parties to the suit in order to defend their property, no personal liability can be established against them in that action.}\(^7\)
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In Canada, an action *in rem* may be commenced in all claims, in particular with respect to claims relating to title, possession, ownership or earning of ships, mortgage, bottomry or respondentia, and damage or loss of life or personal injury either in collision or otherwise. Additional claims eligible to be commenced as an action *in rem* include salvage, pilotage, general

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\(^5\) *Admiralty*, supra note 8, s 18.

\(^6\) NGA [1966], 1 NSC at 16.

\(^7\) *The Burns*, [1907] 137 at 149.
average contribution, construction, repair or equipping of ship and dock, port fees, and charges for use of facilities.\textsuperscript{88}

In addition to the claims above, there are other claims which may be enforced in \textit{rem} on the condition that the ship or other property which is the subject matter of the action must be beneficially owned by the same person at the time of the commencement of the action and when the cause of action arose.\textsuperscript{89} These claims include claims for damages or losses to ship, cargo, life, personal injury, towage, stevedoring, supplies, disbursement and services to ship, and claims relating to marine insurance and/or carriage of goods under a through bill of lading.

In \textit{Mount Royal/Walsh Inc v “Jensen Star” (The)},\textsuperscript{90} the court held that to institute an action in \textit{rem} for the enforcement of supply of necessaries to a ship, the beneficial owner at the time of instituting the action must be the same person at the time the cause of action arose. Therefore, in the instance where the ship has been sold to another person at the time of the commencement of the action, the right in \textit{rem} is lost and one needs to commence it via in \textit{personam}.

In Nigeria, in all cases of admiralty jurisdiction, an action may be brought in \textit{personam}. An action in \textit{rem} may only be brought in claims relating to maritime liens, possession, title, mortgage, ownership or earnings of a ship and claims on interest in respect of all maritime claims.\textsuperscript{91} In all other instances of maritime claims, action in \textit{rem} may subsist provided the person who would be liable on the claim in an action in \textit{personam} when the cause of action arose is also the beneficial owner at the commencement of the action.\textsuperscript{92}

There are also other rules adopted by the courts in determining the judicial success of \textit{in rem} action in both Canada and Nigeria. For instance, there must be personal liability on the part of the owner. In \textit{Maritima de Ecologia, S.A. de C.V. v. Maersk Defender (The)}, the court stated that “in any event, the fact that the beneficial ownership may have been the same at the relevant dates is not sufficient to confer in \textit{rem} jurisdiction on the Federal Court. The law is clear that ... in \textit{rem} can only be exercised against a ship

\textsuperscript{88} \textit{Federal, supra} note 11, ss 43(2)-(3).
\textsuperscript{89} \textit{Ibid.}
\textsuperscript{90} 1990 FC 199, 99 NR 42. See also \textit{ibid.}
\textsuperscript{91} \textit{Admiralty, supra} note 8, s 5.
\textsuperscript{92} \textit{Ibid, s 5(4).}
where there is personal liability on the part of the owner.\textsuperscript{93} Also, in the Nigerian case of \textit{M. V. S. v. Scheep}, Uwaifo JCA (as he then was) said that the failure to sue the relevant person who would be liable \textit{in personam} would be fatal to the process of arresting the ship as it is an issue which goes to jurisdiction.\textsuperscript{94} The decision of the court is in essence confirming the importance of personal liability. The rule of personal liability does not, however, apply to claims giving rise to maritime lien as it clings to the ship itself.

In addition to the application of personal liability, there is also the rule in respect of the specific subject matter of the action, it may either be the ship or the cargo. Order IV Rule 2 of \textit{Admiralty Jurisdiction Procedure Rules} states that "the writ in a proceeding commenced as an action \textit{in rem} against a ship or other property shall identify the ship or property."\textsuperscript{95} In \textit{Phoenix Bulk Carriers Ltd v Kremikovtzi Trade},\textsuperscript{96} Nadon JA, while delivering the lead judgment, said that "the subsection 43(2) of Canada's \textit{Federal Courts Act} proposes identifiability of the property. ... In other words, the action \textit{in rem} must relate to the specific property contemplated in the contract at issue."

