

MARITIME PRACTICE IN INDIA



Shrikant Hathi
Binita Hathi

FOURTH EDITION

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by

Shrikant Hathi

BCOM; LLB; LLM; Solicitor
Partner, HATHI & PARTNERS, Advocates & Solicitors, Mumbai
Advocate Bombay High Court
Advocate Supreme Court of India

Binita Hathi

BCOM; LLB; LLM; Solicitor
Partner, HATHI & PARTNERS, Advocates & Solicitors, Mumbai
Advocate Bombay High Court
Advocate Supreme Court of India

Mumbai, India
2007
Printed at Mumbai, India
and
Published by

HATHI & PARTNERS
Advocates & Solicitors
8, Rajabhadur Mansion, 3 rd Floor,
Ambalal Doshi Marg, Fort, Mumbai 400001, India
Tel: +91-22-22659969
Fax: +91-22-22691882
Email: contact@hathipartners.com

First Edition, 2002
Second Edition, 2003
Second Edition (Revised), 2003
Third Edition, 2004
Third Edition (Revised), 2005
Fourth Edition, 2007

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Binita Hathi
2007

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ACKNOWLEDGEMENTS

1. Captain Suresh Divekar, ex-Managing Director, Loss Prevention Association India, Mumbai India
2. Mr. Alanzo Langecker, Director, Club Alanzo YP Cruises GmbH, Germany
3. Dr. Anil Sharma, Director, GMS Inc, Maryland, U.S.A
4. Mr. Hassan Zubedi, Director, Dubai Bank, Dubai and African Energy Ltd, Kenya.
5. Captain Leontopoulos C, Director, Open Seas Shipping Ltd, Dubai.
6. Mr. Bruce Hailey, Solicitor, Hailliwells LLP, United Kingdom.
7. Mr. Marcello Cignolini, President, Euragent Srl, Italy
8. Mr. Charlie Zhou, President, Yicheng Logistics (Tianjin) Co., Ltd., China
9. Mr. Duncan Ross, Partner, Hailliwells LLP, United Kingdom.
10. Mr. Charles Hattersley, Partner, Foot Anstey Sargent, United Kingdom.
11. Mr. Pravin Mhatre, Director, Able Maritime Pvt Ltd, Mumbai, India
12. Mr. Uttam Hathi, Partner, Hathi & Partners, Mumbai India
13. Mr. Leonard van Houten, Partner, Van Harmelen Beijneveld Van Houten, Rotterdam, Netherlands
14. Mr. Ruben J. Levy, Advocate, Ruben J. Levy & Co, Panama City, Panama
15. Mr. A.B.M Shamshud Doulah, Partner, Doulah & Doulah, Dhaka, Bangladesh
16. Mr. Ilan Orly, Partner, Ilan Orly & Co, Tel Aviv, Israel
17. Mr. Alberto Batini, Partner, Studio Legale Batini & Associati, Genoa, Italy
18. Mr. Sameer Gupta, Chartered Accountant, ICICI Bank, Mumbai, India
19. Mr. Shailesh Kothari, Ernst & Young, Mumbai, India
20. Mr. Ahmad Ali, Shaheen Al- Ghanim, Kuwait
21. Mr. Vladimir Mednikov, Partner, Jurinflot, Moscow
22. Mr. Alessandro Palmigiano, Partner, Studio Legale Palmigiano, Italy
23. Dr Christian Farrugia LL.M(Lond) LL.D., Partner, Farrugia Schembri Orland
24. Mr. Henrik Kleis, Partner, Delacour, Denmark
25. Mr. Panayiotis Neocleous, Vice President, ANL and Partner , Andreas Neocleous & Co, Cyprus
26. Dr. Carlos Alfredo López Guevara, Partner, Lopez, Lopez & Associates., Panama
27. Mr. Thomas Tan, Partner, Haridass Ho & Partners, Singapore
28. Mr. Rogaciano Rebelo, Honeywells., Dubai

Preface

Although the focal points of Maritime Practice in India are admiralty laws, this fourth edition book contains the entire gamut of admiralty edicts including ship arrest and substantive maritime law prevalent in India. This book is about a subject that has been lurking in the scourgings of darkness of Indian maritime history for many decades. It provides an in-depth insight into Indian Admiralty law, thus placing maritime practice at the threshold of the legal fraternity.

This book is a compact, integrated guide to admiralty law in India. The primary purpose of this book is to better enlighten shipping and industry related professionals to take prompt and decisive decisions. We seek to clarify what the law requires, allow and prohibit, not to comment on how well it does so or whether what it should. We hope that this publication will contribute towards the realistic assessment and debate of the surrounding issues.

The book does not indulge exhaustively in any topic neither does it predicts any outcome of any particular case nor can it be considered as a substitute for competent legal counsel. Although we believe that the entire text is accurate at the time of publication, if it does not already fall short of this standard, it surely will with the passage of time.

This book is the first of its kind on admiralty laws published in India. Utility of the book with respect to a second central aim, to advance general understanding about the regulation of admiralty laws in India, is less apt to erode.

Shrikant Hathi
Binita Hathi

Mumbai, India, February 10 , 2007

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CHAPTER 1

History and Admiralty jurisdiction of the High Courts

The historical development of admiralty jurisdiction and procedure is of practical as well as theoretical interest, since opinions in admiralty cases frequently refer to the historical background in reaching conclusions on the questions at issue. The special jurisdiction of admiralty has a maritime purpose, different from the common law. It is not exclusively rooted in the civil law system, although it includes substantial derivations there from. It has a strong international aspect, but may undergo independent changes in several countries. Certain universal features exist in all countries that have admiralty law and such international features are given serious consideration by admiralty courts. By the end of the seventeenth century the admiralty jurisdiction in England was restricted, it was not as extensive as compared to other European maritime countries due to a long standing controversy in which the common law courts with the aid of the Parliament had succeeded in limiting the jurisdiction of admiralty to the high seas and as such excluded admiralty jurisdiction from transactions arising on waters within the body of a country.

A suit against a foreign ship owned by a foreign company not having a place of residence or business in India is liable to be proceeded against on the admiralty side of the High Court by an action in rem in respect of the cause of action alleged to have arisen by reason of a tort or a breach of obligation arising from the carriage of goods from a port in India to a foreign port. Courts' admiralty jurisdiction is not limited to what was permitted by the Admiralty Court, 1861 and the Colonial Courts of Admiralty Act, 1890. Prior to the decision of *m.v Elisabeth-v- Harwan Investment & Trading Pvt Ltd., Goa*, the courts exercising Admiralty Jurisdiction statutorily in India were the three High Courts at Calcutta, Madras and Bombay. The High Courts of the other littoral states of India, viz. Gujarat, Karnataka, Kerala, Andhra Pradesh and Orissa, do not possess Admiralty jurisdiction, albeit there have been instances of the High Courts of Gujarat, Andhra Pradesh and Orissa having entertained Admiralty causes apparently on a perfunctory consideration of the various States Reorganisation Acts enacted by the Indian Parliament and presumably without the benefit of a full argument. However, after the decision of the Supreme Court in *m.v Elisabeth-v- Harwan Investment & Trading Pvt Ltd*) interpreting under A.225 the High Courts in India is superior courts of record. They have original and appellate jurisdiction. They have inherent and plenary powers. Unless expressly or impliedly barred, and subject to the appellate or discretionary jurisdiction of the Supreme Court, the High Courts have unlimited jurisdiction, including the jurisdiction to determine their own powers.

The Admiralty jurisdiction of the High Courts at Calcutta, Madras and Bombay were the same as the Admiralty jurisdiction of the High Court in England at the time of the enactment by the British Parliament of the Colonial Courts of Admiralty Act 1890 and is, under subsection (2) of the said Act, and subject to the provisions thereof, over the like places, persons, matters and things as the Admiralty jurisdiction of the High Court in England, whether existing by virtue of any statute or otherwise and exercised in the like manner and to as full an extent as the High Court in England having the same regard as that court to international law and the comity of nations. The subsequent extension of the Admiralty jurisdiction of the High Court in England by statutes passed after that date by the British Parliament, the Administration of Justice Act 1920, re-enacted by the Supreme Court of Judicature (Consolidation) Act, 1925, is not shared by the said three High Courts. After India attained independence, the Indian Parliament has so far not exercised its powers to make laws with respect to Admiralty and thus the three Indian High Courts were to apply Admiralty laws as it was applied by the English Court of Admiralty as defined in the Admiralty Court Act, 1861. The scope and nature of the Admiralty jurisdiction exercised by the High Courts in India have been examined and ascertained in *Kamlakar v. The Scindia Steam Navigation Co. Ltd; Rungta Sons Ltd. v. Owners and Master of Edison*⁶; *National Co. Ltd. v. M. S. Asia Mariner* ; *m.v Elisabeth-v- Harwan Investment & Trading Pvt Ltd., Goa*

The fact that the High Court continues to enjoy the same jurisdiction as it had immediately before the commencement of the Constitution, as stated in Art. 225, does not mean that a matter which is covered by the Admiralty Court Act, 1861 cannot be otherwise dealt with by the High Court, subject to its own Rules, in exercise of its manifold jurisdiction, which is unless barred, unlimited. To the extent not barred expressly or by necessary implication, the judicial sovereignty of this country is manifested in the jurisdiction vested in the High Courts as superior courts. It is true that the Colonial statutes continue to remain in force by reason of Art. 372 of the Constitution of India, but that do not stultify the growth of law or blinker its vision or fetter its arms. Legislation has always marched behind time, but it is the duty of the Court to expound and fashion the law for the present and the future to meet the ends of justice.

It was because of the unlimited civil jurisdiction that was already vested in these High Courts that they were declared to be Colonial Courts of Admiralty having the same jurisdiction in extent and quality as was vested in the High Court of England by virtue of any statute or custom. The High Courts were declared competent to regulate their procedure and practice in exercise of admiralty jurisdiction in accordance with the Rules made in that behalf. There is, therefore, neither reason nor logic in imposing a fetter on the jurisdiction of those High Courts by limiting it to the provisions of an imperial statute of 1861 and freezing any further growth of jurisdiction. This is even truer because the Admiralty Court Act, 1861 was in substance repealed in England a long time ago.

Assuming that the admiralty powers of the High Courts in India are limited to what had been derived from the Colonial Courts of Admiralty Act, 1890, that Act, having equated certain Indian High Courts to the High Court of England in regard to admiralty jurisdiction, must be considered to have conferred on the former all such powers which the latter enjoyed in 1890 and thereafter during the period preceding the Indian Independence Act, 1947. What the Act of 1890 did was not to incorporate any English statute into Indian law, but to equate the admiralty jurisdiction of the Indian High Courts over places, persons, matters and things to that of the English High Court. There is no reason to think that the jurisdiction of the Indian High Courts have stood frozen and atrophied on the date of the Colonial Courts of Admiralty Act, 1890.

The Admiralty jurisdiction exercised by the High Courts in Indian Republic is still governed by the obsolete English Admiralty Courts Act, 1861 applied by (English) Colonial Courts of Admiralty Act, 1890 and adopted by Colonial Courts of Admiralty (India) Act, 1891 (Act XVI of 1891). Yet there appears no escape from it, notwithstanding its unpleasant echo in ears. The shock is still greater when it transpired that this state of affairs is due to lack of legislative exercise.

Viewed in the background of enactment of 1890 it would be too artificial to confine the exercise of power by the High Courts in Admiralty to what was contained in 1861 Act. Even otherwise for deciding the jurisdiction exercised by the High Court in India founded on jurisdiction exercised by the High Court of England it is not necessary to be governed by the decisions given by English Courts. Law is pragmatic in nature to problems arising under an Act and not by abdication or surrender, 1890 Act is an unusual piece of legislation expansive in scope, wider in outlook, opening out the wings of jurisdiction rather than closing in. The authority and power exercised by the High Court in England, the width of which was not confined to the statute but went deep into custom, practice, necessity and even exigency.

Law of 1890 apart, can the Indian High Courts after 1950 be denied jurisdiction to arrest a foreign ship to satisfy the claim of an owner of a bill of lading for cargo taken outside the country ? Without entering into any comparative study regarding the jurisdiction of the High Court of England and the High Courts in our country the one basic difference that exists today is that the English Courts derive their creation, constitution and jurisdiction from Administration of Justice Act or Supreme Court Act but the High Courts in our country are established under the Constitution. Under its Art. 225 enlarged preserves the jurisdiction, including inherent jurisdiction, which existed on the date the Constitution came into force and Art. 226 enlarged it by making it not only a custodian of fundamental rights of a citizen but a repository of power to reach its arms to do justice. A citizen carrying on a particular business which is a fundamental right cannot be rendered helpless on the premise that the jurisdiction of the High Courts stands frozen either by the statute of England or any

custom or practice prevailing there or the High Court of England cannot exercise the jurisdiction.

The jurisdiction of the High Court of Admiralty in England used to be exercised in rem in such matters as from their very nature would give rise to a maritime lien - e.g. collision, salvage, bottomry. The jurisdiction of the High Court of Admiralty in England was, however, extended to cover matters in respect of which there was no maritime lien, i.e., necessities supplied to a foreign ship. In terms of Section 6 of the Admiralty Act, 1861, the High Court of Admiralty was empowered to assume jurisdiction over foreign ships in respect of claims to cargo carried into any port in England or Wales. By reason of Judicature Act of 1873, the jurisdiction of the High Court of Justice resulted in a fusion: of admiralty law, common law and equity. The limit of the jurisdiction of the Admiralty court in terms of Section 6 of the 1861 Act was discarded by the Administration of Justice Act, 1920 and the jurisdiction of the High Court thereby was extended to (a) any claim arising out of an agreement relating to the use or hire of a ship; (b) any claim relating to the carriage of goods in any ship; and (c) any claim in tort in respect of goods carried in any ship.

The admiralty jurisdiction of the High Court was further consolidated by the Supreme Court of Judicature (Consolidation) Act, 1925 so as to include various matters such as any claim "for damage done by a ship", and claim 'arising out of an agreement relating to the use or hire of a ship'; or 'relating to the carriage of goods in a ship'; or "in tort in respect of goods carried in a ship".

The admiralty jurisdiction of the High Court was further widened by the Administration of Justice Act, 1956 so as to include not only the claims specified under Section 1(i) of Part I but also any other jurisdiction which either was vested in the High Court of Admiralty immediately before the date of commencement of the Supreme Court of Judicature Act, 1873 (i.e. November 1, 1875) or is conferred by or under an Act which came into operation on or after that date on the High Court as being a court with admiralty jurisdiction and any other jurisdiction connected with ships vested in the High Court apart from this section which is for the time being assigned by rules of court to the Probate, Divorce and Admiralty Division.

Sub-section (4) of Section 1 removed the restriction based on the ownership of the ship. By reason of Clauses (d)(g) and (h) of the said Section the jurisdiction in regard to question or claims specified under Section 1(i) included any claim for loss of or damage to goods carried in a ship, any claim arising out of any agreement relating to the carriage of goods in a ship or to the use or hire of a ship.

In the course of time the jurisdiction of the High Courts vested in all the divisions alike. The Indian High Courts after independence exercise the same jurisdiction.

CHAPTER 2

Ship and Sisterships

The word "vessel" was substituted for "ship"^{7b} and is defined as including "any ship or boat, or any other description of vessel used in navigation," whilst "ship" includes any description of vessel used in navigation not propelled by oars. This latter definition does not exclude things not specified, so that it will include any vessel used in navigation not habitually propelled by oars, and will include a hopper barge not navigable without external assistance^{7c} where it was held that a hopper barge with rudder and navigating lights but without means of propulsion, has been held to be a "ship". By the Judicature (Consolidation) Act, 1925, the expression "ship" is defined as including any description of vessel used in navigation not propelled by oars, and the statutory jurisdiction of the High Court over salvage claims for services rendered to a ship would therefore appear to be confined to services rendered to vessels not propelled by oars. The Admiralty Court Act, 1861 defines "Ship" under section 2 of the act: "Ship" shall include any description of vessel used in navigation not propelled by Oars.

In *Steedman –v- Scofield*^{7d} [1992] 2 Lloyd's Rep .163 (Sheen J.) Mr. Justice Sheen said, "To my mind the word "boat" conveys the concept of a structure, whether it be made of wood, steel or fiberglass, which by reason of its concave shape provides buoyancy for the carriage of persons or goods. Thus a lifeboat differs from a life raft in that the boat derives its buoyancy from its shape, whereas a raft obtains its buoyancy from some method of utilizing air receptacles." "a vessel is usually a hollow receptacle for carrying goods or people. In common parlance "vessel" is a word used to refer to craft larger than rowing boats and it includes every description of watercraft used or capable of being used as a means of transportation on water."

In *Steedman –v- Scofield* Mr. Justice Sheen considered what was meant by the phrase "used in navigation" and he said "Navigation is the nautical art or science of conducting a ship from one place to another. The navigator must be able to determine the ship's position and to determine the future course or courses to be steered to reach the intended destination. The word "navigation" is also used to describe the action of navigating or ordered movement of ships on water. Hence "navigable waters" means waters on which ships can be navigated. To my mind the phrase "used in navigation" conveys the concept of transporting persons or property by water to an intended destination. A fishing vessel may go to sea and return to the harbour from which she sailed, but that vessel will nevertheless be navigated to her fishing grounds and back again. "Navigation" is not synonymous with movement on water. Navigation is planned or ordered movement from one place to another."

Under the so called "Dead vessel" doctrine, a vessel permanently withdrawn from use for navigational purposes is not a vessel, in terms of admiralty jurisdiction. However, a vessel is not a "dead vessel" merely because it is not actively engaged in trade or commerce, where arrangements have been made to alter it to fit it for an intended maritime service. In addition, a ship may be a "live ship," not a "dead vessel," when it is in dry dock.

An action *in rem* lies in the English High Court in respect of matters regulated by the Supreme Court Act, 1981, and in relation to a number of claims the jurisdiction can be invoked not only against the offending ship in question but also against a "sistership" i.e., a ship in the same beneficial ownership as the ship in regard to which the claim arose.

In *m.v. Mariner IV -v- Videsh Sanchar Nigam Limited* decided on 15th December 1997 by the appeal court of the Bombay High Court observed that "In view of the decision of the in m. v. Elizabeth, we are of the clear view that the High Court does have jurisdiction to arrest a "sister ship" for securing any maritime claim."

The Appeal Court of the Bombay High Court in *m.v. Sea Success I -v- Liverpool and London Steamship Protection and Indemnity Association Ltd.*, are of the view that a subsidiary company and a parent company of the subsidiary company are two separate entity. The Appeal court has the following view, "In maritime law worldwide ownership of a ship is denoted by the concept of the owner of the shares in a ship..... Fundamentally each company incorporated in law is a distinct legal entity and mere incorporation of 100% subsidiary company by its parent Company cannot lead to the conclusion that the assets of the former belong to and are owned by parent company. The action *in rem* under admiralty jurisdiction has been initiated by the plaintiffs against the defendant no.1 vessel Sea Success -I on the basis of allegations of it being a sister ship i.e. a ship in the same beneficial ownership as the ships "Sea Glory" and "Sea Ranger" in regard to which the claim arose. In case of *m.v.Mariner IV*, 1998 (1) Mah. L.J. 751, the Division Bench of this Court held, "The admiralty jurisdiction could be invoked not only against the offending ship in question but also against a sister ship in regard to which the claim arose". The ships are deemed to be in the same ownership when all the shares are owned by the same person or persons (Article 3(2) of 1952 Brussels Arrest Convention).

The Appeal Court further viewed that "....the defendant no. 1 vessel is a sister ship of the two vessels "Sea Glory" and "Sea Ranger" in view of the beneficial ownership, management and control of all three vessels having vested in defendant no. 2. The basis of this deduction by the plaintiff in the plaint is that the defendant no. 1 vessel is owned by defendant no. 2 through its 100% subsidiary S.S. Shipping Corporation Inc., Monrovia.....the law permits the plaintiff to arrest a ship which is beneficially owned by the defendant no. 2 then the plaintiff is required to plead the material facts which discloses the beneficial ownership of the defendant no. 2 over the ship which is to be arrested and an inference drawn by itself in the

pleading about beneficial ownership which is legally unsustainable cannot be said to disclose a cause of action. It is true that while ascertaining whether the plaint discloses a cause of action or not, the court is not required to make any enquiry into doubtful or complicated questions of fact or law and that the court proceeds with the assumption that the facts stated therein true but then those facts as they stand must disclose plaintiffs right to sue”.

The Supreme Court of India in the matter of *m.v. Sea Success I* has stated that "...we do not intend to delve deep into the questions as to whether the two ships named hereinabove are the sister ships of the respondent No. 1 Vessel or whether the requirement of law as regard ownership of a ship in the Respondent No. 1 as beneficial owner has been fulfilled or not. Such issues must be considered at an appropriate stage".

CHAPTER 3

International Convention for Arrest of Ships

India did not sign and consequently did not ratify or promulgate either the International Convention Relating to the Arrest of Seagoing Ships or the International Convention on Certain Rules concerning Civil Jurisdiction in Matters of Collision, both signed at Brussels on 10 May 1952.

A foreign vessel, no matter what flag she flies, owes temporary and local allegiance to the sovereign of any port to which she comes. Moreover, the persons in such a vessel likewise must obey the laws and regulations of the port. Such jurisdiction is discretionary. Once a foreign vessel passes out of territorial waters, she owes no further duty to the place, which she has left, unless there is a hot pursuit. However, her conduct on the high seas or in foreign ports may subject her to penalties on returning on a subsequent visit.

In the words of Chief Justice Marshall of the United States Supreme Court "it would be obviously inconvenient and dangerous to society and would subject the laws to continual infraction, and the government to degradation, if such (alien) individuals or merchants (trading in ships) did not owe temporary and local allegiance, and were not amenable to the jurisdiction of the country."

All foreign merchant ships and persons thereon fall under the jurisdiction of a coastal State as they enter its waters. Subject to the right of "innocent passage", the coastal State is free to exercise its jurisdiction over such ships in respect of matters on which the consequences extend beyond the ships. Such ships are subject to the local jurisdiction in criminal, civil and administrative matters. This jurisdiction is, however, assumed only when, in the opinion of the local authorities, the peace or tranquility of the port is disturbed, when strangers to the vessel are involved or when the local authorities are appealed to. Questions which affect only the internal order and economy of the ship are generally left to the authorities of the flag State. Coastal States are entitled to assume jurisdiction in respect of maritime claims against foreign merchant ships lying in their waters. These ships are liable to be arrested and detained for the enforcement of maritime claims. The courts of the country in which a foreign ship has been arrested may determine the cases according to merits, provided they are empowered to do so by the domestic law of that country or in any of the cases recognised by the International Convention relating to the Arrest of Seagoing Ships, Brussels, 1952. The maritime claims in respect of which the power of arrest is recognised in law includes claims relating to damage caused by any ship either in collision or otherwise; claims relating to carriage of goods in any ship whether by charter party or otherwise, loss of or

damage to goods etc. These principles of international law, as generally recognised by nations, leave no doubt that, subject to the local laws regulating the competence of courts, all foreign ships lying within the waters of a State, including waters in ports, harbour, roadsteads, and territorial waters, subject themselves to the jurisdiction of the local authorities in respect of maritime claims and they are liable to be arrested for the enforcement of such claims.

In India, carriage of goods by sea is governed by the Indian Bills of Lading Act, 1856, the Indian Carriage of Goods by Sea Act, 1925, the Merchant Shipping Act, 1958, and general statutes, such as the Marine Insurance Act, 1963, the Contract Act, 1872, the Evidence Act, 1872, the Indian Penal Code, 1860, the Transfer of Property Act, 1882, the Code of Civil Procedure, 1908, the Criminal Procedure Code, 1973, the Companies Act, 1956 etc as well as the general principles of law such as the law of tort, public and private international law etc. In this connection, reference may also be made to the Indian Ports Act, 1908 and the Major Port Trusts Act, 1963 concerning the administration of the port and the jurisdiction over ships in ports, the Customs Act, 1962 containing various regulatory measures affecting ships, goods and persons in connection with importation or exportation of goods, as well as the provisions governing employment of labour. The Indian Bills of Lading Act, 1856 emphasis the negotiable and other characteristics of a bill of lading. The Carriage of Goods by Sea Act, 1925, contains the Hague Rules regulating the respective rights and liabilities of the parties to a contract governed by bills of lading or similar documents of title for carriage of goods by sea "from any port in India to any other port whether in India or outside India". The Merchant Shipping Act embodies rules regarding registration of Indian ships; transfers or mortgages of ships or shares; national character and flag; employment of seamen; safety, nuclear ships; collisions; accidents at sea and liability; limitation of liability; navigation; prevention of pollution; investigation and enquiries; wreck and salvage; coasting trade; sailing vessels; penalties and procedure, etc. Many of these provisions have been adopted from rules formulated by various international conventions.

It is true that the Indian statutes lags behind the development of international law in comparison to contemporaneous statutes in England and other maritime countries. Although the Hague Rules are embodied in the Carriage of Goods by Sea Act, 1925, India never became a party to the International Convention laying down those rules (International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, Brussels 1924). The Carriage of Goods of Sea Act, 1925 merely followed the (United Kingdom) Carriage of Goods by Sea Act, 1924. The United Kingdom repealed the Carriage of Goods by Sea Act, 1924 with a view to incorporating the Visby Rules adopted by the Brussels Protocol of 1968. The Hague-Visby Rules were accordingly adopted by the Carriage of Goods by Sea Act, 1971 (United Kingdom). The Indian Legislation has not, however, progressed, notwithstanding the Brussels Protocol of 1968 adopting the Visby Rules or the United Nations Convention

on the Carriage of Goods by Sea, 1978 adopting the Hamburg Rules. The Hamburg Rules prescribe the minimum liabilities of the carrier far more justly and equitably than the Hague Rules so as to correct the tilt in the latter in favour of the carriers. The Hamburg Rules are acclaimed to be a great improvement on the Hague Rules and far more beneficial from the point of view of the cargo owners. Neither has India adopted the International Convention relating to the Arrest of Sea-going Ships, Brussels, 1952 nor has India adopted the Brussels Conventions of 1952 on civil and penal jurisdiction in matters of collision; nor the Brussels Conventions of 1926 and 1967 relating to maritime liens and mortgages. India seems to be lagging behind as compared to other countries in ratifying and adopting the beneficial provisions of various conventions intended to facilitate international trade. Although these conventions have not been adopted by legislation, the principles incorporated in the conventions are themselves derived from the common law of nations as embodying the felt necessities of international trade and are as such part of common law in India and applicable for the enforcement of maritime claims against foreign ships.

It is important to remember that the Brussels Convention on Arrest of Ships merely restricts or regulates the power of the coastal States and is not intended to confer power which they did not otherwise have as sovereign States. "Arrest" to which the convention refers to is the detention of a ship to secure a maritime claim, and not seizure of a ship in execution or satisfaction of a judgment.

All persons and things within the waters of a State fall within its jurisdiction unless specifically curtailed or regulated by rules of international law. The power to arrest a foreign vessel, while in the waters of a coastal State, in respect of a maritime claim, wherever arising, is a demonstrable manifestation and an essential attribute of territorial sovereignty. This power is recognised by several international conventions. These conventions contain the unified rules of law drawn from different legal systems. Although many of these conventions have yet to be ratified by India, they embody principles of law recognised by the generality of maritime States, and can therefore be regarded as part of our common law.

The judicial power of this country, which is an aspect of national sovereignty, is vested with the people and is articulated in the provisions of the Constitution and the laws and is exercised by courts empowered to exercise it. It is absurd to confine that power to the provisions of imperial statutes of a bygone age. Access to court which is an important right vested with every citizen implies the existence of the power of the Court to render justice according to law. Where the statute is silent and judicial intervention is required, Courts strive to redress grievances according to what is perceived to be the principles of justice, equity and good conscience.

CHAPTER 4

Mareva injunction

There being no provision in the law of India equivalent to section 45 of the Supreme Court of Judicature (Consolidation) Act 1925, a *Mareva* injunction, to the extent that it may be regarded as an alternative, albeit far narrower in concept, form of proceeding to an action *in rem* in order to make a ship lying within the jurisdiction available as pre-judgment security, it is not yet allowed in the Indian Courts in the exercise of their Admiralty Jurisdiction and it is also not available in their ordinary original civil jurisdiction.

The intention of a Competent Court hearing a dispute between two or more parties is to arrive at a logical and legal conclusion, keeping in mind the business needs – and to give credit where it is due. For a variety of reasons, no court worldwide is able to determine a dispute on merits forthwith on reference. In other words, there is a considerable time gap between commencement of litigation and its final conclusion. This interregnum can however provide a party sufficient opportunity to make itself judgment-proof by tampering or destroying evidence or leaving the jurisdiction (and thereby evading the effect of a restraint order). These and other realities, which in the past have enabled, "*..... a defendant snapping his fingers at a judgment of a court with impunity*" and defeat the effectiveness of a legal system, have fuelled the growth of relief in the interregnum i.e. interim relief.

English Courts, since the mid-seventies have revolutionized the role of interim relief by enlarging the role of "judicial discretion" and granting two very effective orders – The *Mareva* and the *Anton Piller* – thereby infusing a huge degree of professionalism and expertise, both for the business community and the legal fraternity

Of even greater relevance has been the exponential growth in their use, the development and branching of other incidental relief, the use of the concept of full and frank disclosure of all material facts, standardization and clarity of the orders actually passed and the speed of their implementation – to keep up with technological and business strides which have made movement of funds and persons from one to another jurisdiction easy and quick – and to ensure balanced application of the relief in consonance with human rights' issues. Prominent among these are the interest of third parties, the acknowledgment of judicial power of courts of other nation states in worldwide relief, granting orders in criminal matters and use of costs undertakings for damages.

In several litigation proceedings, the interim relief, actually meant to support the main claim, can make or break the dispute – commercially, if not legally – and thus the need for a court is to see, "that the stable door is locked before the horse has gone"

This title, in its third (revised) successful edition, is a must for every practicing lawyer – to fully understand and comprehend the history and growth of the Mareva and the Anton Piller, other supplementary orders and writs, like the writ ne exeat regno (arrest of defendant pending provision of security), delivery up of chattels and goods, order for disclosure of information (for the Mareva to bite available assets) or inspection of books, writs of assistance through a receiver or sequestration and Security for costs. Novel developments have taken place for service outside jurisdiction and grant of worldwide orders

The essential ingredients, which an applicant should satisfy on an ex-parte application to become entitled to a Mareva are –

- a. a good arguable claim;
- b. a real risk that the final judgment in its favour would remain unsatisfied;
- c. full and frank disclosure of all material facts;
- d. the exercise of discretion by the court

CHAPTER 5

"Attachment" before judgment

"Attachment" before judgment of a ship, as of any other property, is available in all the Indian courts of ordinary civil jurisdiction having jurisdiction over the subject-matter of the claim for most kinds of claims, which would include claim for charter hire or stevedoring services or necessities supplied, provided the court is convinced on affidavit or otherwise that the ship is the only asset of the defendant within the jurisdiction and is about to be disposed of or removed out of the limits of the court's jurisdiction with intent to defeat, obstruct or delay the execution of any decree that may be passed against the defendant.

CHAPTER 6

Specific jurisdiction

The three Indian Courts of Admiralty i.e. Bombay, Calcutta and Madras were courts of specific jurisdiction (prior to the decision of *m.v. Elizabeth*) and, if a controversy does not come within their specific jurisdiction, they cannot entertain it and, in that respect, are unlike the courts of residuary jurisdiction such as common law courts or, in India, courts of ordinary original civil jurisdiction. The Admiralty jurisdiction of each of these courts is concurrent and territorially extends over the coast line of India. In the course of time the jurisdiction of the High Courts vested in all the divisions alike. The Indian High Courts after independence exercise the same jurisdiction.

CHAPTER 7

Jurisdiction in Admiralty

The Indian Courts possessing Admiralty jurisdiction have jurisdiction over the following claims and to hear and determine any questions with regard thereto.

(a) Any claim for the building, equipping or repairing of any ship

"(a) Any claim for the building, equipping or repairing of any ship if at the time of the institution of the action the ship or the proceeds thereof are under arrest of the court."

Where the facts pleaded in the plaint read with the particulars set forth in the annexure conclusively show that the repairs done and material supplied were *prima facie* "necessaries", an action will lie.

(b) Any claim for necessities supplied to any ship

"(b) Any claim for necessities supplied to any ship elsewhere than in the port to which the ship belongs and on the high seas unless it is shown to the satisfaction of the court that at the time of the institution of the action any owner or part-owner of the ship is domiciled in India."

(c) Any claim by the owner or consignee or assignee of any bill of lading of any goods for damage

"(c) Any claim by the owner or consignee or assignee of any bill of lading of any goods carried into any port in India in any ship for damage done to the goods or any part thereof by the negligence or misconduct of, or for any breach of duty or breach of contract on the part of, the owner, master or crew of the ship, unless it is shown to the satisfaction of the court that at the time of the institution of the action any owner or part-owner of the ship is domiciled in India."

This section has been construed liberally by the Indian High Courts which have held that, in order to attract the jurisdiction, it is not necessary that the goods should be imported into India or that their carriage should be for delivery in India. It is sufficient if the goods are carried into an Indian port and there is a breach of duty or contract on the part of the master or owner of the ship. An unpaid vendor exercising his right of stoppage in transit can call upon the master of the ship to deliver the goods and refusal on the part of the latter would constitute a breach of duty so as to attract the jurisdiction.

The section has been held to apply not only to cases of damage, actual or constructive, done to the goods in the strict sense but also to cases of non-delivery or delay in delivery. Unless damage, actual or constructive, is done to the goods or in other words, unless the goods carried or to be carried are affected in some manner, the section can have no application. A cause of action based on false statements or

misstatements made in a bill of lading is not a cause of action founded on a breach of contract of carriage or breach of duty in relation to carriage within the meaning of the section. "Carriage of goods", in the context of the section, means carriage of goods actually shipped and not hypothetical goods which ought to have been shipped but were never shipped. There can be no breach of contract of carriage or breach of duty in relation to carriage within the meaning of the section before the goods are delivered to the carrier.

The object of this section is not to provide a remedy for something done which is not connected with carriage or delivery of actual goods; a claim for issuing an antedated bill of lading or a false bill of lading, or a bill of lading in contravention of the Hague Rules is a claim arising out of a bill of lading but is not a claim within the scope of the section because, without anything more, such a claim is not in respect of damage done to the goods nor does it relate to the goods carried by the ship; a claim based on the wrongful exercise of lien on cargo by a ship owner is an Admiralty cause within this section.

(d) Any claim for damage done by any ship

"(d) Any claim for damage done by any ship."

The High Court on its Admiralty side has exclusive jurisdiction in respect of damage caused by a ship to property on the high seas; a suit for damages for loss of life or personal injuries as a result of a collision on the high seas falls within the section by virtue of the Maritime Conventions Act, 1911. *Quaere*: The Maritime Conventions Act, 1911, in so far as it extended to and operated as part of the law of India, was repealed by Section 46(2) of the Merchant Shipping Act, 1958, with effect from 1 January, 1961 and whether from such date such a claim for damages, for loss of life or personal injuries will fall within the section may require to be considered.

(e) Any claim for damage received by any ship or sea-going vessel

"(e) Any claim for damage received by any ship or sea-going vessel whether such a ship or vessel may have been in India or upon the high seas when the damage was received."

(f) Any claim for the possession or ownership of a ship

"(f) Any claim for the possession or ownership of a ship or to the owner-ship of any share therein."

(g) Any claim in the nature of salvage services

"(g) Any claim in the nature of salvage services rendered to a ship, whether such ship or vessel may have been within India or the high seas at the time when its services were rendered in respect of which the claim is made."

