Priority in Maritime Liens and Mortgage Claims in Nigeria

Dr. Olisa Agbakoba SAN*

The Nigerian maritime industry is still at the formative stages. Nigeria has just passed the first level of enacting relevant laws to govern our basic maritime practice and domesticating international Conventions considered important to Nigeria. Nigeria is now at the level of developing the existing maritime laws. The implication of this is that certain areas of our maritime law that are not yet developed are shrouded in uncertainty. The law on priorities in maritime claims is one such area of law. This paper therefore attempts to x-ray the Nigerian law on priorities with particular focus on maritime liens and mortgages. This paper will strive to identify the shortcomings of the law in Nigeria and offer possible remedies.

Liens
What is a Lien?

A lien can be said to be an interest or right in the property of another that makes that property a “security” for any claim founded on that interest or right. In ordinary civil law, such interest or right arises from a commercial transaction and the lien imposes an obligation on the owner of the property (the lienor). D.C. Jackson (Enforcement of Maritime Claims 2nd Edition Page 369) describes a lien as “interests of prime importance and of inconsiderable uncertainty.”

A lien is of “prime importance” because it gives some benefits to the claimant over and above a simple legal claim. Again, a lien confers a proprietary interest in an asset that makes it enforceable against the owner and third parties. The proprietary interest conferred on an asset is in the nature of a security for judgment or claim akin to a pre-judgment security.

A lien is of “inconsiderable uncertain” due to the fact that in most cases, liens are not registerable and so those who may desire to acquire interest in the affected asset has no means of checking for the prior existence

* Dr. Agbakoba is Senior Partner of Olisa Agbakoba and Associates, and Senior Counsel of the Human Rights Law Service (HURILAWS). He was the founding President of the first human rights non-government organisation in Nigeria, the Civil Liberties Organisation.
Liens share with mortgages a common feature as proprietary interests over a property enforceable against third parties.

A mortgagee’s charge arises solely from the mortgage agreement whereas the charge of a lien arises by operation of law, and without any formal requirement. So while the contract between the mortgagor and mortgagee are founded on mutual intention the contract between the lienee and lienor is implied by law.

Another distinctive feature of the two concepts is in the vesting of ownership of the ship. In a mortgage, ownership of the asset or property vests in the mortgagee while in a lien ownership remains in the lienor. The right of “lien” itself does not vest but remains dormant, inchoate and floating until exercised whereas a mortgage specifically vests from time of creation.

This may be as a result of the fact that the purpose of a lien is to provide security for a claim based on an independent legal transaction or situation. A seaman for instance whose wages are due has a lien to enable him enforce his contractual rights and not so much to acquire or own the vessel.

Again, the right of a mortgagee to pursue this security into the hands of a third party is founded on notice. The right of a lienee on the other hand arises by operation of law and is independent of notice.

Types of Lien

There are several types of lien namely – possessory lien, statutory lien, equitable lien, and maritime lien. The Admiralty Jurisdiction Decree (AJD) 1001 however recognizes two types of lien namely, maritime lien and statutory lien. Though the AJD does not mention possessory lien, the incidence of a possessory lien are reflected in Section 15 of the AJD leading to the conclusion that possessory liens are also recognized by the AJD. For our present purposes, it would be pertinent to consider only maritime liens.
Maritime Lien

D.R. Thomas (Supra) describes a maritime lien as a privileged claim upon a maritime res to be carried into effect by legal process. The effect of a maritime lien is to give a claimant a charge on the res from the moment the cause of action giving rise to the maritime lien arises.

The charge or incumberance thereafter travels with the res into the possession of whosoever the res passed. The charge is crystallised by an action in rem notwithstanding that the res has been conveyed into the hands of a bona fide purchaser without notice.

This proprietary right of the maritime lien upon a vessel usually arise from services rendered to the vessel or injuries caused by it, which hovers over, attaches to and remains with the vessel irrespective of who is in actual possession thereof at the given time.

Maritime lien is a right which arises from general maritime law and is based on the concept that the ship (personified as the “res”) has itself caused harm, loss or damaged to others or to their property and must itself make good that loss or damage. The ship, in other words, is deemed to be the wrongdoer and not its owners and is therefore liable to the party who suffers as a result of such wrongdoing. Upon the occurrence of the wrongful act a maritime lien arises in favour of the party concerned and attaches as a right in and against the property of the ship concerned (“jus in re” and “jus in rem”)

It has also been described by Gorell Barnes J. in The Ripon City (1987) P. 226 at page 242 as;

“a right acquired by one over a thing belonging to another – a jus in re aliena. It is, so to speak, a subtraction from the absolute property of the owner in the thing .....”