Regarding the enforcement of maritime lien, there are some vessels which are excluded from \textit{in rem} action. In Canada, these vessels are warships, police vessels, coast-guard ships and ships owned or operated by Canada, a province, any sovereign power, or any cargo laden thereon, where the ship is engaged on government service or exclusively used for non-commercial government purposes.\textsuperscript{97} In Nigerian admiralty law, the vessels concerned are government ships and property (including Nigerian Navy ships) but do not include ships belonging to a government agency. The law is also silent on ships operated by any sovereign power, but in practice foreign ships are excluded from \textit{in rem} action.\textsuperscript{98} Apart from this slight difference in the written law, the same principle applies in both Canada and Nigeria with respect to \textit{in rem} action.

\textsuperscript{93} \textit{Maritima de Ecologia, SA de CV v Maersk Defender (Ship)}, 2007 FCA 194 at para 32.
\textsuperscript{94} (1996) 5 NWLR pt 447, 207 CA.
\textsuperscript{95} Rules, supra note 9, Order IV, Rule 2.
\textsuperscript{96} 2006 FCA 1, 3 FCR 475, cited in Chircop, supra note 56 at 29.
\textsuperscript{97} \textit{Federal}, supra note 11, s 43(7). See also \textit{Marine}, supra note 4, s 139(3).
\textsuperscript{98} \textit{Admiralty}, supra note 8, s 24.
B) Action *in personam*

An action *in personam* is an action against people in possession when the cause of action arose. It is an action against persons who are usually the owners of the ship that gave rise to the cause of action. The court in this type of action is required to adjudicate on the rights of one party against the other and the judgment will become binding only on the parties themselves or their privies. By contrast, in the *in rem* action, the court is required to adjudicate on rights in relation to the ship, cargo or freight, being the *res*.\(^9\) An action *in personam* is seldom resorted to as a result of inherent problems like problems of effecting service.

In Canada, maritime claims may be exercised *in personam* in all cases except cases of collision between ships, that is unless the defendant has a residence or place of business in Canada, the cause of action arose within the territorial, internal, or other waters of Canada, or the parties agree that the Federal Court is to have jurisdiction.\(^10\) In Nigeria, an action *in personam* may also be brought in all cases of statutory and maritime liens, but to determine whether a person would be liable for *in personam* action or not, there is an assumption that the person’s habitual residence or place of business is in Nigeria.\(^11\) This assumption is what stands out as the difference in the admiralty practices of the two jurisdictions. While in Canada, it limits the applicability of the exception to collision matter and proof, the Nigerian admiralty practice bases its applicability on assumption.

C) Enforcement of Action *in rem* or *in personam*

To commence an action *in rem* or *in personam* in order to enforce maritime or statutory liens, the style to be adopted will depend on the provision of the law and the civil procedure of the court concerned. The style of the cause of action *in personam* is the general trend of what operates in the ordinary proceedings of each of the two jurisdictions. Each party commencing the action shall be named as plaintiff and the adverse party shall be the defendant. To effect service of process, personal service is utilized, although substituted service may be ordered where personal service is impossible.\(^12\)

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\(^10\) Federal, supra note 11, s 43(1)-(4).

\(^11\) Admiralty, supra note 8, s 5(1), (7).

\(^12\) See the Rules of Civil Procedure of the Federal Court of Canada and Federal High Court of Nigeria.
In an in rem action, all documents filed in the court must be headed "Admiralty action in rem". The writ must specify the defendant and where it is an action against the ship or other property, the ship or property must be specific. Service of process is effected by securely affixing a sealed copy of the process to the mast or some other conspicuous part of the ship, or delivering the same to the master or person in charge of the ship. As earlier discussed, it should be noted that only Federal Courts of both jurisdictions can enforce in rem action.

The ship or property is arrested upon the issuance of the arrest warrant by the court. The action shall be defended by the owner of the res or any other party interested in the res. Where a ship or cargo not the subject of an action is arrested, a person who is entitled to immediate possession of the ship or cargo may apply to the court to discharge the ship or cargo.