Section 402 of the (Indian) Merchant Shipping Act 1958 provided as follows:

"(1) Where services are rendered: -

(a) wholly or in part within the territorial waters of India in saving life from any vessel or elsewhere in saving life from a vessel registered in India; or

(b) in assisting a vessel or saving the cargo or equipment of a vessel which is wrecked, stranded or in distress at any place on or near the coasts of India; or

(c) by any person other than the receiver of wreck in saving any wreck; there shall be payable to the salvor by the owner of the vessel cargo, equipment or wreck, a reasonable sum for salvage having regard to all the circumstances of the case.

(2) salvage in respect of the preservation of life when payable by the owner of the vessel shall be payable in priority to all other claims for salvage.

(3) where salvage services are rendered by or on behalf of the Government or by a vessel of the Indian Navy or the commander or crew of any such vessel, the Government, the commander or the crew, as the case may be, shall be entitled to salvage and shall have the same rights and remedies in respect of those services as any other salvor.

(4) any dispute arising concerning the amount due under this section shall be determined upon application made by either of the disputing parties -

(a) to a Judicial Magistrate of the first class or Metropolitan Magistrate as the case may be where the amount claimed does not exceed ten thousand rupees; or

(b) to the High Court, where the amount claimed exceeds ten thousand rupees.

(5) where there is any dispute as to the persons who are entitled to the salvage amount under this section, the Judicial Magistrate of the first class or the Metropolitan Magistrate or the High Court as the case may be shall decide the dispute and if there are more persons than one entitled to such amount, such Magistrate or the High Court shall apportion the amount thereof among such persons.

(6) The costs of and incidental to all proceedings before a Judicial Magistrate of the first class or Metropolitan Magistrate or the High Court under this section shall be in the discretion of such Magistrate or the High Court, and such Magistrate or the High Court shall have full power to determine by whom or out of what property and to what extent such costs are to be paid and to give all necessary directions for the purpose aforesaid."

The section provides that any dispute as to salvage shall be determined by a magistrate where the amount does not exceed Rs.10,000 and by the High Court where the amount exceeds that sum. For the purpose of the said Act the term "High Court" has been defined by section 3(15) of the said Act in relation to a vessel to mean the High Court within the limits of whose appellate jurisdiction:

- (a) the port of registry of the vessel is situate; or
- (b) the vessel is for the time being; or
- (c) the cause of action wholly or in part arises.

One of the effects of the said section is that all the High Courts of littoral states will have jurisdiction to entertain a cause relating to salvage and not just the High Courts having Admiralty Jurisdiction. That part it is arguable that the Admiralty Jurisdiction exercised by the High Courts in relation to such a cause has been replaced and substituted by or must yield to the special jurisdiction conferred by the Act and that consequently a suit on such a cause is not maintainable in the Admiralty jurisdiction of the High Courts.

(h) Any claim by a master or crew for wages, etc.

"(h) Any claim by a master or crew for wages or for any money or property which under any statutory provisions is recoverable as such."

(i) Any claim by a master in respect of disbursements

"(i) Any claim by a master in respect of disbursements made on account of a ship."

(j) Any claim arising out of bottomry

"(j) Any claim arising out of bottomry."

To the best of the writer's knowledge, the last case of bottomry in the Bombay High Court, relating to the *m.v. Kali Elpis* was in or about 1967 and this part of the Admiralty jurisdiction can be regarded as obsolete in practice.

(k) Any claim in the nature of towage

"(k) Any claim in the nature of towage supplied to any foreign ship or sea-going vessel whether such ship or vessel may have been within India or upon the high seas at the time services were rendered in respect of which the claim is made."

(l) A claim and cause of action in respect of any mortgage

"(l) Whenever any ship shall be under arrest by the court or the proceeds of any ship having been so arrested shall have been brought into and be in the registry of the said court a claim and cause of action of any person in respect of any mortgage of such ship."

(m) Any claim in respect of any registered mortgage

"(m) Any claim in respect of any mortgage duly registered according to the provisions of the (Indian) Merchant Shipping Act, 1958, whether the ship or the proceeds thereof be under arrest of the Court or not."

The reader is referred to section 51 of the Merchant Shipping Act 1958, regarding the rights of a registered mortgagee of a ship, which is as follows:

"(1) A registered mortgagee of a ship or share shall be entitled to recover the amount due under the mortgage in the High Court, and when passing a decree or thereafter the High Court may direct that the mortgaged ship or share be sold in execution of the decree.

(2) Subject to the provisions of Sub-s. (1), no such mortgagee shall merely by virtue of the mortgage be entitled to sell or otherwise dispose of the mortgaged ship or share."

The "High Court" referred to in the section by definition in the Act means the High Court within the limits of whose appellate jurisdiction (a) the port or registry of the ship is situate; or (b) the ship is for the time being; or (c) the cause of action wholly or in part arises. The High Court need not be one having Admiralty jurisdiction and the sale of the ship which the High Court directs to be sold will not extinguish all the claims to or liens on the ship so as to give the purchaser a free and clear title to the ship.

(n) Claims Relating to Cargo and contracts of Affreightment

(o) Forfeitures

CHAPTER 8

Maritime liens

For the claims under subparagraphs (a) (b) (c) (f) (k) (l) and (m) of Chapter 7 there is no maritime lien but only a right in rem. For those under (d) (e) (g) (h) (i) and (j) there is maritime lien. Though this point has not come up for consideration, under Indian rules of conflict of laws, a foreign maritime lien may not be recognised and enforced as such by the Indian courts even though the proper law of the claim accords it a maritime lien status, e.g. a preferred ship's mortgage, necessities, repairs, supplies, towage, use of dry-dock, and a like, under United States law.

In case of the owner's bankruptcy before arresting the ship, a claimant who has no maritime lien may require to ascertain and consider the claims having maritime liens such as for wages, damage, salvage, and like, or for mortgage, ranking in priority over his claim which may take away the entire sale proceeds with little or no surplus left. Often, the arrest or even a threat to arrest a ship, already loaded with a perishable cargo or of a time-chartered ship or one having a charter commitment, has the effect of inducing the owners to settle a claim though not maintainable in Admiralty. However, in the case of a claim clearly outside their Admiralty jurisdiction, the chances are that the courts will reject *in limine* an application for arrest.

In the matter of *Epoch Enterrepots –v- m.v. Wong Fu* before the Supreme Court of India (2002) the following passages were referred concerning *maritime lien*.

The Encyclopedia Britannica has the following to state as regards Maritime Lien and the same reads as below:

"Maritime liens: although admiralty actions are frequently brought in personam, against individual or corporate defendants only, the most distinctive feature of admiralty practice is the proceeding in rem, against maritime property, that is, a vessel, a cargo, or "freight", which in shipping means the compensation to which a carrier is entitled for the carriage of cargo.

Under American maritime law the ship is personified to the extent that it may sometimes be held responsible under no liability. The classic example of personification is the "compulsory pilotage" case. Some State statutes impose a penalty on a ship owner whose vessel fails to take a pilot when entering or leaving the waters of the State. Since the pilotage is compulsory, the pilot's negligence is not impugned to the ship owner. Nevertheless the vessel itself is charged with the pilot's fault and is immediately impressed with an inchoate maritime lien that is enforceable in Court.

Maritime liens can arise not only when the personified ship is charged with a maritime tort, such as a negligent collision or time tort, such a negligent collision or personal injury, but also for salvage services, for general average contributions and for breach of certain maritime contracts."

Sir John Jervis who probably for the first time in the *Bold Buccleugh* defined maritime lien as below:

"...a maritime lien is well defined...to mean a claim or privilege upon a thing to be carried into effect by legal process...that process to be a proceeding in rem..... This claim or privilege travels with the thing in whosoever' 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, relates back to the period when it first attached."

While the definition provided by Sir John Jervis, as above, stands accepted in various other decisions of the English courts, the definition by Atkin L.J. in *The Tervaete* became subject matter of criticism by reason of its failure to distinguish a maritime lien and its maritime right of action in rem. Atkin L.J., however, in *The Tervaete* defined the maritime lien as below:

"...of the right by legal proceedings in an appropriate form to have the ship seized by the officers of the court and made available by sale if not released on bail."

Elizabeth's case (*supra*) has the following to state as regards the attributes of maritime lien. This Court observed in paragraphs 33 to 36 as below:

33. Be it noted that there are two attributes to maritime lien: (a) a right to a part of the property in the res; and (b) a privileged claim upon a ship, aircraft or other maritime property in respect of services rendered to, or injury caused by that property. Maritime lien thus attaches to the property in the event the cause of action arises and remains attached. It is, however, inchoate and very little positive in value unless it is enforced by an action. It is a right that springs from general maritime law and is based on the concept as if the ship itself has caused the harm, loss or damages to others or to their property and thus must itself make good that loss. (See in this context 'Maritime Law' by Christopher Hill, 2nd Edn.)

34. As regards the concept of proceeding in rem and proceeding in personam, it should be understood as actions being related to the same subject-matter and are alternative methods pertaining to the same claim and can stand side by side.

35. In this context, reference may also be made to the observations of this Court in *m.v. Elisabeth's* case (AIR 1993 SC 1014) (supra), as stated below: -

"47. Merchant ships of different nationalities travel from port to port carrying goods or passengers. They incur liabilities in the course of their voyage and they subject themselves to the jurisdiction of foreign States when they enter the waters of those States. They are liable to be arrested for the enforcement of maritime claims, or seized in execution or satisfaction of judgments in legal actions arising out of collisions, salvage, loss of life or personal injury, loss or damages to goods and the like. They are liable to be detained or confiscated by the authorities of foreign States for violating their customs, regulations, safety measures, rules of the road, health regulations, and for other causes. The coastal State may exercise its criminal jurisdiction on board the vessel for the purpose of arrest or investigation in connection with certain serious crimes. In the course of an international voyage, a vessel thus subjects itself to the public and private laws of various countries. A ship traveling from port to port stays very briefly in any one port. A plaintiff seeking to enforce his maritime claim against a foreign ship has no effective remedy once it has sailed away and if the foreign owner has neither property nor residence within jurisdiction. The plaintiff may therefore detain the ship by obtaining an order of attachment whenever it is feared that the ship is likely to slip out of jurisdiction, thus leaving the plaintiff without any security.

48. A ship may be arrested (i) to acquire jurisdiction; or (ii) to obtain security for satisfaction of the claim when decreed; or (iii) in execution of a decree. In the first two cases the Court has the discretion to insist upon security being furnished by the plaintiff to compensate the defendant in the event of it being found that the arrest was wrongful and was sought and obtained maliciously or in bad faith. The claimant is liable for damages in case of wrongful arrest. This practice of insisting upon security being furnished by the party seeking arrest of the ship is followed in the United States, Japan and other countries. The reason for the rule is that a wrongful arrest can cause irreparable loss and damages to the ship owner and he should in that event be compensated by the arresting party. (See *Arrest of Ships* by Hill, Soehring, Hosoi and Helmer, 1985)".

36. In Halsbury's Laws of England, the nature of action in rem and the nature of action in personam is stated to be as below:

310. *Nature of actions in rem and actions in personam.* - An action in rem is an action against the ship itself but the view that if the owners of the vessel do not enter an appearance in the suit in order to defend their property no personal liability

can be established against them has recently been questioned. It has been stated that, if the defendant enters an appearance, an action in rem becomes, or continues also as, an action in personam; but the Admiralty jurisdiction of the High Court may now in all cases be invoked by an action in personam, although this is subject to certain restrictions in the case of collision and similar cases, except where the defendant submits or agrees to submit to the jurisdiction of the Court.

The foundation of an action in rem is the lien resulting from the personal liability of the owner of the res. Thus an action in rem cannot be brought to recover damages for injury caused to a ship by the malicious act of the master of the defendant's ship, or for damage done at a time when the ship was in the control of third parties by reason of compulsory requisition. On the other hand, in several cases, ships allowed by their owners to be in the possession and control of charterers have been successfully proceeded against to enforce liens which arose whilst the ships were in control of such third parties.

The defendant in an Admiralty action in personam is liable, as in other actions in the High Court, for the full amount of the plaintiff's proved claim. Equally in an action in rem a defendant who appears is now liable for the full amount of the judgment even though it exceeds the value of the res or of the bail provided. The right to recover damages may however be affected by the right of the defendant to the benefit of statutory provisions relating to limitation of liability."

In *m.v. Al Quamar* (supra) this Court spoke of two attributes of maritime lien as noticed herein before. The International Convention for Unification of Certain Rules relating to Maritime Liens and Mortgages at Brussels in 1967 defined the maritime lien to be as below:

- a. wages and other sums due to the master, officers and other members of the vessel's complement in respect of their employment on the vessel;
- b. port, canal and other waterways and pilotage dues;
- c. claims against the owner in respect of loss of life or personal injury occurring, whether on land or water, in direct connection with the operation of the vessel;
- d. claims against the owner based on tort and not capable of being based on contract, in respect of loss of or damage to property occurring, whether on land or on water in direct connection with the operation of the vessel;
- e. claims for salvage, wreck removal and contribution in general average.

Incidentally, the Admiralty Court Act, 1861, read with the International Convention for Unification of Certain Rules relating to Maritime Liens and Mortgages, Brussels, 1926 read with Brussels Arrest (Of Seagoing Ships) Convention 1952 and Brussels Maritime Liens Convention, 1967 clearly indicates that a claim arising out of an agreement relating to the use and/or hire of the ship although a maritime claim would not be liable to be classified as maritime lien. (See in this context Thomas on Maritime Liens).

We have in the judgment herein before dealt with the attributes of maritime lien. But a simply stated maritime lien can be said to exist or restricted to in the event of (a) damage done by a ship; (b) salvage; (c) seamen's and master's wages; (d) master's disbursement; and (e) bottomry; and in the event of a maritime lien exists in the aforesaid five circumstances, a right in rem is said to exist. Otherwise, a right in personam exists for any claim that may arise out of a contract.

Further on this issue, Thomas on Maritime Liens states that it represents a small cluster of claims which arise either out of services rendered to a maritime res or from damage done to a res and listed five several heads of maritime liens as under:

- (a) Damage done by a ship
- (b) Salvage
- (c) Seamen's wages
- (d) Master's wages and disbursements
- (e) Bottomry and Respondentia

The limited applicability of such a lien thus well illustrates that not every kind of service or every kind of damages, which arises in connection with a ship, gives rise to a maritime lien. We, however, hasten to add that this is apart from the statutory enactments, which may further list out various other forms of maritime liens. In *the Ripon City* [(1897) P. 226, 246], Gorrel Barnes, J. upon appreciation of this facet of a maritime lien and also, in part, to the surrounding policy considerations observed:

".....A maritime lien travels with the vessel into whosoever possession it comes, so that an innocent purchaser of a ship may find his property subject to claims which exist prior to the date of his purchase, unless the lien is lost by laches or the claim is one which is barred by the Statutes of Limitation. This rule is stated in *The Bold Buccleugh*...to be deducted from the civil law, and, although it may be hard on an innocent purchaser, if it did not exist a person who was the owner at the time a lien was attached could defeat the lien by transfer if he pleased."

As regards the issue of relationship between a maritime lien and personal liability of a res owner, Thomas has the following further to state:

"The issue as to the relationship between a maritime lien and the personal liability of a res owner is therefore one which may be answered differently as between individuals maritime liens. It is clear that the various maritime liens do not, in this regard, display common characteristics. The fact that there exists this disparity may in turn be a symptom of the absence of any clearly defined theoretical framework in the development of the law relating to maritime liens. It is also note-worthy that the emphasis on personal liability is most clearly established in relation to the damages and disbursement of maritime liens which were the last in point of time to be established."

CHAPTER 9

Possessory Liens

Possessory liens are usually asserted by shipyards who have not been paid for repairs to vessels. This is a self-help remedy long recognised by the courts. Shipyards exercising possessory lien are entitled to detain the vessel without having to arrest the vessel. On occasions, parties exercising possessory lien may need to arrest the vessel in order to obtain the assistance of the court to sell the vessel, as a right to exercise possessory lien does not carry the right to sell the vessel. The arrest of vessels by parties exercising possessory lien has created some uncertainty as to whether in arresting the vessel, the party exercising the possessory lien is deemed to have lost possession of the vessel and consequently their lien. After some uncertainty, the position is now clear, both in the UK and in Singapore, that in arresting the vessel, the possessory lienholder retains his lien over the vessel - *The Dwina* [1996] 2 SLR 670.

As possessory liens are recognised as self-help remedies, the courts in England have consistently held that they would not interfere to assess the value of the lien in the absence of fraud - *Gebruder Naf-v-Ploton* (1890) 25 QBD 13 (CA) and *Segbedzi -v- Glah* (1989) New LJ 1303 (CA). This English principle was tested in Singapore in *The Solitaire*. The shipyard asserted a possessory lien against the vessel in the sum of S\$300m. The shipowner applied to court to reduce the security demand and invited the court to depart from established English principles. The judge at first instance refused to do so and allowed the shipyard to retain their lien for the full amount of their security demand since there was no evidence of fraud on the part of the shipyard. In the Court of Appeal, the lien was reduced to S\$125m. Unfortunately, there are no written grounds for the decision, but it is clear that in doing so, the Court of Appeal departed from English principles to assess the value of the possessory lien despite the absence of fraud on the part of the shipyard.

Possessory Liens are subdivided into particular liens and general liens.

Possessory Liens (Particular)

A particular lien is the right of a person in possession of goods to retain possession of them until payment has been made by their real owner of any sum due in respect of those goods. Such a lien arises (i) when the person in possession has bestowed labour, skill or expense in altering or improving the goods, (ii) where the person in possession has been obliged to receive the goods or render the service which has given rise to the lien, (iii) where the person in possession has saved the goods from loss at sea or capture by an enemy.

Such lien cannot arise until the work contracted for has actually been performed; but if the owner of the goods prevents the work from being completed, the lien attaches for the work actually done.

At common law, a person enforcing a particular lien has no right to sell the goods. He may retain them until his charges are settled, and once he parts with either actual or constructive possession of the goods his right of lien is lost. In certain circumstances, however, the possessor may have a statutory right to sell the goods.

The most common cases of particular liens are:

1. the common law lien of a carrier on the goods he carries for his charge for carriage (e.g., shipowner's lien on cargo for freight);
2. tradesmen's liens in respect of labour expended for reward on goods;
3. the lien of an unpaid seller of goods
4. warehousemen's liens on goods for their services for reward in connection with the goods.

Shipowners' Possessory Liens

At common law, a shipowner has a lien on the cargo carried on board his ship for:-

1. Freight
2. Cargo's contribution in general average
3. Salvage expenditure

Possessory liens on cargo for charges other than the above must be specifically contracted for.

Freight. The common law lien on cargo for freight only arises when the freight is due on delivery of the cargo. Obviously no lien can arise in connection with freight that is payable in advance, or where a contract provides for freight to be payable after delivery. In the latter case delivery must be made before the freight can be demanded, and in the event of such freight remaining unpaid when due the carrier would have to seek some other remedy for its recovery.

In exercising his lien for freight the shipowner may lawfully retain all the goods for which freight is payable, and that is so even though the value of the goods exceeds the freight due. He may, however, if he wishes, merely retain sufficient of the goods to give adequate security for the freight due on them all. Where a number of bills of lading have been issued in respect of one shipment and the various bills have been endorsed to different consignees, the shipowner has a separate lien under each B/L extending only to the freight due under each particular bill. The shipowner cannot exercise his lien on goods carried under one B/L in respect of freight due from the holder of another B/L. Nevertheless, if several B's/L issued in pursuance of the same agreement between shipper and carrier are all endorsed to the same person, the carrier may retain goods shipped under one of those bills in exercise of his lien for the freight due under them all. Further, the lien for freight applies only to the freight due on the particular

goods carried; it cannot be exercised in respect of a payment due from the owner of the goods under some other transaction.

General Average. The lien on cargo for general average charges can be exercised only by the shipowner in possession of the goods and, where necessary, it is his duty to other cargo owners to protect their interests by retaining possession of any goods in respect of which a contribution in G/A is outstanding. However, owing to the difficulty of assessing the amount of such contributions and the time required for general average adjustment, it is not usual for shipowners to avail themselves of the right of lien in these circumstances. The customary procedure is for the goods to be delivered in exchange for the security afforded by a general average bond, a general average deposit, or both.

Salvage. Whenever salvage expenditure has been incurred by a shipowner for the preservation of ship and cargo, he has a lien on the cargo for its proportion so long as the salvage was not made necessary by neglect or default of the shipowner himself.

Demurrage and Detention. A lien on cargo for demurrage exists only when the contract of affreightment expressly gives one. Where a charter-party does provide one, that lien does not extend to damages for detention at the loading port when a fixed number of demurrage days have been agreed and the ship is detained after the lay days and demurrage days have expired. To give the shipowner full protection, it would be necessary to stipulate in the C/P that the ship is to have a lien on cargo for demurrage and detention. Liens for demurrage and detention expressly given by a charter-party do not hold good against a bill of lading holder, unless they are specifically incorporated in the B/L. It has been held that the words "all other conditions. . . as per charter-party" are sufficient to incorporate in the B/L all liens expressly provided by the C/P.

Deadfreight. As deadfreight is payable, in respect of space which has been booked but not used, no common law lien for it can arise. There are no goods which the shipowner can retain by way of exercising a lien. All the same, it is quite common for a C/P to give an express lien for deadfreight, and such a lien, evidently, can be exercised only by refusing delivery of goods which have been carried to enforce payment of the deadfreight chargeable in respect of goods which have not been carried. Where an express lien for deadfreight exists, it applies not only where the entire cargo is carried at the same rate of freight but also where different parcels are carried at different rates.

Voyage Chartered Ships. The shipowner's lien for freight and other charges on goods shipped under a B/L on a chartered ship may, according to circumstances, apply to the freight due under the C/P or to the freight due under the B/L. The following appear to be established rulings.

1. If the consignee is the charterer, or charterer's agent, he is bound by the lien for freight due under the C/P and by express liens given

by the C/P for other charges. But if it be found that the shipowner and the charterer-cum-consignee intended that the C/P should be varied by the B/L (and such an intention can only be found where the charterer is not only the shipper but also the consignee), then the lien extends only to the B/L freight. The consignee will, in any case, be bound by liens expressly given in the C/P, provided they are clearly incorporated in the B/L.

2. If the consignee is an agent of the shipper who is not the charterer, or if the consignee is an endorsee of the B/L, he is bound only by the lien for freight due under the terms of the B/L. Such consignee is also bound by express liens given in the B/L. Express liens given by the C/P will not bind such consignee, unless it is incorporated in the B/L by the insertion of an adequate clause.

3. A shipper or endorsee of a B/L, even if he is acquainted with the terms of the C/P, will ordinarily be bound only by the terms which are expressly incorporated in the B/L. But if a person who does not know the C/P terms is also aware that the master chartered ship has no authority to issue a B/L that does incorporate the liens expressed in the C/P, the shipowner will be able to exercise such liens, in spite of the fact that the B/L has not included them.

Time Chartered Ships. A simple time charter usually contains a clause giving the shipowner a lien on all cargoes and all sub-freights for hire and general average contributions, and giving the charterer a lien on the vessel for all moneys paid in advance and not earned. If the vessel is sub-chartered, the lien on the sub-freight can be exercised before the sub-freight has been paid to the charterer, the exercise of such a lien is considered advisable for the shipowner to give a formal notice to the sub-charterer or consignee requiring him to pay the sum to the owner before payment is made to the charterer or his agent.

Demise Chartered Ships. The cargo carried in a ship has been demised or leased to the charterer is in the charterer's possession, not the shipowner's. Accordingly, no shipowner's lien on such cargo can arise.

Effect of Warehousing Goods. To preserve his lien owner must retain actual or constructive possession of goods. If they are warehoused with an independent agent the lien is lost except in the United Kingdom where goods landed to a warehouse because the owner has failed to take delivery remain there subject to lien under the M.S. Act. In all other cases, in order to preserve the lien, goods not retained in the ship must be stored in the shipowner's name or placed in a warehouse over which the shipowner or his agent has exclusive control.

Abandoned Goods. Since at common law freight is not earned until the goods are delivered at their proper destination, it follows that no lien for freight can exist in a case where goods have been abandoned by the shipowner before their arrival at the agreed destination and

afterwards carried on to that destination by a salvor or other third party.

Waiver of Lien. A shipowner will be deemed to have waived his lien on goods for freight if he has accepted a bill of exchange for freight in advance which has not matured by the time of delivery, and this is still the case should the acceptor of the bill be bankrupt at the time of delivery.

Possessory Liens (General)

A general lien is the right which arises by custom in certain trades or professions, or by contract, to retain goods not only until any sum due in respect of them is paid; but also in respect of any sum which may be owing by the owner of the goods to the person in possession of them. Examples of general liens are (i) a solicitor's lien over all the papers of his client except his will, (ii) a factor's lien on the goods of his principal.

CHAPTER 10

Necessaries, a Maritime Claim

“Necessaries” as specified under the provision of the Admiralty Courts Act, 1861 reads as:

“5. The High Court of Admiralty shall have Jurisdiction over any Claim for Necessaries supplied to any Ship elsewhere than in the Port to which the Ship belongs, unless it is shown to the Satisfaction of the Court that at the Time of the Institution of the Cause any Owner or Part Owner of the Ship is domiciled in England or Wales : Provided always, that if is any such Causes the Plaintiff do not recover twenty pounds he shall not be entitled to any costs, charges or expenses incurred by him therein, unless the Judge shall certify that the Cause was a fit one to be tried in the said Court. [*As to claims for necessaries*].”

Articles 1(k) and 2 of the 1952 Brussels Convention as regards “Maritime Claim”, are as under:

1. "Maritime Claim" means a claim arising out of one or more of the following:

(k) goods or materials wherever supplied to a ship for her operation or maintenance;

2. A ship flying the flag of one of the Contracting States may be arrested in the jurisdiction of any of the Contracting States in respect of any maritime claim, but in respect of no other claim; but nothing in this Convention shall be deemed to extend or restrict any right or powers vested in any Governments or their Departments, Public Authorities, or Dock or Harbour Authorities under their existing domestic laws or regulations to arrest, detain or otherwise prevent the sailing of vessels within their jurisdiction."

The term "necessaries" had not been defined in the Act of 1861. It was given a meaning by judicial pronouncements.

It stands accepted that having regard to the legislative and executive policy, England and Wales never considered the arrears of insurance premium as a 'necessary'. The Courts of England further maintained a distinction between a maritime claim and maritime lien. English Courts proceeded on the premise that for the purpose of considering as to whether any necessary has been supplied to a ship or not must have a sufficient and direct connection with the operation of the ship.

It is held that unpaid insurance premium is not a maritime claim as it is not needed to keep it going. [See *Queen v. Judge of the City of London Court* (supra), *Heinrich Bjorn* (supra), *The Andre Theodore*

(supra), *The Aifanourious* (supra). The English Courts, thus, refused to put a wide construction on that term.

A similar view was also adopted by an Australian High Court in *Gould v. Cornhill Insurance Co. Ltd.* [1 DLR 4th Ed. 183].

In *The Riga* [(1869-72) L.R. 3 A&E 516], it is stated:

"The definition of the term "necessaries" given by Lord Tenterden in *Webster v. Seekamp* (4 B. & Ald. 352) adopted and applied in proceedings in Admiralty. Semble, there is no distinction between necessaries for the ship and necessaries for the voyage."

In *The Edinburgh Castle* [(1999) Vol. 2 Lloyd's Law Reports 362], it has been held:

"To address these concerns, Mr. Charkham helpfully invited my attention to a number of the authorities and to such discussion as there is on Section 20(2)(m) and its predecessors. Taking the matter very shortly, for present purposes, the following propositions emerge:

1. The words "in respect of" are wide words which should not be unduly restricted: *The Kommunar*, [1997] 1 Lloyd's Rep. 1, at p.5.

2. Section 20(2)(m), which is derived from the equivalent provision in the Administration of Justice Act, 1956, contains a jurisdiction which is no narrower than the predecessor jurisdiction in respect of claims for "necessaries" : *The Fairport* (No. 5), [1967] 2 Lloyd's Rep. 162; *The Kommunar*, sup.

3. No distinction is to be drawn:

...between necessaries for the ship and necessaries for the voyage, and all things reasonably requisite for the particular adventure on which the ship is bound are comprised in this category. [Roscoe, *The Admiralty Jurisdiction and Practice*, 5th ed., at p. 203; *The Riga* (1872) L.R. 3 Ad. & Ecc. 516].

4. The jurisdiction extends to the provision of services: *The Equator*, (1921) 9 L.L.R.6. 1; *The Fairport* (No. 5), sup.

In the light of these propositions, I am satisfied that the plaintiffs bring their claims within Section 20(2)(m). Provisions for the passengers were "necessaries" for the particular adventure on which this passenger vessel was engaged. The provision of services is capable of coming within the subsection and does so here, given the nature of the services provided. I should mention that I was referred in addition to *The River Rima*, [1988] 2 Lloyd's Rep. 193 (H.L.) and [1987] 2 Lloyd's Rep. 106 (C.A.) but, as I understand it,

nothing said there precludes my decision in favour of the plaintiffs on the facts of this case."

In *Nore Challenger* and *Nore Commander* [(2001) Vol. 2 Lloyd's Law Reports 103] the claim relating to supply of crew was held to be "necessary" stating:

"Before considering whether the concept of necessities encompasses the provision or supply of crew, it is important to bear in mind that it has long been established that no distinction need be drawn between the supply of necessities and the payment for such supply."

Identical view has been taken by a Court of Durban in *m.v. Emerald Transporter* [1985 2 SALR 448] with reference to the provisions contained in Admiralty Jurisdiction Regulation Act 105 of 1983 wherein it was held that services which are insured solely to the benefit of the ship owner would not be classed as necessities. The said decision was, however, rendered in the context of ranking of claims against a fund comprising of sale proceeds of the vessel *m.v. Emerald Transporter*.

The House of Lords in *The River Rima* (supra) considered the provisions of Article 1(1)(k) of the 1952 Brussels Arrest Convention incorporating "goods or materials wherever supplied to a ship for her operation or maintenance" as a maritime claim. Having regard to the provisions contained in Section 6 of Admiralty Court Act, 1840 and Section 5 of Admiralty Court Act, 1861 it was held:

"In other words, what is now called a claim in respect of goods or materials supplied to a ship for her operation or maintenance is the equivalent of what used to be called a claim for necessities, but without the restrictions which formerly applied to such a claim."

(Emphasis Supplied)

The Singapore High Court also in *Golden Petroleum* (1994 1 SLR 92) considered the expression "goods supplied to a ship for her operation and maintenance" in the following terms:

"In my opinion, bunker oil supplied to the ship for sale to other ships could not be conceived as goods supplied for her operation. The phrase 'operation of the ship' should not be equated with the business activities of the shipowner and the section as enacted could not cover goods which are loaded onto two ship only to be unloaded or disposed of soon thereafter by sale."

Yet again in *Gatoil International* (supra), it was held:

"An agreement for the cancellation of a contract for the carriage of goods in a ship or for the use or hire of a ship would, I think, show a sufficiently direct connection. It is unnecessary to speculate what other cases might be covered."

Each case would require to be decided on its own facts. As regards the contract of insurance founded on in the instant appeal, I am of opinion that it is not connected with the carriage of goods in a ship in a sufficiently direct sense to be capable of coming within para (e)."

The question, however, is as to whether having regard to the changed situation unpaid insurance premium should be held to be a commercial necessity. With a view to answer the question it is necessary to consider as to whether a failure to insure the security is a matter which would have a bearing upon the security of the ship.

In *Liverpool and London S.P. and I Asson. Ltd -v- m.v. Sea Success I and Anr*, it was held that unpaid insurance premium of the club would come within the purview of necessities; Unpaid insurance premium being a maritime claim would be enforceable in India.

CHAPTER 11

Claims relating to Cargo

The Admiralty jurisdiction of the High Court in respect of cargo claims and contracts of affreightment is statutory. The High Court has Admiralty jurisdiction over any claim arising out of an agreement relating to the use or hire of a ship; or relating to the carriage of goods in a ship; or tort in respect of goods carried in a ship, unless it is shown (a) to the Court that at the time of the institution of the proceedings any owner or any part owner of the ship was domiciled in England (b) Jurisdiction in relation to the carriage of goods was first acquired by the Admiralty Court under the Admiralty Court Act, 1861 (c) The Act of 1861 gave jurisdiction to the Court over claims by the owner, consignee or assignee of the bill of lading of any goods carried by a ship into any port in England or Wales for damage caused by negligence or for any breach of contract or breach of duty, unless at the institution of the cause the owner or part owner of the ship was domiciled in England or Wales. The jurisdiction which the Court now exercises has thus been extended to include claims which, notwithstanding the liberal interpretation which the Act of 1861 received could not have been entertained under the earlier statute. Under the Act of 1861 the right to bring an Admiralty action was limited to owners of cargo, but now there appears to be no reason why a ship-owner, provided that he is not domiciled in England, should not bring an Admiralty action against cargo owners, although the latter are domiciled in England; to this extent the Judicature Act, 1925, has put the foreign owner in a superior position to the English owner. The only express limitation upon this exercise of jurisdiction in rem in claims relating to the carriage of goods is now the proviso that no owner or part owner of the ship shall on the institution of the suit be domiciled in England. Under the Act of 1861 it was held that "owner" meant the owner at the time when the cause of action arose, and that the word "domiciled" is to be understood in its strict legal sense. It was also held that the claim must be in respect of goods actually shipped on board the vessel which is made subject to proceedings in rem. It is submitted that the Act of 1925 must be read subject to the same limitation, and that proceedings in rem under sect.22 (1) (a) (xii) can only be instituted against the ship in which such goods have actually been carried. Upon the same principle it would seem that a claim relating to the use or hire of any ship is only capable of being enforced against the ship to which such agreement relates. The language of the section does not, however, expressly impose any such limitation, but leaves a plaintiff free to enforce in proceedings in rem a claim relating to an agreement for the hire of a ship, or carriage of goods in a ship, against a ship other than that to which the agreement relates or in which the goods were carried, belonging to the same owner.

The jurisdiction is, however, no longer confined to claims relating to goods "carried into any port in England or Wales in any ship". This

limitation, which was imposed by the Act of 1861 has not been re-enacted. The numerous cases which were decided upon this part of the earlier statute are, therefore, no longer relevant. Under the Act of 1861 it was also held that the jurisdiction was confined to cases where the breach of duty or breach of contract was in relation to the goods and connected with damage to them. The language of the Act of 1925 appears to be sufficiently comprehensive to include claims in respect of any breach of contract for the use or hire of a ship. The right to proceed is no longer confined to the owner, consignee or assignee of the bill of lading, as was the case in the Act of 1861; and therefore it would seem that the limitation of the jurisdiction to claims where actual damage to goods has been sustained, or a breach of contract taken place in relation to them, which the Courts held to be a consequence of the restriction under the Act of 1861 of the right to sue to parties interested in the goods, has been abandoned in the Act of 1925.

The jurisdiction in personam has been further extended by the Administration of Justice Act, 1928, by which all jurisdiction vested in the High Court by the Judicature Act, 1925, is declared to belong to all Divisions of the High Court alike. This amendment of the principal Act was rendered necessary by the decision of the Court of Appeal in *The Sheaf Brook* (1), where it was held that a claim in personam by cargo owners against the owners of the carrying ship who were domiciled in England was not within the jurisdiction of the Admiralty Division. Any action in personam may now be brought in the Admiralty Division. The jurisdiction in actions in rem has not, however, been affected in respect of cargo claims or relating to the use or hire of a ship. There is, therefore, no jurisdiction to entertain an action in rem in which the owner of the ship, whether plaintiff or defendant, is domiciled in England. The remedy applies to foreign ships as well as to British ships, its objects being to give a practicable remedy, where formerly in the great majority of cases there was no available process in consequence of the shipowner being out of the jurisdiction. "Many foreign ships" said Dr. Lushington, "came into this country, and did not deliver the goods according to the bill of lading. The owners and consignees of cargo then suffered great loss, and had no practicable remedy; for though the shipowner, if in England, might have been sued for breach of contract, in the very great majority of cases that remedy was wholly unavailable. It appears, too, that in some cases, if not nearly in all, the owner of a British ship carrying cargo to a foreign country was liable to have his ship there seized for any breach of his contract as carrier. To remedy the grievance I have mentioned and to establish a reciprocity with foreign merchants, the 6th section was inserted in the statute" .