A maritime lien therefore can be seen as a right that detracts from the absolute title of the owner of the “res.”

Some of the salient features of Maritime Liens are as follows:-

i. a ship, cargo or freight subject to the maritime lien is liable to be arrested prior to the hearing on the merits of the case;

ii. In respect of the ship, cargo, or freight the lien is enforceable against other creditors whether secured or unsecured subject to existing priority;

iii. Once created, it is enforceable even though the res may be sold and whether or not the purchaser has notice of it.

A property arrested as part of an action in rem enforcing a lien is subject
to judicial (or “forced”). A judicial sale extinguishes the property and transfers the “lien” to the proceeds of sale. The lien is also extinguished by the destruction of the ship, cargo or freight to which it attaches.

The lien may further be extinguished by laches, waiver, or satisfaction of the debt and, possibly, by lodging of bail, or provision of a guarantee and the claims attracting the lien may be extinguished by rules relating to effluxion of time. For instance, Section 374 (1) of the MSA prescribes a two-year time limit within to enforce a lien against a vessel. Time may however be extended by a court on terms. (Section 374 (2) MSA)

Maritime liens recognized under the AJD (Section 5(3)) are:

- a. claims relating 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.

(Capt. Karadoukas Stergios V. MV Nikos A. 4 NSC 315 at 318)

**Mortgages**

A Legal Mortgage can be said to be a “transfer” albeit constructive at first, of property or an interest in property as security for a debt. In other words, it is the creation of a charge or encumbrance in favour of the lender by the person wishing to borrow.

Accordingly, the owner of a vessel (the mortgagor) wishing to borrow money for his operations may do so by transferring interest or property in the vessel to the lender (mortgagee) as security for the loan. The underlying understanding and fundamental term of the loan transaction is that the vessel shall be redeemed and the constructive transfer to the lender cancelled on repayment of the amount due.

It is noteworthy that the Bottomry Bond and Respondentia Bond were two specific kinds of ship’s mortgage – of the ship and cargo respectively entered into by a Ship’s Master to borrow money, as agent of necessity, to meet an emergency during a voyage. These are now relatively obsolete in view of more advanced communication networks. These claims are not recognized under the AJD.

The essential feature of a mortgage is that it is only a security transaction, the property being redeemable by the mortgagor upon satisfaction of the debt it secures. By Section 326(1) of the MSA the mortgagee shall not by reason of the mortgage be deemed the owner of the vessel or share of it nor shall the mortgagor be deemed to have ceased from being the owner thereof.

The ship owner/mortgagor remains free to continue operating and trad-
ing the vessel provided he does not do anything detrimental to the interest of the lender/mortgagee.

A registered mortgagee may however with the consent of the Minister of Transport dispose of the ship or the share in respect of which he is registered absolutely. Where there are other registered mortgagee, a subsequent mortgagee cannot sell the vessel without the consent of the prior mortgagees unless by order of court. (Section 326 (1) MSA)

In principle, the property is realizable by the mortgagee if it is not redeemed by the stipulated date. The law as regards the realization of mortgage on a ship is that if the mortgagor makes default or does anything that tends to jeopardize the security, the mortgagee of a controlling number of shares may take possession of the ship. See NATIONAL BANK OF NIGERIA LTD. V. OKAFOR LINES LTD. (No. 3) 1967 1 NSC 110.

Upon taking possession, the mortgagee may use the ship within limits or sell her. The mortgagee may use the ship for the purpose of earning freight. The mortgagee is however not at liberty to do whatever he likes with the ship. He must consider the interest of the mortgagor and succeeding mortgagees and the law requires him to use the ship only as a prudent man will use her. He will be liable to the mortgagor for any loss sustained through the imprudent use of the ship. See ADALMA TANKER v. MERCANTILE BANK & ORS. (1986) FHCLR 414.

It is equally possible to create an equitable mortgage by depositing the deed of legal mortgage in respect of an existing loan with another person in consideration of another loan. An equitable mortgage may also be by way of agreement to enter into a legal mortgage in consideration of a loan. In the case of vessel under construction, a deposit of the builder's certificate in respect thereto may constitute an equitable mortgage of the vessel.

In practical terms, the lender who has an equitable mortgage acquires some preferential or recognizable interest in the vessel concerned subjects always to the over-riding interest of existing legal mortgages and maritime lien holders.