In Nigeria, the custody of all arrested ships and properties lies in the Admiralty Marshall unless otherwise ordered by the court. While a ship is under arrest, no port or other dues are payable by an interested person to any person or the Nigerian Ports, and application for such dues are not entertained by the court. However, the Admiralty Marshall shall pay for all services requested to the arrested ship by the Nigerian Ports and shall be reimbursed by the arresting party. This is slightly in contrast to the practice in Canada, as the custody of arrested ships or property does not vest in the Sheriff, but continues in the person in possession immediately before the arrest unless otherwise directed by the court on condition that a party assume responsibility for any costs incurred or payable in carrying out the order.

The arrest of the ship does not lead to the determination of the action against it as the court may order the release of the ship or property unless caveat has been filed on it. It may also order the appraisal and sale of the ship or property, with the proceeds of sale paid into the court. This process is similar between Canada and Nigeria. Instances abound where an in rem action, either as a maritime or statutory lien, will be enforced against the proceeds of sale. But, where the creditors' claims outweigh the proceeds, in what priority will the court rank the creditors? Also, where claims involve foreign maritime

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103 Canada, Minister of Justice, Federal Court Rules (SOR/98-106), s 477, 479 [FCR]; see also Rules, supra note 9, Order II, IV, V.
104 Ibid at s 479, 481, 488; see also ibid (Rules), Order VII, VIII.
105 Ibid (Rules), Order VIII, Rules 2, 4.
106 FCR, supra note 103, s 483.
107 Ibid, s 487-91; Rules, supra note 9, Order IXX.
or statutory liens, how will the court rank such? These questions are considered next.

VI) RANKING OF PRIORITIES AND FOREIGN MARITIME CLAIMS

A) Ranking of Priorities

The ranking and prioritization of maritime claims against a vessel are necessary where the proceeds from her sale by the court are insufficient to satisfy all claims against her. For the purpose of this paper, the focus is on what claims will be settled before maritime and statutory liens, and which claims will be settled after both. Under the International Convention on Maritime Liens and Mortgages, the maritime liens set out in Article 4 take priority over registered mortgages and "hypotheques", and no other claim shall take priority over both, provided the latter comply with Article 1 and except as otherwise provided under Article 6. Under the Convention, maritime liens rank in accordance to how they are listed under Article 4. However, where there is a claim for salvage, wreck removal, or contribution in general average, these claims take priority over any other maritime liens which have attached to the vessel before the time the operations giving rise to said liens were performed. Claims for contribution in general average shall be deemed to have accrued on the date on which the general average act was performed, while claims for salvage shall be deemed to have accrued on the date on which the salvage operation was terminated. All other maritime liens shall rank pari passu as between themselves. Among the equals, however, the first in time prevails.

In Canada, the ranking of maritime lien differs from province to province, but generally, in the absence of special situations to be considered by the courts, the maritime claims to be ranked first are the costs of seizure, appraisal, and judicial sale of the ship or property followed by maritime liens

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108 George L Varian, "Rank and Priority of Maritime Liens" (1973) 47 Tul L Rev 751 at 751.
109 ICMLM, supra note 33, art 5(1)-(4). Art 1 refers to mortgages and "hypotheques" that are registered in accordance with the law of the state where the vessel is registered, provided the register or instruments required to be deposited are open to public inspection, copies obtainable and the register or instrument contains particulars of the person in whose favour the mortgage or "hypotheques" was effected. See art 6 for the exception.
110 ICMLM, supra note 33.
111 See generally ibid, art 5.
for salvage or damage.\textsuperscript{112} Next, wages of the master or seamen,\textsuperscript{113} provided they did not guarantee the provision of the unpaid mortgage to the ship. Where they did, their wages shall be ranked after the mortgage. Thus, in Stone \textit{v.} Rochepoint (\textsc{The}),\textsuperscript{114} the court held that where master or member of the crew guarantee the payment of the mortgage or money advanced in respect of a vessel, their wages will rank below the mortgage claims.

Where there is no guarantee for the payment, the master’s disbursements will be paid after wages, followed by registered ship mortgages which subsist at the time the ship is arrested, ending with claims arising from the supply of necessaries and other statutory liens.\textsuperscript{115} Where the supply of necessaries is made to a foreign ship, they will be ranked alongside the maritime lien. The ranking among claims giving rise to statutory lien depends on the date of commencing each of the actions. The last on the list are the unsecured creditors.