As the remedy given by the statute depends upon the place where the owner of the ship is domiciled at the time of the institution of the suit, it is clear that it was not intended that a plaintiff having a claim under the section should have a maritime lien; for a maritime lien accrues from the instant of the circumstances creating it, and not from the date of the intervention of the Court. The claim of the plaintiff in cases of damage to cargo or breaches of contract therefore

accrues only upon the institution of the suit, and is subject to claims subsisting on the ship at the time of the institution of the suit.

When a judgment is pronounced in favour of the plaintiff, the Court usually refers the damages to the registrar and merchants, whose duty it is to assess the damages according to the ordinary and recognized principles of the Common Law. Whilst the Court of Admiralty existed as a separate Court it had not jurisdiction to entertain by way of set-off a claim by the shipowner for freight improperly deducted, there being in our Admiralty law no set-off, in the strict sense of the term, save in the exceptional case of suits for mariners' wages. But where there were cross claims, the Court would endeavour not to disturb any security which either party might have his demand without substituting an equivalent. And now, as in other Admiralty actions, the defendant, in cases of damage to cargo, may claim by way of counterclaim any relief which he could have claimed before the Judicature Act in any suit in any of the Courts consolidated in the High Court of Justice.

CHAPTER 12

Effect of Arbitration Clause on Arrest

The Supreme Court of India in SLP (Civil) no.17183/ 1999, the Owners & Parties Interested in *m.v “B.C” & Anr –vs- State Trading Corporation of India Ltd & Anr* has held that “On a careful consideration of the entire matter we are of the view that there is no good ground or acceptable reason why the intention of the parties to incorporate the arbitration clause in the Charter Party Agreement in the Bill of Lading should not be given effect to. The High Court was not right in rejecting the prayer of the appellants for stay of the suit...”.

A claim which is brought in the Admiralty Court by an action *in rem* is subject to an arbitration agreement so that if an action were commenced the court would stay the proceedings to arbitration upon the application of the defendant.

Under the provision of English Law, under section 26 of The Civil Jurisdiction and Judgments Act, 1982, which is in force since November 1, 1984 provides that where the court stays or dismisses Admiralty proceedings on the ground that the dispute in question should be submitted to arbitration the court may order that any property arrested or security given to prevent arrest or to obtain release from arrest shall be retained as security for satisfaction of the arbitration award or order that the stay be conditional upon the provision of equivalent security for the satisfaction of the arbitration award.

The Court of Appeal has held in *The Bazias* 3 & 4 [1993] 1 Lloyd’s Rep. 101, that the effect of section 26 is to assimilate arbitration claims with *in rem* proceedings in the Admiralty Court. Thus there is no longer a wider discretion when the claim is subject to an arbitration clause, and the ship arrested will ordinarily be released only if security is provided sufficient to cover the amount of the claim, together with interest and costs, on the basis of the plaintiff’s reasonably arguable best case.

CHAPTER 13

Arbitration

Many contracts with which ship owners and their masters are concerned, such as bills of lading, charter-parties, salvage agreements, and marine insurance policies, nowadays provide for various litigious matters to be referred to arbitration. Some of the terms used in connection with this method of settling disputes, together with the main advantages and disadvantages of arbitration, the various methods of referring to arbitration, and so on, form the subject matter of this section.

Arbitration Clauses in contracts of Carriage by Sea

Bills of lading and charter-parties frequently contain clauses to that effect that the parties agree to refer to arbitration disputes arising under the contract. Such clauses are perfectly valid, but what constitutes a "dispute arising under the contract" is a matter deserving of some consideration. If, for instance, one party contends against the other that the contract has never been entered into at all, that is a dispute which cannot go to arbitration under the clause, for the party who denies that he entered into the contract is at the same time denying that he joined in the submission. On similar grounds, if a party alleges that the contract is void, that cannot be a matter for arbitration under the clause, for on the view that the whole contract is void the part (i.e., the submission) must be seen to be void as well.

An arbitration clause may provide that if the claimant fails to appoint an arbitrator within a stipulated time the claim shall be barred absolutely. Generally, this provision is effective, but there are some exceptions. For instance, by the Arbitration Act, 1950, the court may grant an extension of time if of the opinion that undue hardship would otherwise be caused.

No dispute arises within the meaning of the clause where a charterer admits a shipowner's claim for freight but fails to satisfy it. Where a shipowner claimed freight and the charterer, having admitted the claim, sought to set off the amount due against his counter-claim the Court held that failure to appoint an arbitrator within the prescribed time barred the counter-claim but not the claim which was never in issue.

The question may arise as to whether an arbitration clause in a charter-party is imported into a bill of lading when the latter contains an incorporating clause such as "Freight and all other terms, conditions and exceptions, including the negligence clause, as per charter-party". It would seem that it is not, but as between a shipowner and a charterer who is also the shipper and who, in his

capacity as shipper, has obtained a bill of lading, the arbitration clause in the charter-party remains effective even though the charter party contains a cesser clause, and even after the bill of lading has been assigned to a third party.

It appears that a merchant has no right to arrest a ship in respect of a dispute arising under a contract, which contains an arbitration clause.

International Arbitration

International arbitration is a means by which international disputes can be definitively resolved, pursuant to the parties' agreement, by independent, non-governmental decision-makers. There are almost as many other definitions of international arbitration as there are commentators on the subject. Commercial arbitration is common in both international and domestic contexts. Arbitration has several defining characteristics, they are as follows:

1. Arbitration is generally consensual in most cases, the parties must agree to arbitrate their differences.
2. Non-governmental decision-makers resolve arbitrations, arbitrators do not act as state judges or government agents, but are private persons ordinarily selected by the parties.
3. Arbitration produces a binding award, which is capable of enforcement through national courts, but not a mediator's or conciliators non-binding recommendation.
4. Arbitration is comparatively flexible, as contrasted to most court procedures.

In many circumstances, national law permits parties to agree upon the arbitral procedures that will govern the resolution of their dispute. As a consequence, the procedural conduct of arbitrations can vary dramatically across industrial sectors, arbitral institutions, geographic regions, and categories of disputes. In particular fields, or individual cases, parties may agree upon procedural rules that are tailor-made for their individual needs. Apart from specialized fields, commercial arbitration often bears broad resemblances to commercial litigation in national courts. Arbitration will frequently involve the submission of written pleadings and legal argument (often by lawyers), the presentation of documentary evidence and oral testimony, the application of "law" (in the form of judicial precedents and statutes), and the rendition of a reasoned, binding award. Nevertheless, in practice, arbitral procedures are usually less formal than litigation, particularly on issues such as pleadings and evidence. Arbitration often lacks various characteristics that are common in national court litigation, including broad discovery, summary disposition procedures, and appellate review. In smaller matters, domestic arbitrations are frequently conducted without the participation of legal advisers, before a lay-arbitrator, according to highly informal procedures.

International commercial arbitration is similar to domestic arbitration. As in domestic matters, international arbitration is a

consensual means of dispute resolution, by a non-governmental decision-maker, that produces a legally binding and enforceable ruling. In addition, however, international arbitration has several characteristics that distinguish it from domestic arbitration. Most importantly, international arbitration is designed and accepted particularly to assure parties from different jurisdictions that their disputes will be resolved neutrally. Among other things, the parties usually seek an independent decision-maker, detached from the courts, governmental institutions, and cultural biases of either party. They also ordinarily contemplate the arbitrator's application of internationally neutral procedural rules, rather than a particular national legal regime.

In addition, international arbitration is frequently regarded as a means of mitigating the peculiar uncertainties of transnational litigation. These uncertainties can include protracted jurisdictional disputes, expensive parallel proceedings, and choice-of-law debates. International arbitration seeks to avoid these uncertainties by designating a single, exclusive dispute resolution mechanism for settling the parties' disagreements. Moreover, international arbitration awards are often more readily enforceable in jurisdictions other than their place of origin than national court judgments.

Although international arbitration is a consensual means of dispute resolution, it has binding effect only by virtue of a complex framework of national and international law. As we discuss below, international conventions, national arbitration legislation, and institutional arbitration rules provide a specialized legal regime for most international arbitrations. This legal regime enhances the enforceability of both arbitration agreements and arbitral awards, and seeks to insulate the arbitral process from interference by national courts or other governmental authorities.

On the most universal level, the United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention") has been ratified by more than 120 nations, including all significant trading states and most major developing states. The Convention obliges member states to recognize and enforce both international commercial arbitration agreements and awards, subject to limited exceptions. Other international conventions impose comparable obligations on member states with respect to particular categories of disputes or with respect to particular bilateral or regional relationships.

In addition, most developed trading states have enacted national arbitration legislation that provides for the enforcement of international arbitration agreements and awards, that limits judicial interference in the arbitration process, and that authorises specified judicial support for the arbitral process. National arbitration legislation typically affirms the capacity of parties to enter into valid and binding agreements to arbitrate future commercial disputes, provides mechanisms for the enforcement of such arbitration agreements (through orders to stay litigation or (less frequently) to

compel arbitration), and requires the recognition and enforcement of arbitration awards. In addition, most modern arbitration legislation narrowly limits the power of national courts to interfere in the arbitration process, either when arbitral proceedings are pending or in reviewing ultimate arbitration awards. In many cases, national arbitration statutes also authorize limited judicial assistance to the arbitral process. This assistance can include selecting arbitrators or arbitral sittings, enforcing a tribunal's orders with respect to evidence taking or discovery, and granting provisional relief in aid of arbitration.

In recent years, there have been a number of efforts to harmonise national laws relating to international arbitration. The UNCITRAL Model Law on International Commercial Arbitration is the leading example. About twenty nations except the United States, have adopted the Model Law to date, and others are considering it. Similarly, national and international bar associations have produced rules or codes of conduct dealing with various arbitration-related subjects, such as evidence taking in arbitration, organizing arbitral proceedings, and the ethics of arbitrators.

International commercial arbitration frequently occurs pursuant to institutional arbitration rules, which are often incorporated by reference into parties' arbitration agreements. The leading international arbitration institutions include the International Chamber of Commerce, the London Court of International Arbitration, London Maritime Arbitrators Association and the American Arbitration Association, each of which has adopted its own set of rules governing the procedural aspects of arbitration. These institutions, as well as another several dozen or so less widely known bodies, supervise international arbitrations when parties agree to dispute resolution under their auspices. In addition, the UNCITRAL Commercial Arbitration Rules are widely used in so-called ad hoc (or non-institutional) arbitrations.

Advantages and Disadvantages of International Arbitration

The popularity of arbitration as a means for resolving international commercial disputes has grown tremendously over the past several decades. This popularity reflects important advantages provided by international arbitration as a means of resolving international commercial disputes. Despite these advantages, however, international arbitration also has significant disadvantages. These advantages and disadvantages can be summarised as follows:

1. International arbitration is often perceived as ensuring a genuinely neutral decision-maker in disputes between parties from different countries. International disputes inevitably involve the risk of litigation before a national court of one of the parties, which may be biased, parochial, or unattractive for some other reason. Moreover, outside an unfortunately limited number of industrialized nations, local court systems simply lack the competence, experience, resources, and

traditions of even-handedness satisfactorily to resolve many international commercial disputes.

International arbitration offers a theoretically competent decision-maker satisfactory to the parties, who are, in principle, independent of either party or any national or international governmental authority. On the other hand, private arbitrators can have financial, personal, or professional relations with one party (or its counsel). In the eyes of some observers, this poses the risk of even greater partiality than the favoritism or parochialism of local courts.

2. A carefully-drafted arbitration clause generally permits the resolution of disputes between the parties in a single forum pursuant to an agreement that most national courts are bound by international treaty to enforce. This mitigates the expense and uncertainty of multiple judicial proceedings in different national courts.

On the other hand, incomplete or otherwise defective arbitration clauses can result in judicial and arbitral proceedings where the scope or enforceability of the provision, as well as the merits of the parties' dispute, must be litigated. Moreover, even well drafted arbitration agreements cannot entirely exclude the expense and delay of a litigant determined to confound the arbitral process.

3. Arbitration agreements and arbitral awards are generally (but not always) more easily and reliably enforced in foreign states than forum selection clauses or foreign court judgments. As described, some 120 nations have acceded to the New York Convention, which obliges contracting states to enforce arbitration agreements and awards (subject to specified, limited exceptions). In contrast, there are no worldwide treaties relating to either forum selection agreements or judicial judgments. The perceived ease of enforceability of arbitral awards has contributed to fairly substantial voluntary compliance with arbitral awards, although there is little empirical data comparing such compliance with that applicable to judicial judgments.

In some developing and other countries, there has been a perception that international commercial arbitration was developed by, and was biased in favor of, Western commercial interests. As a consequence, national law in many countries was historically hostile towards international arbitration. In some states, this remains the case today. Hostile or simply archaic national law can therefore still pose significant obstacles to the effective enforcement of international arbitration agreements and awards. In general, this hostility has waned somewhat over the past decade, with many states acceding to the New York Convention and enacting "pro-arbitration" legislation.

4. Arbitration tends to be procedurally less formal and rigid than litigation in national courts. As a result, parties have greater freedom to agree on neutral and appropriate procedural rules, set realistic timetables, select technically expert and neutral decision-makers, involve corporate management in dispute-resolution, and the like. On the other hand, the lack of a detailed procedural code or decision-maker with direct coercive authority may permit party misconduct or create opportunities for an even greater range of procedural disputes between the parties.

5. International arbitration typically involves less extensive discovery than is common in litigation in some national courts (particularly common law jurisdictions). This is generally attractive to international businesses because of the attendant reduction in expense, delay, and disclosure of business secrets.

6. International arbitration is usually more confidential than judicial proceedings - as to submissions, evidentiary hearings, and final awards. This protects business and commercial confidences and can facilitate settlement by reducing opportunities and incentives for public posturing. On the other hand, few arbitrations are entirely confidential, with disclosures often occurring by means of judicial enforcement actions, unilateral party action, regulatory inquiries, or otherwise.

7. The existence of an arbitration clause, a workable arbitral procedure, and an experienced arbitral tribunal may create incentives for settlement or amicable conciliation. The cooperative elements that are required to constitute a tribunal and agree upon a procedural framework can sometimes help foster a climate conducive to settlement. Indeed, parties sometimes agree to conciliation (rather than, or in addition to, binding arbitration) or to arbitration *ex aequo et bono* (not based on the strict application of law) in a deliberate effort to foster settlement. On the other hand, where relations are irrevocably soured, the need for some measure of cooperation between the parties in conducting the arbitration can permit party misconduct greatly to impede dispute resolution.

8. Arbitration is often lauded as a prompt, inexpensive means of dispute resolution. That can sometimes be the case, but international arbitration is also frequently criticized as both slow and expensive. The difficulties in scheduling hearing dates (with busy arbitrators, lawyers, and clients in different countries), the need to agree upon various procedural steps, and other factors often gives international arbitrations a fairly stately pace. Nonetheless, national court proceedings are also often slow, and the existence of appellate review (and

possible re-trials) introduces additional delays not ordinarily encountered in arbitration.

Although sometimes advertised on grounds of economy, even its proponents rightly acknowledge that "international arbitration is an expensive process." Both private arbitrators (unlike judges) and arbitral institutions (unlike most courts) must be paid by the parties. And there is a perception that some institutional fees, charged for "administrative" services, are unnecessarily high. Nonetheless, these expenses generally will be less than the legal fees and other costs required for lengthy appellate proceedings or (in some jurisdictions) discovery. Given this background, it is not difficult to find enthusiastic proponents of the arbitral process:

In the realm of international commercial transactions, arbitration has become the preferred method of dispute resolution. Arbitration is preferred over judicial methods of dispute resolution because the parties have considerable freedom and flexibility with regard to choice of arbitrators, location of the arbitration, procedural rules for the arbitration, and the substantive law that will govern the relationship and rights of the parties.

Equally vigorous are some critics, including those who regard arbitration as "the slower, more expensive alternative," or conclude that "arbitration sometimes involves perils that even surpass the 'perils of the seas.'" In fact, the truth is less clear-cut, and lies somewhere between these extremes: "The more enthusiastic of sponsors have thought of arbitration as a universal panacea. We doubt whether it will cure corns or bring general beatitude. Few panaceas work as well as advertised." At bottom, if generalizations must be made, international arbitration is much like democracy; it is nowhere close to ideal, but it is generally better than the existing alternatives. To those who have experienced it, litigation of complex international disputes in national courts is often distinctly unappealing. Despite the daunting procedural complexities and other uncertainties, arbitration often offers the least ineffective way to finally settle the contentious disputes that arise when international transactions go awry.

Institutional and AD hoc Arbitration International Arbitration

International arbitration can be either "institutional" or "ad hoc." There are important differences between these alternatives. A number of international organisations and institutions, located in different countries, provide institutional arbitration services. The best-known international arbitration institutions are the International Chamber of Commerce ("ICC"), the American Arbitration Association ("AAA"), and the London Court of International Arbitration ("LCIA"), apart from this international organisations like the World Intellectual Property Organisation ("WIPO"), International Center for Settlement of Disputes ("ICSID"), World Trade Organisation and like provide for international arbitration.

These arbitral institutions have promulgated sets of procedural rules that apply where parties have agreed to arbitration pursuant to such rules. Among other things, institutional rules set out the basic procedural framework and timetable for the arbitration process. Institutional rules also typically authorize the host arbitral institution to select arbitrators in particular disputes (that is, to serve as "appointing authority"), to resolve challenges to arbitrators, to designate the place of arbitration, to fix or influence the fees payable to the arbitrators, and to review the arbitrator's awards to reduce the risk of unenforceability on formal grounds. Each arbitral institution has a staff (with the size varying significantly from one institution to another) and a decision-making body. Of course, arbitral institutions charge an administrative fee, which can sometimes be substantial, for rendering these various services. This fee is in addition to compensation paid by the parties to the arbitrators.

It is fundamental that arbitral institutions do not themselves arbitrate the merits of the parties' dispute. This is the responsibility of the particular individuals selected as arbitrators. Arbitrators are virtually never employees of the arbitral institution, but instead are private persons selected by the parties. If parties cannot agree upon an arbitrator, most institutional rules provide that the host institution will act as an "appointing authority," which chooses the arbitrators in the absence of the parties' agreement.

Ad hoc arbitrations are not conducted under the auspices or supervision of an arbitral institution. Instead, parties simply agree to arbitrate, without designating any institution to administer their arbitration. Ad hoc arbitration agreements will often choose an arbitrator or arbitrators, who is to resolve the dispute without institutional supervision or assistance. The parties will sometimes also select a preexisting set of procedural rules designed to govern ad hoc arbitrations. For international commercial disputes, the United Nations Commission on International Trade Law ("UNCITRAL") has published a commonly used set of such rules. Where ad hoc arbitration is chosen, parties usually will designate an "appointing authority," that will select the arbitrators if the parties cannot agree. If the parties fail to select an appointing authority, then the national arbitration statutes of many nations permit national courts to appoint arbitrators.

Both institutional and ad hoc arbitration have their strengths as well as weaknesses. Institutional arbitration is conducted according to a standing set of procedural rules and supervised, to a greater or lesser extent, by a professional staff. This reduces the risks of procedural breakdowns, particularly at the beginning of the arbitral process, and of technical defects in the arbitral award. The institution's involvement can be particularly constructive on issues relating to the appointment of arbitrators, the resolution of challenges to arbitrators, and the arbitrators' fees. Less directly, the institution lends its standing to any award that is rendered, which may enhance the likelihood of voluntary compliance and judicial enforcement.

On the other hand, ad hoc arbitration is typically more flexible, less expensive (since it avoids sometimes substantial institutional fees), and more confidential than institutional arbitration. Moreover, the growing size and sophistication of the international arbitration bar, and the efficacy of the international legal framework for commercial arbitration, have partially reduced the relative advantages of institutional arbitration. Nonetheless, many experienced international practitioners prefer the more structured, predictable character of institutional arbitration, at least in the absence of unusual circumstances arguing for an ad hoc approach.

Overview of International Arbitral Institutions & Laws

Introduction to Institutional Arbitration

Different arbitral institutions offer somewhat different products. As noted above, the ICC, the LCIA, and the AAA are presently the leading international arbitral institutions. Each of these institutions, as well as several other important international arbitral institutions, are briefly described below as follows

1. The ICC's International Court of Arbitration: It was established in Paris in 1923. The ICC remains the world's leading international commercial arbitration institution, and has less of a national character than any other arbitral institution. Its annual caseload was well above 300 cases per year during the 1980s and early 1990s, and it now exceeds 500 cases per year. Most of these cases are international disputes, many involving very substantial sums. The ICC's caseload involves parties from around the world, with Western European parties being involved in less than 50% of all ICC cases in many recent years.

The ICC has promulgated the ICC Rules of Arbitration ("ICC Rules"), which were most recently revised in 2000, as well as the ICC Rules of Optional Conciliation. Under the ICC Rules, the ICC is extensively involved in the administration of individual arbitrations. Among other things, the ICC is responsible for service of the Request for Arbitration and other preliminary submissions on the parties, fixing and receiving payment of advances on costs by the parties at the outset of an arbitration confirming the parties' nominations of arbitrators, appointing arbitrators if a party defaults or if the parties are unable to agree upon a presiding arbitrator or sole arbitrator, considering challenges to the independence of arbitrators, in certain cases, reviewing so-called "Terms of Reference," which define the issues and procedures for the arbitration, reviewing a tribunal's award for formal defects, and fixing the arbitrator's compensation.

The ICC's International Court of Arbitration ("ICC Court") is responsible for most significant administrative decisions in ICC arbitrations. The ICC Court is not, in fact, a "court," and does not itself decide substantive legal disputes or act as an arbitrator. Rather, the ICC Court acts in a supervisory and appointing capacity under the

ICC Rules. The ICC Court is supported by a sizeable legal and administrative staff of some twenty persons, of more than ten nationalities, organized as a Secretariat. The Secretariat is substantially involved in the day-to-day management of arbitrations. In appointing and confirming arbitrators, the ICC Court considers "the prospective arbitrator's nationality, residence and other relationships with the countries of which the parties or the other arbitrators are nationals and the prospective arbitrator's availability and ability to conduct the arbitration". The ICC Court's appointments of arbitrators are generally based upon recommendations made by a neutral "national committee," which is usually a business or similar organization in a specific country. Currently, more than 60 countries have ICC National Committees.

ICC arbitrations can be sited almost anywhere in the world. In 1997, for example, ICC arbitrations were conducted in more than different countries. By far the most common situses for ICC arbitrations are France, Switzerland, England, other Western European states, and the United States. The ICC Rules set out schedules of administrative costs and arbitrators' fees. Both are based upon the amount in dispute, with the arbitrators' fees being fixed by the ICC Court, within a prescribed range, in light of the difficulty of the case, the expedition of proceeding, the amount in dispute, and other factors. The ICC Rules also provide for "advances on costs" to be paid by the parties at the outset of the arbitral proceedings, designed to secure payment of future administrative costs and arbitrators' fees.

The ICC's Rules have sometimes been criticised as expensive and cumbersome. The 1998 amendments to the Rules reflected a concerted and promising effort to meet these charges. Despite criticism, the ICC clearly remains the institution of last resort for most sophisticated commercial users.

2. London Court of International Arbitration (LCIA): The LCIA is, by some accounts, the second most popular European arbitration institution. Its annual caseload, which is increasing, has reached about 50 disputes per year. Founded in 1892, the LCIA has made a determined and generally successful effort in recent years to overcome perceptions that it is an exclusively English organization. Among other things, it has appointed two successive non-English presidents, and its vice-presidents include non-English practitioners.

The LCIA administers a set of arbitration rules, the London Court of International Arbitration Rules ("LCIA Rules"), which were extensively revised in 1998. Although identifiably English in drafting style and procedural approach, the LCIA Rules generally provide a sound, neutral basis for international dispute resolution. Broadly speaking, LCIA arbitrations are administered in a less comprehensive fashion than ICC cases. Among other things, the LCIA Rules contain no Terms of Reference procedure and do not provide for administrative review of draft awards.

In contrast to most other institutional rules, the LCIA Rules set out the powers of an LCIA arbitral tribunal in some detail. The powers to order discovery and security for legal costs (i.e., a deposit or bank guarantee securing the estimated amounts which an unsuccessful claimant would be liable to reimburse to a successful respondent for its costs of legal representation) are prominently included among the arbitrators' powers.

The LCIA's appointments of arbitrators are drawn largely from the English bar and retired judiciary, particularly in cases governed by English law. The LCIA fixes the arbitrators' fees according to the time expended by the arbitrators at the hourly rate agreed by the arbitrators with the parties. The LCIA provides a scale of customary fees for arbitrators, to assist in fixing rates. The LCIA's administrative fees are calculated based upon the time spent by LCIA personnel (currently £150/hour for the Registrar and £75/hour for the Secretariat).

Most LCIA arbitrations are sited in London. In the absence of agreement by the parties to the contrary, London will ordinarily be selected by the LCIA as the arbitral situs.

3. American Arbitration Association (AAA): The AAA was founded in 1926 (three years after the ICC) and is based in New York, with nearly 40 regional offices throughout the United States. The AAA is the leading U.S. arbitral institution, and handles what it describes as the largest number of arbitral disputes in the world. It administers more than 60,000 arbitrations or other forms of alternative dispute resolution each year, with specialized rules for numerous different industries. Nonetheless, only a few of these disputes are "international." Although its methods for identifying "international" disputes are sometimes questioned, the AAA claims a caseload of some 400 international disputes per year.

The primary arbitration rules promulgated by the AAA are the AAA Commercial Arbitration Rules. These rules are widely used in domestic arbitrations between businesses in the United States. In 1991, the AAA promulgated the AAA International Arbitration Rules designed specifically for international arbitrations. The rules are based principally on the UNCITRAL Arbitration Rules, and were intended to permit a maximum of flexibility and a minimum of administrative supervision. They were most recently revised in April 1997. Numerous other sets of AAA arbitration rules also exist, including rules for specialized types of disputes, and can be selected in the parties' arbitration agreement.

The 1997 version, of the AAA International Arbitration Rules provide the applicable set of AAA arbitration rules in "international" disputes (except where the parties have otherwise agreed). This alters the pre-1997 position, in which the primarily domestic AAA Commercial Arbitration Rules provided the fallback rules when parties to international agreements had agreed to AAA arbitration without designating a particular set of rules.

Under all versions of AAA rules, the AAA administrative staff plays a less significant supervisory role than does the ICC Secretariat. Among other things, the AAA does not receive or serve initial notices or requests for arbitration; does not require or review a Terms of Reference; does not review draft awards; and plays a less significant role in setting the arbitrators' fees. The AAA's appointments of arbitrators are generally based on a list procedure, whereby names drawn from the AAA's files are presented to the parties for expressions of preference. Although the AAA's lists are heavily domestic in character, it increasingly seeks to appoint arbitrators with international experience in appropriate cases. To that end, the AAA reports that it has enhanced the quality of its international panel of arbitrators.

The AAA's administrative charges are based on the amount in dispute. With respect to the arbitrators' fees, the AAA case administrator will initially attempt to broker an agreement between the proposed arbitrators and the parties on a basis for compensation. Failing such agreement, the AAA will fix the arbitrators' fees after considering the arbitrators' hourly rates, the amount in dispute, and the complexity of the dispute.

Non-U.S. parties are often reluctant to agree to arbitration under AAA rules, fearing parochial predisposition and unfamiliarity with international practice. The AAA is working to overcome this image. In addition to upgrading its approach to selecting arbitrators, the AAA has concentrated the handling of all international cases in an "International Center" in New York, staffed by specialized attorneys with language skills. It remains to be seen how these efforts will be received.

4. International Center for Settlement of Investment Disputes (ICSID): The International Center for the Settlement of Investment Disputes ("ICSID") administers arbitrations conducted pursuant to the ICSID Convention. ICSID is located in Washington, D.C., where it operates under World Bank auspices.

As discussed below, the ICSID Convention provides a specialized arbitration regime for certain "investment disputes" between states and foreign investors. Before adopting an ICSID arbitration clause or commencing an ICSID arbitration, care should be taken to ensure that the Convention's jurisdictional limits are satisfied (e.g., that the relevant foreign state has ratified the ICSID Convention and that an "investment dispute" would be involved). If these limits are satisfied, parties must consider whether ICSID arbitration is suitable for their needs.

Sophisticated users have been reluctant to embrace ICSID arbitration because of uncertainties about jurisdictional limits, appointment procedures for arbitrators, and the risk of internal review. With respect to the final point, the annulment of two ICSID awards by appellate panels has provoked concerns among foreign investors.

5. Stockholm Chamber of Commerce Arbitration Institute (SCC): The Arbitration Institute was founded in Stockholm in 1917, the Stockholm Chamber of Commerce Arbitration Institute ("SCC") developed into a substantial forum for disputes involving parties from the USSR and China during the 1970s and 1980s. The SCC typically appoints members of the Swedish bar, with international experience, or former Swedish judges, as arbitrators. SCC arbitrations are usually sited in Sweden, although other sities can be chosen.

6. Singapore International Arbitration Center (SIAC): The SIAC was established in 1990, principally for disputes arising out of construction, shipping, banking, and insurance. The SIAC Rules are based largely on the UNCITRAL Arbitration Rules. The SIAC has not yet won broad favor among sophisticated users, in part because of historic perceptions of an interventionist attitude of local courts. There are signs that this disfavor is waning, especially in conjunction with concerns about Hong Kong as an arbitral situs.

7. Hong Kong International Arbitration Center (HKIAC): The Hong Kong International Arbitration Center ("HKIAC") was established in 1985 and had developed into Asia's leading international arbitration institution prior to departure of the British administration. The HKIAC's Rules are based on the UNCITRAL Arbitration Rules, although parties are free to agree upon alternative procedural regimes. The HKIAC still enjoys a substantial case-load (approximately 200 disputes annually in recent years), but many users are now reluctant to designate it in new agreements. Concerns about future stability and judicial independence in Hong Kong are typically cited.

8. World Intellectual Property Organisation (WIPO): The Arbitral Center of WIPO was established in Geneva, Switzerland in 1994. WIPO and the WIPO Arbitration Rules are designed particularly for intellectual property disputes, although other types of controversies are not excluded from their facilities. WIPO's Arbitration Rules contain detailed provisions dealing with issues that are of particular importance in intellectual property disputes. These include provisions relating to discovery, disclosure and protection of trade secrets, and confidentiality of arbitral proceedings. As yet, WIPO has had insufficient opportunity to establish a track record with respect to its selection of arbitrators and/or administration of arbitral proceedings.

9. German Institution of Arbitration: The German Institution of Arbitration ("Deutsche Institution für Schiedsgerichtsbarkeit" or "DIS") was originally founded in 1920. It has since 1992 incorporated the arbitration institutions of the former German Democratic Republic, and provides nationwide arbitration services in Germany. The DIS Arbitration Rules (published in English translation as well as an authoritative German text) are intended for both national and international arbitrations. A majority of the DIS's caseload consists of domestic disputes, although Germany's recent

enactment of the UNCITRAL Model Law is expected to attract greater international usage.

International Conventions and National Laws on International Commercial Arbitration

International businesses and industrialized trading nations have long sought to establish a stable, predictable legal environment in which international commercial arbitrations can be conducted. Because national arbitration laws have historically varied considerably from state to state, substantial uncertainties often attend the enforcement of international arbitral agreements and awards. To reduce these uncertainties, major trading nations have entered into international treaties and conventions designed to facilitate the transnational enforcement of arbitration awards and agreements.

International agreements concerning commercial arbitration originally took the form of bilateral treaties. Later, multilateral conventions sought to facilitate international arbitration by encouraging the recognition of arbitration agreements and awards. The first such arrangement in the contemporary era was the Montevideo Convention, signed in 1889 by various Latin American states. Like other early efforts in the field, the Montevideo Convention attracted few signatories and had little practical impact. Following are the conventions dealing with International Arbitration :

1. Geneva Protocol of 1923 and Geneva Convention of 1927: In the early 1920s, at the behest of the International Chamber of Commerce, the Geneva Protocol of 1923 was negotiated and adopted under the auspices of the League of Nations. The Protocol was ultimately ratified by the United Kingdom, Germany, France, Japan, India, Brazil, and about a dozen other nations. Although the United States did not ratify the Protocol, the nations that did so represented a very significant portion of the international trading community at the time.

The Geneva Protocol's primary focus was to require the enforcement of arbitration agreements (with respect to both existing and future disputes). In addition, the Protocol also sought to facilitate the enforceability of arbitral awards, although it addressed only the enforcement of awards within the state where they were made.

The Protocol was augmented by the Geneva Convention for the Execution of Foreign Arbitral Awards of 1927. The Geneva Convention expanded the enforceability of arbitration awards rendered pursuant to arbitration agreements subject to the Geneva Protocol. It did so by requiring the enforcement of such awards within any contracting state (rather than only within the state where they were made).

The Geneva Protocol and Convention were major early steps towards an effective international framework for commercial arbitration. Nevertheless, both agreements were subject to significant limitations on their scope and were not widely ratified. More important, because of a relative dearth of international commercial arbitrations at the

time, neither agreement received frequent application nor had extensive practical effect.

2. The New York Convention: The successor to the Geneva Protocol and the Geneva Convention was the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Often referred to as the "New York Convention," the treaty is by far the most significant contemporary international agreement relating to commercial arbitration.

The Convention was signed in 1958 in New York after lengthy negotiations under U.N. auspices. The Convention is widely regarded as "the cornerstone of current international commercial arbitration." In the apt words of Judge Stephen Schwebel, former President of the International Court of Justice, "It works."

The Convention was designed to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory nations." In broad outline, the Convention is as follows:

1. It requires national courts to recognize and enforce foreign arbitral awards, subject to specified exceptions.
2. It requires national courts to recognize the validity of arbitration agreements, subject to specified exceptions.
3. It requires national courts to refer parties to arbitration when they have entered into a valid agreement to arbitrate that is subject to the Convention.

The New York Convention made significant improvements in the regime of the Geneva Protocol and Geneva Convention of 1927. Particularly important was the New York Convention's shifting of the burden of proving the validity or invalidity of arbitral awards to the party resisting enforcement and its recognition of substantial party autonomy with respect to choice of arbitral procedures and applicable law. In the words of the President of the U.N. Conference on the Convention:

"It was already apparent that the document represented an improvement on the Geneva Convention of 1927. It gave a wider definition of the awards to which the Convention applied, it reduced and simplified the requirements with which the party seeking recognition or enforcement of an award would have to comply; it placed the burden of proof on the party against whom recognition or enforcement was invoked. It gave the parties greater freedom in the choice of the arbitral authority and of the arbitration procedures. It gave the authority before which the award was sought to be relied upon the right to order the party opposing the enforcement to give suitable security."

It became available in the 1960s and 1970s, as world trade and investment began significantly to expand. With this expansion came

substantially greater numbers of international commercial disputes and arbitrations, which gave practical utility to the Convention. Despite its contemporary significance, the New York Convention initially attracted relatively few signatories. The Convention was drafted at the United Nations Conference on Commercial Arbitration held in New York in 1958. Twenty-six of the forty-five countries participating in the Conference ratified the Convention. Many other nations, including the United Kingdom, Sweden, and most Latin American and African states, failed to ratify the Convention for some time thereafter. The United States also did not initially ratify the Convention, nor did it do so for some time.