Majority of ships are “registered” in a particular state. In order to create a mortgage of a registered ship certain formalities are usually required to be complied with under the law of the state of registration. A legal mortgage of a vessel is usually in writing and is registerable or recordable in the ship’s register at the port of registry of the vessel in most jurisdiction.

On the production of a mortgage, the Registrar at the ships port of registry shall record it in the Registrar records mortgages in the order they are produced to him and the Registrar shall endorse and sign a memorandum in each mortgage stating the date and time of registration.

The law as regards the realization of mortgage on a ship is that if the mortgagor makes default or does anything that tends to jeopardize the security, the mortgagee of a controlling number of shares may take possession of the ship.
Registration of a mortgage is deemed to be notice to the public of that transaction since the ship’s register is a public document available for search by interested parties. Failure to register a mortgage may be detrimental to the interest of the mortgage as will be discussed later under priorities.

**International Regimes on Maritime Liens and Mortgages 1926, 1967 And 1993 Conventions**

The aim of the International Conventions on Maritime Liens and Mortgages of 1926, 1967, and 1993 was to secure uniform framework for the recognition and enforcement of these proprietary interest. However, much success has not been achieved in this direction due principally to a lack of consensus on conflicts or laws principles governing the creation and operation of maritime liens. This often results in a lien being attached or lost as a ship sails from one country to another. Also, the conflict between operating interests (ship owners, salvors, crew and financial interests (lenders) continues to pose difficulty in accepting the priority of maritime liens over mortgages in some jurisdictions.

Consequently, many national laws are yet to implement any of these conventions thereby leaving the proprietary rights attaching to any ship exposed to divergent enforcement regimes.

**1926 Convention**

The International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages 1926 recognizes five categories of maritime liens namely:

- law costs (Admiralty Court Charges) light, harbour, tonnage and pilotage dues and taxes
- master and crew wages and related contractual rights
- salvage and general average claims
- collision, personal injury and cargo claims
- master’s disbursements.

Such claims may attach to a ship, freight or a ship’s accessories as defined in Articles 2, 4 & 7 of the Convention. Article 8 and 13 of the Convention provide that a maritime lien is enforceable against a ship “into whatever hands it may pass and against a chartered ship.” Generally, the liens are extinguished after one year except the lien for master’s disbursements which expires after six months - (Article 9 of the Convention).
As regards Mortgages, Article 1 of the 1926 Conventions stipulates that Mortgages, hypothecations and other charges created and registered in accordance with the laws of a contracting state in which a vessel is registered shall be recognized. Such interests are to be ranked immediately after maritime lien claims.

It is pertinent to mention that as at January 1995 the 1926 Convention had only been ratified by 28 states including France, Belgium, Italy, Poland, Portugal, and Spain.

1967 Convention

The International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages 1967 retains the same lists of claim that attach as maritime liens under the 1926 Convention except for the unjustified removal of the claim for master’s disbursement. Contrary to anticipation, this Convention has not come into force to replace the 1926 Convention and as at 1995 had been ratified by only four states though the national laws of some states that have not ratified it can be said to conform to its provisions (e.g. Germany).

As in the 1926 Convention, the maritime liens become unenforceable after one year unless there is an earlier arrest and subsequent judicial (forced) sale. In such a situation, existing claims may be lodged against the proceeds of sale.

The 1967 Convention, as in the 1926 Convention, recognizes Mortgages and hypothecation but not “other charges” created and registered under national laws of contracting states. It further requires that deregistration of such ships should be with consent of registered mortgages and hypothecques as a way of protecting such interests.

1993 Convention

This Convention known as the International Convention on Maritime Liens and Mortgages 1993, unlike the earlier ones initiated by the United Nations came under the auspices of the International Maritime Organization (IMO). It is to come into force six months after consent of ten states are received.

The Convention though basically similar to the 1926 and 1967 Conventions as regards the five categories of maritime liens, now excludes from the list of maritime lien claims wreck removals, general average contributions and damage arising from carriage of oil and other hazardous substances where compensation is payable under another Convention or statutory provision.

Under the Convention maritime liens attach to claims against the owner, demise charterer, manager or operator of the vessel and also become extinguished where forced sales takes place or after one year except in the case of master’s disbursement which also lasts for six months.
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As regards mortgages, the Convention contains provisions similar to the earlier Conventions. Such provisions deal with recognition, enforcement, and priority of interests registered in accordance with the law of the state of the vessel’s registration.

