

ADMIRALTY  
JURISDICTION  
REGULATION  
ACT NO. 105 OF 1983

# 1. INTRODUCTION

- I thought I would go through the relevant sections of our Admiralty Jurisdiction Regulation Act No. 105 of 1983 and point out to you the salient provisions of our Act which I'm sure you will agree are unique in the sense of the vast scope and extent of our Act. Our Act has a wide ambit of potential claimants and targets entitling the wandering litigants of the world to consider South Africa as an appropriate "jurisdiction" to enforce claims.

## 2. SCOPE

- In terms of Section 2(1) of the Act it allows for claims to be adjudicated in the High Courts of South Africa. *“irrespective of the place where “a claim” arose, or the place of registration of the ship concerned or of the resident, domicile or nationality of its owners”.*
- Furthermore South African jurisdiction allows for not only the traditional maritime liens to be considered, such as salvage, collision, crew wages, and bottomry bonds, but also for any claim which might arise providing the claimant has a personal action against the owner of the property to be arrested Section 4(b).

### 3. ASSOCIATE SHIPS

- I allude to the associated arrests provisions. They are contemplated in Section 3(6) of the Act which reads as follows : -
- *“Subject to the provisions of subsection (9), an action in rem, other than such an action in respect of a maritime contemplated in paragraph (d)(mortgage) of the Definition of 'maritime claim', may be brought by the arrest of an associated ship instead of the ship in respect of which the maritime claim arose.”*

- Associated ships are classified as in terms of S3(7) as :-

*(a) an associated ship means a ship, other than the ship in respect of which the maritime claim arose:-*

- (i) owned, at the time when the action is commenced, by the person who was the owner of the ship concerned at the time when the maritime claim arose; or*
- (ii) owned, at the time when the action is commenced, by a person who controlled the company which owned the ship concerned when the maritime claim arose; or*
- (iii) owned, at the time when the action is commenced, by a company which is controlled by a person who owned the ship concerned, or controlled the company which owned the ship concerned, when the maritime claim arose.*

(b) For the purposes of paragraph (a)

(i) *ships shall be deemed to be owned by the same persons if the majority in number of, or of voting rights in respect of, or the greater part, in value, of, the shares in the ships are owned by the same persons;*

(ii) *a person shall be deemed to control a company if he has power, directly or indirectly, to control the company;*

(iii) *a company includes any other juristic person and any body of persons, irrespective of whether or not any interest therein consists of shares.*

- The current law and defining a case in respect of the association concept is to be found in the Supreme Court of Appeal decision of the MV “Heavy Metal” case which in summary was considered with the following criteria in mind:-

1. The evidence placed before the court was that the companies owning the respective vessels had their registered offices at the same address in Cyprus, that each company had the same sole director as well as the same secretary. Moreover, the majority of the shares of both companies were registered in the name of the sole director, one Emilios Lemonaris, a Cypriot advocate and **not in the name of the true beneficial owner a Mr Vafias.**
2. The applicant, in short, argued that Lemonaris controlled the two companies that owned the associated and guilty ships because he was the nominee shareholder of the shares in both companies.



3. The respondents refuted this by stating that only the beneficial owner and not the nominee shareholder can be said to control a company.
4. Smalberger AJ held that the Act differentiated between 'direct' and 'indirect' power. He stated that it was the intention of the drafters of the legislation not to restrict the meaning of 'power' in terms of the section and that either 'direct' or 'indirect' power would be satisfactory to effect an associated ship arrest.
5. The person who exercises authority or influence over the person who has de jure control, is said to be in indirect control of a company.

- He stated that the true seat of power to control needs to be established and to this end a claimant may 'pierce the veil' of apparent power to get to the person who actually controls the company. **The person who exercises authority or influence over the person who has de jure control is said to be in indirect control of the company.** He held that on the facts, weighed on a preponderance of probabilities, the beneficial owner had the power to control the nominee shareholder and that therefore the appeal should be dismissed.

### SECTION 3 (7)(c)

**This provision provides that:**


*“If at any time a ship was the subject of a charter-party the charterer or subcharterer, as the case may be, shall for the purposes of subsection (6) and this subsection be deemed to be the owner of the ship concerned in respect of any relevant maritime claim for which the charterer or the subcharterer, and not the owner, is alleged to be liable.”*

This later provision effectively **confers**, (**inequitable** as it may seem) the **right to a** claimant to arrest a vessel chartered from an **innocent** ship owner **in respective of** liabilities **arising against a** ship in **the** guilty **charterers/shipowners** fleet.


It is important to note that section 3(7)(c) NOT only extends an associated ship arrest in South Africa but is also altered by the new section 1(3) added to the Admiralty Jurisdiction Act. Section 1(3) reads:

***‘For the purposes of an action in rem, a charterer by demise shall be deemed to be, or to have been, the owner of the ship for the period of the charter by demise.’***

There is an alarming anomaly created by section 1(3). For example, if the demise charterer is deemed by s 1(3) to be the owner of the vessel, then the true legal owner is displaced for the duration of the demise charter. Accordingly, while the vessel is on demise charter, the true owner’s creditors would not be able to arrest the ship to enforce claims *in rem* against that true owner. This is both anomalous and inequitable.