Over time, states from all regions of the globe reconsidered their position and today some 120 nations have ratified the Convention. The Convention's parties include all major trading states and many Latin American, African, Asian, Middle Eastern, and former socialist states. During the past decade, numerous states (including a number in the Middle East and Latin America) have departed from long traditions of distrust of international arbitration, and ratified the Convention. In ratifying the Convention, many states have attached reservations that can have significant consequences in private disputes.

Art. VII(1) of the New York Convention specifically provides that the Convention does not affect the validity of any bilateral or other multilateral arrangements concerning the recognition and enforcement of foreign arbitral awards (except the Geneva Protocol and Geneva Convention). That has been interpreted by many national courts in a "pro-enforcement" fashion, to permit agreements and awards to be enforced under either the Convention or another treaty.

In virtually all countries, the New York Convention has been implemented through national legislation. The practical effect of the Convention is therefore dependent on both the content of such national legislation and the interpretation given by national courts to the Convention and national implementing legislation.

An important aim of the Convention's drafters was uniformity; they sought to establish a single, stable set of international legal rules for the enforcement of arbitral agreements and awards. The fulfillment of that aim is dependent upon the willingness of national legislatures and courts, in different signatory states, to adopt uniform interpretations of the Convention. In general, however, national courts have performed adequately, but no better, in arriving at uniform interpretations of the Convention.

3. The Inter-American Convention on International Commercial Arbitration: After the pioneering Montevideo Convention in 1889, much of South America effectively turned its back on international commercial arbitration. Only Brazil ratified the Geneva Protocol of 1923, and even it did not adopt the Geneva Convention. South American states were very reluctant to ratify the New York Convention, for the most part only beginning to do so in the 1980s.

Nevertheless, in 1975 the United States and most South American nations negotiated the Inter-American Convention on International Commercial Arbitration, also known as the "Panama Convention." The United States ratified the Convention in 1990; other parties include Mexico, Venezuela, Columbia, Chile, Ecuador, Peru, Costa Rica, El Salvador, Guatemala, Honduras, Panama, Paraguay, and Uruguay. The Inter-American Convention is similar to the New York Convention in many respects. Among other things, it provides for the general enforceability of arbitration agreements and arbitral awards, subject to specified exceptions similar to those in the New York Convention.

The Inter-American Convention introduces a significant innovation, not present in the New York Convention, by providing that, where the parties have not expressly agreed to any institutional or other arbitration rules, the rules of the "Inter-American Commercial Arbitration Commission" ("IACAC") will govern. In turn, the Commission has adopted rules that are almost identical to the UNCITRAL Arbitration Rules. Less desirably, the Panama Convention also departs from the New York Convention by omitting provisions dealing expressly with judicial proceedings brought in national courts in breach of an arbitration agreement.

4. The ICSID Convention: The International Center for the Settlement of Investment Disputes ("ICSID") is a specialized arbitration institution, established pursuant to the so-called "Washington Convention" of 1965. ICSID was established at the initiative of the International Bank for Reconstruction and Development and is based at the World Bank's Washington headquarters.

The ICSID Convention is designed to facilitate the settlement of a limited range of "investment disputes" that the parties have specifically agreed to submit to ICSID. Investment disputes are defined as controversies that arise out of an "investment" and involve a signatory state or designated state entity (but not merely a private entity headquartered or based in a signatory state) and a national of another signatory state. As to such disputes, the Convention provides both conciliation and arbitration procedures.

The Convention contains a number of unusual provisions relating to international arbitration.

1. The Convention provides that, absent agreement by the parties, ICSID arbitrations are governed by the law of the state that is party to the dispute (including its conflicts rules) "and such rules of international law as may be applicable." In contrast, neither the New York nor Panama Conventions contains comparable substantive choice of law provisions.
2. ICSID awards are theoretically directly enforceable in signatory states, without any method of review in national courts. There has thus far been very little experience with judicial enforcement of ICSID awards.

3. When a party challenges an ICSID award, the Convention empowers the Chairman of the Administrative Council of ICSID to appoint an ad hoc committee to review, and possibly annul awards; if an award is annulled it may be resubmitted to a new arbitral tribunal. The ICSID annulment mechanism has been vigorously criticised, on the grounds that it permits politicised appellate review.

Nearly 100 countries, from all geographical regions of the world, have ratified the ICSID Convention. Until relatively recently, however, relatively few cases had been brought under the Convention. ICSID's caseload is gradually increasing, particularly as a consequence of arbitrations brought pursuant to bilateral investment treaties or investment protection legislation.

Unfortunately, the prospects for greatly-increased usage of the ICSID Convention have been threatened by the annulment of several ICSID awards by ad hoc panels assigned to review awards. In addition, uncertainty as to the jurisdictional scope of the Convention and the Convention's appointment mechanism for arbitrators have led many to question ICSID's usefulness as a means of dispute resolution.

5. Iran-United States Claims Tribunal: The Iran-United States Claims Tribunal is one of the most ambitious international claims commissions. The Tribunal was established pursuant to the so-called Algiers Accords, which resolved some of the legal disputes arising from the Iranian seizure of U.S. hostages during President Carter's administration. Pursuant to the Accords, litigation in national courts concerning defined claims between U.S. and Iranian entities was suspended. A nine-person tribunal was established in the Hague, with defined jurisdiction over claims arising from U.S.- Iran hostilities; three tribunal members were appointed by the United States, three by Iran, and three from other states. The tribunal adopted the UNCITRAL Arbitration Rules and has issued a substantial number of decisions.

6. Bilateral Investment Treaties or Investment Protection Agreements: Bilateral investment treaties ("BITs") or investment protection agreements ("IPAs") became common during the 1980s and 1990s, as a means of encouraging capital investment in developing markets. Capital-exporting states (including the United States, most Western European states, and Japan) have entered into numerous BITs or IPAs with countries in developing regions. A recent tally indicated that more than 1,300 BITs are presently operative.

Many BITs contain provisions dealing with the enforceability of international arbitration agreements and awards. In addition, some BITs contain provisions, which permit foreign investors to require international arbitration of certain categories of disputes including in the absence of an arbitration agreement in the contract(s) giving rise to the dispute. The possibility of "arbitration without privity" is an

important option in some international commercial disputes, which counsels careful attention to applicable BITs.

7. **Bilateral Friendship, Commerce and Navigation Treaties:** A number of nations have entered into bilateral treaties dealing principally with commercial relations and incidentally with international arbitration. These treaties generally provide for the reciprocal recognition of arbitral awards made in the territory of the contracting states. For example, the United States has included an article relating to arbitration in many of its bilateral Friendship, Commerce and Navigation treaties. U.S. and other FCN provisions regarding arbitration are often drafted along the following lines:

"Contracts entered into between nationals or companies of either party and nationals or companies of the other party that provide for settlement by arbitration of controversies shall not be deemed unenforceable within the territories of such other party merely on the grounds that the place designated for arbitration proceedings is outside such territories or that the nationality of one or more of the arbitrators is not that of such other party. Awards duly rendered pursuant to any such contracts which are final and enforceable under the laws of the place where rendered shall be deemed conclusive in enforcement proceedings brought before the courts of competent jurisdiction of either party, and shall be entitled to be declared enforceable by such courts, except where found contrary to public policy." Such provisions have been interpreted liberally by national courts.

Many nations historically regarded international commercial arbitration with a mixture of suspicion and hostility. That was particularly true of various parts of Latin America and the Middle East, as well as developing countries elsewhere. This hostility arose from reluctance to compromise principles of national sovereignty and from perceptions concerning the fairness, neutrality, and efficacy of contemporary international commercial arbitration. Although historic distrust for international arbitration has waned, it continues to influence legislation, judicial decisions, and other actions in many states.

Against this background, contemporary arbitration legislation in many foreign states does not provide effective enforcement of arbitration agreements; such provisions are either revocable at will or unenforceable in broad categories of disputes. Similarly, in a number of states, international arbitral awards are subject to either *de novo* judicial review or to similarly rigorous scrutiny on other grounds. Finally, some national courts have been prepared to interfere in the international arbitral process for example, by purporting to remove arbitrators, to resolve "preliminary" issues, to bar foreign lawyers from appearing, or to enjoin arbitrations.

During the last decade, a number of states, which historically distrusted international arbitration, have ratified the New York

Convention and/or enacted legislation supportive of the arbitral process. These include Russia, India, China, Saudi Arabia, Argentina, Algeria, Bahrain, Tunisia, Nigeria, Peru, and Venezuela. Although there is often little practical experience with the application of arbitration statutes in such states, these statutes have the potential for providing a more stable, predictable framework for international arbitration. Unfortunately, even where national law is superficially supportive of the international arbitral process, many national courts have displayed a readiness to hold arbitration agreements or awards invalid, particularly when requested to do so by local individuals, companies, or state entities.

Despite the hostility to international arbitration in some parts of the world, most states in Europe, North America, and parts of Asia have adopted legislation that provides effective and stable support for the arbitral process. In particular, England, Switzerland, the United States, Canada, France, Sweden, Belgium, the Netherlands, Austria, Germany, and Italy have enacted arbitration statutes that ensure the basic enforceability of arbitration agreements and awards with minimal judicial interference in the arbitral process.

Choice of Arbitration Law and Procedural Rules

Parties frequently agree to arbitration to avoid the jurisdictional and choice of law uncertainties that arise when international disputes are litigated in national courts. Unfortunately, international arbitration can produce its own set of complex, often unpredictable choice of law issues. Choice of law issues play an important role in international commercial arbitration. It is necessary at the outset to distinguish between four separate choices of law issues that can arise in connection with an international arbitration:

1. The substantive law governing the merits of the parties' underlying contract and other claims.
2. The substantive law governing the parties' arbitration agreement.
3. The procedural law applicable to the arbitration proceedings (also called the "curial law" or the "lex arbitri").
4. The conflict of law rules applicable to select each of the foregoing laws. Although not common, it is possible for each of these four issues to be governed by a different national (or other) law.

Each of the foregoing choice of law issues can have a vital influence on international arbitral proceedings. Different national laws provide different sometimes dramatically different rules applicable at different stages of the arbitral process. Understanding which national rules will potentially be applicable can therefore be critical. The parties' underlying dispute will ordinarily be resolved under the rules of substantive law of a particular national legal system. In the first instance, it will usually be the arbitrators who determine the substantive law applicable to the parties' dispute. International arbitrators typically give effect to the parties' agreements concerning

applicable substantive law ("choice-of-law clauses"). The principal exception is where mandatory national laws or public policies purport to override private contractual arrangements.

Where the parties have not agreed upon the substantive law governing their dispute, the arbitral tribunal must select such a law. In so doing, the tribunal will usually refer to some set of national conflict of laws rules. Although the historical practice was to apply the national conflict of laws rules of the arbitral situs, more recent practice is diverse. Some tribunals and commentators adhere to the traditional approach, while others look to the conflicts rules of all states having a connection with the dispute. Additionally, some authorities appear to be moving towards recognition of an international body of conflict of laws rules. There is also authority supporting an arbitral tribunal's "direct" application of substantive rules of law, purportedly without prior recourse to any set of conflict of laws rules. The development of bodies of international substantive rules dealing with commercial matters has facilitated this development.

Arbitration agreements are regarded under most national laws and institutional arbitration rules as "separable" from the underlying contract in which they appear. One consequence of this is that the parties' arbitration agreement may be governed by a different national law than that applicable to the underlying contract. This can occur either by the parties' express choice of law or by the application of conflict of laws rules i.e. theoretically different substantive laws may be applied for the parties' arbitration agreement and their underlying contract.

The following four alternatives of law governing an arbitration agreement are of particular importance, they are as follows:

1. The law chosen by the parties to govern the arbitration agreement itself.
2. The law of the arbitral situs.
3. The law governing the parties' underlying contract.
4. The law of the forum in which judicial enforcement of the agreement is sought (for example, the FAA in a U.S. court and the IACA in India). In the absence of a choice by the parties, arbitral tribunals and national courts tend to apply the law of the arbitral situs.

The arbitration proceedings themselves are also subject to legal rules. The law governing the arbitral proceedings is variously referred to as the procedural law of the arbitration, the curial law, the *lex arbitri*, or the *loi de l'arbitrage*.

Among other things, the procedural law applicable to an arbitration typically deals with such issues as the appointment and qualifications of arbitrators, the qualifications and professional responsibilities of parties' legal representatives, the extent of judicial intervention in the arbitral process, the procedural conduct of the arbitration, and the

form of any award. Different national laws take significantly different approaches to these various issues. In some countries, national law imposes significant limits or requirements on the conduct of the arbitration and local courts have broad powers to supervise arbitral proceedings. Elsewhere, and in most developed jurisdictions, local law affords international arbitrators virtually unfettered freedom to conduct the arbitral process subject only to basic requirements of procedural regularity ("due process" or "natural justice").

In most cases, the procedural law applicable to the arbitral proceedings will be the law of the arbitral situs, the place where the parties have agreed that the arbitration will be seated and that arbitral hearings are conducted. Parties nonetheless have the power, under many developed legal systems, to agree to the application of a different procedural law than that of the arbitral situs. This seldom occurs in practice, and the effects of such an agreement are uncertain.

Selecting each of the bodies of law identified above, the laws applicable to the merits of the underlying dispute, to the arbitration agreement, and to the arbitration proceedings, ordinarily requires application of conflict of laws rules. In order to select the substantive law governing the parties' dispute, for example, the arbitral tribunal must often apply a conflict of laws system. And, just as different states have different rules of substantive law, they also have different conflict of laws rules. An international arbitral tribunal must therefore decide at the outset what set of conflicts rules to apply. The actual practice of arbitral tribunals in selecting the law applicable to each of the foregoing issues varies significantly. It includes the following approaches

1. Application of the arbitral situs' conflict of laws rules.
2. Application of the "international" conflict of laws rules.
3. Successive application of the conflict of laws rules of all interested states.
4. Direct application of substantive law without any express conflicts analysis.

Following are the procedural laws dealing with International Arbitration:

1. UNCITRAL Model Law on International Commercial Arbitration: A leading effort towards harmonization in the field of international commercial arbitration is the United Nations Commission on International Trade Law ("UNCITRAL") Model Law on International Commercial Arbitration. The UNCITRAL Model Law was adopted by a resolution of UNCITRAL in Vienna in 1985 and by a U.N. General Assembly resolution later the same year. The Model Law is designed to be implemented by national legislatures, with the objective of further harmonizing the treatment of international commercial arbitration in different countries.

2. UNCITRAL Arbitration Rules: As significant to the development of the international arbitral regime as the UNCITRAL Model Law are the UNCITRAL Arbitration Rules. The UNCITRAL Rules were promulgated by Resolution 31/98, adopted by the General Assembly of the United Nations on December 15, 1976. The UNCITRAL Arbitration Rules were designed for use in ad hoc international arbitrations. When they were adopted in 1976, the UNCITRAL Rules were the only set of rules available specifically for that purpose, although alternatives now exist. Under the Rules, the Secretary General of the Permanent Court of Arbitration serves as appointing authority, unless the parties agree to the contrary.

The objective of the UNCITRAL Rules was to create a relatively predictable and stable procedural framework for international arbitrations without stifling the informal and flexible character of such dispute resolution mechanisms. The Rules aimed to satisfy common law, civil law, and other jurisdictions, as well as capital-importing and capital-exporting interests. Foreign states, which generally will have supported the Rules in the United Nations debates, often find it difficult to object to their use in an arbitration agreement or arbitral proceeding.

The UNCITRAL Rules have contributed significantly to the harmonization of international arbitration procedures. That is reflected in part by the readiness of the AAA and the IACAC to base the AAA International Rules and IACAC Rules substantially on the UNCITRAL Rules. Other institutional rules, including the LCIA Rules, have also drawn on the UNCITRAL Rules.

3. IBA Rules on the Taking of Evidence in International Commercial Arbitration: In 1983, the International Bar Association adopted the "Supplementary Rules Governing the Presentation and Reception of Evidence in International Commercial Arbitration." The Rules attempted to provide a blend of civil law and common law approaches to the subjects of discovery and evidentiary presentations in arbitration. The Rules were revised in 1999, and re-titled the IBA "Rules on the Taking of Evidence in International Commercial Arbitration." The Rules are intended principally for contractual incorporation into parties' arbitration agreements, but they are also sometimes the basis for an arbitral tribunal's procedural rulings.

4. ABA/AAA Code of Ethics and IBA Ethics in International Arbitration: In 1980, a joint committee of the American Bar Association and American Arbitration Association adopted the ABA/AAA Code of Ethics. The Code sought to provide ethical guidelines, focusing particularly on issues of bias and partiality, for arbitrators. Consistent with historic practice in the United States, the Code set different ethical standards for party-appointed and "neutral" arbitrators.

In 1990, however, the American Bar Association recommended amendment of the Code of Ethics to provide for the neutrality and impartiality of all members of the arbitral panel (unless otherwise

agreed). The American Bar Association is presently considering revisions to the Code of Ethics. In 1987, the International Bar Association adopted "Ethics for International Arbitration," derived in substantial part from the ABA/AAA Code, the IBA effort sought to establish uniform ethical standards for application to international arbitrators. Unlike the original ABA/AAA Code, the IBA Ethics applied the same standards to party-appointed and neutral arbitrators. The IBA Ethics are influential guidelines in international arbitration practice.

5. UNCITRAL Notes on Organizing Arbitral Proceedings: In 1996, UNCITRAL published the "UNCITRAL Notes on Organizing Arbitral Proceedings." The UNCITRAL Notes are non-binding guidelines for arbitrators and parties designed to identify issues that frequently arise in the course of international arbitrations. Among other things, the UNCITRAL Notes briefly discuss procedural rules, communications, written submissions, evidence, witnesses, and hearings.

Fundamental importance of an arbitration agreement

Introduction to Arbitration Agreements

The foundation for almost every international arbitration is an international arbitration agreement. In the absence of a valid agreement to arbitrate, there is generally no basis for requiring arbitration or for enforcing an arbitral award against a party. International arbitration agreements can be drafted in countless different ways. Typically, an arbitration agreement will be a provision in an underlying commercial contract, calling for arbitration of any future disputes relating to the contract. Such a provision can be either short and standardised or longer and tailor-made for a particular transaction. As a model of brevity, if not prudence, European commentators cite a clause that provided "English law arbitration, in London according ICC Rules." A U.S. counterpart read: "Arbitration, if required in New York City."

At the opposite end of the spectrum are multi-paragraph arbitration provisions, recommended by assiduous practitioners for inclusion in commercial contracts, or specially-drafted for a particular transaction. It is also possible for entire agreements to be devoted exclusively to the arbitration of disputes under a related commercial contract or series of contracts. In between these extremes are model clauses promulgated by the ICC, LCIA, AAA, and other international arbitration institutions. Whatever form they may take, international arbitration agreements are vitally important to the international arbitral process. Properly drafted, they can pave the way for a relatively smooth and efficient arbitration; less carefully drafted they can give rise to a host of legal and practical issues.

Separability of the Arbitration Agreement

In the international context, arbitration clauses are generally deemed to be presumptively "separable" or "severable" from the underlying

contract within which they are found. The "separability doctrine" is specifically provided for by leading institutional arbitration rules, and by national arbitration legislation or judicial decisions from many jurisdictions, including the United States and India.

The separability doctrine provides that an arbitration agreement, even though included in and related closely to an underlying commercial contract, is a separate and autonomous agreement. According to a leading international arbitral award: "The principle ... of the autonomy or the independence of the arbitration clause ... has been upheld by several decisions of international case law." The analytical rationale for the separability doctrine is that the parties' agreement to arbitrate consists of promises that are distinct and independent from the underlying contract: "the mutual promise to arbitrate form the quid pro quo of one another and constitute a separable and enforceable part of the agreement."

The separability doctrine is regarded as having important consequences for the arbitral process: "Acceptance of autonomy of the international arbitration clause is a conceptual cornerstone of international arbitration." Among other things, the separability doctrine is generally understood as implying the continued validity of an arbitration clause (notwithstanding defects in the parties' underlying contract), and as permitting the application of different substantive laws to the parties' arbitration agreement and underlying contract.

The UNCITRAL Model Law, the Swiss Law on Private International Law, the English Arbitration Act, 1996, the Indian Arbitration and Conciliation Act, 1996 and the Federal Arbitration Act ("FAA"), as well as provisions from the UNCITRAL, ICC, and LCIA arbitration rules introduce the separability doctrine.

A Soviet arbitral tribunal in *All-Union Export-Import Association v. JOC Oil Ltd*, by its award dealt rigorously with the separability doctrine and other related issues. *Sojuznefteexport* (the "Association" or "SNE") was a foreign trade organization established under the laws of the former Union of Soviet Socialist Republics ("USSR"). In 1976, SNE entered into various agreements to sell quantities of oil to JOC Oil Limited ("JOC"), a Bermuda company.

The purchase agreements incorporated SNE's standard conditions, which contained the following arbitration clause:

"All disputes or differences which may arise out of this contract or in connection with it are to be settled, without recourse to the general Courts of law, in the Commission of the U.S.S.R. Chamber of Commerce and Industry in Moscow [\"FTAC\"], in conformity with the rules of procedure of the above Commission."

JOC took delivery of 33 oil shipments (worth approximately \$100 million) without paying for them. Following JOC's non-payment,

SNE initiated arbitration under the arbitration clause set forth above. JOC replied, in part, by claiming that the purchase agreement had not been executed by two authorised representatives of SNE and accordingly was void under Soviet law. JOC also alleged that, as a consequence, the arbitral tribunal lacked competence to adjudicate the dispute because the arbitration clause was void. SNE claimed that the sales agreement was not void and that, even if it were, the arbitration clause was separable and the law applicable to that agreement did not require two signatures to be valid.

As a result the arbitral tribunal held that "the Commission has recognized that an arbitration agreement (arbitration clause) is a procedural contract, independent from the material-legal contract and that therefore the question as to the validity or invalidity of this contract does not affect the agreement of the parties about the submission of the existing dispute to the jurisdiction of the FTAC. The Commission has come to the conclusion that the arbitration clause contained in the contract is valid and therefore in accordance with the right assigned to it has recognized itself as competent to hear the dispute as to its essence and to rule upon it. The arbitral tribunal further held that, although the underlying sales contract was void, Soviet principles of restitution applied. Under these principles, the tribunal awarded SNE the value of the oil shipped to JOC Oil, at the then-prevailing international oil prices. It also awarded SNE lost profits realized by JOC Oil (in an amount equal to market interest rates. This produced an award of approximately \$200 million in SNE's favour.

After the arbitral award was made against JOC Oil, Sojuznefteexport sought to enforce it in Bermuda. The first instance court denied recognition on various grounds, including that the arbitral tribunal lacked jurisdiction. The court held that "based on the Tribunal's finding that the underlying contract was invalid ab initio, then under both Soviet and English law there never was any contract between the parties from the very onset as such there never was an arbitration clause or agreement which could be submitted to arbitration." This judgment was reversed on appeal.

Finally, the U.S. Supreme Court's decision in *Prima Paint Co. v. Conklin Mfg Co.*, is one of the cases of seminal treatment of the separability doctrine by a national court, Justice FORTAS said "This case presents the question whether the federal court or an arbitrator is to resolve a claim of "fraud in the inducement," under a contract governed by the Federal Arbitration Act, 1925, where there is no evidence that the contracting parties intended to withhold that issue from arbitration...."

Flood & Conklin Manufacturing Company ("F&C") entered into a Consulting Agreement with Prima Paint Corporation ("Prima Paint"); at about the same time, Prima Paint also purchased F&C's paint business. The Consulting Agreement obligated F&C to assist Prima Paint's exploitation of the paint business, and forbid it from competing with that business.

The agreement contained what the Court termed "a broad arbitration clause," which provided:

"Any controversy or claim arising out of or relating to this Agreement, or the breach thereof, shall be settled by arbitration in the City of New York, in accordance with the rules then obtaining of the American Arbitration Association ..."

One week after the Consulting Agreement was executed, F&C filed a bankruptcy petition. Prima Paint thereafter withheld amounts payable under the agreement and notified F&C that it had breached the contract by fraudulently representing that it was solvent. F&C then served a notice of intention to arbitrate. Prima Paint responded by filing suit in federal district court, seeking to rescind the Consulting Agreement on grounds of fraudulent inducement. F&C moved to stay the judicial action pending arbitration.

The District Court granted F&C's motion to stay the action pending arbitration, holding that a charge of fraud in the inducement of a contract containing an arbitration clause as broad as this one was a question for the arbitrators and not for the court. For this proposition it relied on *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*¹²⁰. The Court of Appeals for the Second Circuit dismissed Prima Paint's appeal. It held that the contract in question evidenced a transaction involving interstate commerce; that under the controlling *Robert Lawrence Co.* decision a claim of fraud in the inducement of the contract generally as opposed to the arbitration clause itself, is for the arbitrators and not for the courts and that this rule of "national substantive law" governs even in the face of a contrary state rule. We agree, albeit for somewhat different reasons, and affirm the decision of the District Court.

Interpretation and Enforceability of International Arbitration Agreements:

Related to the separability doctrine is the allocation of authority between arbitrators and national courts to decide disputes over the interpretation and enforceability of arbitration agreements. That is, "who decides" disputes over the formation, validity or interpretation of arbitration agreements.

Disputes over the enforceability or interpretation of an arbitration agreement can arise in a variety of different circumstances.

1. When an adverse party attempts to commence arbitration, a party may refuse by inaction to honour the arbitration clause, simply by not participating in the arbitral process. If this occurs, the meaning or enforceability of the clause may be raised by the party pursuing arbitration in a judicial action seeking an order to compel arbitration. Alternatively, the arbitral tribunal may proceed to a final default award (either expressly or impliedly confirming its own jurisdiction).

The meaning and enforceability of the parties' arbitration agreement may thereafter be raised by the losing party in either a defense to judicial enforcement of the award brought by the prevailing party or in a judicial action to vacate or annul the award.

2. One party may commence litigation concerning the parties' underlying dispute in national courts in derogation of the arbitration agreement. It may do so either concurrently with the other party's effort to initiate arbitration or before any effort to invoke arbitration has occurred. In either event, the meaning or enforceability of the parties' arbitration agreement is likely to arise in a motion to suspend or stay judicial proceedings pending arbitration. The interpretation or validity of the parties' arbitration agreement may also be simultaneously presented to the arbitral tribunal, if one has been constituted.

3. Both parties may participate in the arbitration process and forego litigation in national courts. Nevertheless, one party may choose to argue to the arbitral tribunal that it lacks jurisdiction over some or all of the claims before it. The tribunal will generally hear argument on that issue and render an interim jurisdictional award. Assuming that the tribunal upholds its jurisdiction, the unsuccessful party can then seek to vacate or annul the jurisdictional award (or a final award, dealing inter alia with jurisdiction) in a national court.

4. The parties can arbitrate the merits of their dispute, with one party attempting to reserve its rights as to jurisdiction. Once a final arbitral award is rendered, the losing party may seek to vacate or annul the award; alternatively, it may refuse to honor the award and the prevailing party will be required to seek judicial enforcement. Subject to claims that jurisdictional objections have been waived, the proceedings to vacate or enforce the final award may raise issues relating to the enforceability of the underlying arbitration agreement.

In *First Options of Chicago, Inc. v. Kaplan*, the case concerns several related disputes between, on one side, First Options of Chicago, Inc., a firm that clears stock trades on the Philadelphia Stock Exchange, and, on the other side, three parties: Manuel Kaplan; his wife Carol Kaplan; and his wholly owned investment company, MK Investments, Inc. (MKI), whose trading account First Options cleared. The disputes center around a "workout" agreement, embodied in four separate documents, which governs the "working out" of debts to First Options that MKI and the Kaplans incurred.

In 1989, after entering into the agreement, MKI lost an additional \$1.5 million. First Options then took control of, and liquidated, certain MKI assets; demanded immediate payment of the entire MKI debt; and insisted that the Kaplans personally pay any deficiency. When its demands went unsatisfied, First Options sought arbitration. MKI, having signed the only workout document (out of four) that contained an arbitration clause, accepted arbitration. The Kaplans, however, who had not personally signed that document, denied that their disagreement with First Options was arbitrable and filed written

objections to that effect with the arbitration panel. The arbitrators decided that they had the power to rule on the merits of the parties' dispute, and did so in favour of First Options.

The Kaplans then asked the Federal District Court to vacate the arbitration award and First Options requested its confirmation. The court confirmed the award. Nonetheless, on appeal the Court of Appeals for the Third Circuit agreed with the Kaplans that their dispute was not arbitrable; and it reversed the District Court's confirmation of the award against them. The Court of Appeals for the Third Circuit further held that "a party who has not agreed to arbitrate will normally have a right to a courts decision about the merits of its dispute (say, as here, its obligation under a contract). But, where the party has agreed to arbitrate, he or she, in effect, has relinquished much of that right's practical value. The party still can ask a court to review the arbitrators' decision, but the court will set that decision aside only in very unusual circumstances."

In *AT&T Technologies, Inc. v. Communications Workers* and *Steelworkers v. Warrior & Gulf Navigation Co* it was well settled that the parties may agree to arbitrate arbitrability. That is to say, the court should give considerable leeway to the arbitrator, setting aside his or her decision only in certain narrow circumstances. This Court has added an important qualification, applicable when courts decide whether a party has agreed that arbitrators should decide arbitrability: Courts should not assume that the parties agreed to arbitrate arbitrability unless there is "clear and unmistakable" evidence that they did so.

The law treats silence or ambiguity about the question "who primarily should decide arbitrability" differently from the way it treats silence or ambiguity about the question "whether a particular merits-related dispute is arbitrable because it is within the scope of a valid arbitration agreement" incase of the latter question the law reverses the presumption. Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.

In *Christopher Brown Ltd v. Genossenschaft Osterreichischer Waldbesitzer Holzwirtschaftsbetriebe*, it was held that "Despite the arbitrators' power to rule on jurisdictional challenges, either party to the arbitration would be free to seek either immediate or subsequent judicial resolution of the jurisdictional challenge. (In the event of concurrent arbitral and judicial proceedings, each decision-maker (i.e., arbitrator and court) could consider the desirability of staying its own proceedings.) In the event of an arbitral award on the subject of jurisdiction (either interim or final), the arbitrator's ruling would be subject to judicial review under otherwise-applicable standards of review."

Law Applicable to International Arbitration Agreements.

Identifying the law applicable to an international arbitration agreement is a complex, but critically important subject. The topic has given rise to extensive commentary, and even more extensive

confusion. This confusion does not comport with the ideals of international commercial arbitration, which seeks to simplify, expedite, and rationalize dispute resolution. Nonetheless, the intricacies of contemporary conflicts of law doctrine must be understood.

The law applicable to the parties' arbitration agreement may be different from both the law applicable to the substance of the parties' underlying contract and to the arbitral proceedings. There are four possible alternatives for the law governing an arbitration agreement, they are as follows:

1. The law expressly or impliedly chosen by the parties to govern the arbitration agreement itself.
2. The law of the arbitral situs.
3. The law governing the parties' underlying contract.
4. The law of the forum in which judicial enforcement of the agreement is sought (for example, the FAA in a U.S. court and the IACA in India). There is little uniformity among either arbitral tribunals or national courts in choosing between these alternatives.

The choice of law applicable to international arbitration agreements is affected by both the New York Convention and national law. Both sources arguably provide choice of law rules and/or substantive rules applicable to the formation, validity, and interpretation of international arbitration agreements. Determining the interplay between the Convention's choice of law and substantive rules, and those of national law, can be complex. The New York Convention, the Inter-American Convention, and the 1961 European Convention. And the provisions of the UNCITRAL Model Law, the Swiss Law on Private International Law, the FAA, and the IACA deal with the choice of law applicable to international arbitration agreements.

In *Ledee v. Ceramiche Ragno*, the defendants-appellees are Italian corporations that make and market ceramic tiles. The plaintiffs-appellants are two Puerto Rico corporations and an individual citizen of the Commonwealth. In 1964 the parties entered into a distributorship agreement giving the appellants exclusive rights to sell and distribute the appellees' ceramic tiles in the Antilles. The agreement contained the following paragraph 9:

"Any dispute related to the interpretation and application of this contract will be submitted to an Arbiter selected by the President of the Tribunal of Modena, Italy, who will judge as last resort and without procedural formalities".

In March, 1981, the appellants brought suit in the Superior Court of Puerto Rico, alleging that the appellees had breached the contract by unjustifiably terminating their distributorship. The complaint sought damages in accord with the provisions of the Puerto Rico Dealers Act. The appellees removed the case to the United States District Court for the District of Puerto Rico. The district court ordered arbitration in accord with paragraph 9 and dismissed the complaint.

This appeal ensued. Appellants contend first that, under the laws of the Commonwealth of Puerto Rico, paragraph 9 is void and unenforceable. They invoke the general principle that contracting parties may not agree to clauses or conditions "in contravention of law, morals, or public order." And to show that paragraph 9 is contrary to the public order, they direct attention to the Dealers Act, as amended. The Dealers Act was enacted to help protect Puerto Rico distributors from the allegedly exploitative practices of certain foreign suppliers. Substantively, it prohibited termination of dealership contracts except "for just cause." Moreover, it declared that its provisions were of a public order and that the dealers' rights under it could not be waived. It reads as follows

"Any stipulation that obligates a dealer to adjust, arbitrate or litigate any controversy that comes up regarding his dealer's contract outside of Puerto Rico, or under foreign law or rule of law, shall be likewise considered as violating the public policy set forth by this chapter and is therefore null and void".

Nothing in the record suggests that the arbitration agreement was "null and void, inoperative or incapable of being performed" within the terms of Art. II (3) of the Convention.

In *Rhone Mediterranee Compagnia Francese di Assicurazioni e Riassicurazioni v. Achille Lauro*, Rhone Mediterranee Compagnia Francese di Assicurazioni E Riassicurazioni ("Rhone"), a casualty insurer, appeals from an order of the District Court of the Virgin Islands staying Rhone's action pending arbitration. The action results from a fire loss, which occurred when the vessel Angelina Lauro burned at the dock of the East Indian Co. Ltd in Charlotte Amalie, St. Thomas. At the time of the fire the vessel was under time charter to Costa Armatori SpA ("Costa"), an Italian Corporation. Rhone insured Costa, and reimbursed it for property and fuel losses totaling over one million dollars. Rhone, as subrogee of Costa, sued the owner of the vessel, Achille Lauro, ("Lauro") and its master, Antonio Scotto di Carlo, alleging breach of the Lauro-Costa time charter, unseaworthiness, and negligence of the crew.

The district court granted defendants' motion for a stay of the action pending arbitration, and Rhone appeals. As subrogee, Rhone stands in place of its insured, the time charterer Costa. In the time charter contract there is a clause:

"23. Arbitration. Any dispute arising under the Charter to be referred to arbitration in London (or such other place as may be agreed according to box 24) one arbitrator to be nominated by the Owners and the other by the Charterers, and in case the Arbitrators shall not agree then to the decision of an Umpire to be appointed by them, the award of the Arbitrators or the Umpire to be final and binding upon both parties. Box 24 Place of arbitration (only to be filled in if place other than London agreed (cl. 23) NAPOLI.

All the parties to the time charter agreement and the lawsuit are Italian. Italy and the United States are parties to the New York Convention. The FAA, implements the United States' accession on September 1, 1970 to the Convention by providing that it "shall be enforced in United States courts in accordance with this chapter." Rhone does not dispute that the Convention is applicable. What Rhone does contend is that under the terms of the Convention the arbitration clause in issue is unenforceable. Rhone's argument proceeds from a somewhat ambiguous provision in Art. II (3) of the Convention.

Rhone contends that when the arbitration clause refers to a place of arbitration, here Naples, Italy, the law of that place is determinative. It then relies on the affidavit of an expert on Italian law, which states that in Italy an arbitration clause calling for an even number of arbitrators is null and void, even if, as in this case there is a provision for their designation of a tie breaker.