A registered mortgagee’s interest is recognized under the Convention where the register is open to public inspection and contains full particulars of the nature of interest, its creation, and holder. As in the case of maritime liens, registered mortgages are extinguished by judicial or forced sale of the vessel except where the sale takes place in the state of registry and there is consent as between the parties that the mortgage should continue.

Article 11 of the Convention now requires that notice of a forced sale must be given to the registry in the state of registration, the registered owner, and holders of registered mortgages. De-registration must also be with such notices. These developments are welcome and subject to the applicable national law should enhance the position of registered mortgages in the distribution of the proceeds of sale.

It is observed that the Conventions are limited in scope. None of them applies to Government ships on public non-commercial service or vessels of war. (Article 15 of 1967 Convention). The provisions dealing with maritime liens merely set out claims which constitute Convention Maritime Liens whilst recognizing that these may be different from national laws.

In respect of mortgages, the Conventions deal mainly with the registration, priority, transfer of ownership and rules relating to forced sale. Again, these provisions may differ from those obtaining under laws of most states that are often at variance with the Convention.

Furthermore, the Conventions lack more support and acceptability, as many of the more powerful maritime nations such as Japan, the United States, and the United Kingdom have not ratified the 1926 and 1967 Conventions. This therefore heightens the conflict of laws principles governing the creation and operation of these proprietary rights. The eagerness with which 65 state members of the IMO articulated the 1993 Convention appears to have been defeated as ratifications of the Conventions are slow in coming in.

The impact and full value of the provisions of these Conventions cannot therefore be appreciated given that any conflict usually gets resolved in favour of national law, more often than not, to the detriment of foreign maritime lien holders and registered mortgages.
Jurisdictional Adaptations

It is a fundamental principle of International Law that nation states are at liberty to formulate and implement their own laws. Implementation of International Conventions into national laws (statutes) is therefore not mandatory even after ratification by the state. International Conventions to which Nigeria is a signatory do not apply automatically in Nigeria. Section 12 of the 1999 Constitution makes it mandatory for any Convention ratified by Nigeria to be passed into law by the National Assembly before it can attain force of law.

The most direct reference to maritime lien under Nigerian Law is that stipulated in Section 5 (3) of the Admiralty Jurisdiction Act 1991. This express provision of Section 5 of the AJD seems to exclude admiralty court charges, port, harbour, tonnage and other charges or dues recognized as one of the categories of Maritime Lien claims under the various International Maritime Liens and Mortgages Conventions. Such claims arising from port, harbour and other charges are classified as general maritime claims under Section 2 (3) of the AJD and can be at best be regarded as giving rise to “statutory liens” on a vessel under Nigerian Law.

The Nigerian Merchant Shipping Act 1990 makes reference to liens in general terms in Section 374 (1) without further details or definition and grants a two-year (2) limitation period for pursuing such claims.

As regards mortgages, the same Admiralty Jurisdiction Act 1991 defines a mortgage (S. 26 (1)) in relation to a ship to include “a hypothecation or pledge of and a charge on, the ship or share”

Sections 323-334 of the Merchant Shipping Act 1990 set out the requirements for mortgaging Nigerian vessels, registration, and priority of such mortgages etc.

These provisions can be said to conform in some measure to these International Maritime Liens and Mortgages Conventions though Nigeria is yet to ratify and/or implement any of these Conventions specifically.

Priorities

Procedure for Determining the Order of Priority

Ordinarily, the parties who have a claim against the vessel should be able to agree upon the order of priorities according to well-settled principles. In the absence of an agreement, any party who has obtained judgment against the ship or the proceeds of sale may apply to the court for an order determining the order of priorities of the various claims. This process is covered by Order XV of the Admiralty Jurisdiction Procedure Rules (AJPR) 1993.
Steps to Follow to Determine Priority

The following steps can be discerned from the above provisions of Order XV:-

a) Judgment is obtained against the vessel. The particular court from which judgment may be obtained is not stated. It must be assumed that the judgment of a superior court is referred to. The judgment must be enforceable. Note that a foreign judgment is not enforceable in Nigeria unless it is registered in accordance with the provisions of the Foreign Judgments (Reciprocal Enforcement) Act Cap 152 LFN 1990. Does this imply that in the case of a foreign judgment, the court should be satisfied that it has been registered before making an order for determination of priority?

b) An application is made to the court for determination of the order of priority of claims against the ship;

c) At the hearing of the application, the court may order that notice of the application be given or published for the benefit of other claimants. The court may give direction as to the period within which creditors may notify the court of their claims against the vessel;

d) The applicant gives notice or publishes (in a newspaper with national spread) the application. The publication will specify the period within which claimants are to enter their claims.

e) The determination will be made after the end of the period specified in the notice.