Where possessory lien exists, it ranks immediately after maritime lien except when possessory lien came into existence before maritime lien, because in that case it will rank above maritime lien as long as the claimant retains possession of the ship. Existing possessory lien (where claimant retains possession) also ranks above statutory lien if in existence prior to the creation of statutory lien. In contrast, other possessory liens which occur after statutory lien rank after it.

However, the courts sometimes exercise their jurisdiction to vary the order of priorities where they are satisfied that adhering to the usual cause will result in obvious injustice. In \textit{Metaxas v Galaxias},\textsuperscript{116} it was held that ranking should be done in accordance with equitable principles which will serve the purpose of justice. This exception was considered at length by the prothonotary in \textit{Scott Steel Ltd v Alarissa (\textsc{The})(T.D.)},\textsuperscript{117} where he held that any change in the usual ranking of maritime priorities must be accomplished by the application of equitable principles, and that the powers in equity to upset the long established orders of priority should be exercised only where necessary to prevent an obvious injustice. In his analysis of Osborn Refrigeration

\begin{footnotes}
\item[112] See generally the recent case of \textit{Royal Bank of Scotland plc v Golden Trinity (\textsc{The})}, 2004 FC 795, 2 FCR D-27.
\item[113] See \textit{Metaxas v Galaxias}, [1989] 1 FC 386, 19 FTR 108 \textsc{[Metaxas]}.
\item[114] (1921) 21 Ex CR 143.
\item[115] \textit{Canada}, supra note 6, s 226(3).
\item[116] \textit{Metaxas}, supra note 113.
\item[117] [1996] 2 FC 883, 111 FTR 81.
\end{footnotes}
Sales and Service v The Atlantean \(^{118}\) and Metaxas,\(^{119}\) he concluded that the usual ranking ought not to be departed from except in very special circumstances. This assertion was affirmed in the same case on appeal by Richard J.\(^ {120}\)

In Nigeria, there is no particular manner of ranking claims as all claims are ranked as if they were all general maritime claims. Order XV, Rule 1 of the Admiralty Jurisdiction Procedure Rules merely directs a person that has obtained a judgment (including the judgment of a foreign court) against a ship to apply to the court for the determination of the order of priority. In addition, the Admiralty Jurisdiction Act provides that “[t]he order by which general maritime claims against both ships shall be paid out of a sister ship shall be determined as if all the claims were general maritime claims against the sister ship.”\(^ {121}\) Thus, in Nigeria, ranking among maritime claims will depend on the merit of the case of each party and persuasive application of the laws of other commonwealth jurisdictions. In practice, however, maritime liens will be ranked above mortgages and statutory liens.

The lack of provisions on this matter in Nigerian law leave much discretion to the courts. Thus, judgments are based on intuition rather than on specified rules, creating conflicting judgments on similar matters, potentially causing chaos among disputing parties and lack of confidence in the judicial system. This is one clear instance where the Nigerian legislature should borrow a leaf from Canadian law and legislate on the ranking of maritime claims under the admiralty jurisdiction of its courts.

**B) Ranking of Foreign Maritime Claims**

The international convention that deals with the ranking of foreign claims is the Convention on Private International Law.\(^ {122}\) The aim of this Convention is to establish standards on how to resolve jurisdictional problems in international maritime law, to determine the law of the nation to be applied to regulate creditors’ rights on the proceeds of sale of a vessel, and the law of the nationality to be adopted in relation to the procedure for arresting a vessel.

\(^{118}\) [1979] 2 FC 661 at 668, 100 DLR (3d) 11.

\(^{119}\) Metaxas, supra note 113 at 423.

\(^{120}\) Scott Steel Ltd v Alarissa (The), 1997 FCJ 139 at para 44, 125 FTR 284.

\(^{121}\) Admiralty, supra note 8, s 14.