The ambiguity in Art. II (3) of the Convention with respect to governing law contrasts with Art. V, dealing with enforcement of awards. Art. V (1)(a) permits refusal of recognition and enforcement of an award if the "agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made." Art. V (1)(e) permits refusal of recognition and enforcement if "the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made." Art. V (1)(d) permits refusal of enforcement if "the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place." Thus Art. V unambiguously refers the forum in which enforcement of an award is sought to the law chosen by the parties, or the law of the place of the award.

Rhone and the defendants suggest different conclusions that should be drawn from the differences between Art. II and Art. V. Rhone suggests that the choice of law rule of Art. V should be read into Art. II. The defendants urge that in the absence of a specific reference Art. II should be read so as to permit the forum, when asked to refer a dispute to arbitration, to apply its own law respecting validity of the arbitration clause. However, we conclude that the meaning of Art. II(3) which is most consistent with the overall purposes of the Convention is that an agreement to arbitrate is "null and void" only when

1. It is subject to an internationally recognized defense such as duress, mistake, fraud, or waiver.
2. It contravenes fundamental policies of the forum state.

The court therefore held that "an action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties

of the United States." Since no federal law imposes an odd number of arbitrators rule - the only defect relied upon by Rhone, the district court did not err in staying the suit for breach of the time charter agreement pending arbitration...."

In ICC Case No. 6149 (names of the parties not disclosed due to confidentiality), A Korean manufacturer entered into three contracts to supply an Iraqi buyer with various goods. The goods were to be delivered in Iraq. The contracts contained the following arbitration clause:

"Any dispute with regards to this contract will be solved cordially; otherwise by two arbitrators appointed by each side. In an eventual non agreement it will be governed by the laws and regulations of the International Chamber of Commerce in Paris whose ruling should be final."

Disputes arose under the contract, which led to various revisions to the parties' original contracts. These revisions failed to preserve relations. In due course, the Korean seller commenced an arbitration under ICC Rules. The Iraqi purchaser raised jurisdictional objections to the tribunal's jurisdiction, citing Sect. 2 of Jordanian Law No. 35 of 1983.

The tribunal rendered the following interim award:

"Sect. 2 of the Jordanian Law No. 35 of 1983 called "Amendment Law to the Merchandise Maritime Law" is not applicable to the arbitration agreements contained in the three contracts of sale. The arbitration agreements therefore have not been voided by said Sect. 2. But they are still valid and binding upon the parties thus being susceptible of serving as a legitimate basis for the exercise of the arbitral tribunal's jurisdiction over the subject-matter of this arbitration...."

Applicability of International Conventions and National Legislation

An important preliminary issue in disputes over the enforcement or interpretation of international arbitration agreements is determining the applicability of the New York Convention (or other international arbitration conventions or treaties) and national arbitration legislation to a particular agreement. Both international arbitration conventions and national arbitration statutes contain "jurisdictional requirements" which define what arbitration agreements are (and are not) subject to those instruments' substantive rules. These jurisdictional requirements can have important practical consequences, because the substantive terms of the Convention and most contemporary international arbitration statutes (such as the UNCITRAL Model Law) are "pro-arbitration."

Despite its importance, there are numerous international arbitration agreements to which the New York Convention does not apply: "there is a vast area not covered by the Convention. " Defining precisely those arbitration agreements that are subject to the New

York Convention is not always straightforward. In contrast to Art. I's definition of the arbitral awards which are subject to the Convention, nothing in Art. II (or otherwise) details which arbitration agreements fall within Art. II's "recognition" requirement. In the words of one commentator, "the Convention does not give a definition as to which arbitration agreements fall under" Art. II. Five jurisdictional requirements of the New York Convention warrant attention (and parallel similar requirements under the Inter-American Convention). They are as follows:

1. Art. II(1) limits the Convention's coverage to "agreements in writing."
2. The Convention is applicable in many national courts only on the basis of reciprocity (i.e., vis-à-vis other nations that also have ratified the Convention).
3. The Convention only applies to agreements concerning "foreign" or "non-domestic" awards.
4. The Convention is generally applicable only to differences arising out of "commercial" relationships.
5. Again pursuant to Art. II (1), the parties' agreement must provide for arbitration of "differences which have arisen or which may arise ... in respect of a defined legal relationship, whether contractual or not."

Like the New York Convention, contemporary international arbitration statutes in most states contain either express or implied jurisdictional limitations. These jurisdictional requirements have substantial practical importance, because they determine when the generally "pro-arbitration" substantive provisions of contemporary arbitration legislation apply. The jurisdictional requirements of national arbitration statutes vary from state to state. In general, however, these jurisdictional limits are broadly similar to those contained in the New York Convention:

1. A "writing" requirement.
2. A possible reciprocity requirement.
3. A "foreign" or "international" connection requirement.
4. A "commercial relationship" requirement.
5. A "defined relationship" requirement.

The New York Convention and most contemporary national arbitration statutes that regulate international arbitration apply only to arbitration agreements that have some sort of "foreign" or "international" connection. This is consistent with the purpose of both types of instruments, which is to facilitate the international arbitral process, without disturbing local legal rules for domestic arbitration matters. The New York Convention is applicable only to arbitral awards:

1. That are "made" in a state other than the one where recognition or enforcement is sought, or
2. That are "not considered as domestic awards" under the law of the enforcing state.

These provisions have generally been held applicable by analogy to arbitration agreements (as well as awards), extending the Convention only to those agreements that have a "foreign" or "international" connection. Similarly, the Inter-American Convention is applicable (according to its title and preamble) to "international commercial arbitration." The Conventions' limitation to international arbitration agreements is paralleled by similar jurisdictional requirements in many national arbitration statutes. For example, Art 1(1) of the UNCITRAL Model Law provides that the Law applies only to "international commercial arbitration," as defined in Art 1(3). Similarly, Art 176 of the Swiss Law on Private International Law provides that the Act's international arbitration provisions are limited to cases where, "when the arbitration agreement was concluded, at least one of the parties had neither its domicile nor its habitual residence in Switzerland." These jurisdictional limits serve the general purpose of permitting separate legal regimes for international and domestic arbitration agreements (in light of the differing policies implicated in each case).

In *Brier v. Northstar Marine Inc*, on or about October 21, 1990, plaintiff John H. Brier, Jr., the owner of the vessel and three other individuals were traveling from Connecticut to Maryland aboard a fifty-three (53) foot yacht titled the M/Y Joanie Bee.... As plaintiff was entering the Hereford Inlet in New Jersey, the vessel ran aground.... Plaintiff (contacted defendant) Northstar Marine, Inc. to ascertain whether the company could provide the necessary assistance to plaintiff in refloating his vessel. Captain Risko, the owner and operator of Northstar Marine, Inc. informed plaintiff that he could provide the necessary assistance.... Captain Risko informed Mr. Brier that he would be conducting a salvage operation. He then read from a document known as the "Miranda Act for Salvors" which basically states that the Lloyd's of London Form will be used. This form also states that the terms are "No Cure, No Pay," which allows the company to conduct the salvage operation without a prearranged price and at the completion of the operation the company will submit a claim. If the master or his insured do not agree with the claim, it must be arbitrated by the Lloyd's of London Arbitration Panel.

Somewhere between 8:25 a.m. and 9:00 am on October 22, 1990, Mr. Cassidy, the owner and operator of the Cape May Marine Services, arrived at plaintiff's motel room with an initial set of documents for plaintiff to sign prior to defendants attempting to refloat the boat. Among the documents was the Lloyd's Standard Form of Salvage Agreement (hereinafter, "LOF Agreement"), which was approximately three pages long. Mr. Cassidy then proceeded to scan the document with the plaintiff, highlighting each paragraph. The document provided that all disputes between the parties be arbitrated at Lloyd's of London in England and that English law will govern the resolution of the dispute.

Plaintiff signed the documentation including the LOF Agreement and his vessel was thereafter refloated and towed to the Canyon Club

Marina in New Jersey.... On or about October 24, 1990, plaintiff was informed that the costs of the refloating and towing his vessel amounted to \$38,250.00. Plaintiff refused to pay this amount and on February 11, 1991 instituted the instant action, for a declaratory judgment that the LOF Agreement was an invalid adhesion contract. The defendants invoked the arbitration clause and the New York Convention. Plaintiff replied that the Convention did not apply. ...

It is plaintiff's contention that the provisions of the Lloyd's Standard Form of Salvage Agreement requiring the contractor and the owner to arbitrate their dispute concerning compensation in London pursuant to English law, when both are U.S. citizens and their relationship is not reasonably related to England, falls outside the New York Convention as enacted in the United States and therefore this court is precluded from requiring arbitration in accordance with the agreement.

In the present case the parties are in agreement that all are citizens of the United States.... However, my inquiry cannot end here since 202 ... carves out certain exceptions even where all parties to the relationship are citizens of United States.... The legislative history of 202 makes it clear that where the matter is solely between citizens of the United States it will fall outside the Convention unless there is a reasonable relation with a foreign state.

Therefore, unless the facts allow this case to fit within one of the four jurisdictional requirements noted above, it will fall outside the Convention and render the arbitral agreement between these parties unenforceable. The only property involved in the case at bar is the vessel, the M/Y Joanie Bee, which is registered in the State of Connecticut and at all times material hereto has been located off the Coast of New Jersey. The performance in the instant case involved the refloating of the vessel and the towing of it to Canyon Club Marina, in New Jersey. All performance, which occurred in this case, occurred within the coastal waters of New Jersey. The Defendants argue that the LOF Agreement clearly satisfies the third condition in that the language of the contract envisions that English law would apply to the arbitration, and more importantly, the arbitration and any appeal there from, would be before the Committee of Lloyd's in London, England.

The Defendants relied on *Fuller Co. v. Compagne Des Bauxites De Guinea*, to support their assertion that the present case is the type of enforcement Congress envisioned when it carved out the exceptions found in Title 9, United States Code, Sect 202. However, Fuller is easily distinguishable from the case at bar. While it is true that both parties were considered United States citizens in Fuller, the court in Fuller found the "reasonable relationship" to exist under the performance exception not the enforcement exception. In Fuller, the contract envisaged that plaintiff would provide extensive technical services in Guinea. An affidavit submitted to the court stated that the total cost of Fuller's technical representatives in Guinea was \$269,562.08. Consequently, the court held that the case fell within

the exception due to the "substantial amount of performance of this contract in Guinea." As stated above performance of the contract in dispute was performed solely in New Jersey.

In contrast, plaintiff asserts that the enforcement of this agreement bears no reasonable relation to London, England. The fact that the parties are currently before this court to determine the enforceability of the arbitration agreement is of itself significant. Moreover, plaintiff asserts that the vessel upon which the contractor claimed a maritime lien was located in New Jersey and therefore the security posted to obtain the release of the vessel would have remained in this district subject to enforcement of a subsequent arbitration award. I agree. Accordingly, I find this district to be the proper place to enforce an arbitral award, not London, England. Additionally, unlike the facts in *Fuller*, where the contract provided for the design, manufacture and sale of equipment to be used at the buyer's plant in Guinea and for extensive technical services to be provided in Guinea, in the instant case, the only visible tie with the foreign nation is found in the language of the LOF Agreement itself

Defendants argue that the current facts set forth a reasonable relation with the foreign nation. Their contention is that the parties willingly entered into the LOF Agreement, which clearly compelled arbitration in London, England, and that the Committee of Lloyd's is the only internationally recognized body, which deals with salvage arbitrations, and no other body is so recognised. Furthermore, defendants assert that it is undisputed that Lloyd's sits in London, England and that English law controls their arbitrations and any appeal thereof. Consequently, defendants contend that the situs and law found in the LOF Agreement was selected with care and that of itself encompasses the reasonable relation with London, England.

Defendants' argument however, is circular. If I were to agree with defendants' analysis that the reasonable relation with the foreign forum is created by the document itself, I would be allowing "the exception to swallow the rule." The only avenue, which would bring this particular issue before the court, is where a document has been signed by the parties, compelling foreign arbitration, and all the parties are United States citizens. Consequently, following defendants reasoning, in every case the parties would fall within the fourth jurisdictional exception, since the document itself would always name a foreign nation for arbitration.

Taking into consideration the purpose of the agreement and the motivation for the exception created by Congress I find based on the narrow facts before me that this case falls outside the Convention.

International arbitration proceedings

Procedural Issues in International Arbitration

The heart of most international arbitrations are the arbitral proceedings themselves. In international matters, arbitral proceedings

can take a wide variety of forms, depending on a host of legal, practical, commercial, cultural, and other considerations. Many parties agree to international arbitration, in substantial part, because of the procedural flexibility, neutrality, and expertise, which it promises. In many cases, this promise is realized, with the arbitrators adopting efficient, fair, and transparent procedures, without rigidly adhering to any particular domestic approach to national court litigation. In some cases, however, a combination of obstructionist parties and inexperienced arbitrators can produce chaotic, arbitrary, or inappropriately parochial arbitral proceedings.

The arbitration proceedings themselves, as distinguished from the parties' underlying contract or arbitration agreement, are subject to a set (or sets) of legal rules. The law governing the arbitration proceedings is variously referred to as the "curial law," "lex arbitri," "procedural law," or "loi de l'arbitrage." The concept of the procedural law governing the arbitral proceedings plays a vital role in international arbitration.

The procedural law that applies to an international arbitration has a potentially significant impact on the procedures used in the arbitration. In particular, the procedural law may either require that certain arbitral procedures be adopted or forbid arbitrators from taking other procedural steps. The procedural law also has important consequences for actions to vacate or enforce an arbitral award.

Firstly, the procedural law of an arbitration may directly govern various procedural issues that arise in the arbitral proceedings. The issues that are governed by the procedural law of an arbitration are defined differently in different states. The issues potentially governed by the procedural law include matters such as:

1. The parties' autonomy to agree on substantive and procedural issues in the arbitration.
2. The arbitrators' liability, ethical standards, appointment, and removal.
3. The extent of judicial supervision of, or interference in, the arbitration proceedings (such as reviewing the arbitrator's rulings and ordering provisional relief or discovery in aid of arbitration).
4. The rights of lawyers to appear, and their ethical obligations, in the arbitration; pleading rules.
5. Evidentiary rules.
6. The permissibility and administration of oaths.
7. The conduct of hearings.
8. Disclosure, "discovery," and related issues.
9. The arbitrators' remedial powers, including to grant provisional measures.
10. The form and making of the award.

In addition, and less clearly, the procedural law sometimes governs:

1. Interpretation and enforceability of the parties' arbitration agreement (including issues of non-arbitrability).
2. Conflict of laws rules applicable to the substance of the dispute.
3. Quasi-substantive issues, such as rules concerning interest and costs of legal representation.

Secondly, the procedural law governing the arbitration also has a decisive effect on the nation in which an action to vacate an arbitral award can properly be brought under the New York Convention. Arts V(1)(e) and VI of the Convention permit awards to be vacated by courts of the nation "under the law of which the award was made." Most commentators and courts generally agree that this reference is to the procedural law of the arbitration.

Finally, several of the exceptions to enforceability of arbitral awards under Art. V of the Convention require determination and application of the procedural law. That is, the standards set forth in the nation's law, which provides the procedural law of an arbitration must be ascertained and applied to decide whether an arbitral award can be denied recognition.

In most cases, the procedural law governing an international arbitration will be that of the arbitral seat or situs. That is the place where the arbitration proceedings will usually be conducted, the place whose law the parties intended to govern their proceedings, and the place where any arbitral award will be made. In the overwhelming majority of cases, this intention will prevail often. Nevertheless, in some cases, choice of law complexities relating to the applicable procedural law in an arbitration may arise. One party may argue that some law other than that of the arbitral situs must be applied as the applicable procedural law. In most such cases, the law governing the parties' arbitration agreement or underlying contract will be said to provide the procedural law of the arbitration. Alternatively, the arbitral tribunal may hold hearings in more than one country, provoking disputes over what the applicable procedural law is.

In *Sapphire International Petroleum Limited v. National Iranian Oil Company*, Art 39 of the parties' agreement provides that ... the only way of settling any difference concerning the interpretation or performance of the agreement is arbitration of the kind set out in Art. 41 of the agreement. The parties have thus unequivocally shown their mutual desire to use arbitration in order to obtain a decision which will settle once and for all their possible differences concerning the interpretation and performance of the agreement, including claims for damages.

Among other things, the parties' arbitration clause provides for the determination of a seat for the arbitration, which is a necessary element in the activity of any judicial authority. The judicial authority thus conferred upon the arbitrator necessarily implies that the arbitration should be governed by a law of procedure and that it

should be subject to the supervision of a State authority, such as the judicial sovereignty of a State.

Authority is to be found, in doctrine and case law, which gives the parties the right to make a free choice of the law of procedure to be applied to the arbitration, as for example, the State to whose judicial sovereignty the arbitration is submitted, or in other words "the location" of the arbitration. In the present case the parties agreed to leave the arbitrator free to determine the seat of the arbitration, if they failed to agree it themselves. Thus by agreeing beforehand to whatever seat was fixed by the arbitrator, who would make his choice under express delegation from the parties, they committed themselves to accept the law of procedure, which results from his choice. In this case it is the law of the Swiss canton of Vaud, since the seat of the arbitration has been fixed at Lausanne located in Vaud.

Even if this interpretation of the parties' intention is wrong, the rule is that, in default of agreement by the parties, the arbitration is submitted to the judicial sovereignty of the seat of the arbitration at the place where the case is heard. Resolution of the Institute of International Law, Arts 8, 9, 10, 12; Geneva Protocol concerning Arbitral Clauses of September 24, 1923, Art. 2. Thus, in the present case, Lausanne is at the same time the headquarters of the judicial authority, which has jurisdiction to appoint the arbitrator, the seat of the arbitration, the domicile of the sole arbitrator, and the place where all the arbitration procedure up to and including judgment has taken place.

The present arbitration, then, is governed by the law of procedure of Vaud and is subject to the judicial sovereignty of Vaud. Therefore, as far as procedure is concerned, it is subject to the binding rules of the Code of Civil Procedure of Vaud of November 20, 1911, and in particular to the 8th Title of this Code. The case has been heard in accordance with the rules prescribed by the Order of June 13, 1961, in which the arbitrator laid down the arbitral procedure, as he was entitled to do under Art. 41, para. 7, of the agreement if the parties failed to agree upon the procedure to follow, and in accordance with Art. 511 of the Code of Civil Procedure of Vaud. Art. I of the above Order laid down that the Federal Law of Civil Procedure of December 4, 1947, was applicable where there was no contrary provision in the Order. The defendant NIOC has refused to cooperate in the procedure and has deliberately made default. Art. 41, para. 8, of the agreement lays down that the absence or default of one party should not be an obstacle to the arbitral proceedings in any of their stages. Accordingly, despite the default of the defendant, the arbitrator has proceeded to hear the case and to give judgment on the merits.

According to Art. 15 of the arbitrator's Order, which is in accordance with Art. 12 of the Federal Law of Civil Procedure, the default of one party and the omission of a procedural step simply means that the case proceeds without the step, which had been omitted. By virtue of Art. 3 of the Federal Law of Civil Procedure, the judge cannot base

his judgment on facts other than those, which have been alleged during the case. As a result, the present award is based upon the facts pleaded by the plaintiff, who alone has taken part in the procedure. But in applying these rules, the arbitrator has accepted only those facts, which have been satisfactorily proved to him during the procedure ...

In ICC Case No. 5029, two French companies entered into a joint venture with two Egyptian companies. The joint venture thereafter entered into a contract to construct certain civil works in Egypt. Art. 5 (1)(b) of the Contract provided: "The Contract shall be deemed to be an Egyptian Contract and shall be governed by and construed according to the laws in force in Egypt." Art. 67 of the agreement contained an arbitration clause, providing for arbitration under ICC Rules. The agreement did not specify an arbitral situs. Disputes arose and the French companies filed a request for arbitration under the ICC Arbitration Rules against the Egyptian employer. Pursuant to Art. 12 of the ICC Arbitration Rules, the ICC International Court of Arbitration selected the Netherlands as the arbitral forum.

The defendant argued that Egyptian law of civil procedure governed the arbitration proceedings. It reasoned that the choice-of-law clause in Art. 5 covered both substantive and procedural subjects, including issues relating to the arbitration. According to defendant, the text of Art. 67 of the agreement "clearly expressed the intention of the parties that the arbitration is a local arbitration and not international" and "that it is internal and not external."

The claimant agreed with the defendant that Egyptian law rules of interpretation should be applied to the parties' contract, but distinguished between substantive and procedural law. According to the claimant substantive law is governed by the law chosen by the parties (i.e., Egyptian law), but procedural law is governed by the mandatory provisions of the place of arbitration (i.e. Dutch arbitration law).]....

The choice-of-law clause contained in Art. 5(1)(b) of the Contract must be interpreted in accordance with the rules of contract interpretation of Egyptian law, in particular Arts 150 et seq. of the Egyptian Civil Code. The Arbitral Tribunal will follow these rules of interpretation in respect of all the jurisdictional issues. The Arbitral Tribunal holds that the law governing the arbitration is the arbitration law of the Netherlands. The Arbitral Tribunal notes at the outset that the Contract is a truly international contract involving parties of different nationalities (i.e. French and Egyptian), the movement of equipment and services across national frontiers, and the payment in different currencies (i.e., Egyptian Pounds and U.S. Dollars).

The international character of the Contract is inconsistent with the defendant's allegation that the parties intended to provide for domestic, internal (i.e. Egyptian) arbitration. Such intent cannot be derived from the choice-of-law clause contained in Art. 5(1)(b) of the Contract, providing for the applicability of Egyptian law, whilst Art.

67, providing for arbitration under the Rules of the ICC, clearly expresses the contrary. As it is recognized in virtually all legal systems around the world, a basic distinction must be made between the law governing the substance and the law governing the procedure. That distinction is also recognized in Egyptian conflict of laws; whereas Art. 19 of the Egyptian Civil Code provides for the law governing the substance of the dispute, Art. 22 is concerned with the law governing the procedure. Accordingly, if the parties had wished that the arbitration be governed by Egyptian procedural law, they should have made a specific agreement thereon. Art. 5(1)(b) of the Contract is not such a provision as it does not mention specifically that arbitration is governed by Egyptian law. Failing such agreement, the arbitration law of the place governs the arbitration. This principle is in accordance with Art. V(1)(a), (d) and (e) of the New York Convention of 1958 to which Egypt and the Netherlands have adhered.

The agreement of the parties in arbitration under the Rules of the International Chamber of Commerce in Clause 67 meant that, failing their agreement on the place of arbitration, they gave, under Art. 12 of the Rules, a mandate to the Court of Arbitration to fix the place of arbitration on their behalf. It is to be noted that defendant itself proposed in the alternative The Hague as the place of arbitration. The prevailing interpretation of the Rules of the ICC nowadays, is also that the mandatory provisions of the arbitration law of the place of arbitration govern the arbitration, irrespective of the law governing the substance. Whereas Art. 13(3) of the Rules contains the contractual conflict of laws rules for determining the law governing the substance of the dispute, Art. 11 is concerned with the rules governing the proceedings and specifically requires observance of the mandatory procedural requirements of the situs.

The Arbitral Tribunal emphasizes that the applicability of Dutch arbitration law in the present case by no means implies that the Dutch rules concerning proceeding before Dutch State Courts are applicable. According to Dutch arbitration law, parties are free to agree on the rules of procedure and, failing such agreement, the arbitrator determines the conduct of the proceedings, subject to a few necessary mandatory provisions.

In *Union of India v. Mc Donnell Douglas Corporation*, by a written agreement dated July 30, 1987 the plaintiffs contracted with the defendants for the latter to undertake services for the former in and about the launch of a space satellite. Art. 11 of the agreement provided that the agreement was to be governed by, interpreted and construed in accordance with the laws of India. The agreement also contained an arbitration clause (Art. 8) in the following terms:

In the event of a dispute or difference arising out of or in connection with this Agreement, which cannot be resolved by amicable settlement, the same shall be referred to an Arbitration Tribunal consisting of three members. Either Party shall give notice to the other regarding its decision to refer the matter to arbitration. Within

30 days of such notice, one Arbitrator shall be nominated by each Party and the third Arbitrator shall be nominated by agreement between the Parties to this Agreement. If no such agreement is reached within 60 days of the mentioned notice, the President of the International Chamber of Commerce shall be requested to nominate the third Arbitrator.

The third Arbitrator shall not be a citizen of the country of either Party to this Agreement. The arbitration shall be conducted in accordance with the procedure provided in the Indian Arbitration Act of 1940 or any reenactment or modification thereof. The arbitration shall be conducted in the English language. The award of the Arbitrators shall be made by majority decision and shall be final and binding on the Parties hereto. The seat of the arbitration proceedings shall be London, United Kingdom. Each Party shall bear its own cost of preparing and presenting cases. The cost of arbitration including the fees payable to Arbitrators, shall be shared equally by the Parties to this Agreement....

The parties' dispute or difference has been referred to arbitration under the provisions of art. 8. The hearing before the arbitrators is presently fixed to begin in London on Jan. 11, 1993. The question before me is as to the law governing the arbitration proceedings. The parties are, as I understand it, agreed that this Court should decide this question, and should do so on the basis that there is no difference on this issue between English and Indian law.

In essence the plaintiffs contend that the words: "The arbitration shall be conducted in accordance with the procedure provided in the Indian Arbitration Act 1940" make clear that the parties have chosen Indian law, or at least those parts of Indian law found in the 1940 Act, to govern any arbitration proceedings arising under Art. 8. The defendants, on the other hand, contend that by stipulating London as the "seat" of any arbitration proceedings under Art. 8, the parties have made clear not merely that any arbitration will take place in London, but that English law will govern the arbitration proceedings. An arbitration clause in a commercial contract like the present one is an agreement inside an agreement. The parties make their commercial bargain, i.e. exchange promises in relation to the subject matter of the transaction, but in addition agree on a private tribunal to resolve any issues that may arise between them. The parties may make an express choice of the law to govern their commercial bargain and that choice may also be made of the law to govern their agreement to arbitrate. In the present case it is my view that by Art. 11 the parties have chosen the law of India not only to govern the rights and obligations arising out of their agreement to arbitrate.

In legal terms, therefore, the proper law of both the commercial bargain and the arbitration agreement is the law of India. The fact that the law of India is the proper law of the arbitration agreement does not, however, necessarily entail that the law governing the arbitration proceedings themselves is also the law of India, unless there is in that agreement some effective express or implied term to

that effect. In other words, it is, subject to one proviso, open to the parties to agree that their agreement to arbitrate disputes will be governed by one law, but that the procedures to be adopted in any arbitration under that agreement will be governed by another law.

The U.S. Supreme Court in *Scherk v. Alberto-Culver Company*, "stated that uncertainty will almost inevitably exist with respect to any contract touching two or more countries, each with its own substantive laws and conflict-of-laws rules. A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction. Absent such agreements, one enters the dicey atmosphere of ... a legal no-man's-land, which would surely damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements.

Place of Arbitration (Arbitration Situs)

The location of the arbitral situs is a critical issue in any international arbitration. The location of the arbitral situs can have profound legal and tactical consequences, and can materially alter the course of dispute resolution. The significance of the arbitral situs includes relatively mundane issues of convenience and cost. Although such factors are often given undue weight, they can be important to the conduct and outcome of an arbitration. An expensive arbitral forum can effectively preclude some parties from pursuing their claims, while an inconvenient forum without a developed local legal system or infrastructure can impact on the viability of the arbitration process. Moreover, factors such as visa requirements, availability of air or other transportation, hotel and meeting room accommodations, support staff (such as interpreters, stenographers, secretaries), and the like can bear heavily on the smooth progress of an arbitration. Much more significant than convenience is the effect of the local law of the arbitral situs on the arbitration. This requirement encompasses a number of distinct factors.

First, national courts in the arbitral situs have the potential to interfere in the ongoing arbitral proceedings. Examples of such interference include mandatory requirements for interlocutory judicial resolution of issues of law or possibilities for judicial intervention in matters such as procedural rules or selection of arbitral situs. The possibility of judicial interference may create an incentive for dilatory tactics and expensive, confusing procedural disputes.

Second, some courts, while not interfering in arbitral proceedings, will nonetheless be prepared to assist if necessary in local arbitral proceedings. Examples of desirable judicial assistance can include enforcing discovery orders made by the tribunal and enforcing orders for provisional relief, such as prejudgment attachment.

Third, the location of the arbitral situs affects the law applicable to the arbitration agreement. Arts II(3) and V(1)(a) of the New York Convention contemplate that the validity of the parties' arbitration agreement will be determined under "the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made." National law requirements on subjects such as arbitrability, number or qualifications of arbitrators, contract formation, validity and illegality, and the like vary significantly.

Fourth, the national courts in the arbitral situs are usually competent (and exclusively competent) to entertain actions to vacate or set aside the arbitral award. The scope of judicial review of an arbitral award is a matter of national law that varies from country to country. Under many developed national laws, an arbitral award is subject to little or no review of the merits of the tribunal's decision; other states permit no review of the merits of arbitral awards, and little or no review of the arbitral process. Some nations, however, permit more thoroughgoing review of the merits of arbitral awards, which can result in costly appellate proceedings and duplicative litigation.

Fifth, some nations restrict the right of non-nationals to appear as counsel in international arbitration proceedings conducted on local territory. If a company wishes to have its regular outside international arbitration counsel participate in the arbitral proceedings, selecting such nations as an arbitral situs should be avoided. Other nations impose restrictions on the nationality of arbitrators.

Sixth, the arbitral situs is usually (but not always) the place where the arbitral award will be "made" for purposes of the New York Convention. This has significant legal consequences for the enforceability of arbitral awards outside the country where they are rendered. The best general indicator of the enforceability of a nation's arbitral awards is whether or not the country is a party to the New York Convention or, to a lesser extent, certain other international arbitration conventions. If a state is party to the New York Convention, awards made within its territory will generally be subject to the Convention's pro-enforcement rules in other Convention parties; conversely, if a state is not party to the Convention, its awards often will not enjoy the benefits of the Convention. Before selecting an arbitral forum, counsel should examine U.S. law (and the law of other forums where enforcement would likely be required) to ensure that an award rendered in that forum can be enforced.

Finally, the location of the arbitral situs can both directly and indirectly affect the identity of the arbitrators (absent other agreement by the parties). That is because many institutional appointing authorities will be inclined to select an arbitrator qualified to practice law in the arbitral situs. Moreover, local procedural rules and practices may influence the tribunal's procedural decisions, and local conflicts rules may be applied with respect to choice of law issues.

Despite the wisdom of selecting an arbitral situs, parties not infrequently fail to designate either the arbitral situs or a means of selecting a situs in their arbitration agreement. Worse, they may enter into agreements that are ambiguous or internally contradictory as to the situs of the arbitration. If no unambiguous prior agreement exists regarding an arbitral situs, or its means of selection, parties will often be unable to settle on an arbitral forum after disputes have arisen. Alternatively, even where an agreement as to arbitral situs exists, one party occasionally may regret its decision and seek to arbitrate in a different place. In either case, national courts can be drawn into disputes over the appropriate arbitral situs, with one or both parties seeking injunctive or declaratory relief designating the arbitral situs.

In *Econo-Car International, Inc. v. Antilles Car Rentals, Inc.*, the controversy prompting this appeal centers upon a franchise agreement between Econo-Car International, Inc., the franchisor, and Antilles Car Rentals, Inc., the franchisee. On February 25, 1972, Antilles notified Econo-Car that it intended to terminate the franchise agreement.... Econo-Car advised Antilles that it desired to submit the parties' various disagreements to the process of arbitral resolution pursuant to paragraph 15 of the franchise agreement. Antilles refused to submit the disputes to arbitration, and Econo-Car thereupon filed petition in the district court for the Virgin Islands to compel arbitration. On November 21, 1973, the district court ordered Antilles to "enter into arbitration proceedings in the City of New York in accordance with the terms of the franchise agreement."

On this appeal, Antilles challenges the district court's order on several grounds.... Under the order's terms the contemplated arbitration is to take place in New York City, as specifically provided in the agreement between the parties. Sect 4 of the FAA permits a party to request an order requiring arbitration "in the manner provided for in such agreement." But Sect 4 also provides that the arbitration "shall be within the district in which the petition for an order directing such arbitration is filed." In a case like the present, where the agreement provides for arbitration outside the district in which the petition is filed, Sect 4 can create a perplexing dilemma: a district court might not be able to order arbitration strictly in accordance with the terms of the agreement, as one portion of Sect 4 seems to require, without contravening a second portion of Sect 4.

While any directive in Sect 4 that arbitration be conducted according to the terms of the agreement is implicit at best, the requirement that arbitration take place in the district court where the petition is filed is clear and unequivocal. Certainly the saving of resources occasioned by the geographic concentration of all proceedings provides an appropriate legislative basis for this limitation on the district court's power. We recognize that if the statutory language referring to the terms of the arbitration agreement is also given a restrictive reading, a party who seeks arbitration in a district court properly having venue may well be unable to secure an arbitration order in such district court in circumstances like those presented by this case. Despite the somewhat paradoxical situation thus possibly created, we are inclined

to heed the unambiguous statutory language limiting the district court's power to order arbitration outside of the district. We hold, therefore, that the district court erred in ordering arbitration to take place in New York City.

In *Aram Fibers, Inc. v Deutsche Engineering Der Voest Alpine Industrieanlagenbau GMBH*, Defendant Barmag AG ("Barmag") moves, pursuant to the [FAA,] to compel arbitration and to stay this action pending the completion of arbitration. Plaintiff filed this action in state court and it was removed to this Court by defendant *Deutsche Engineering Der Voest-Alpine Industrieanlagenbau GmbH* ("Deutsche Engineering").

Defendant Barmag shows through an affidavit that the parties entered into a contract, which provided in paragraph 12 that any contract disputes were to be decided in accordance with the Arbitration Rules and Regulations of the International Chamber of Commerce ("ICC"). Defendant Barmag further shows that plaintiff's lawsuit claims breach of warranties and, thus, falls within the scope of this arbitration provision. Consequently, defendant Barmag argues the Court should grant the motion to compel arbitration and stay proceedings.

Plaintiff does not dispute defendant Barmag's claim that this action is subject to the parties' arbitration clause and that defendant's motion to compel arbitration and to stay the proceedings in this Court should be granted. Rather, plaintiff states that the claims against Barmag are based upon allegations made by defendant Deutsche Engineering. Therefore, it adds that judicial economy will only be served if Deutsche Engineering also requests that the proceedings be referred to arbitration and that the proceedings against both Deutsche Engineering and Barmag be coordinated. Finally, because the equipment is located in Ashboro, North Carolina, plaintiff requests that the arbitration forum be set for Randolph County, North Carolina.

Defendant Barmag opposes any such limitation on the arbitration forum. It claims that to require arbitration to be held in Randolph County, North Carolina, would be tantamount to rewriting the arbitration clause, which is forbidden. It argues that plaintiff must direct its request to the ICC because Art. 12 of the ICC Arbitration Rules grants the arbitral court, absent agreement by the parties, the power to fix the place of arbitration. Defendant Barmag further points out that the ICC Rules do not present any obstacle to coordinated proceedings.

The Court finds considerable complications arise from the fact that defendant Barmag's motion seeks both to compel arbitration and to stay this action pending arbitration.... Upon motion of a party, Sect 3 of the Act permits a court to stay court proceedings pending arbitration should it find an issue referable to arbitration under the parties' contract. A Sect 3 order does not concern itself with the place

of arbitration. Rather, the court merely enters an order staying proceedings until such arbitration proceedings are completed.