A few comments are called for here. First, the rule would appear to anticipate that the party that secured the arrest of the vessel is not necessarily the person entitled to bring the application for the determination of priority. So while X may have arrested the vessel pendente lite, Y, who has already obtained judgment in a separate action, may apply to court that the order of priority of claims be determined.

Second, it is required by the rules that all caveators and all persons who to the knowledge of the court have obtained judgment against the ship or the proceeds of sale be served with the notice of motion. The rule gives the applicant the option of giving the notice by personal service of the application or by publication in a newspaper. It may however be safer to order that in addition to giving personal notice to caveators who may already be known to the court, notice of the application be published. This gives notice to the whole world.

This is significant because the court has the jurisdiction to reopen an order for priorities, but it will be reluctant to do so unless there is some
very good reason shown. (The “Fairport” (No. 4) (1967) 1 Lloyd’s Rep. 602). It is submitted that the absence of notice may constitute a good reason to reopen the order for priority.

**Order of Priorities between Different Claimants**

There is no single Nigerian legislation setting out the order of priorities between different claimants. For instance, the Admiralty Jurisdiction Decree (AJD) 1991 makes certain provisions (Sections 14 and 15) relating to priorities. These provisions however deal with Admiralty Marshal’s expenses, general maritime claims, and statutory possessory liens. The AJD did not rank these claimants.

The AJD is regrettably the only single legislation dealing with priority of claims between different claimants but the Act is rather scanty and do not cover the field on the subject of determination of order of priorities. It is accordingly of little help. A review of the AJD will make this point clear.

**Order of Priority under the Admiralty Jurisdiction Decree**

Section 14 of AJD provides for priorities for general maritime claims concerning a sister ship. The Section states that where;

(a) a proceeding in respect of a general maritime claim concerning a ship has been commenced against a sister ship, or

(b) in relation to a proceeding commenced concerning a ship, a sister ship is arrested,

the order in which general maritime claims against both ships shall be paid out of the proceeds of the sale of a sister ship shall be determined as if all the claims were a general maritime claim against the sister ship.

This section does not cover a claim for instance under a proprietary maritime claim nor a claim not involving a sister ship.

Section 15 of the AJD again does not help much except that it puts a statutory possessory lien over all other claims except the claim of the Admiralty Marshal. Section 15 provides that:-

(1) Where a law other than this Decree (AJD) confers on a person power to detain a ship-

   (a) if the ship is under arrest under this Decree, the power to detain the ship shall not be exercised;

   (b) the exercise of the power to detain the ship shall not prevent the arrest of the ship under this Decree

(2) if a ship that has been detained under such a power, as is mentioned in subsection (1) of this section, is arrested under this Decree, then by force of this paragraph, the detention shall be suspended for so
long as the ship is under arrest;

(3) if a ship that has been detained pursuant to a civil claim or would, but for paragraph (a) of subsection (1) of this section, be liable to be detained under such a power, is arrested and sold under this Decree, then, the civil claim shall, unless the court otherwise directs, be payable in priority to any claim against the ship other than the claim of the Admiralty Marshal for expenses.

A brief analysis of Section 15 is necessary before we delve into the principles governing order of priority generally. The following points should be noted:-

(a) The section recognizes the right of any person conferred by a statute other than the AJD to detain a vessel. These rights, generally referred to as statutory possessory liens, are usually conferred by statute to Governments or their departments, public authorities or the ports authority to detain or otherwise prevent a vessel from sailing. This is done without recourse to a court for the purpose of enforcing public law as such they are not to be equated with arrest for the purpose of enforcing private rights. For instance, the Sea Fisheries Decree No. 71 of 1992 prohibits any person from operating or navigating any fishing boat or reefer vessel for the purpose of fishing without a licence. Section 9(3) of the Decree gives the Minister of Agriculture, Water Resources and Rural Development acting, through the Federal Department of Fisheries, power to detain any vessel not duly licensed. My experience shows that the vessel will be detained until the licence is procured and penalties paid.

(b) The section makes the right to detain subject and inferior to the right to arrest. But the arrest only suspends the right of detention for as long as the ship is under arrest.