\(^{122}\) Convention on Private International Law (Bustamante Code), 20 February 1928, 86 LNTS 111, 34 OASTS.
Concretely, it provides that the law of the country where the vessel is registered will determine what liens and mortgages can be claimed against it. The Convention applies where the concerned nations are parties to the Convention. Where they are not, it provides that the law of the place of incident or the law guiding the transaction will apply.

It must be noted that Canada and Nigeria are not parties to this Convention. Thus, as noted earlier, Canadian domestic law, the law that is most closely connected with the transaction or occurrence, which may either be the lex loci contractus or the lex loci delictus, are applied. But, Canadian federal law governs matters arising on the high seas. Ranking of priorities in Canada does not pose as many problems as compared to the problems encountered when foreign courts rank Canadian statutory lien relating to supply of necessaries and services.

To decide priority of payment where the proceeds of sale are not sufficient to pay the creditors, the lex fori or the law of the forum always applies. The law of the forum guides the ranking of priority and procedural guidelines such that where a foreign country ranks certain claims higher than what ensues in the local jurisdictions, the foreign law of the opponent nation prevails. This situation applies in Canada. Thus, where a foreign vessel is arrested in Canadian port for maritime liens, Canadian courts apply foreign law to recognize liens on the res. Canadian courts have adopted the principle that the order of priority must be determined by the lex fori. In *Marquis v. "Astoria" (The)*, the court stated:

> It seems clear that the creation of the lien must be governed by the law of the place where the vessel is situated when the services are rendered. ... The creation of liens for service on the high seas, as for seamen's wages, is on the same theory, governed by the law of the ship's flag. But though international comity requires that the creation of a lien by a foreign flag be recognized, the priority which it will be given in the distribution of proceeds is adjusted by the law of the forum at which the vessel is libelled and sold.

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123 *Ibid*, art 278.
124 That is, the law of the jurisdiction where the claim arose.
125 Pires-Filho, * supra* note 41 at 526.
In the case of *Todd Shipyards Corp v Altema Compania Maritima*, a Greek ship owned by a Panamanian company, and having a registered claim against it, was repaired in New York, and sailed away without paying for the service, avoiding both the ship repair yard's possessory lien and the US maritime lien for repairs. The ship was subsequently arrested and judicially sold in Vancouver, Canada. In resolving the issue of priority, the Supreme Court of Canada assigned a higher ranking to the ship repairer's US maritime lien over the Greek ship mortgage, even though the same claim could not have been ranked above mortgage under Canadian law. The decision was based on precedent and the application of the *lex fori* rule. The court held:

> It must ... be remembered that it is the right, and not the remedy, which is regulated by the *lex loci*. ... [T]he further question to be determined in this case is whether that lien takes precedence over the respondent's mortgage claim, and in my view this question must be determined according to the law of Canada (i.e., the *lex fori*).

In *JP Morgan*, the Federal Court of Canada stated that "a maritime lien acquired under a foreign law will be recognized and may be enforced by the Federal Court. ... But once the nature of the right has been assessed under its proper law, the priority to be given to that right will be assessed under Canadian law (*lex fori*)." In *Marlex Petroleum v Har Rai*, the Supreme Court of Canada enforced a US maritime lien for supply of necessaries that was ordered by an unauthorized person who was a time charterer. According to Tetley, the Supreme Court had taken the right approach at ranking the US repair fees over a mortgage. He condemned the British decision in *The Halcyon Isle*, saying:

> The Supreme Court's decision was also equitable, because the repairs added to the value of the mortgaged vessel, so that that

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130 *JP Morgan*, supra note 25 at para 35. On appeal the court stated further that "If foreign law is not pleaded or, if pleaded, it is not proved or is insufficiently proved, the court will apply the *lex fori*. It was once said that in the absence of proof the court would presume the foreign law to be the same as the *lex fori*, but it is better to say that in all cases where foreign law is not proved, the *lex fori* prevails as it is the only law available." Kent *Trade & Finance Inc v JP Morgan Chase Bank*, 2008 FCA 399, [2009] 4 FCR 109.
131 [1987] 1 SCR 57, 72 NR 75.
132 *Halcyon*, supra note 54.
added value benefited the mortgagee. ... *The Ioannis Daskalelis* is thus ... a wiser and better founded precedent than the subsequent decision of the Privy Council in *The Halcyon Isle*.  