Selection of Arbitrators

In many international arbitrations, the parties are able to agree, either directly or indirectly, on the identity of the arbitrators who will decide their dispute. This process is usually the simplest, most direct, and best means of selecting an arbitrator, although it involves delicate legal and tactical considerations. Agreement on the identity of the arbitrators can occur either in the parties' original arbitration clause, before any dispute arises, or in post-dispute negotiations during the course of the arbitral proceedings. The parties' agreement can be reached in direct discussions between the parties themselves, or indirectly, through discussions between the parties' legal advisers or party-nominated arbitrators.

In many cases, the parties' existing arbitration agreement will provide a procedural mechanism for the selection of the arbitrators either expressly or by incorporating institutional arbitration rules. The almost universal contractual mechanism for selecting an arbitrator is designation of a neutral "appointing authority" to choose the arbitrators if the parties cannot agree. All leading institutional arbitration rules provide for such a role by the sponsoring institution when parties agree to arbitrate under the institution's rules.

In most countries, national arbitration legislation permits and gives effect to the parties' agreement on the identity of the arbitrators. This is true under leading national arbitration statutes. It is also true under all leading institutional arbitration rules, including the ICC, LCIA, and AAA Rules, as well as the UNCITRAL Arbitration Rules.

Many international arbitration agreements provide for arbitration by three arbitrators. Typically, each party (in a two-party dispute) nominates an arbitrator and the two party-nominated arbitrators (or "co-arbitrators") endeavor to agree upon a presiding arbitrator (or "chairman"). Where the co-arbitrators are unable to reach agreement, an "appointing authority" is delegated authority to select the presiding arbitrator.

A party's exercise of its autonomy to select a co-arbitrator or to agree upon the identity of other arbitrators is a crucial matter. Particularly in international commercial arbitrations, exercise of this autonomy occurs against a complex background of legal rules and tactical considerations. Among other things, parties must consider applicable legal standards regarding the independence of arbitrators, including national law, the arbitration agreement, and any applicable institutional rules. Parties must also consider what personal characteristics, qualifications, and experience they would like an arbitrator to have, as well as how any appointing authority would be likely to exercise its authority to select an arbitrator in the absence of agreement between the parties or arbitrators. Of course, all of these factors must be considered from the perspective of obtaining

arbitrators who are most likely to render a favorable, binding arbitral award for one's clients.

Some U.S. courts have held, under FAA Sect 5, that judicial appointment of an arbitrator is improper if the parties have agreed to an alternative appointment method, which has not been exhausted. In *Cargill Rice, Inc. v. Empresa Nicaraguense de Alimentos Basicos*,. It was held that, national courts must generally refused to interfere with, or subject to interlocutory review, institutional appointment procedures.

The arbitration statutes of many countries permit the judicial appointment of arbitrators in international arbitrations. The availability of judicial appointment ensures that arbitral proceedings can be pursued, even where the parties have not agreed upon either an arbitrator or an appointing authority.

In the United States, Sect 5 of the domestic FAA provides that, if the parties have agreed on a means of appointing an arbitrator, that means shall be followed. If the parties have not so agreed, then Sect 5 authorises the district court to appoint an arbitrator or arbitrators upon the application of either party. Similarly, Sect 5 authorises judicial appointment of an arbitrator if a party fails to make use of the agreed means for selecting an arbitrator or if the agreed means "lapses." In actions subject to the New York Convention, Sect 206 provides that: "A court having jurisdiction under this chapter ... may also appoint arbitrators in accordance with the provisions of the parties' arbitration agreement.". Similarly, in India under Sect 11 of the IACA if the parties fail to appoint an arbitrator or form an ad hoc tribunal on the basis of their arbitration agreement than either of the parties may make an application to the High Court for the appointment of the arbitrator.

In *Astra Footwear Industry v. Harwyn International*,Petitioner *Astra Footwear* brings this action to compel arbitration to resolve a contract dispute, which has arisen between the parties. Petitioner is a footwear manufacturer located in Zagreb, Yugoslavia; respondent is a footwear distributor with offices in New York. In May, 1975 the parties entered into an agreement under which petitioner agreed to sell and deliver and respondent agreed to purchase 13,400 pairs of shoes. Petitioner alleges that it has shipped footwear pursuant to the agreement, but that respondent has refused to pay....
Petitioner seeks to compel arbitration before the International Chamber of Commerce....

In so requesting, petitioner relies on paragraph 12 of the contract, which provides:

"12. Disputes: For all claims of disputes arising out of this agreement which could not be amicably settled between the parties, is competent the arbitrage for export trade at the Federal Chamber of Commerce in Beograd. In the case that the buyer is accused, the Chamber of Commerce in New York is competent."

It is petitioner's position that in designating the "Chamber of Commerce in New York," the parties were referring to the International Chamber of Commerce ("ICC"), which is based in Paris and has offices in New York. Petitioner further indicates that should the Court determine that the ICC was not agreed to, it stands ready to arbitrate before any arbitrator appointed by the Court, including the American Arbitration Association.

In reply, respondent maintains that the agreement refers to and the parties intended the New York Chamber of Commerce ("NYCC") to arbitrate disputes arising there under. In support of its position, respondent asserts that prior to entering into this agreement it had never before done business with a Communist concern, and therefore was careful to choose an arbitration body NYCC, that would best protect its interests. It appears that the New York Chamber of Commerce ceased to arbitrate disputes in April, 1973 when it merged to become the New York Chamber of Commerce & Industry ("NYCCI"). It is respondent's position that the naming of NYCC was "an integral part of the substantive rights bargained for by Harwyn," and that in light of NYCCI's inability to hear the dispute, the agreement to arbitrate has been vitiated and the petition must be dismissed. Respondent argues that the question of whether the agreement was to arbitrate in general or was to arbitrate before a particular organization is an issue mandating a jury trial under Title 9, United States Code. Sect 4 of the FAA.

In order to support this position, the respondent cited a New York case, *Laboratorios Gross, SA v. Forest Laboratories, Inc.*, which dealt with a closely analogous fact situation. There the parties agreed to arbitrate "in accordance with the rules and procedures of the Pan American Arbitration Association," an organization which had never in fact existed. A petition was brought to stay arbitration. The Court, in ordering a hearing to determine the parties' intent stated: "the issue to be decided is whether the dominant purpose of the agreement was to settle disputes by arbitration, rather than the instrumentality through which arbitration should be effected." However, the intent of the parties was necessary only to determine the appropriate arbitrator to appoint.

The Appellate Division rejected the argument that since the provisions for arbitration had failed, the parties were relegated to their remedies in court. Instead, the court held that there was a dominant intent to arbitrate and not merely to arbitrate before particular arbitrators. Without requiring a trial on the question of intent, the appellate court directed the lower court to appoint three arbitrators of its own selection, pursuant to the New York statute.

The Court of Appeals for this Circuit has stated that what a party must show in order to place the making of an arbitration agreement in issue or to make a genuine issue entitling a party to trial by jury is "an unequivocal denial that the agreement had been made ... and some evidence should have been produced to substantiate the denial.

The Court further finds that by the term "Chamber of Commerce in New York" the parties intended the New York Chamber of Commerce, and not the International Chamber of Commerce, which has an office in New York. Respondent has pointed out that even the petitioner, when seeking arbitration applied first to the New York Chamber of Commerce and Industry. In addition, the International Chamber of Commerce when approached as an arbitrator also suggested that the parties try the New York Chamber of Commerce.

International arbitration awards

Recognition and Enforcement of Awards

The conclusion of most international arbitrations is marked by an arbitral award, disposing of the parties' respective claims. The validity and enforceability of such an award is critical to the international arbitral process and the parties' interest. The enforcement of international arbitration awards occurs within a complex legal framework. This framework includes both international arbitration conventions and national arbitration legislation. Many international arbitral awards do not require either judicial enforcement or confirmation, because they are voluntarily complied with. Nevertheless, the ultimate test of any arbitration proceeding is its ability to render an award, which, if necessary, will be recognized and enforced in relevant national courts. The recognition and enforcement of international arbitral awards involve a potentially complex series of issues. In many cases, enforcement of an award implicates the national law of the state where an award is made, the national law of the state where enforcement is sought, and the provisions of applicable international conventions or treaties.

After an international arbitral award is made, most national arbitration statutes provide two basic legal avenues, which may be taken with respect to the award in the arbitral situs.

1. The prevailing party in the arbitration may commence proceedings in the national courts of the arbitral situs to "confirm" the award (which will usually provide the basis for the entry of a judgment of a local national court). Thereafter, either the judgment can be enforced locally (like a domestic judgment) or the judgment and the award can be taken to another state for enforcement.
2. The unsuccessful party in the arbitration may commence proceedings, also in the national courts of the arbitral situs, to "set aside," "vacate," or "annul" the award. If successful, such an action generally has the legal effect of nullifying the award, much the way that an appellate decision vacates a trial court judgment. After an award is vacated, it cannot be enforced locally and, in general, can be enforced outside the arbitral situs only with difficulty.

If an arbitral award is not vacated, then there are two principal purposes to which it may be put.

1. The prevailing party may seek to "enforce" the award, either in the arbitral situs or in a foreign court. This will involve commencing legal proceedings, under local law, in which the award provides the basis for coercively appropriating money or imposing other consequences on the "award-debtor." An award, which is subject to the New York or Inter-American Convention, does not generally need to be confirmed in the arbitral situs before it may be confirmed and enforced in other forums. Often, however, an award must be "confirmed" by a local court in a particular forum before it may be coercively enforced in that forum.
2. The party to an arbitration may seek to have the arbitral award "recognized." This will usually occur in judicial proceedings commenced by a party, which unsuccessfully pursued claims in an arbitration, seeking to relitigate claims or issues, which were resolved by the award. Most typically, a respondent who successfully defended against claims in an arbitration will seek recognition of an award to preclude the disappointed claimant from relitigating its claims.

In some instances, it is not possible for an arbitral award to be enforced as an award. This can result from a failure to timely confirm it, from formal defects, or from valid substantive grounds for resisting confirmation of the award. Even in such cases, the award may nonetheless have limited legal effect under national law. For example, the award may be the basis for a contract action under national law, or may be admissible as evidence in an action on the merits of the parties' underlying dispute.

Framework for Enforcement of International Arbitral Awards

The enforcement of international arbitral awards is subject to a complex legal framework derived from international and national sources. On the national level, as outlined below, national arbitration statutes provide procedural mechanisms and substantive criteria for vacating, confirming, and enforcing international arbitral awards. On the international level, also outlined below, the New York Convention, the Inter-American Convention, and other bilateral and multilateral treaties address the recognition and enforcement of international arbitral awards.

Most nations have enacted local arbitration legislation, which provides for the confirmation or vacation of arbitral awards made locally. National arbitration statutes typically set forth substantive standards and procedural avenues for confirming an award, as well as the grounds for vacating awards made locally. The provisions of Art. 34 of the UNCITRAL Model Law are a good example of this.

National arbitration legislation contains provisions governing the recognition and enforcement of arbitral awards. These provisions set

forth the substantive grounds for enforcing, or denying enforcement to, arbitral awards. The provisions of Art 36 of the UNCITRAL Model Law are an illustrative example of this. National legislation often provides separate, somewhat differing, legal regimes for recognition of domestic and international awards.

Equally relevant to the enforcement of international arbitral awards are international arbitration conventions. Particularly significant in this regard is the New York Convention. A principal purpose of the Convention was to make it easier to enforce an arbitral award made in one country in other nations. The drafting history of the New York Convention, and the clear thrust of national court decisions applying the Convention, emphasize the drafters' desire to make awards more readily enforceable than under the Geneva Convention, and less subject to challenges based upon local law or public policy.

When the New York Convention is applicable (i.e., where its "jurisdictional requirements" are satisfied), it imposes a general obligation on signatory states to enforce arbitral awards. Art. III of the Convention requires signatory states to recognize arbitral awards made in other countries, subject to procedural requirements no more onerous than those for domestic awards. Art. III's presumption of enforceability is subject to important jurisdictional limitations, set forth in Art. I, and significant exceptions, set forth in Art. V.

Finally, Art. V of the Convention sets forth a limited set of grounds for non-recognition of an arbitral award. Importantly, Art. V's exceptions are exclusive; outside its country of origin, recognition can be denied a Convention award only on one of the grounds contained in Art. V. In light of all these features, national courts have emphasized the "general pro-enforcement bias informing the Convention."

There is a significant limitation on the New York Convention's obligation to enforce arbitral awards: according to most authorities, the obligation to recognize awards which is imposed by Art. III does not apply in actions to vacate (or annul) an arbitral award that are brought in a forum permitted by the Convention for such actions. Thus, as discussed below, the Convention has been held to permit actions to vacate an award to be brought in either the arbitral situs or the country under whose laws the award was made. In such a forum sometimes referred to as an award's "country of origin"- the Convention is generally held to permit an award to be vacated for any reason whatsoever, including reasons not contained in Art. V of the Convention. In the United States, for example, an action to vacate could be brought on any ground permitted under Sect 10 of the domestic FAA, even if one of Art. V's exceptions to enforceability did not apply. In other forums, outside the country of origin, an award cannot be vacated, and can only be denied recognition if one of Art. V's exceptions is satisfied.

Aside from the New York Convention, other international conventions and treaties can have important effects on the

recognition and enforcement of international arbitral awards. The Inter-American Convention establishes a legal regime paralleling the New York Convention between the United States and many Latin American states. The ICSID Convention establishes a unique legal regime for the enforcement of arbitral awards involving investment disputes. Finally, bilateral treaties among many states facilitate the enforcement of foreign arbitral awards.

Provisional Measures in International Arbitration by Arbitrators

Contemporary litigation in developed legal systems is accompanied by procedural safeguards and opportunities for all parties to be heard. One consequence of these protections is delay in ultimate resolution of the parties' dispute, which can prejudice one party, sometimes irreparably. Classic examples include dissipation of assets, destruction of evidence, loss of market value of property, disruption of a joint venture's operations, disclosure or misuse of intellectual property, and interference with customer relations. In such circumstances, national legislatures and courts have developed means for granting immediate "provisional measures," designed to safeguard parties from serious injury caused by delays in the litigation process.

Provisional measures have particular importance in international disputes. Cases involving litigants from different nations pose special risks, including the increased danger that vital evidence will be taken out of the reach of relevant tribunals or that assets necessary to satisfy a judgment will be removed to a jurisdiction where enforcement is unlikely. As a consequence, provisional measures are often more significant in international litigation than in purely domestic cases. Provisional measures are at least as important in international arbitration as in international litigation, but are often less easily obtained.

It includes a variety of orders designed to preserve the essential rights of the parties to a legal dispute pending the ultimate resolution of the dispute. The provisional measures that are available in a particular national court, and the circumstances in which they will be granted, are matters of local law. For the most part, developed legal systems provide for the same general types of provisional measures. They are as follows:

1. Litigants may seek to freeze or sequester property in the hands of adverse parties. Sequestration orders are designed to prevent dissipation of the property or to preserve the condition of the property for future inspection. Alternatively, a litigant may be ordered to deposit property into the custody of a third party.
2. Litigants may seek injunctive relief aimed at preserving the status quo between the parties pending resolution of the merits of their dispute. For example, a party may be ordered not to take certain steps terminating an agreement, disclosing

trade secrets, or using disputed intellectual property or other rights pending a decision on the merits.

3. Litigants may seek orders requiring adverse parties to post security for satisfying the final judgment in the case. Orders for security may be for either the amount in dispute in the underlying controversy or for the fees of legal representation and other costs to be incurred in resolving the dispute.

4. Litigants may seek attachment of funds owned by adverse parties, or debts owed to them. An attachment is intended to preserve sums necessary to satisfy a final judgment (of damages or legal costs) against the owner of the property and, in particular, to prevent the owner or others from removing the property from the territory of the forum court. Unlike most other provisional measures, an attachment is usually directed against third parties such as banks or securities brokers, holding the defendants' property, or persons owing debts to the defendant.

5. Litigants may seek the appointment of neutral third parties to take specified actions. For example, an independent expert or referee may be appointed to inspect goods, a site, or other property and render a factual statement as to its condition.

Parties to an international arbitration will not infrequently wish to obtain one or more of the foregoing types of provisional relief. Provisional measures are, in principle, potentially available from either an arbitral tribunal or a national court. The threshold question for a party seeking pre-award relief is whether an arbitrator possesses the authority to order provisional measures. In general, that question requires consulting three sources:

1. Any applicable international arbitration convention or treaty, such as the New York or Inter-American Convention.
2. Applicable national laws.
3. The parties' arbitration agreement, including any relevant institutional arbitration rules.

International arbitration conventions have little to say about the authority of arbitrators to order provisional measures. The New York Convention contains no provision expressly referring to awards of provisional measures by arbitrators. The Inter-American Convention is the same. The 1961 European Convention does address the general subject of provisional relief, but it only provides that "a request for interim measures or measures of conservation addressed to a judicial authority shall not be deemed incompatible with the arbitration agreement, or regarded as a submission of the substance of the case to the court." Like the New York Convention, however, the 1961 European Convention does not address whether or when an arbitral tribunal may grant provisional measures.

An arbitrator will seldom grant provisional relief unless he is satisfied that the national arbitration legislation applicable to the arbitral proceedings allows him to do so. Equally important, tribunal-ordered provisional relief will generally not be enforceable in a national court unless the procedural law of the arbitration permits such relief and the law of the enforcement jurisdiction provides for judicial enforcement of the tribunal's orders.

There are significant differences among national arbitration laws on the subject of tribunal-ordered provisional measures. In some nations, like Argentina and Italy, local arbitration law contains a mandatory prohibition that apparently forbids arbitrators from ordering provisional relief. The granting of provisional measures is reserved exclusively to local courts, which are specifically authorized to issue provisional relief in aid of arbitration. Other nations, like Switzerland, India and the United States, authorise arbitrators to grant provisional measures (absent contrary agreement) and provide for judicial enforcement of such orders.

In *Charles Construction Company v. Derderian*, in October, 1984, Derderian, as owner of property in Brookline ("owner"), and Charles, as construction manager ("contractor"), entered into an associated general contractors' standard form of agreement pursuant to which a condominium and parking garage were to be constructed. That agreement provided for the arbitration of certain claims, disputes, and other matters arising out of the agreement "in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association then obtaining."

Disputes did arise, and they were submitted to arbitration. The owner asserted claims for more than \$2,800,000, and the contractor for more than \$ 1,170,000. Hearings commenced in September, 1987, and continued intermittently until January, 1990, when the contractor requested the panel to issue an order for interim security. On February 16, 1990, in an interim order, the arbitrators, purporting to act under Sect 34 of the construction industry arbitration rules, ordered the owner to provide the security that we have previously described. There is no contractual provision apart from the arbitration rules on which the contractor relies. He points to no statutory authorisation for the arbitrators' award of interim relief. The owner contends first that, if Charles is to obtain relief before the arbitration proceeding is concluded, it must come from a court.

Judge Wilkins in his judgment stated that, "Because the applicable arbitration rules did not authorise them to do so, the arbitrators had no authority to enter an interim order directing a party to provide security toward the payment of any award the arbitrators might eventually enter. We, therefore, affirm Superior Court judgments vacating the arbitrators' interim order for security. That award had directed James Derderian, as trustee of Parkman Realty Trust, to furnish a \$1,000,000 irrevocable letter of credit, payable on demand, to the American Arbitration Association, as security for the payment

of any arbitration award that might be entered against Derderian, as trustee, in the arbitration proceeding.

The course of the arbitration seems atypical because it commenced in September, 1987, and, after seventy-three hearing days, suspended early in 1990. Charles Construction Co., Inc., seeks enforcement of the interim arbitration award in one of the actions before us, and Derderian seeks an order vacating that award in the other.

In *Swift Indus., Inc. v. Botany Indus., Inc.*, the court held that the arbitrator lacked the power to order provisional relief. The court further stated that, "We have sought to distill from the Agreement the essence of the arbitrator's authority. Whatever that authority may be, it is clear to us that it does not include the authority to award a six million dollar cash bond to cover a liability which contrary to the requirements of the applicable breach of warranty clause, has not yet been (and may not be) "incurred or suffered," in a situation where the parties did not provide for such security in their agreement, although they might have done so. In our view, to award, as an adjunct to declaratory relief, a form of prejudgment execution, which the Agreement by its lack of reference to security seems to exclude rather than to intend, is to eclipse the framework of the agreement and to venture onto unprotected ground. We subscribe to the observations ... that the draftsmen may be unable to perceive in advance what specific remedy should be awarded to meet a particular contingency and that in arbitration flexibility is important. But the principle of flexibility of relief cannot be permitted to obscure or to effect a metamorphosis of the claim itself. That untoward event would occur if we were to permit the arbitrator's award to stand in this case."

In *Sperry International Trade, Inc. v. Israel*, Circuit Judge Kearse,. The principal question on these appeals concerns the power of arbitrators to make certain rulings, in light of a prior decision of this Court in this litigation reversing the district court's granting of a preliminary injunction on the ground that the moving party had failed to prove irreparable injury. The Government of Israel ("Israel") appeals from an order of the United States District Court for the Southern District of New York ... confirming an arbitration award in a proceeding between Israel and petitioner-appellee Sperry International Trade, Inc. ("Sperry"). Because we conclude that the award was within the arbitrators' powers and did not disregard the law, we affirm.

In July 1978, Sperry and Israel executed a contract (the "Contract") requiring Sperry to design and construct a communication system for the Israeli Air Force. As contemplated by paragraph 59 of the Contract, Sperry caused Citibank, N.A. ("Citibank") to open a clean irrevocable letter of credit in Israel's favor for a sum eventually set at approximately \$15 million. Paragraph 59 gave Israel the right to draw on this letter of credit, to the extent of its payments to Sperry, upon presentation of a sight draft and Israel's own "certification that it is entitled to the amount covered by such draft by reason of a clear

and substantial breach" of the Contract. The provision for payment in the letter of credit itself stated, somewhat differently, as follows:

"funds under this credit are available to you against your sight draft drawn on us ... Provided such draft is accompanied by your certification that you are entitled to the amount covered by such draft by reason of non-delivery in accordance with contract no. 6977 or by reason of denial of the necessary licenses."

Paragraph 45 of the Contract provided that all Contract disputes that could not be resolved by negotiation were to be submitted to arbitration in accordance with the rules of the American Arbitration Association. On August 3, 1981, Sperry initiated arbitration proceedings, seeking a declaration that Israel had breached its contractual obligations and demanding damages of approximately \$10 million. Sperry alleged that its attempts to perform its obligations under the Contract had been seriously and substantially frustrated by wrongful actions and inactions of Israel. Israel denied Sperry's allegations and asserted eleven counterclaims, claiming, inter alia, non performance of the Contract by Sperry.

On September 11, 1981, Sperry instituted suit in the district court to compel arbitration and to enjoin Israel from drawing on the letter of credit pending a decision by the arbitrators. The district court enjoined Israel from making the certification that would enable it to draw on the letter of credit, "pending an early ruling by the arbitrators" as to "whether it is equitable and proper in the circumstances that Israel shall or shall not draw on the letter of credit." On January 21, 1982, we reversed the district court's order granting the preliminary injunction because Sperry had made no showing that it would be irreparably injured in the absence of such an injunction. We declined to express a view as to the merits of the controversy.

On January 27, 1981, Israel furnished Citibank with a sight draft and certification acceptable to Citibank for drawing down the letter of credit, and requested Citibank to transmit the proceeds to an account at another bank in New York. On January 31, however, before the proceeds had been transmitted, Sperry obtained an ex parte order of attachment in New York State Supreme Court. Israel removed the action to federal court pursuant to Title 28, United States Code, Sect 1441(d) (1976) and moved to vacate the order of attachment; Sperry cross-moved to confirm the attachment. Argument on these motions was scheduled for February 9, with the expectation that by that time the arbitrators would have ruled on the letter of credit question. On February 8, the arbitration panel held its first hearing and considered Sperry's motion to require Israel to withdraw its certification and demand for payment, and to enjoin it permanently from drawing down the letter of credit. Early on the morning of February 9, the arbitrators made their award on these issues (the "Award"), ordering that the proceeds of the letter of credit be held in an escrow account in the joint names of Israel and Sperry.

This action was promptly reported to Judge John M. Cannella, before whom the parties argued the motions to vacate or confirm Sperry's attachment. Sperry stated that it would move for an order confirming the arbitrators' Award, and that if the Award were confirmed, the attachment would become "essentially moot and unnecessary." On February 10 Judge Cannella vacated the attachment on the ground "that the attachment was unnecessary to the security of Sperry." N.Y. Civ. Prac. Law Sect 6223(a) (McKinney 1980). Judge Cannella also stayed Israel "from taking any further action to collect the proceeds of the letter of credit ... or to remove the proceeds resulting from any payment of that letter of credit from their present location at Citibank" pending a hearing on Sperry's motion to confirm the arbitrators' award.

Sperry's motion to confirm the Award was heard before Judge Pollack on February 18, and was opposed by Israel principally on the ground that the Award was inconsistent with our decision in *Sperry*, since the arbitrators allegedly had granted substantially the same relief Israel claimed we had held impermissible. Judge Pollack rejected all of Israel's arguments in a reasoned opinion and confirmed the Award. On this appeal, Israel renews its contention that our decision in *Sperry* bars the arbitrators' Award. We disagree and affirm the order of the district court.

In *Sprinzen v. Nomberg*, the New York Court of Appeals stated as follows, "An arbitrator's paramount responsibility is to reach an equitable result, and the courts will not assume the role of overseers to mould the award to conform to their sense of justice. Thus, an arbitrator's award will not be vacated for errors of law and fact committed by the arbitrator..." Under New York law arbitrators have power to fashion relief that a court might not properly grant.

In *Rochester City School District v. Rochester Teachers Association*, the court reversed the vacation of an arbitration award that ordered the petitioner school district to grant sabbaticals to certain teachers, stating as follows, "In the final analysis 'Arbitrators may do justice' and the award may well reflect the spirit rather than the letter of the agreement.... Thus courts may not set aside an award because they feel that the arbitrator's interpretation disregards the apparent, or even the plain, meaning of the words or resulted from a misapplication of settled legal principles. In other words a court may not vacate an award because the arbitrator has exceeded the power the court would have, or would have had if the parties had chosen to litigate, rather than to arbitrate the dispute. Those who have chosen arbitration as their forum should recognize that arbitration procedures and awards often differ from what may be expected in courts of law."

CHAPTER 14

Lay Time

The time during which a ship is lying, for the purpose of loading or discharging is Laytime, as distinct from moving with the object of carrying her cargo from one place to another.

"There must be a stipulation as to the time to be occupied in the loading and in the unloading of the cargo. There must be a time, either expressly stipulated, or implied. If it is not expressly stipulated, then it is a reasonable time which is implied by the law; but either the law or the parties fix a time. Now, when they do fix a time, how do they fix it Why, they allow a certain number of days, during which, although the ship is at the disposal of the charterer to load or to unload the cargo, he does not pay for the use of the ship. That is the meaning of 'lay days.'

It is the duty of the shipowners to make their ship available to the charterers at the agreed place; it is the duty of the charterers to make the cargo available and to bring it to the ship. The charterers' duty may be expressed in terms of time, in that the charterparty states how long shall be allotted for this purpose or provides a method by which the time may be calculated; alternatively the charterers must bring or take the cargo within a reasonable time. Where that time, which is called the "lay time", is exceeded, the charterers may be called upon under the charterparty to pay liquidated damages known as demurrage. In the absence of any provision for demurrage they become liable to pay damages for detention. Where the work is completed within the lay time the shipowners may be called upon under the charterparty to pay dispatch money.

The total time allowed for the lay days is the result of an assessment by the parties of the characteristics of the cargo, the ship and the loading and discharging facilities of the ports. The rate allowed for demurrage usually bears some relation to the amount which the ship can earn. On one view, both freight and demurrage can be regarded as payments for the detention of the ship. The detention for the anticipated period of the voyage is recompensed by freight. The sum agreed for freight in a charter covers the use of the ship for an agreed time for loading and discharging, known as the lay days, and for the voyage.

The lay time provision contained in a charterparty, or, in some cases, in a bill of lading, is usually in the form of an undertaking by the charterers for the benefit of the shipowners. It limits the time allowed to the charterers for the performance of their share of the loading or discharging, by providing a fixed period or a method of calculating the time, or alternatively by allowing a reasonable time. For any time beyond that period the charterers are liable in demurrage, and this liability is absolute unless the delay arises through the fault of the shipowners or is covered by an exception in the charterparty or arises

because working the ship becomes illegal by the law of the place of performance.

It is possible, though unusual, for circumstances to arise in which the undertaking is regarded as having been given for the benefit of the charterers. In *Dabell v. Watts, Ward & Co.* there was such a situation. The charterparty, for the carriage of timber from Quebec to London, stated: "Cargo to be furnished and received by ship at port of loading as fast as vessel can receive in ordinary working hours, and to be received from alongside ship at port of discharge as customary as fast as steamer can deliver in ordinary working hours, Sundays always excepted, loading or discharging. Not less than 100 standards a day loading or discharging and ten days on demurrage over and above the said laying days at £70 per day." By custom of the port of London the ship had to engage stevedores, but the men struck. The charterers claimed damages for delay in the delivery of the cargo and for detention of barges. The shipowners contended that on the true construction of the charterparty the lay days were fixed, and that there was an absolute obligation on the charterers to take delivery of at least 100 standards a day. Wills J. held that the clause was a provision in favour of charterers, and that its effect was to oblige the ship to deliver not less than 100 standards a day; the interests of the shipowners were protected by the terms imposing on the charterers a duty to receive as fast as the ship could deliver. In the Court of Appeal, dismissing the shipowners' appeal, Lindley L.J. is reported as follows:

"... he agreed with Mr. Justice Wills in thinking that the provision as to the 100 standards a day was inserted for the protection of the charterers, and that, according to the true interpretation of these words, the shipowners were bound to discharge the cargo at least at that rate."

The charterers are entitled to use the whole of the lay time for loading or discharging. They are therefore not in breach of contract if, notwithstanding that they could work the ship faster, they keep the ship for the whole of the lay time. Even if the ship is not being worked, she must remain at the loading port throughout the lay time unless the charterers have refused to provide a cargo. Their refusal constitutes a final breach which the shipowners may accept as a repudiation of the contract.

The decision of the High Court in *Petersen v. Dunn & Co.* has been cited as an authority for the proposition that the charterers are not in breach of the charterparty if they retain the ship for the whole of the lay time, even though they could work the ship faster. In the reports of the case itself the proposition was not so stated, but it seems that the judge must have considered it to be correct.

A ship had been chartered to carry coal from Ardrossan, the charterparty providing for loading "in the customary manner, say, in twelve colliery working days. She was "to be loaded according to the custom of the port"; "strikes and lock-outs of pitmen and others" were excepted perils. The charterparty further provided: "It is

understood that vessel is to be loaded at once, and lay days to count when vessel ready and notice given." A strike occurred seven colliery days after notice of readiness. The coal was not loaded (the loading taking two days) until the expiry of the 12 colliery working days. The shipowners argued that the ship could and should have been "loaded at once," and that the charterers, having waited for several days without loading till the strike broke out, were liable for demurrage. The charterers said that there were no working days between the outbreak of the strike and the day on which coal was first sent down to Ardrossan, just before loading began. The High Court held that the charterers were not liable, the loading having been completed within the permitted lay days. "if the cargo was ready the ship might have been loaded in two days. The charterparty allowed twelve days for the loading, and the plaintiff in effect says that it only allowed seven.

A question thus arises as to whether this decision is an authority for the proposition that the charterers are entitled to keep the ship for the whole lay days though they could have loaded in less time.

The charterers are not bound either to work, or to maintain an average loading or discharging rate, on each of the lay days allowed, and are not liable for demurrage or damages for any wasted time, provided that the lay time has not expired and the work has not been completed.

" .. where the charterers have been guilty of a breach causing delay, they are entitled to apply their lay time so as to diminish or extinguish any claim for the delay, leaving the shipowners to claim for demurrage at the agreed rate for any extra delay over and above the lay time. The reason is because they have bought their lay time and paid for it in the freight, and are entitled to use it in the way which suits them best, and in particular to use it so as to wipe out or lessen any delay for which they would otherwise be responsible."

If they complete the work within the lay time, they will be rewarded under the dispatch provision, if there is one in the charterparty; if they fail to do so, they must compensate the shipowners.

Lay time can only be occupied by the charterers if it is being employed for loading or discharging, or if some loading or discharging remains to be done. When loading has ended, the charterers must release the ship and present the bills of lading for signature within a reasonable time. This duty arises whether or not lay time has ended. Charterers who are in breach of this duty are liable not for demurrage at the charterparty rate but for damages for detention of the ship, because demurrage is due only where the ship is detained for the purpose of working her. The measure of damages is the amount which the parties can reasonably be presumed to have had in mind when they concluded the charterparty. This will usually be the amount which the ship can earn per day in that area or in areas reasonably accessible at that time, less any amounts saved by the detention. As with other breaches of contract, this prima facie rule as to damages does not apply where the

parties had in contemplation at the time of the conclusion of the charterparty some special measure of damages, if that measure formed the basis of their contract. .

However expeditious the charterers are, they may therefore be liable for wrongful detention of the ship if she is not released when loading or discharging has finished; if accounts have to be settled, bills of lading signed, or some other task completed, a reasonable additional time is allowed for completion of such work.

In *Nolisement (Owners) v. Bunge & Born* a charterparty for the carriage of grain from the River Plate provided for loading at the rate of a certain number of tons per day "otherwise demurrage shall be paid by the charterers." The master was "to sign bills of lading in the form indorsed hereon at any rate of freight that the charterers or their agents require." The ship loaded in 8 days, 19 days before expiry of the lay days. Bills of lading and orders as to the port of discharge were not forthcoming until three days after loading ended, as the charterers had not decided upon a discharging port. It was agreed that the charterers had a right to keep the ship for 24 hours after completion to settle accounts. The shipowners claimed damages for detention for the two extra days. The Court of Appeal held that the charterers were not entitled to detain the ship further, although lay time had not expired. They were obliged to present bills of lading for signature within a reasonable time, which had been agreed to be 24 hours; thereafter they were in breach of contract. But they were entitled to dispatch money for the 19 days saved, which included the two days for which they had to pay damages.

During the lay time, provided that work has not been completed, they can load or not; but if work has been completed they must release the ship even if lay time has not ended.

After loading or discharging has finished, the charterers are not liable for any delay unless it arises from some fault on their part. A delay in naming a discharging port with a consequent delay in issuing the bills of lading, may be attributable to the charterers. But delays resulting from failure by the shipowners to secure clearances, or from ice, or even from a breach of contract by the charterers if the shipowners could have avoided the consequences, have all been held to fall upon the shipowners.

In *Jamieson & Co. v. Lawrie* a ship loaded at Cronstadt. After the ship was ready to sail bad weather delayed her and she was frozen up for six months. The House of Lords, sitting as an appeal court from a Scottish court, held that the shipowners could recover demurrage up to the moment at which the ship was ready to sail, but neither demurrage nor damages for detention for any time thereafter.

In *Pringle v. Molleu* a ship loading a general cargo at Odessa in December was frozen in and unable to leave for London until the end of February. The shipowners claimed demurrage for the 10 days fixed by the charterparty and damages for detention for the rest of the

delay. The charterers denied liability for any part of the delay caused by ice after loading had ended. The shipowners argued that the general rule of law was that detention was to be paid by the charterers and that the authorities showed that they were not excused from the performance of their covenant by an unavoidable detention. It was held that the shipowners must fail. The court is reported as saying: "The detention by the ice was not occasioned by any fault of the defendant. In order to render him liable, the detention must have been for the purpose of loading."

Where the charterers delay the ship after the end of loading or discharging, and by doing so are in breach of contract, the shipowners are not entitled to demurrage or detention damages if they could have avoided the delay. The payment of harbour dues, for example, even where there is some doubt as to whether the shipowners are liable for them, should be made by them if this will reduce the delay.