(c) Recognizing that the sale of the vessel will prejudice the right of any person with an existing right of detention to make a claim against the vessel, the section makes that claim payable in priority over any other claim against the vessel other than the Admiralty Marshal’s expenses.

The conclusion to be drawn from the combined effect of Sections 14 and 15 is that the following order of priority are recognized under the AJD:-

i. Admiralty Marshal’s expenses and costs.

ii. Statutory Possessory lien.

iii. General Maritime claims.

The above order set by the AJD cannot be exhaustive. Regrettably, there is yet no reported case law on the point. Where any exists, it is my opinion that the court will very likely have resort to English Law to get the full order of priorities. For instance, in the exercise of the general jurisdic-
tion conferred on the Federal High Court, Sections 10 and 11 of the Federal High Court Act Cap. 134 LFN 1990 empowers the court to apply common law, English doctrines of equity, and the practice in the Admiralty Division of the High Court of England. Section 32 of the Interpretation Act Cap. 192 LFN 1990 also allows resort to English rules.

**Order of Priorities under English Law**

L. N. Mbanefo, SAN in his authoritative Book, Nigerian Shipping Practice and Procedure, Page 166, citing an English author, Nigel Meeson, Admiralty Jurisdiction and Practice, set the following order of priority which should be much helpful to us in making a general statement of the principles regarding the complex question of priorities:

1. The Admiralty Marshal shall have a first charge on the vessel for his expenses in connection with the vessel.
2. A common law or statutory possessory lien, provided possession is not voluntarily relinquished, takes priority over all but prior maritime liens;
3. Maritime liens rank in priority to mortgages and to statutory liens;
4. Mortgages take priority over statutory liens;
5. Statutory liens rank in pari passu inter se and have priority over ordinary judgment creditors.
6. The Admiralty Marshal’s Expenses

The expenses of the Admiralty Marshall in complying with an order of the court for the appraisement and sale of the vessel shall be regarded as part of the expenses of sale. (Order XV Rule 2 AJPR) These will include the expenses incurred in effecting the arrest, in maintaining the arrest and any other expenses authorized by the court to enable the ship to be sold for the best possible price.

A. Expenses Incurred in Order to Achieve the Best Price

   i. Cost of Repatriation of Crew

   Unless the prospective buyer agrees, the vessel cannot be sold when the crewmen are still on board. Ordinarily the ship owner’s P&I Club or the seamen’s protecting association (International Transport Workers Federation (ITWF)) arrange for repatriation of the crew.

   Where however such assistance is not forthcoming and the Plaintiff is not in a position to do so, he may apply to court under Order VIII rules 5 (1) and 7 AJPR for an order that the Admiralty Marshal pay the crew’s repatriation expenses and, if necessary, their wages and for such payments to form part of the Admiralty Marshal’s costs of arrest and so be a first charge on the net proceeds of the sale. (Order IX rule 3 AJPR).
It should be noted that the same principles apply to expenses incurred by the Admiralty Marshal in connection with the preservation, management, or control of the vessel while under arrest. (Order VIII rule 7 AJPR).

In practice, these powers are rarely exercised by the courts.

ii. Cost of Repairs

In The “Westport” (No. 2) (1965) 1 Lloyd’s Rep. 549 the Admiralty Marshal was ordered to carry out certain repairs on the ship so that the ship could be sold as a going concern. It was the brokers view that the price the vessel may have realized could be adversely affected by a failure to repair.

iii. Classification Society Fees

In The “Parita” (1964) 1 Lloyd’s Rep. 199 the Admiralty Marshal was empowered to pay outstanding classification society fees in order that the ship might regain her classification and be sold at a higher price.

B. Expenses Other than the Admiralty Marshal’s Expenses

There are certain expenses incurred in connection with the arrest and sale of the Ship that are not ranked but are nevertheless accorded priority after Admiralty Marshal’s expenses under English Law. These are the Solicitor’s lien and the costs incurred by the producer of the fund. (Nigel Meeson (Supra) at Pages 158 and 159)

3. Common Law or Statutory Possessory Lien

The statutory possessory lien takes priority over all other claimants other than the admiralty marshal. The statutory possessory lien has similar incidence as the rights recognized by Section 15 of the AJD to the extent that they both have the right to be paid in priority to any claim other than the claim by the Admiralty Marshal for expenses. (Nigel Meeson (Supra) at Pages 158 and 159)

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It is pertinent to mention here the power of the Nigerian Ports Authority (NPA) to exercise a lien over goods in its custody for its statutory rates and freight under Sections 66 and 67 of the Nigerian Ports Authority Decree No. 38 of 1999. NPA is empowered under Section 69 to sell the goods and apply the proceeds of sale in accordance with Section 70. It is interesting to note that order of priority does not take into consideration other interests that may exist on the goods. Section 70 sets the following order of priority:

i. Customs and excise duties and state warehouse rent owed.

ii. Expenses of sale.
 iii. Rates and expenses due to NPA.

iv. Payment of the freight on the goods.

v. The owner of the goods.