Tetley's opinion may have been based on the principle of public policy and comity among nations, and this makes sense provided the US accord the same treatment to Canada, but the opposite is the case. According to Gold, Chircop and Kindred:

A right in *rem* generated in Canada sought to be enforced in the United States does not rank as a maritime lien. So whereas a Canadian court will enforce the U.S. claim for necessaries as a maritime lien, the same Canadian claim will be treated as something much less in the United States and in Canada.  

Possibly, the above outcome in the US caused the Canadian courts to want to move away from *The Ioannis Daskalelis* to *The Halcyon Isle* precedent. Although this has not been judicially tested, the enabling law regarding ranking of priorities has been changed so that the supply of necessaries and services to a foreign vessel by Canadian suppliers will be classified as claims giving rise to maritime lien. The *Marine Liability Act* provides on this as follows:

(2) A person, carrying on business in Canada, has a maritime lien against a foreign vessel for claims that arise

a) in respect of goods, materials or services wherever supplied to the foreign vessel for its operation or maintenance, including ... stevedoring and lighterage; or

b) out of a contract relating to the repair or equipping of the foreign vessel.  

To classify lighterage and stevedoring services for foreign vessel as claims giving rise to maritime lien, the services must have been provided at the request of the owner or the agent of the foreign vessel.  

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134 Gold, *supra* note 1 at 274.
135 Amendment, *supra* note 47, s 12.
136 Ibid.
In Nigeria, the priority of ranking foreign maritime claims is yet to be adjudicated upon by the courts. However, there is the possibility that *The Halcyon Isle* has a persuasive effect on Nigerian courts. The precedent laid down in the *The Halcyon Isle* is to the effect that maritime lien is a remedy and procedure adopted and not a proprietary right. Where the foreign maritime lien is not recognized by the law of the state, such a claim will be ranked after all secured claims. There is a need for expeditious legislation in this area, and the law must ensure that no foreign maritime lien which is not classified under Nigerian law *lex fori* rule should be adopted while the decision in *The Halcyon Isle*\(^\text{137}\) should be codified in the legislation.

The deduction from the above is that the supply of necessaries and services to foreign vessels are classified as maritime lien in Canada because it ranked foreign suppliers of goods and services as maritime lien in the foreign state as such. In Nigeria, with the British precedent of *The Halcyon Isle*, no foreign maritime lien not recognized as such will take priority over Nigerian maritime lien. The major difference lies in the specified way of ranking maritime and statutory liens. While Canada has guidelines on the prioritization of its maritime liens, although different from province to province, Nigeria has no specific guideline with respect to how its maritime liens and statutory liens would be ranked before or after other maritime claims. Also, there is no specific rule on the ranking of foreign maritime and statutory liens, especially as it relates to the supply of necessaries and provision of services to ship, which is very common. Based on these deductions, we hereby summarize, recommend, and conclude in the following section of this work.

**VII) SUMMARY, RECOMMENDATIONS, AND CONCLUSION**

**A) Summary**

Generally, in the coastal states, the differences in the claims which may give rise to maritime liens and statutory liens are pronounced and constitute the factor underpinning the slight difference in the operation and enforcement of maritime and statutory liens in Canada and Nigeria. Despite the similarities that exist between the laws of the two coastal states, there exist

\(^{137}\) *Halcyon*, supra note 54.
distinct differences ranging from the definition of a ship to the enforcement of maritime liens, and in particular, the issue on priority of claims.

In both jurisdictions, the same claims give rise to maritime and statutory liens with slight differences. Recently, Canada enacted a law which upgraded the supply of necessaries and services to foreign ships as a claim giving rise to maritime lien, while the supply to local ships remained a claim giving rise to statutory lien. This is not the position of Nigerian admiralty practice, as the supply of necessaries remains part of general maritime claims giving rise to statutory lien, while no foreign claim of supply of necessaries or services will be enforced as maritime lien in Nigeria.