In *Moller v. Jecks* a ship carried timber from Finland to Lowestoft. After the cargo had been discharged, and the freight paid to the master, the charterers objected to paying harbour dues payable for landing the cargo. The master could have paid them and departed but instead he refused. As a result, the ship was detained. The shipowners' claim for demurrage was rejected. Willes J. said: "The master might and ought to have paid those charges and sailed out of the harbour, resorting to his remedy against the merchant afterwards. A man has no right to aggravate damages against another by the course of proceeding adopted by the plaintiff here."

Time ceases to count against the charterers when the ship is no longer detained by the physical problems involved in loading and discharging, and is ready to leave, subject to clearances and other obstacles not the responsibility of the charterers.

The duties of the charterers, so far as they relate to the task of loading, are often said, incorrectly, to come to an end as the cargo passed across the ship's rail.

It is true that in *Harris v. Best, Ryley & Co* Lord Esher M.R. said: "By universal practice the shipper has to bring the cargo alongside so as to enable the shipowner to load the ship within the time stipulated by the charterparty, and to lift that cargo to the rail of the ship. It is then the duty of the shipowner to be ready to take such cargo on board and to stow it in the vessel." Loading was a joint operation; it was "a joint act of the shipper or charterer and of the shipowner, neither of them is to do it alone, but it is to be the joint act of both. What is the obligation of each of them in that matter? Each is to do his own part of the work, and to do whatever is reasonable to enable the other to do his part." "The shipowner has performed the principal part of his obligation when he has put the goods over the rail of his ship; but I think he must do something more - he must put the goods in such a position that the consignee can take delivery of them. He must put them so far over the side as that the consignee can begin to

act upon them; but the moment the goods are put within the reach of the consignee he must take his part in the operation."

The ship's rail is often mentioned in connection with the question of responsibility for the care of the cargo. The Carriage of Goods by Sea Act 1971 states in its Schedule: 'Carriage of goods' covers the period from the time when the goods are loaded on to the time they are discharged from the ship."

CHAPTER 15

Limitation of Liability

Part X of the Indian Merchant Shipping Act, 1958 deals with Collision, Accident at Sea and Limitation of Liability wherein the owners of a ship or other persons entitled to the benefit of statutory provisions for limitation of liability who allege that they have incurred liability in respect of loss of life, personal injury, or loss of or damage to vessels, goods, merchandise, or property or rights of any kind, and that several claims are made or apprehended in respect of that liability, may apply to the High Court having admiralty jurisdiction to determine the amount of their liability and to distribute that amount rateably among the several claimants, and any proceedings pending in any other court in relation to the same matter may be stayed. The Court may proceed in such a manner and subject to such regulations as making the parties, interested parties to the proceedings, and as to the exclusion of any claimants who do not come in within a certain time, and as to requiring security from the owners or other persons applying, and as to payment of any costs, as the Court thinks fit.

CHAPTER 16

Merchant Shipping Act 1958, s. 443,444

The Merchant Shipping Act, 1958 contains various provisions to enforce territorial jurisdiction. The Act being essentially regulatory in character, the various authorities, tribunals and Courts entrusted with the administration and enforcement of its provisions are specifically stated. The High Court is defined under S.3 (15) as follows:

"3(15). "High Court", in relation to a vessel, means the High Court within the limits of whose appellate jurisdiction-

- a.
- b. the port of registry of the vessel is situate;
- c. the vessel is for the time being; or
- d. the cause of action wholly or in part arises;"

· · Accordingly, a foreign ship falls within the jurisdiction of the High Court where the vessel happens to be at the relevant time i.e., at the time when the jurisdiction of the High Court is invoked, or, where the cause of action wholly or in part arises.

The detention of a foreign ship is authorised in terms of Ss. 443 and 444. In view of their vital significance in the enforcement of maritime jurisdiction, we shall read these two sections in full. Section 443 defines the character and scope of the power of detention:

"S.443. Power to detain foreign ship that has occasioned damage-

(1) Whenever any damage has in any part of the world been caused to property belonging to the Government or to any citizen of India or a company by a ship other than an Indian Ship and at any time thereafter that ship is found within Indian jurisdiction, the High Court may, upon the application of any person who alleges that the damage was caused by the misconduct or want of skill of the master or any member of the crew of the ship, issue an order directed to any proper officer or other officer named in the order requiring him to detain the ship until such time as the owner, master or consignee thereof has satisfied any claim in respect of the damage or has given security to the satisfaction of the High Court to pay all costs and damages that may be awarded in any legal proceedings that may be instituted in respect of the damage, and any officer to whom the order is directed shall detain the ship accordingly.

(2) Whenever it appears that before an application can be made under this section, the ship in respect of which the application is to be made will have departed from India or the territorial waters of India, any proper officer may detain the ship for such time as to allow the application to be made and the result thereof to be communicated to

the officer detaining the ship, and that officer shall not be liable for any costs or damages in respect of the detention unless the same is proved to have been made without reasonable grounds.

(3) In any legal proceedings in relation to any such damage aforesaid, the person giving security shall be made a defendant and shall for the purpose of such proceedings be deemed to be the owner of the ship that has occasioned the damage."

The power of enforcement of an order of detention of a foreign ship is dealt with by S.444.

"S.444. Power to enforce detention of ship.

- 1.
2. Where under this Act a ship is authorised or ordered to be detained, any commissioned officer of the Indian Navy or any port officer, pilot, harbour master, conservation of port or customs collector may detain the ship.
3. If any ship after detention, or after service on the master of any notice of, or order for, such detention proceeds to sea before she is released by competent authority, the master of the ship shall be guilty of an offence under this sub-section.
4. When a ship so proceeding to sea takes to sea, when on board thereof in the execution of his duty any person authorised under this Act to detain or survey the ship, the owner, master or agent of such ship shall each be liable to pay all expenses of, and incidental to, such person being so taken to sea and shall also be guilty of an offence under this sub-section.
5. When any owner, or master or agent is convicted of an offence under sub-sec (3), the convicting Magistrate may inquire into and determine the amount payable on account of expenses by such owner, master or agent under that sub-section and may direct that the same shall be recovered from him in the manner provided for the recovery of fines."

These provisions relate to detention by reason of damage caused in any part of the world by a foreign ship to property belonging to the Government of India or to an Indian citizen or company. The sections are wide in terms and the expansion "damage" is not necessarily confined to physical damage. Ordinarily damage is caused by physical damage. Damage is caused by physical contact of the ship; such as in collision. But damage can also be caused to property by breach of contract or acts of commission or omission on the part of the carrier or his agents or servants by reason of the negligent operation and management of the vessel, as, for example, when cargo is damaged by exposure to weather or by negligent stowage; or, by the misconduct of those in charge of the ship, like when cargo is disposed of contrary to the instructions of the owner or by reason of theft and other misdeeds. In all these cases, damage arises by reason of loss caused by what is done by the ship or by the breach,

negligence or misdeeds of those in charge of the ship. It must however be noticed that the expression "damage done by any ship" has been construed by the English Courts as not to apply to claims against the carrying ship for damage done to cargo. In the *Victoria*, (1887) 12 PD 105, the Court so construed, "S.7 of the Admiralty Court Act, 1861 (24 Victoriaec.10)- The High Court of Admiralty shall have jurisdiction over any Claim for Damage done by any ship". It has been held to apply only to physical damage done by a ship by reason of its coming into contact with something. See *The Vera Cruz*, (1884) 9 PD 96; *Currie –v- M. Knight*, (1897) AC 97 and *the Jade*, (1976) 1 All ER 920. In view of the specific provisions of the English statutes of 1920, 1925, 1956 and 1981, it was unnecessary for the English Courts to construe the expression broadly so as to include cargo claims and the like. The last two enactments contain an exhaustive list of maritime claims and questions in regard to which the High Court can exercise jurisdiction over any merchant ship by arresting it as it enters the waters of Britain. The power, as already noticed, is available, whatever be the nationality of the ship or its owner or the domicile or place of residence or business of the owner, or wherever the cause of action has arisen. About the words "damage done by a ship" in S.7 of the Admiralty Court Act, 1861 and the decision in the *Victoria* (1887) 12 PD 105 to the effect that the section had no application to claims against the carrying ship for damage to cargo, the following observation significantly appears in Halsbury's laws of England, 4th ed. Vol.I (i), para 319 No. 12.

".....but this question is academic in the light of the fact that jurisdiction in respect of claims for damage to cargo carried in a ship is now expressly given by the Supreme Court Act, 1981, S. 20(2)(g)".

In the absence of any statute in India comparable to the English statutes on admiralty jurisdiction, there is no reason why the words "damage caused by a ship" appearing in S.443 of the Merchant Shipping Act, 1958 should be so narrowly construed as to limit them to physical damage and exclude any other damage arising by reason of the operation of the vessel in connection with the carriage of goods. The expression is wide enough to include all maritime questions or claims. If goods or other property are lost or damaged, whether by physical contact or otherwise, by reason of unauthorised acts or negligent conduct on the part of the shipowner or his agents or servants, wherever the cause of action has arisen, or wherever the ship is registered, or wherever the owner has his residence or domicile or place of business, such a ship, at the request of the person aggrieved, is liable to be detained when found within Indian jurisdiction by recourse to Ss. 443 and 444 of the Merchant Shipping Act, 1958 read with the appropriate rules of practice and procedure of the High Court. These procedural provisions are but tools for enforcement of substantive rights which are rooted in general principles of law, apart from statutes, and for the enforcement of which a party aggrieved has a right to invoke the inherent jurisdiction of a superior court.

The Indian Carriage of Goods by Sea Act, 1925 applies to carriage of goods by sea under bills of lading or similar documents of title from a port in India to any other port whether in or outside India. The Act imposes certain responsibilities and liabilities and confers certain rights and immunities upon the carrier (Arts. III & IV). In respect of a claim relating to an outward cargo, the cargo owner has a right to bring a suit against a ship owner subject to the period of limitation specified under the Act, namely one year (Art.III (6)). The substantial rights recognised by the statute are of equal application to foreign merchant ships as they are to Indian merchant ships. The Carriage of Goods by Sea Act does not, however, contain any provision for the enforcement of the right by arresting the foreign vessel found in Indian waters. In the absence of arrest, no effective remedy against a foreign owner may be available to the cargo owner. The same is the position with regard to claims relating to cargo carried under a charter party. It is, therefore, necessary that he should have recourse to the remedy available to him under the Merchant Shipping Act. That Act, as stated earlier, confers a right to arrest a vessel in respect of any damage caused by a ship. If that expression, in the absence of any other more appropriate statute, is understood sufficiently broadly as an enabling provision to effectively assume jurisdiction over a foreign ship for the enforcement of a substantive right recognised by law, there would be no difficulty in finding a remedy for the right the law has conferred on the cargo owner.

The Merchant Shipping Act empowers the concerned High Court to arrest a ship in respect of a substantive right. A right conferred by the Indian Carriage of Goods by Sea Act, 1925 in respect of outward cargo is one of those rights which can be enforced by arrest and detention of the foreign ship in order to ascertain jurisdiction over the vessel and its owners, just as it can be done in respect of inward cargo by reason of substantive rights conferred by the Admiralty Court Act, 1861 read with the Colonial Courts of Admiralty Act, 1890, and other rules of law. The same principle must hold good for carriage under a charter party. These and other laws, such as the law of contract, tort, crime, mortgage, marine insurance, customs, port operations, etc., and the Civil and Criminal Procedure Codes as well as the relevant rules of court regulating procedure and practice together constitute the body of substantive and procedural laws governing claims relating to inward and outward cargo, and such claims are enforceable against foreign ships by recourse to arrest and detention when located within the courts jurisdiction. Viewed in this light, and by this reasoning, the Andhra Pradesh High Court, as a successor to the Madras High Court, does not lack admiralty jurisdiction in respect of claims relating to outward cargo.

The admiralty jurisdiction of the High Court is dependent on the presence of the foreign ship in Indian waters and founded on the arrest of that ship. This jurisdiction can be assumed by the concerned High Court, whether or not the defendant resides or carries on business, or the cause of action arose wholly or in part, within the local limits of its jurisdiction. Once a foreign ship is arrested within the local limits of the jurisdiction of the High Court, and the owner of

the ship has entered his appearance and furnished security to the satisfaction of the High Court for the release of his ship, the proceedings than continue as a personal action.

The Merchant Shipping Act, 1958 provides a detailed Code of substantive and procedural rules regulating shipping as an industry and the control exercised over it by the competent authorities in conformity with various international conventions which have, under the auspices of International Organisations such as the IMO or the ILO, unified and developed various aspects of shipping laws. Conventions regulating sea traffic, safety of life at sea, employment of seamen, wages, hours of work, social security, etc. are cases in point. Likewise, the substantive rules concerning transport of goods are contained in the Indian Bills of Lading Act, 1856 and the Indian Carriage of Goods Act, 1925. But the jurisdictional questions concerning arrest of foreign ships for enforcement of claims against the ship owner as a transporter of goods, which in England are regulated by the Supreme Court Act, 1981, are in many respects left unregulated by the Indian legislation. While the provisions of various international conventions concerning arrest of ships, civil and penal jurisdiction in matters of collision, maritime liens and mortgage etc. have been incorporated into the municipal laws of many maritime States, India, as stated above, lags behind in adopting these unified rules. By reason of this void, doubts about jurisdiction often arise, as in the present case, when substantive rights, such as those recognised by the Carriage of Goods by Sea Act, are sought to be enforced. The remedy lies, apart from enlightened judicial construction, in prompt legislative action to codify and clarify the admiralty laws of this country. This requires thorough research and investigation by a team of experts in admiralty law, comparative law, and public and private international law. Any attempt to codify without such investigation is bound to be futile.

No Indian statute defines a maritime claim. The Supreme Court Act, 1981 of England has catalogued maritime claims with reference to the unified rules adopted by the Brussels Convention of 1952 on the Arrest of Seagoing Ships. Although India has not adopted the various Brussels Conventions, the provisions of these Conventions are the result of international unification and development of the maritime laws of the world, and can, therefore, be regarded as the international common law or transnational law rooted in and evolved out of the general principles of national laws, which, in the absence of specific statutory provisions, can be adopted and adapted by courts to supplement and complement national statutes on the subject. In the absence of a general maritime code, these principles aid the Courts in filling up the lacunae in the Merchant Shipping Act and other enactments concerning shipping. "Procedure is but a handmaiden of justice and the cause of justice can never be allowed to be thwarted by any procedural technicalities."

There have been a few occasions in Bombay that the provisions for temporary detention of a foreign ship under sub-section (2) of the said section having been availed of and the ship owners having quickly settled the claim. However, the reason why attention is drawn

to this section here is because the term "High Court" therein in relation to a vessel is defined by the Act to mean the High Court within the limits of whose appellate jurisdiction the vessel is for the time being. This would have the effect of conferring on the High Courts of the littoral states of India jurisdiction in respect of claims covered by the said section. As already stated, the provisions of this section as a whole have not been widely invoked perhaps because the existence of that section in the said Act may have been missed by those connected with maritime litigation.

CHAPTER 17

Claims payable in foreign currency

In those cases where there are several claims payable in a foreign currency, usually United States dollars, the court may accede to a request in that behalf and order that the sale be restricted to persons who are able to bid for the ship in free foreign currency and that, in the event that there is no bid in free foreign currency equivalent to the appraised value, the ship be sold for Indian rupees. In order not to expose the claimants in foreign currencies to the hazards of fluctuations in the rate of exchange between the time from the filing of their suits and the payment out of their claims after adjudication, the court may be persuaded to direct that the sale proceeds in foreign currency, subject to prior approval of the Reserve Bank of India, be held by the registry in the same currency without conversion into Indian rupees. The Bombay High Court has so directed in the cases of *The East Hampton*, *The St. Nicolas*, and in both cases the Reserve Bank of India accorded approval to the sale proceeds, when received in the registry, being held in United States dollars without being converted into Indian rupees. The writer has mentioned the two cases within his experience which serve as precedents, as the Reserve Bank of India has not acted consistently in the matter of according such approval. In the cases of ships sold for Indian rupees, foreign claimants have experienced inexorable difficulty and delay in obtaining exchange control permission for repatriation out of India of the amounts recovered by them and wages claimants, especially, have had to suffer great hardship and privation.

CHAPTER 18

Interest

The question of interest on a claim in an Admiralty suit is dealt with in accordance with the provisions of Section 34 of the Code of Civil Procedure, 1908, which provides as follows: -

"(1) Where and in so far as a decree is for the payment of money, the Court may, in the decree, order interest at such rate as the Court deems reasonable to be paid on the principal sum adjudged, from the date of the suit to the date of the decree, in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit with further interest at such rate not exceeding six per cent per annum as the Court deems reasonable on such principal sum, from the date of the decree to the date of payment, or to such earlier date as the Court thinks fit:

Provided that where the liability is in relation to a sum so adjudged which had arisen out of a commercial transaction, the rate of such further interest may exceed six per cent per annum, but shall not exceed the contractual rate of interest or where there is no contractual rate, the rate at which moneys are lent or advanced by nationalised banks in relation to commercial transactions.

Explanation I - In this sub-section, 'nationalised bank' means a corresponding new bank as defined in the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970 (5 of 1970).

Explanation II - For the purposes of this section, a transaction is a commercial transaction, if it is connected with the industry, trade or business of the party incurring the liability.

(2) Where such a decree is silent with respect to the payment of further interest on such principal sum from the date of the decree to the date of payment or other earlier date, the Court shall be deemed to have refused such interest, and a separate suit therefore shall not lie."

CHAPTER 19

Priorities

The question of priorities is another factor to be considered before instituting the action for arrest. The Indian courts will decide questions of priority on the same principles as the Admiralty Court in England and a contractual claimant, e.g. with a low priority, may not be benefited by suing or arresting the ship in India if there be prior claimants who will take away the whole of the sale proceeds of the ship. However, if an appearance were to be entered and bail or security for his claim given and the ship released and it sails away before it is arrested by other claimants, his arrest will not be in vain.

In respect of claims arising out of collision or salvage or towage and if the vessel sued is entered with a P.& I. Club, it is usual to obtain from the ship owner an agreement to submit to the Admiralty jurisdiction of the High Court in England, along with an undertaking to give bail or other security and, as the claim will involve a consideration of the technicalities of navigation of ships, the claimant may find it advantageous to accede to such an agreement and undertaking and withdraw. It may however be noted that under section 140 of the Code of Civil Procedure, 1908 in any Admiralty cause of salvage, towage or collision, the court whether it is exercising its original or its appellate jurisdiction may, if it thinks fit, and shall upon request of either party to such cause, summon to its assistance two competent assessors who shall attend the hearing and assist the court.

CHAPTER 20

Applicable Law

As stated above, the three High Courts at Calcutta, Madras and Bombay were invested with the same Admiralty jurisdiction (now other High Courts also having Admiralty Jurisdiction) as was invested in the Court of Admiralty in England in the year 1890 and, as will be observed from the cases cited *supra*, they have referred to, relied on and have been guided by the decisions of the England Court for not only ascertaining the Admiralty jurisdiction and practice of the High Court in England in the year 1980 but also on questions of interpretation of the various sections of the Admiralty Court Act 1840 and the Admiralty Court Act 1861, *supra*, of the British Parliament which, as observed, continues to be the law of India notwithstanding their repeal in England. The said decisions will continue to be relevant as will also the opinions contained in such maritime law classics as William & Bruce's *Jurisdiction and Practice of the English Courts of Admiralty: Actions and Appeals*; Roscoe's *The High Court of Admiralty*; Abbot's *Law Relating to Merchant Ships and Sea-men*; Halsbury's *Laws of England* (2nd edn.), Vol. I; as also *Admiralty Practice* by McGuffie, Fugeman & Gray (Vol. 1; British Shipping Laws).

Though not binding on them, the *dicta* in some of the recent English cases in Admiralty and some other countries of the Common wealth, principally Australia and Canada, may be relied upon as authorities of highly persuasive value in deciding a point of practice though not to add to the Admiralty causes presently taken cognizance of.

CHAPTER 21

Time Bar

The (Indian) Limitation Act 1963 applies to all claims within the Admiralty jurisdiction of the High Courts. The Act provides a three-year limitation period for actions for damage, wages, necessities, salvage, and towage. In case of claims for loss or damage to cargo brought under bills of lading incorporating the Hague Rules, the one year period under rule 6 of Article III, providing for an extinguishment of the cause of action, itself may apply. The limitation period under the Limitation Act 1963 is absolute and cannot be extended by agreement nor can the court enlarge the same. The Act does contain provisions for extension of time, exclusion of time for filing suit in certain cases, acknowledgement of liability and/or payment on account before expiry of the initial limitation period, so as to afford a fresh limitation period, and the Act may be referred to for ascertaining the operation of the said provisions.

There is no provision in the Act equivalent to section 8 of the repealed Maritime Conventions Act 1911, *supra*, and in view of the precise limitation periods specified in the Limitation Act, 1963, the doctrine of laches may not prevail.

CHAPTER 22

Security for costs and damages

Security for costs and damages is not a condition for the arrest, but while applying for the arrest an undertaking is required to be given in writing to pay such sum by way of damages as the court may award compensation in the event of a party affected sustains prejudice by the arrest. There is however little risk of being condemned to pay damages to the owners of an arrested ship, even if the claim fails unless the arrest was manifestly a gross abuse of the court's process which was instituted with malafide intention.

The undertaking from the Plaintiff securing cost and damages should be given to the court when an application for arrest of the Defendant vessel is made before the trial court.

A person who, maliciously and without reasonable and probable cause procures the arrest of a ship by Admiralty proceedings is liable to pay damages to the person aggrieved. A separate suit has to be filed for *wrongful arrest* proving malicious cause. Wrongful arrest may result in a condemnation of the claimant for damages only where the court is satisfied that the arrest was motivated by *mala fides* (bad faith) or *crassa negligentia* (gross negligence). Merely unjustified (i.e. erroneous) arrest would not normally entitle the defendant to claim damages, although he might then be able to recover costs.

CHAPTER 23

Wrongful Arrest

The test for wrongful arrest of a vessel dates back 150 years to the Privy Council decision of *The Evangelismos* (1858) 12 Moo PC 352. To succeed in a claim for wrongful arrest, the owners must demonstrate that there is either mala fides (bad faith) or crassa negligentia (gross negligence) which implies malice. Subsequent to *The Evangelismos*, several UK decisions have applied the test 'without reasonable or probable cause' so as to infer malice interchangeably with the test of gross negligence. In Singapore, the phrase 'without reasonable or probable cause' has also found favour in two local decisions: *The Evmar* [1989] 2 MLJ 460; [1989] SLR 474 and *The Ohm Mariana* [1992] 2 SLR 623. In 1999, the Court of Appeal in Singapore in *The Kiku Pacific* [1999] 2 SLR 595 settled the test once and for all. The Court of Appeal held that while the use of the term 'reasonable or probable cause' is well established in actions for malicious prosecution (not involving vessels), they would be uncomfortable with the import of such a term into admiralty law as part of the test for wrongful arrest of a vessel. The Court of Appeal ruled that the test for wrongful arrest of a vessel should be the test laid down in *The Evangelismos*, ie mala fides or crassa negligentia implying malice.

The cases involving wrongful arrest are rather rare. However, in 1999 there were two attempts to obtain damages for wrongful arrest. It succeeded in *The Trade Resolve* [1999] 4 SLR 424. It is interesting to note that in *The Trade Resolve*, the judge relied on the test of no reasonable or probable cause and found that the arrest was wrongful. However, in my view, even if the judge had applied the test of gross negligence, he would nevertheless have reached some conclusion on the facts in *The Trade Resolve*. In that case, the Sheriff authorised the plaintiffs' solicitors to serve the writ and arrest the vessel within port limits. The vessel was outside port limits but the plaintiffs maintained that she was nevertheless within territorial waters. Despite being aware that the vessel was in fact outside port limits, the plaintiffs proceeded to arrest the vessel which the court found to be '... a contemptuous act in deliberate and flagrant disregard of the limited authority granted to them'. The decision of *The Trade Resolve* is also significant in one other respect, ie vessels can only be arrested if they are within port limits. It is irrelevant whether the vessel is within territorial waters as long as she is outside port limits.

CHAPTER 24

Admiralty Rules

The Admiralty Rules of the High Courts provide that the rules and practice of the court in the matter of suits and proceedings on the original side of the court shall, if not inconsistent with the said Rules, apply to suits and proceedings on the Admiralty side of the court. The Rules also provide that the forms used in the Admiralty Division of the Supreme Court of England under the Rules of that court for the time being in force may be followed with such variations as the circumstances of each case may require.

In the title of the plaint in a suit *in rem*, after the name of the ship which is sued, its nationality is usually stated followed by the words "together with its engines, boats, gear, tackle, apparel furniture and papers and everything belonging to it whether on board or ashore", and a statement as to its location. Some draftsmen include in the title "The Owners and other parties interested in the first defendant ship" as the second defendants. If the claim is under a contractual document, it is usual for a copy thereof and, if it be in a language other than English, a translation thereof to be annexed to the plaint as an exhibit and in the case of a claim for repairs or necessities, copies of the unpaid bills (In case of urgency, courts allow application for arrest on fax copy of the Power of Attorney/Letter of Authority; on Lodging number of the Suit; and also on clear photocopies of the documents). The court may at any time require that they be produced for its scrutiny when applying for arrest.

The Admiralty Rules of the High Courts require that in a suit for wages or for possession against a foreign ship, notice of the institution of the suit be given to the consul of the state to which the ship belongs, if there be one resident at those places and a copy of the notice be annexed to the affidavit leading to the warrant. The Rules of the High Court at Bombay require that such notice shall be given in a suit for necessities also and that, if there is no such consul resident in Bombay, a statement of that fact be made in the affidavit leading to the warrant. The Rules of the High Courts relevant to filing of the various caveats are substantially similar.

Whereas the Rules of the High Courts require that before issuing the warrant of arrest the registrar of the court shall ascertain whether or not any caveat warrant has been entered, rule 941 of the Bombay Rules, *inter alia*, requires that a Certificate of the Prothonotary & Senior Master (i.e. the Admiralty Registrar of the Court), certifying that search has been made in the Caveat Warrant Book and that no caveat has been filed, be annexed to the affidavit leading to the warrant.

The Rules of all High Courts having Admiralty Jurisdiction require that the affidavit leading to the warrant shall state the nature of the claim in the suit and that it has not been satisfied.

The Rules of the Calcutta and Madras courts also require that in a suit for bottomry a copy of the bottomry bond and, if in a foreign language, also a copy of a notarial translation thereof certified to be correct shall be annexed to the affidavit and the original bond and the notarial translation thereof shall be produced for the inspection and perusal of the court's registrar.

CHAPTER 25

Pleadings

Plaint

In the title of the plaint in a suit *in rem*, after the name of the ship which is sued, its nationality is usually stated followed by the words "together with its engines, boats, gear, tackle, apparel furniture and papers and everything belonging to it whether on board or ashore", and a statement as to its location. Some draftsmen include in the title "The Owners and other parties interested in the first defendant ship" as the second defendants. The Plaint should be very clear as regards maritime claim/ lien. Affidavit in Support to the Plaint should be drawn up and filed along with the Plaint.

Judge's order for arrest and its affidavit in support

The Judge's order for the arrest of the ship will direct that the ship be arrested at any hour of the day or night, including Sundays and holidays, and that it may not be arrested if payment of the sum stated in the order, comprising the amount of the claim in the suit and the *ad valorem* court fee and the sheriff's poundage, is paid on behalf of the ship or satisfactory security for the claim is furnished. The affidavit in support should state as to why the Judges Order should be allowed, this affidavit should also mention that notice to consul has been given, wherever applicable.

Undertaking, Certificate *et al*

An undertaking from the Plaintiff securing cost and damages should be given to the court when an application for arrest of the Defendant vessel is made.

A Certificate from the Prothonotary should be obtained prior to making an application for arrest of the vessel stating that a search of the caveat against arrest register has been taken and that no caveat are filed or has been filed, depending on the search result and if a caveat exist, a notice to the caveator has to be given.

Warrant for Arrest

The warrant for arrest when issued by the Court's registry will be served by the bailiff of the Marshal of Calcutta and by the bailiff of the Sheriff of Mumbai (Bombay) or Chennai (Madras) or his substitute who is required to effect the service by affixing (i.e. attaching and not just holding in position by hand) the original warrant of arrest for a short time (the duration should be about 10 to 15 minutes) on any mast of the ship or on the outside of any suitable part of the ship's superstructure, then removing the original and leaving a duplicate thereof affixed in its place. (This mode of service is enjoined in the case of service of the writ of summons, *see infra*, on the ship.) There have been occasions where persons entrusted with

the service are not competently instructed as to the mode of the service, which is of particular importance in a suit *in rem*, and, indeed, there have been instances where service has been effected on the master or a mate by delivering the duplicate of the warrant to him and obtaining his acknowledgment on the original. This would constitute bad service as would service on any other person on board the ship - *The Marie Constance*. There have been no instances of the arrest having been impugned on account of bad service.

There is no provision made in the Rules for effecting service on a ship lying at a port other than that in whose registry the writ has been issued, viz, Calcutta, Madras or Bombay, through the Collector of Customs at such other port. This lacuna puts the plaintiff to the expense of taking the marshal's/sheriff's substitute to that port to arrest the ship and there is also the possibility of the ship sailing away before service can be accomplished. To avoid this possibility it is advisable that the registry should be requested by a *praecipe* (after obtaining order from the Court to that effect) to give telegraphic/facsimile intimation to the Port Conservator and to the Commissioner of Customs at the particular port of issue of the warrant for arrest of the ship and instruct that officer not to grant port clearance to the ship, pending arrival of the warrant of arrest.

Whereas the Admiralty Rules require that the warrant shall be returned within a stipulated period from the service thereof.

The Calcutta and Madras Rules provide that, after expiration of 12 days from the return of the warrant for arrest, if no appearance shall have been entered in the suit the advocate for the plaintiff may cause the suit to be set down for hearing and also provide that, if when the suit comes up before the court, the judge is satisfied that the plaintiff's claim is well founded he may pronounce the claim and may order the ship to be sold with or without previous notice and the proceeds of the sale paid into the registry or make such order in the premises as he deems fit. The warrant of arrest issued by the said two High Courts is in its form citatory, calling upon the owners and all parties interested in the ship to appear before the court, is deemed sufficient notice to all whom it may concern regarding the suit. It, however, does not require them to file a written statement to the suit.

CHAPTER 26

Writ of Summons

There was a similar provision in the Bombay Rules, which has been omitted in the new Rules which came into effect from 1 January 1980 and the warrant of arrest now being issued by the court does not contain a citation to the owners and other parties interested in the ship. The Bombay Rules currently applicable enjoin the service of the writ of summons on the ship in the same manner as the warrant of arrest. The writ of summons is in the same form as applicable to suits filed in the ordinary original civil jurisdiction of the High Court with such variations as the circumstances of the case may require. The prescribed form requires the filing of an appearance and a written statement of the defence to the suit and delivery of a copy thereof to the plaintiffs within 30 days from the service thereof. Unless otherwise directed, the returnable date of the writ of summons is 16 weeks after the date of filing of the suit and on that date the suit will be placed before the judge in chambers for directions. If on that date no appearance has been filed, the judge may order the suit to be set down on the board to be proceeded with as undefended.

This difference in the Bombay Rules is liable to put a plaintiff, particularly in a suit for wages, who has arrested a ship for his claim, to inconvenience and hardship as it precludes him from having the suit set down on board for judgment for default of appearance before the returnable date. To overcome this problem, in the writer's view, a direction will have to be obtained from the judge ordering the arrest, for variation of the form of the writ of summons by abridging the time for entry of appearance to 12 days of the service thereof and fixing the returnable date to say two weeks after such service.

When the warrant of arrest is citatory in form as under the Calcutta and Madras Rules, it may not be necessary for a separate writ of summons to be served on the ship. (It has been so held by the Bombay High Court when the Bombay Rules were similar to the Calcutta and Madras Court Rules.) Nevertheless, in the writer's view it is advisable to ensure that the Writ of Summons is issued by the registry and served at the same time as the warrant of arrest. A writ of summons on the vessel may not be required if warrant of arrest is properly served on the vessel.

The Rules of all the three courts provide that in a suit *in rem* no service of warrant of arrest shall be required when the advocate for the defendant ship agrees to accept service and to give security or to pay money into court.

CHAPTER 27

Ship Arrest

Merchant ships of different nationalities travel from port to port carrying goods or passengers. They incur liabilities in the course of their voyage and they subject themselves to the jurisdiction of foreign States when they enter the waters of those States. They are liable to be arrested for the enforcement of maritime claims, or seized in execution or satisfaction of judgments in legal actions arising out of collisions; salvage, loss of life or personal injury, loss of or damage to goods and the like. They are liable to be detained or confiscated by the authorities of foreign States for violating their customs, regulations, safety measures, rules of the road, health regulations, and for other causes. The coastal State may exercise its criminal jurisdiction on board the vessel for the purpose of arrest or investigation in connection with certain serious crimes. In the course of an international voyage, a vessel thus subjects itself to the public and private laws of various countries. A ship traveling from port to port stays very briefly in any one port. A plaintiff seeking to enforce his maritime claim against a foreign ship has no effective remedy once it has sailed away and if the foreign owner has neither property nor residence within jurisdiction. The plaintiff may therefore detain the ship by obtaining an order of attachment whenever it is feared that the ship is likely to slip out of jurisdiction, thus leaving the plaintiff without any security.

A ship may be arrested (i) to acquire jurisdiction; or (ii) to obtain security for satisfaction of the claim when decreed; or (iii) in execution of a decree. In the first two cases, the court has the discretion to insist upon security being furnished by the plaintiff to compensate the defendant in the event of it being found that the arrest was wrongful and was sought and obtained maliciously or in bad faith. The claimant is liable to pay damages for wrongful arrest. The practice of insisting upon security being furnished by the party seeking arrest of the ship is followed in the United States, Japan and other countries. The reason for the rule is that a wrongful arrest can cause irreparable loss and damages to the ship owner; and he should in that event be compensated by the arresting party.

The attachment by arrest is only provisional and its purpose is merely to detain the ship until the matter has been finally settled by a competent court. The attachment of the vessel brings it under the custody of the marshal or any other authorised officer. Any interference with his custody is treated as contempt of court, which has ordered the arrest. But the Marshal's right under the attachment order is not one of possession, but only of custody. Although the custody of the vessel has passed from the defendant to the marshal/sheriff, all the possessory rights, which previously existed, continue to exist, including all the remedies, which are based on possession. The warrant usually contains admonition to all persons

interested to appear before the court on a particular day and show cause why the property should not be condemned and sold to satisfy the claim of the plaintiff.

The attachment being only a method of safeguarding the interest of the plaintiff by providing him with a security, it is not likely to be ordered if the defendant or his lawyer agrees to "accept service and to put in bail or to pay money into court in lieu of bail".

Affixing it on the main mast or single mast of the ship usually affects the service of a warrant. The court may release a ship, which has been arrested under an order of attachment, if sufficient bail is put in to cover the claim of the plaintiff as well as the costs of the action. The sureties are liable for the amount entered in the bail bond.

If the ship or cargo under arrest before judgment has not been released by the defendant by putting in sufficient bail, and if the property is found deteriorating, the court has the power to order the sale of the property after notice has been duly issued to the parties interested.

If the plaintiff has finally obtained a decree of condemnation and sale of the ship, the court will issue an order to the competent officer commanding him to sell the property, in execution of the decree, and to bring the proceeds into court. There upon the officer shall issue proper notice and arrange for the sale of the property by auction. The proceeds of the sale are paid into the registry of the court and they shall be disposed of by the court according to law.

A personal action may be brought against the defendant if he is either present in the country or submits to the jurisdiction. If the foreign owner of an arrested ship appears before the court and deposits security as bail for the release of his ship against which proceedings in rem have been instituted, he submits himself to jurisdiction.