Nigel Meeson (at page 155) identifies a Common Law possessory lien as parallel to a statutory possessory lien. It is not quite clear what difference exists between a common law possessory lien and a maritime lien. In Mercantile Bank of Nigeria Ltd. V. E. R. Tucker 1 NSC 428 at 431 they were both treated as the same.

4. Maritime liens

A maritime lien will however be treated as a statutory lien if brought against a sister ship which will result in a loss in priority (Section 14 AJD)

Under the AJD the claims constituting a maritime lien are rather limited and they include claims for reward for salvage of the vessel; claim for damage done by a ship; claims for wages and other sums due to the Master, officer and other members of the vessel’s complement in respect of their employment on the vessel, including cost of repatriation; Master’s disbursements. (Section 5 (3) AJD)

D.C. Jackson (Enforcement of Maritime Claims at pages 501-504) expands maritime liens to include:-

(a) Claims for bottomry, in so far as it preserves the res. This is not recognized under Nigerian law;

(b) Claims in respect of loss of life or personal injury occurring, whether on land or on water, in direct connection with the operation of the vessel;

(c) Claims based on tort arising out of physical loss or damage caused by the operation of the vessel other than loss of damage to cargo, containers, and passengers effects carried on the vessel.

These claims do not however constitute maritime liens in Nigeria, as a foreign law is not applicable to Nigeria where a local statute has made adequate provisions on the subject.

5. Mortgages and Other Statutory Liens;

D.C. Jackson (Enforcement of Maritime Claims at page 504) states that for the purpose of priority between statutory lien, the liens must be classified into three categories:

(i) mortgages and charges;

(ii) ownership claims; and

(iii) the remainder.
Priority is accorded in that order. The mortgage claim takes priority over a statutory maritime lien arising subsequent to the mortgage being created. It does not however take priority over a statutory maritime claim that arose prior to the creation of the mortgage.

Through the availability of an action, in rem claims for ownership or co-ownership of a vessel may be said technically to be statutory lien. These are classified as proprietary maritime claims under the AJD (Section 2) and includes claim for possession, title or ownership of a ship or a share in the ship. Claims relating to a mortgage of a ship or a share in a ship or ship’s freight are also proprietary maritime claims. These rank higher than other proprietary maritime claims as shown above.

The claims of other statutory liens who are entitled to proceed against the ship by admiralty action in rem will rank in pari passu inter se but have priority over general creditors of the ship owner except the secured creditors. A secured creditor will include a creditor who has caused the ship to be attached pursuant to a writ of fieri facias. From the time of the seizure, the creditor stands in priority over an admiralty writ in rem issued after the execution in respect of a claim not giving rise to maritime lien. The execution is also subject to statutory rights of action in rem where the writ was issued prior to execution and to mortgages or other charges granted prior to execution.

The claims of in personam creditors will be last having no priority at all. And the owner of the ship is entitled to the balance remaining of the proceeds, if any.

Disturbing the Settled Order of Priority

Note that the above order is only a prima facie ranking. The determination of priorities is an equitable jurisdiction and in theory, the court exercises its discretion afresh in the circumstances of each case. The settled order of ranking may be disturbed where there are particular circumstances where it is in the interest of justice to do so. (See Meeson (Supra) at Pages 160 and 166)

One of such instance is where the holder of a priority claim has himself assumed personal liability to another claimant and loses his priority as against that other claimant. Thus the claim for wages and disbursements of the master of a ship who is a part owner is postponed to the claim of persons who have supplied necessaries to the ship.

Similarly, the master’s maritime lien for wages and disbursements will be postponed to the claim of a mortgagee where he has personally guaranteed the mortgage debt.

The mortgagee on his part may disturb his priority where he is in posses-
sion of the ship and necessaries are supplied to the ship upon his au-
thority. Here the mortgagee’s priority will be postponed to the person 
who supplied the necessaries.