It is interesting to note that the judgment of ***The Rio Caroni*** recently delivered decided whether a claimant could arrest a demise charterer's rights in a bareboat charterparty as security for court or arbitration proceedings. The court held that although a demise charterer enjoys rights of use and possession of the chartered vessel, it does not step into the shoes of the owner in all respects during the period of the charter. The court noted that whatever rights the charterer may have in and to the vessel are not based on his ownership or "deemed ownership" of it. Thus, the arresting claimant could not attach and arrest the right, title and interest in a charterparty. Judge Van Amstel ruled that as the right is not situated in South Africa it therefore is not capable of an arrest here.



The court in arriving at its conclusion drew a distinction between section 1(3) of AJRA in terms of an action in rem and in terms of a security arrest. The court held that section 1(3) applies to actions in rem instituted in this country. However, it does not apply to arrests for the purpose of providing security for claims in proceedings elsewhere. Thus, the deeming provision in section 1(3) does not apply in the context of an arrest in terms of section 5(3).

# SECURITY ARRESTS

- In the context of association, possibly the most important and most utilized provision is embodied in S5(3)(a) of the Act which reads as follows: [*my emphasis of the highlighted section*]

- *“A court may in the exercise of its admiralty jurisdiction order the arrest of **any property** for the purpose of providing security for a claim which is or **may** be the subject of an arbitration or **any proceedings contemplated, pending or proceeding**, either in the Republic or elsewhere, and whether or not it is subject to the law of the Republic, if the person seeking the arrest has a claim enforceable by an action in personam against the owner of the property concerned or an action in rem against such property or which would be so enforceable but for any such arbitration or proceedings.”*



# THE CRITERIA FOR A SECURITY ARREST ARE:

- (1) That the claimant has a prima facie case on the merits of the maritime claim for which security is sought, based upon facts which if proved would give rise to that cause of action;  
and
- (2) That the forum in which that claim has been or is to be enforced has jurisdiction to hear the matter
- (3) That it has a maritime claim as defined by the Act; and

- (4) That its maritime claim is enforceable in South African law (or would be enforceable here but for arbitration or other unsecured court proceedings) by an action in personam against the owner of the property to be arrested or by an action in rem against such property, including, where appropriate, an associated ship; and
- (5) That the property to be arrested has not previously been arrested nor has security already been given for the same claim of the same claimant; and

(5) That it has a genuine and reasonable need for security for its claim.

- Item 5 is usually the most difficult hurdle to overcome for a potential claimant.

## 5. INSOLVENCY EXCLUSION


Another profound provision is contained in Section 10 which reads as follows :-

- *“Any property arrested in respect of a maritime claim or any security given in respect of any property, or the proceeds of any property sold in execution or under an order of a court in the exercise of its admiralty jurisdiction, shall not, except as provided in section 11 (13) (effectively the residue of any fund after maritime claims have been paid), vest in a trustee in insolvency and shall not form part of the assets to be administered by a liquidator or judicial manager of the owner of the property or of any other person who might otherwise be entitled to such property,*

*security or proceeds, and no proceedings in respect of such property, security or proceeds, or the claim in respect of which that property was arrested, shall be stayed by or by reason of any sequestration, winding-up or judicial management with respect to that owner or person.”*

## 6. PREFERENTIAL RANKING

- That contained in Section 11(4) contains a codified section of claims which ranks ahead of the mortgage are as follows:
  - (a) a claim in respect of costs and expenses incurred to preserve the property in question or to procure its sale and in respect of the distribution of the proceeds of the sale
  - (b) a claim to a preference based on possession of the property in question, whether by way of a right of retention or otherwise;
  - (c) a claim which arose not earlier than one year before the commencement of proceedings to enforce it or before the submission of proof thereof and which is a claim in respect of --

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- i. crew claims
  - ii. port, canal, other waterways or pilotage dues;
  - iii. loss of life or personal injury, whether occurring on land or on water, directly resulting from employment of the ship;

- iv damage to property, whether occurring on land or on water resulting from delict (tort), and not giving rise to a cause of action based on contract, and directly resulting from the operation of the ship;
- v the repair of the ship or the supply of goods or the rendering of services to or in relation to a ship for the employment, maintenance, protection or preservation thereof;



- vi the salvage of the ship, removal of any wreck of a ship, and any contribution in respect of a general average act or sacrifice in connection with the ship;
- Vii premiums owing under any policy of marine insurance with regard to a ship or the liability of any person arising from the operation thereof; or
- viii. any body of persons for contributions with regard to the protection and indemnity of its members against any liability mentioned in subparagraph (vii);

- (d) a claim in respect of any mortgage, hypothecation or right of retention of, and any other charge on, the ship, effected or valid in accordance with the law of the flag of a ship, and in respect of any lien to which any person mentioned in paragraph (o) (**bottomry bonds**) of the Definition of 'maritime claim' is entitled;
- (e) claim in respect of any maritime lien on the ship not mentioned in any of the preceding paragraphs
- (f) any other maritime claim

Section 11(5) contemplates the ranking amongst the parties in time and according to the codified rules set out herein. Which I could give you advice depending on specific examples.

## 7. CONCLUSION

- It certainly is a jurisdiction which requires consideration and as can be seen does not require, as is the case in most other maritime jurisdictions, the Plaintiff to be domiciled or carrying on business within the jurisdiction of the South African Court such as in Thailand or America for that matter. Neither does it require pre-arrest security to be provided.