In addition, in Canada, there are two different courts conferred with authority to enforce maritime and statutory liens, the Federal Court and the Superior Provincial Courts. It is only the Federal Court and the Superior Provincial Court of British Columbia that can enforce maritime liens. Other Superior Provincial Courts can only enforce maritime claims that are not commenced in rem. In Nigeria, no other court except the Federal High Court can enforce maritime and statutory liens in relation to admiralty matters. It has the power to enforce both in rem and in personam actions.

The procedure for the enforcement of maritime liens is the same in both states, with the exception that in Nigeria the Marshall is mandated to be the custodian of the arrested ship (unless otherwise decided by the court), while the reverse is the case in Canada. In the Canadian context, the person who was in possession of the ship must be the custodian, except when the court decides that the court Sheriff should take custody of the ship. In any of the two instances, all expenses incurred are reimbursed.

The foregoing discussion of maritime and statutory liens under Canadian and Nigerian admiralty law show that in comparison, Canadian law has provisions which Nigerian law could profitably adopt on this issue. To effect the changes, the following suggestions and recommendations are made.

B) Recommendations

Firstly, lack of uniformity among national rules is one of the challenges facing the enforcement of maritime and statutory liens. Different jurisdictions have different claims to what gives rise to maritime and statutory liens. Shipping is an international business and to realize the full objectives of the international conventions governing it, there should be uniformity in the national laws of every state regarding claims that will give rise to maritime and statutory liens. Moreover, regarding the ranking of claims, it is suggested that
for all states, particularly the coastal states, both parties and non-parties to the Convention should incorporate the provisions of the International Convention on Maritime Liens and Mortgages into their respective national laws so as to achieve standard and uniform rules across the globe.

Secondly, section 2(3)(k) of Nigeria’s Admiralty Jurisdiction Act\textsuperscript{138} provides for statutory liens in respect of “goods, materials or services (including stevedoring and lighterage service) supplied or to be\textsuperscript{139} supplied to a ship for its operation or maintenance.” That said, any action in relation to this claim will not cling to the ship once ownership passes to another person. This provision contemplates both executed contracts and future services to a ship. How shall we rank the supply of necessaries and services that are yet to be performed? To entertain this kind of claim will be a waste of time and a delay in the adjudication of more concise claims. The provision should be rephrased by excluding the words “to be supplied” so as to create a concise and unambiguous phrase modelled after the Canadian provision and read as “a claim in respect of goods, materials or services (including stevedoring and lighterage service) supplied to a ship for its operation or maintenance.”\textsuperscript{140}

Generally speaking, the amendment and overhaul of both content and citation of Nigerian law of admiralty practice and procedure is long overdue. In relation to this paper, Nigeria must legislate on issues regarding general ranking and prioritization of maritime liens and foreign claims. It is necessary for the country to jettison its bondage to 18\textsuperscript{th} century English cases as persuasive authorities for the interpretation of the Federal High Court jurisdiction over admiralty disputes in 21\textsuperscript{st} century commercial shipping matters. There must be specific rules guiding the ranking of maritime liens and other claims. This should not be left to the intuition and discretion of the judges and the operation of doctrines of equity alone. Clear guidelines must exist regarding the platform which an aggrieved party may base his claim on appeal to a higher body. Corruption and unfair or misplaced justice must be avoided. By these changes, more confidence will be placed in the Nigerian judicial system.

\textsuperscript{138} Admiralty, supra note 8.
\textsuperscript{139} Emphasis added.
\textsuperscript{140} Federal, supra note 11, s 22(2)(m).
C) Conclusion

It is useful for Nigerian law to adopt the better and more problem-solving provisions identified under Canada’s legal regime on shipping disputes. As pointed out by the eminent jurist Jhering:

> [t]he reception of foreign legal institutions is not a matter of nationality, but of usefulness and need. No one bothers to fetch a thing from afar when he has one as good or better at home, but only a fool would refuse quinine just because it didn’t grow in his back garden.  

Adopting the equivalent of Canada’s shipping laws highlighted in this comparative discussion will reshape Nigeria’s regime on maritime and statutory liens. Not only will this advance domestic law, it will also be in keeping with the growing connectedness among worldwide shipping interests. Nigeria will be in a better position to more easily participate in seaborne trade in today’s global economy.

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