**Order of Priority among Specific Class of Claimants**

**Particular Ranking Relationship among Maritime Liens**

There is no set order of ranking among maritime lienees. The Nigerian 
MSA 1990 makes reference to liens in general terms in Section 374 (1) 
without further details on priority. D. R. Thomas (Supra) however set 
out the following principles:

Damage liens stand on equal footing ranking in pari passu. For salvage 
liens, the “inverse priority rule” applies. This means that the last salvage 
lien in time prevails over earlier salvage liens. Seamen’s wages rank in 
pari passu. Masters wages and disbursements also rank pari passu and 
where they co-exist, they are treated as one.

As between maritime liens of different classes, the following order of 
ranking apply:-

i. Damage liens.

ii. Salvage liens. This is however in respect of prior liens. Salvage liens 
will not take precedence over subsequent liens where they operate to 
preserve the res.

iii. Wages and disbursements. A seaman’s wage ranks above a Master’s 
wage. A wage lien is postponed to damage claims except with respect 
to subsequent wages arising after the damage claim. In very rare occa-
sions, a subsequent wage lien may assume priority over salvage lien 
where such lien preserves the res.

It is noteworthy that the legal nature of the claim plays a significant role 
in determining priorities as between competing maritime liens. The 
damage liens for instance arise ex indeleicto i.e. arising out of a tort. 
They are regarded as involuntary liens and they do not depend on the 
owner’s personal liability. This largely accounts for the priority they 
have over other liens. The salvage and wage liens on the other hand 
arise quasi ex contractu (i.e. arising out of a quasi-contract) and ex con-
tractu (i.e. out of contract) respectively. They are both voluntary liens 
arising out of service rendered to the vessel.

**Particular Ranking Relationship among Mortgages**

Section 325 (1) of MSA makes provisions for priority of mortgages. The 
section provides that if there more than one registered mortgage in re-
spect of the same ship or share, the mortgagees shall, notwithstanding 
any express, implied or constructive notice, be entitled to priority one 
over the other, according to the date at which each mortgage is regis-
terred in the Register book and not according to the date of each mortgage.

It would appear from the Section 325 (1) above that the order of priority is determined according to the date of registration regardless of notice. If it is noted that registration itself constitutes notice, then reference to notice in Section 325 (1) must be taken to imply knowledge that could be by any means. So for instance if Mr. A came across a Mortgage agreement between Mr. B (the mortgagee) and Mr. C (the mortgagor) entered prior to his but not registered he can rush to register his mortgage and gain priority over Mr. B.

Conclusion
The state of the law in Nigeria relating to priority of settling claims is still unsettled. It is difficult to ascertain the Nigerian law on the point as neither our case law nor our statutes are well developed. There is a dire need for our laws to be updated.

I have already touched some of the gray areas of primary concern. They include the following:

i. The Admiralty Marshal's expenses.

While the AJD recognizes the right of the Admiralty Marshal to be paid for his expenses in priority to other claimants, what constitutes the Admiralty Marshal's expenses is not defined. The AJPR identifies some areas in which the Admiralty Marshal will incur expenses. These include:

- a. expenses in relation to the arrest of the vessel, (O. VIII r. 1);
- b. payment for services supplied to the arrested vessel, (O. VIII r. 2 (2));
- c. fees and expenses in connection with the valuation and sale of the ship, (O. XIV r. 4);
- d. expenses in connection with complying with an order of court in an application to determine priorities. (O. XV r. 2)

If the above expenses are taken as what makes up the Admiralty Marshal's expenses, then they are by no means exhaustive. In any event, these are matters of substantive law that should be incorporated in the AJD and not the AJPR.

ii. Powers of the Admiralty Marshal.

The Admiralty Marshal needs to be given a greater discretion to take proactive steps to ensure that the best price is achieved when a vessel is sold. In addition, the Admiralty Marshal should be empowered to carry through a sale once an order of sale has been made when the party in whose favour the order was made is unable to bear the cost of executing
the order of sale. Provisions should be made for the Admiralty Marshal's expense to be deducted from the proceeds of sale. This will not only save the ship but also decongest our ports.

iii. Order of Priority.

The AJD also does not spell out the order of priority between, for instance, maritime liens and statutory liens. This matter is too serious to be left to speculations.

While the AJD recognizes the right of the Admiralty Marshal to be paid for his expenses in priority to other claimants, what constitutes the Admiralty Marshal's expenses is not defined.