An action in rem is directed against the ship itself to satisfy the claim of the plaintiff out of the res. The ship is for this purpose treated as a person. Such an action may constitute an inducement to the owner to submit to the jurisdiction of the court, thereby making himself liable to be proceeded against by the plaintiff in personam. It is however, imperative in an action in rem that the ship should be within jurisdiction at the time the proceedings are started. A decree of the court in such an action binds not merely the parties to the writ but everybody in the world at large who might dispute the plaintiff's claim.

It is by means of an action in rem that the arrest of a particular ship is secured by the plaintiff. He does not sue the owner directly and by name; but the owner or any one interested in the proceedings may appear and defend. The writ is issued to the "owner and parties interested in the property proceeded against." The proceedings can be started in England or in the United States in respect of a maritime lien, and in England in respect of a statutory right in rem. A maritime lien is a privileged claim against the ship or a right to a part of the

property in the ship, and it "travels" with the ship. Because the ship has to "pay for the wrong it has done", it can be compelled to do so by forced sale. In addition to maritime liens, a ship is liable to be arrested in England in enforcement of statutory rights in rem (Supreme Court Act, 1981). If the owner does not submit to the jurisdiction and appear before the court to put in bail and release the ship, she is liable to be condemned and sold to satisfy the claims against her. If, however, the owner submits to jurisdiction and obtains the release of the ship by depositing security, he becomes personally liable to be proceeded against in personam in execution of the judgment if the amount decreed exceeds the amount of the bail. The arrest of the foreign ship by means of an action in rem is thus a means of assuming jurisdiction by the competent court.

The admiralty action in rem, as practised in England or in the United States, is unknown to the civil law. In countries following the civil law, all proceedings are initiated by actions in personam. The President of the Court having competence in the matter has the power to order an attachment of the ship if he is convinced that the plaintiff is likely to lose his security unless the ship is detained within the jurisdiction. His hands are not fettered by the technicalities of an action in rem and the scopes of the proceedings are not limited to maritime liens or claims. According to the French law, arrest of a ship is allowed even in respect of non-maritime claims and whether or not the claimant is a secured or unsecured creditor. A vessel may be arrested either for the purpose of immobilising the vessel as security (*Saisie Conservatoire*) or in execution of judgment (*Saisie Execution*) whether or not the claim has any relation to the vessel. Arrest of the vessel has the advantage of forcing the owner to furnish security to guarantee satisfaction of any decree that may be passed against him. On furnishing sufficient security with the Court, he is usually allowed to secure the release of the vessel. Maritime law is part of the general law of France and other "civil law countries", and is dealt with by the ordinary courts or tribunals. The presence of any property belonging to the defendant within the territorial jurisdiction confers jurisdiction on the French Court.

The real purpose of arrest in both the English and the Civil Law systems is to obtain security as a guarantee for satisfaction of the decree, although arrest in England is the basis of assumption of jurisdiction, unless the owner has submitted to jurisdiction. In any event, once the arrest is made and the owner has entered his appearance, the proceedings continue in personam. All actions in the civil law- whether maritime or not- are in personam, and arrest of a vessel is permitted even in respect of non-maritime claims, and the vessel is treated as any other property of the owner, and its very presence within jurisdiction is sufficient to clothe a competent tribunal with jurisdiction over the owner in respect of any claim. Admiralty actions in England, on the other hand, whether in rem or in personam, are confined to well defined maritime liens or claims and directed against the res (ship, cargo and freight) which is the subject-matter of the dispute or any other ship in the same beneficial ownerships as the res in question.

Where statutes are silent and remedy has to be sought by recourse to basic principles, it is the duty of the court to devise procedural rules by analogy and expediency. Action in rem, as seen above, were resorted to by courts as a device to overcome the difficulty of personal service on the defendant by compelling him to enter appearance and accept service of summons with a view to furnish security for the release of the res; or, in his absence, proceed against the res itself, by attributing to it a personality for the purpose of entering a decree and executing the same by sale of the res. This is a practical procedural device developed by the courts with a view to rendering justice in accordance with substantive law not only in cases of collision and salvage, but also in cases of other maritime liens and claims arising by reason of breach of contract for the hire of vessels or the carriage of goods or other maritime transactions, or tortious acts, such as conversion or negligence occurring in connection with the carriage of goods. Where substantive law demands justice for the party aggrieved, and the statute has not provided the remedy, it is the duty of the court to devise procedure by drawing analogy from other systems of law and practice. To the courts of the "civil law countries" in Europe and other places, like problems seldom arise, for all persons and things within their territories (including their waters) fall within their competence to deal with. They do not have to draw any distinction between an action in rem and an action in personam.

It is likewise within the competence of the appropriate Indian Courts to deal, in accordance with the general principles of maritime law and the applicability of provisions of statutory law, with all persons and things found within their jurisdiction. The power of the court is plenary and unlimited unless it is expressly or by necessary implication curtailed. In the absence of such curtailment of jurisdiction, all remedies, which are available to the courts to administer justice, are available to a claimant against a foreign ship and its owner found within the jurisdiction of the concerned High Court. This power of the court to render justice must necessarily include the power to make interlocutory orders for arrest and attachment before judgment.

The High Courts in India are superior courts of record. They have original and appellate jurisdiction. They have inherent and plenary powers. Unless expressly or impliedly barred, and subject to the appellate or discretionary jurisdiction of the Court, the High Courts have unlimited jurisdiction, including the jurisdiction to determine their own power.

A person who, maliciously and without reasonable and probable cause procures the arrest of a ship by Admiralty proceedings is liable to pay damages to the person aggrieved. A separate suit has to be filed for *wrongful arrest* proving malicious cause. Wrongful arrest may result in the condemnation of the claimant for damages only where the court is satisfied that the arrest was motivated by *mala fides* (bad faith) or *crassa negligentia* (gross negligence). Merely unjustified (i.e. erroneous) arrest would not normally entitle the defendant to claim damages, although he might then be able to recover costs.

The safeguarding of ownership/private property rights when ships are arrested *in rem* by the Admiralty Court are built into the rules of the High Court having admiralty jurisdiction for ship arrest. For example, a party wishing to prevent the arrest of property in an action *in rem* may, by filing a *praecipe* in the prescribed form, obtain the entry of a caveat against arrest in the caveat book kept in the Admiralty Registry/ Prothonotary & Senior Master of the High Court. Although the entry of the caveat does not prevent arrest of the *res*, the caveator, on a subsequent motion after arrest, may obtain the discharge of the arrest warrant and the condemnation of the arresting party in damages, if the latter is unable to show "good and sufficient reason" for having arrested.

Where a foreign ship registered in a port of a country having a consulate in jurisdiction of the High Court where arrest application is sought /is to be arrested in India in an action *in rem* for wages, prior notice of the arrest must be given to the consul concerned.

In the decision of the Supreme Court in *Videsh Sanchar Nigam Limited -vs- m.v. Kapitan Kud* (1986) the court observed that the admiralty action is an action *in rem* and that there is strong triable case. The ship is a foreign ship and if it leaves the shores of Indian territorial waters it is difficult to get hold of it and it may not return to the jurisdiction of Indian courts. The claim thereby, even if successful, would remain unexecutable or land in trouble in private international law in its enforcement. Under these circumstances, we are of the firm opinion that the vessel may be released on the certain conditions..., viz., [i] the respondent shall deposit a sum of Rs.10 crores; [ii] the Ukrainian Government shall give an undertaking through its accredited authority, more particularly may be its Ambassador attached to its Embassy in India in writing duly undertaking that in the event of the suit being decreed they would comply with the decree without reference to the execution; [iv] the undertaking should be for balance amount of Rs.18 crores and towards costs and other expenses roughly put at Rs.25 crores. It would be open to them to comply with these directions at any time. We are not fixing any time limit because it would be open to them to comply with it at any time and until then the ship shall remain arrested and shall not leave the shores of the Indian territorial waters. On deposit of Rs.10 crores and on furnishing of undertakings to the satisfaction of the Division Bench of the High Court, as stated above, the High Court would give appropriate direction for releasing the vessel in accordance with law.

In *m.v. Kapitan Kud* the Supreme court also observed that whether the appellant (VSNL) has made out prima facie case. Rules on Admiralty Jurisdiction in Part III were framed by Bombay High Court to regulate the procedure and practice thereof on the original side of the Bombay High Court. Equally, Original Side Rule 941 is relevant in this regard which provides that party applying under this rule in a suit *in rem* for arrest of the property shall give an undertaking in writing or through advocate to pay such sum by way of damages as the court may award as compensation in the event of a party affected sustaining prejudice by such order. In *Mahadeo*

Savlaram Shelke & Ors. v. Pune Municipal Corporation & Anr. [(1995) 3 SCC 33], even in case of civil court, exercising its power under order 39 Rule 1, this Court held that while granting interim injunction, the Civil Court or Appellate Court is enjoined to impose as a condition that in the event of the plaintiff failing to prove the case set up and if damages are caused to the defendant due to the injunction granted by the court, the court would first ascertain whether the plaintiff would adequately be compensated by damages if injunction is not granted. Equally the court should also impose condition for payment of damages caused to the defendant in the same proceeding without relegating the parties for a separate suit. The plaintiff should give such an undertaking as a part of the order itself. Rule 954 of Admiralty Rules provides that subject to the provisions of Rule 952 [caveat property not to be released unless notice is given to the caveator], property arrested under a warrant may be ordered to be released - [i] at the request of the plaintiff, before an appearance in person or a vakalatnama is filed by the defendant; or [ii] on the defendant paying into Court the amount claimed in the suit; or [iii] on the defendant giving such security for the amount claimed in the suit as the Court may direct; or [iv] on any other ground that the Court may deem just. Thus a ship arrested under warrant maybe released on fulfillment of any of the conditions mentioned hereinbefore. This could be done on the plaintiff showing prima facie best case.

CHAPTER 28

Advisability of litigation

A maritime claimant, before deciding to sue in Admiralty in India, would do well to consider whether it would be advisable to embark upon the litigation at all. It should be noted that overhead expense for executing an arrest would depend on the fact as to which port the vessel is lying, therefore while quoting charges all expenses should be considered.

Though it is seen that arresting a vessel is one of the quickest way to realise claimants' claim one should not forget that if settlement talk fails a road of long drawn litigation lies ahead. The claimant should also consider the expenses that are likely to be incurred after arrest of the ship, should the settlement if initiated fails.

There are several other factors, which should be considered prior to initiating action for arrest of vessel one of which is:

In the case of claims under contractual documents, such as bills of lading or charter-parties which contain a provision for their settlement by arbitration, and the New York Convention applies, the court under the provisions of Arbitration and Conciliation Act 1996, giving effect to the said Convention, shall on application made, on behalf of the owner of the ship sued *in rem* and arrested, after entering an appearance but before taking any step in the suit, the suit shall be stayed.

CHAPTER 29

Application for arrest

The procedure for commencing an action on a claim in the Admiralty jurisdiction of the three High Courts (now other High Courts also) is totally unlike that which prevailed in England in the year 1890, or which now prevails in England and in many other countries, and is an ordinary procedure. The Admiralty Rules of the High Courts having Admiralty Jurisdiction require that a suit shall be instituted by a plaint drawn up, subscribed and verified according to the provisions of the Civil Procedure Code 1908. The plaint must be signed and verified by the plaintiff, if he is an individual, in the case of a firm by any one of its partners and if it is a corporation by a director, the secretary or other principal officer.

In the case of a foreign plaintiff it may be necessary for it to grant a power of attorney to a person, usually, at the place where the action is to be instituted, authorising that person to institute the action with incidental powers to sign and verify all pleadings, petitions, applications etc. A foreign firm is not recognised in India and in this case all its partners will have to be nominated as the plaintiffs and must execute the power of attorney. A power of attorney in a Common-wealth country may be executed before and authenticated by a notary public. In the case of other countries it is advisable that the signature of the notary public be legalised by an Indian consular officer. Alternatively, the power of attorney may be executed before an Indian consular officer under the provisions of section 3 of the Diplomatic and Consular Officers (Oaths and Fees) Act, 1948.

The aforesaid requirement of signing and verification of the plaint has often been a major disadvantage to foreign maritime claimants by making a *quia timet* action for arrest before departure of the ship impossible.

In the title of the plaint in a suit *in rem*, after the name of the ship which is sued, its nationality is usually stated followed by the words "together with its engines, boats, gear, tackle, apparel furniture and papers and everything belonging to it whether on board or ashore", and a statement as to its location. Some draftsmen include in the title "The Owners and other parties interested in the first defendant ship" as the second defendants. The Plaint should be very clear as regards maritime claim/ lien. Affidavit in Support to the Plaint should be drawn up and filed along with the Plaint.

The Judge's order for the arrest of the ship will direct that the ship be arrested at any hour of the day or night, including Sundays and holidays, and that it may not be arrested if payment of the sum stated in the order, comprising the amount of the claim in the suit and the *ad valorem* court fee and the sheriff's poundage, is paid on behalf of the ship or satisfactory security for the claim is furnished. The affidavit in support should state as to why the Judges Order should be

allowed, this affidavit should also mention that notice to consul has been given, wherever applicable.

An undertaking from the Plaintiff securing cost and damages should be given to the court when an application for arrest of the Defendant vessel is made.

A Certificate from the Prothonotary should be obtained prior to making an application for arrest of the vessel stating that a search of the caveat against arrest register has been taken and that no caveat are filed or has been filed, depending on the search result and if a caveat exist, a notice to the caveator has to be given.

Unless a caveat against the issue of a warrant for arrest has been entered, an application for arrest of a ship proceeded against may be applied for at any time after instituting the suit and, in a situation where the departure of the ship from the port is imminent, may be entertained even before the registry has scrutinised and admitted the plaint to the court's file.

The judge in chambers before whom the application is made may, in any case, allow the warrant of arrest to issue, though the affidavit leading to the warrant or the plaint may not contain all the required particulars and, in a suit for wages, may also waive the service of the notice to the consul of the state to which the ship belongs.

The application for arrest is normally moved *ex parte*. However, some judges in their anxiety to prevent a wrongful arrest are inclined to direct that the application be moved after notice to the master of the ship and there have been rare instances of a master, on getting wind of the proceedings, clandestinely weighing anchor and slipping out. The giving of such a notice is, however, often useful in that it may produce a speedy settlement of the claim out of court, of the furnishing of security or payment of money into court, along with an undertaking by an advocate appointed for the defendant ship to accept service and will thus save the plaintiff the poundage payable to the Sheriff, as to which see *infra*.

Warrant of Arrest is served by the bailiff of the Sheriff/ Marshall and in a state where there is no Sheriff court allows direct service. The Sheriff shall serve the process of the Court and shall return the process to the Registry within four days from the service thereof.

In a suit in rem the Writ of Summons or the Warrant of arrest shall be served on the property against which the suit is brought; Where the property is ship or cargo on board, service shall be effected by affixing the original Writ of Summons or the Warrant of arrest for a short time on any mast of the ship or on the outside of any suitable part of the ship's superstructure, and leaving a duplicate thereof affixed in its place, when removing the original Writ of Summons or the Warrant of arrest; Where the property is cargo which has been landed or transshipped, service shall be effected by placing the original Writ of Summons or the warrant of arrest for a short time on the cargo and leaving a duplicate thereof upon the cargo, when removing the original Writ of Summons or the warrant of arrest;

Where the cargo is in the custody of a person who will not permit access to it, service shall be made upon the custodian; Where the property is freight, service shall be effected by serving on the cargo in respect of which the freight is payable or on the ship in which the cargo was carried, in the manner hereinabove prescribed in this rule for service on a cargo or on a ship.

The effect of arrest is that it constitutes the ship or other property as security in the hands of the court for the claim in the action and this security cannot be defeated by the subsequent insolvency of the owner of the arrested property. The arrest enables the Court to keep the property as security to answer the judgment, and unaffected by chance events which may happen between the arrest and the judgment.

Once the warrant for arrest has been executed, the property is arrested and is in the custody of the Sheriff/ Marshall on behalf of the court. Interference by any party with the arrest process such as removing the property to be arrested with knowledge that an arrest has been issued is a contempt of court, this includes any interference with the custody of the property after arrest such as moving the property within the jurisdiction without authority, or removing it from the jurisdiction, as was held in *The "Jarlinn"* [1965] 1 W.L.R. 1098 and also in *The "Abodi Mendi"* [1939] 178.

A warrant of arrest on a ship covers everything belonging to it as part of its equipment, even items which are physically detached from it, but not items which do not belong to the ship owner such as the personal property of the master and crew or the luggage of a passenger.

A ship may be arrested but the cargo on board her is not under arrest, or cargo is arrested but the ship in which it is laden is not. If a ship is to be arrested while she is in the course of discharging her cargo, the Sheriff/ Marshal will not stop the discharge operations unless the arrest is in respect of the cargo. When cargo is arrested the ship owners can request the Sheriff/ Marshal to take the appropriate steps to enable the ship to be discharged.

When arrest of a ship in a port causes considerable and continuing disruption to the operation of the port and the port authority had to turn away other ships so harming its reputation and causing its financial loss in such circumstances the court has inherent jurisdiction to allow a party to intervene if the effect of an arrest is to cause that party serious hardship or difficulty or danger. The court may pass directions to remove the ship to a safe berth in such other place as he shall think appropriate.

A person who, maliciously and without reasonable and probable cause procures the arrest of a ship by Admiralty proceedings is liable to pay damages to the person aggrieved. A separate suit has to be filed for *wrongful arrest* proving malicious cause. Wrongful arrest may result in a condemnation of the claimant for damages only where the court is satisfied that the arrest was motivated by *mala fides* (bad faith) or *crassa negligentia* (gross negligence). Merely

unjustified (i.e. erroneous) arrest would not normally entitle the defendant to claim damages, although he might then be able to recover costs.

The safeguarding of ownership/private property rights when ships are arrested *in rem* by the Admiralty Court are built into the rules of the High Court having admiralty jurisdiction for ship arrest. For example, a party wishing to prevent the arrest of property in an action *in rem* may, by filing a *praecipe* in the prescribed form, obtain the entry of a caveat against arrest in the caveat book kept in the Admiralty Registry/ Prothonotary & Senior Master of the High Court. Although the entry of the caveat does not prevent arrest of the *res*, the caveator, on a subsequent motion after arrest, may obtain the discharge of the arrest warrant and the condemnation of the arresting party in damages, if the latter is unable to show "good and sufficient reason" for having arrested.

Where a foreign ship registered in a port of a country having a consulate in jurisdiction of the High Court where arrest application is sought /is to be arrested in India in an action *in rem* for wages, prior notice of the arrest must be given to the consul concerned.

To institute an Admiralty action the plaintiff must file a *praecipe* for the search of the caveat registry to find out if any caveat against arrest of the vessel is filed and to obtain a Prothonotary Certificate to that effect and at the time of application for arrest of a vessel the Plaintiff should be lodged, the draft of the Judges Order, affidavit in support to Judges Order, undertaking as per rule of the High Court should be with the court file. A notice to consul may be required prior to making an application for arrest of a vessel as per rule of the High Court and an averment to that effect should be made in the affidavit.

CHAPTER 30

Effecting the arrest

The marshal/sheriff will not act until he has received the warrant of arrest issued from the registry and a deposit towards his fees and expenses and, as there is invariably some delay before the warrant of arrest is issued from the office of the registry and reaches the office of the marshal/sheriff, it is convenient to intimate to the marshal/sheriff, as soon as the judge's order for arrest is signed, information as to where the ship is to be found which will enable him to arrange for his substitute, who will effect the arrest, to be readily available to proceed to the ship as soon as the warrant of arrest is lodged in his office. The plaintiff or his advocate will have to provide a conveyance to the ship for the person entrusted with the service and, if the ship happens to be at an anchorage berth, a launch to enable him to go on board.

The marshal/sheriff, before he proceeds to effect the arrest will require an initial deposit of a sum (in Bombay it is Rs.500) towards such expenses as may be incurred by him in connection with the custody and care of the ship while under arrest; he will also require a personal undertaking from the plaintiff's advocate to make further deposits towards such expenses as and when required. Before giving such an undertaking, the plaintiff's advocate should ensure that he himself is placed in sufficient funds by his client who may not be resident within the jurisdiction. The plaintiff will have a first charge in respect of the said expenses on the sale proceeds of the ship. In the event of the prompt release of the ship, on giving of security for the claim in suit, there will be no expenses incurred by the marshal/sheriff on its custody and the whole of the deposit placed with him will fall to be refunded to the plaintiff or his advocate.

After arresting the ship the marshal/sheriff will issue intimations in writing to the customs and harbour authorities of the arrest, enjoining them against the grant of customs and port clearance to the ship until they have received further intimations from him that the arrest has been lifted. It is advisable for the plaintiff's advocate to ensure that such intimations reach the said authorities expeditiously.

CHAPTER 31

Release from Arrest

In cases where the arrested ship is released on security being furnished for the plaintiff's claim, the suit, unless compromised, will proceed to trial and judgment in the normal course.

Problems are, however, encountered in those cases where the ship is not released, usually because of the owner's bankruptcy and the master and crew have also abandoned the ship. The marshal/sheriff who has the custody and care of the ship is expected to take steps involving expenses for protecting the ship and its equipment; he has to provide a skeleton crew in accordance with the requirements of the port regulations in order to maintain an anchor watch and to tend to the lights to be exhibited between sunset and sunrise in compliance with the Collision Regulations; and to keep the ship up to full sea-going standards, entailing over and inspection of machinery and watchmen to prevent thefts of valuable equipment and fittings.

The marshal's/sheriff's office does not have either the personnel or the wherewithal to undertake these measures in order to prevent undue deterioration and reduction of the ship's value. The arresting party will be called upon to provide the marshal/sheriff with funds to meet the expenses involved and, in the event of failure to do so, the marshal/sheriff will report the matter to the court and apply for directions with respect to the ship. On the report coming up for consideration after notice to the arresting party and interveners, if any, the court may order the arrested ship to be released.

In such a situation, it is appropriate for any other party who was an intervener in the suit, especially a mortgagee with a high ranking priority, to volunteer to provide the marshal/sheriff with funds to engage a caretaker, usually a firm of marine surveyors, to undertake the said measures. The court may be moved to make the appropriate order appointing the caretaker and directing that the expenses incurred shall be a first charge on the proceeds of sale of the ship to be paid first out of the sale proceeds to the party advancing them, regardless of the priority ranking of its claim and irrespective of the result of its own suit. The advocate of the arresting plaintiff and/or intervener advancing the funds should ensure that this provision is specifically included in the order.

Following its arrest, the ship is usually released from arrest after security has been provided by the ship owner or any interested parties for the claim. The security may be in the form of a bail bond, a payment of money into court, a bank guarantee or a letter of undertaking (LOU) from the ship owner's protection and indemnity club (P.& I. Club). The security is seen as replacing the arrested *res*, thereby precluding re-arrest in most cases. The amount of security is set by the court in its discretion, but the general principle is a sum sufficient to cover the claimant's "reasonably arguable best case",

together with interest and costs, not exceeding the value of the arrested vessel. A final judgment in the claimant's favour may be enforced against the substituted security, just as it could have been against the arrested ship. Although the arrest of his ship may have grave effects on the ship owner's business, it is not usual for the courts to impose any requirement on the plaintiff/claimant to put up countersecurity to guarantee the defendant against losses which the latter may incur as a result of the arrest, although countersecurity is sometimes ordered, in the court's discretion, under order XXV Rule 1 of Code of Civil Procedure, 1908 for *Security for Cost*. Security for Cost may be required from the Plaintiff at any stage of a suit, the court may either of its own motion or on application of any defendant, order the plaintiff, for reasons to be recorded, to give within time fixed by it security for payment of all cost incurred or likely to be incurred by any defendant provided that such an order shall be made in all cases in which it appears to the court that a sole plaintiff is, or (when there are more plaintiffs' than one) that all the plaintiffs are, residing out of India and that such plaintiff does not possess or that no one of such plaintiffs' possess any sufficient immovable property within India other than property in suit.

Any person desiring to prevent the release of any property under arrest shall file in the registry a praecipe, signed by himself or his advocate, who may be acting for him, requesting that a caveat be entered against the release of the said property. A caveat against the release of the said property shall thereupon be entered in a book to be kept in the registry, called the "Caveat Release Book."

CHAPTER 32

Security for release of a Ship

In the case of arrest of a trading ship which is ready to sail from the port, it is not only usual but considered to be the prudent thing to do for security to be furnished to the extent fixed by the court, together with the sheriff's poundage, and to sail away the ship and thereby avoid detention loss, unless there is a caveat against release outstanding in the Caveat Release Book in which case notice will have to be issued to the caveator. It is not necessary that the filing of the appearance or the giving of security shall be under protest as to the Court's jurisdiction to receive and try the suit and the entry of an appearance and giving of security will not amount to submission to the court's jurisdiction.

The objection to the jurisdiction of the court to entertain the suit can be raised on behalf of the defendant by way of a notice of motion, supported by an affidavit, praying for an order that the warrant of arrest issued by the court be superseded and set aside and the amount of the bail or guarantee furnished on behalf of the defendant be released, and there is no necessity to deliver a written statement traversing the jurisdiction unless the validity of the objection to jurisdiction depended upon the proof of controversial facts. In cases where the arrested ship is likely to remain at the port for a few days, the notice of motion for superseding the warrant of arrest may be heard as a matter of urgency.

In cases where the amount of the security directed to be furnished is excessive, an application on notice of motion may be made for its reduction either before or after the security is furnished.

Security for the claim in the suit is furnished by means of a cash deposit in the registry or a bank guarantee for the amount stated in the warrant of arrest. The bank guarantee is required to be from a nationalized bank or a foreign bank carrying on business in India and having an office at Calcutta, Madras or Bombay where the warrant of arrest is issued. The bank giving the guarantee will itself require an acceptable counter-guarantee from a bank abroad before it will furnish its guarantee to the court.

The courts are not acquainted with P.& I. clubs and a P.& I. club guarantee is not accepted. However, a plaintiff is free to accept a letter of indemnity issued by a P.& I. club. The master of an arrested ship can represent the ship in taking steps to have it released. The bank guarantee, unless discharged, will have to continue to remain in force till the suit is finally disposed of and for a period of one year thereafter. It is possible to substitute a bank guarantee for the cash deposit. In the case of a cash deposit it is usual for the court, at the instance of the parties, to invest the amount on an interest-bearing term deposit, pending the disposal of the suit.

Property arrested under admiralty jurisdiction by a warrant may be ordered to be released

- (i) at the request of the plaintiff, before an appearance in person or a vakalatnama is filed by the defendant; or
- (ii) on the defendant paying into Court the amount claimed in the suit; or
- (iii) on the defendant giving such security for the amount claimed in the suit as the Court may direct; or
- (iv) on any other ground that the Court may deem just.

In *The “Christiansborg”* (1885) 10 P.D. 141 (C.A), a ship had been arrested in Holland and released by the court against an insurance company guarantee. Subsequently the ship was arrested in England in respect of the same cause of action. It was held that the arrest in England was oppressive and against good faith and the ship would therefore be released.

CHAPTER 33

Enforced Sale of the Ship

Under the Admiralty Rules of the three High courts, the sale of ship whether *pendente lite* or after adjudication on the plaintiff's suit, has to be carried out by the marshal/sheriff, just like a sale of movable property in an ordinary civil suit. There is no provision for a reserve price and there is no provision for appraisement as in English Admiralty practice. Nevertheless, the courts, in order to prevent the ship being sold at a price a great deal less than its real value, from recent times have invariably ordered that the ship be appraised at its real value by a ship's valuer and sold at not less than the appraised value thereof unless the court, on the marshal's/sheriff's application, orders it to be sold for a lesser price when the bidding does not reach up to the appraised value.

The sale is normally by public auction after publication of the notice of sale in such newspapers as the court may direct. There have been no known instances of sales by private treaty, though there is nothing in the Rules preventing such a sale.

In any action a court has power to order the sale of property which is perishable, likely to deteriorate or in relation to which there is good reason for sale. Such a sale of itself would be subject to encumbrances existing prior to the sale. The sale of a ship includes all property on board other than that owned by someone other than the ship owner.

A sale is confined to property that must be under arrest. A court may order the discharge and sale of cargo not under arrest where a ship in which the cargo is loaded is under arrest and an order for sale is made in respect of it. The Admiralty Court may order the appraisement and sale of property under arrest on the application of a party to the action or by an application of the Marshal or the Sheriff. A sale pending suit is normally ordered on the grounds that retention of the property will cause the plaintiff's security to diminish if for no other reason than the mounting costs of arrest. Application must be served on any person who has obtained judgment against the ship and all caveators.

The Sheriff/ Marshal may sell the property in foreign currency. The proceeds will be paid into court and will be invested only on application. The effect of sale of property under arrest in an action in *rem* is to give a title free of encumbrances to the purchaser.

CHAPTER 34

Conditions of sale

Under the terms and conditions of the sale, the successful bidder is required to pay a percentage, usually 15 per cent, of the purchase price forthwith and the balance of the price within a period fixed in the conditions of sale, usually 15 days from the date of the sale. The payment is to be made by means of bankers' draft or a certified cheque. Under the Rules, the sale is subject to sanction of the court. The sale is free and clear of all maritime or other liens and encumbrances.

CHAPTER 35

Judgment

Poundage is payable at 1 per cent of the amount received by the plaintiff in full or part satisfaction of a judgment or, in the event of the claim being satisfied, compromised or settled outside court, upon the amount of such satisfaction, compromise or settlement. The Plaintiff or his advocate on record of the suit who receives direct any installment or other sum ordered to be paid by the judgment debtor in full or part satisfaction of a judgment or order is obliged to file a *praecipe* in the marshal/sheriff's office informing him of the payment made. The advocate on record shall be responsible for filing such *praecipe* if the payment has been made through his office or he is informed of it by his client.

CHAPTER 36

Priority

As already mentioned, the Indian Courts will decide questions of priority on the same principles as the Admiralty Courts in England and the reader is referred to Chapter 39 and paras 1574 et seq. of *Admiralty Practice* by McGuffie, Fugeman and Gray (Vol. I, British Shipping Laws).

CHAPTER 37

Execution of Foreign Decrees

A Person who has obtained a decree from a court in a foreign country can approach an Indian court for enforcement of the said decree under the Civil Procedure Code, the Supreme Court has ruled in November 2000 in *m.v. A.L. Quamar -vs- Tsavliris Salvage (International) Ltd.*

"Section 44A of the code enables a foreign decree holder to execute a foreign decree in this country," a division bench comprising Justices S B Majmudar and Umesh C Banerjee said dismissing an appeal of Merchant Vessel A L Quamar against an Andhra Pradesh High Court order.

The High Court had held that it was competent to issue attachment orders against the merchant vessel on the basis of a decree against it issued by the High Court of Justice Queen's Bench Division Admiralty Court in an action by Tsavliris Salvage (International) Ltd.

Relying on decision by a New Zealand Supreme Court and an Australian judgement, Justice Banerjee, writing the judgement for the bench, said a foreign decree holder could invoke the jurisdiction of an Indian court under Section 44A of the code.

Justice Banerjee said "One can conclude that whereas the domestic law, execution scheme is available under Sections 37, 38, 39, 41 and 42, Section 44A depicts an altogether different scheme for enforcement of foreign judgements through Indian Courts."

The court said that when a decree is obtained from an Indian court to enforce in the country two years after it was obtained, "there exists a mandatory obligation to serve a notice to show cause against the execution."

However, the court said in case of Section 44A, which enabled a foreign decree holder to approach an Indian court for execution, requirement of show cause notice was not mentioned even if the decree was over two-years old.

"In fine, the legal fiction created by Section 44A makes the Andhra Pradesh High Court, the court which passed the decree and as such competency of the High Court to entertain the execution proceeding cannot be doubted in any way," Justice Banerjee said.

The court said the dismissal of the appeal would not preclude m.v. A L Quamar to obtain release of the attached ship on furnishing a bank guarantee of a nationalised bank for suitable amount to the satisfaction of the Registrar of the Andhra Pradesh High Court, pending the execution proceedings.

"Once such Bank guarantee is furnished by the appellant and requisite undertakings as earlier ordered by the High Court are filed, the ship will be released from attachment and will be permitted to sail out of the Port of Vishakhapatnam," the court ordered.

The prime law of India is that where there is an express agreement to, submit to the jurisdiction of a foreign court, a judgment pronounced by such court binds the parties, and effect will be given to such a judgment in Indian courts. The governing legislation for judgments pronounced by foreign courts is the Code of Civil Procedure 1908.

Section 2(6) of the Code defines a "foreign judgment" to mean any judgment of a foreign court. Section 2(5) of the Code defines a 'foreign court' to mean a Court outside India and not established or continued by the authority of the Central Government (of India)

In other words, a foreign judgment means an adjudication by a foreign court on a matter before it. A judgment given by a foreign court does not cease to be so when, as a consequence of political change, the territory where the court was situated at the time of the judgment becomes part of India

Such a judgment, for the purposes of enforcement and execution, will be conclusive, that is, it will be recognised and will operate as *res judicata* (also fulfilling the conditions of it) save in certain exceptional cases. These are mentioned in section 13 of the Code, which reads as follows

A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon, between the same parties or between parties under whom they or any of them claim litigating under the same title, except -

- where it has not been pronounced by a Court of competent jurisdiction;
- where it has not been given on the merits of the case;
- where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognise the law of India in cases in which such law is applicable;
- where the proceedings in which the judgment was contained are opposed to natural justice;
- where it has been obtained by fraud; and
- where it sustains a claim founded on a breach of any law in force in India [an example of this would be a foreign judgment for a gambling debt]

The foreign court must be competent to try the suit, not only as regards pecuniary limits of its jurisdiction and the subject-matter of the suit, but also with reference to its territorial jurisdiction, and the

competency of the foreign court is to be judged not by the territorial law of the foreign state, but by the rules of private international law

Undoubtedly, the foreign court has jurisdiction to deliver a judgment in rem, which may be enforced or recognised in an Indian court, provided that the subject matter is within its jurisdiction. It cannot, however, sit in judgment on, say, immovable property situated outside the country of its jurisdiction

In other words, as laid down by the Supreme Court of India in one of its judgments, the courts of a country generally impose a three-fold restriction on the exercise of their jurisdiction

- jurisdiction in rem (binding not only the parties but the world at large) by a court over res outside the jurisdiction will not be exercised, because it will not be recognised by other courts;
- the court will not deal directly or indirectly with title to immovable property outside the jurisdiction of the state from which it derives its authority, and
- the court will not assist in the enforcement within its jurisdiction of foreign penal or revenue laws

The operation of section 13 would be better appreciated by the following illustration: A sues B in a foreign court. If the suit is dismissed, the decision will operate as a bar to a fresh suit by A in India on the original cause of action, unless the decision is inoperative by reason of one or more of the circumstances specified. If a decree is passed in favour of A in the foreign court and A sues B on the judgment in India, B will be precluded from putting in issue the same matters that were directly and substantially in issue in the suit in the foreign court, unless the decision is once again inoperative for the said exceptions

Though a foreign judgment may be enforced by a suit in India, it must not be assumed that Indian courts are bound in all cases to take cognisance of the suit and they may refuse to entertain it on grounds of expediency

It is also relevant to consider section 14 of the Code. It states -

The Court shall presume, upon production of any document purporting to be a certified copy of foreign judgment, that such judgment was pronounced by a Court of competent jurisdiction, unless the contrary appears on the record; but such presumption may be displaced by proving want of jurisdiction

Execution of Foreign Judgments

A judgment of an Indian court can only be enforced by proceedings in execution, against that, a foreign judgment may be enforced by proceedings in execution in certain cases only. These are mentioned

in sections 44 and 44A of the Code. In all other cases, a foreign judgment can only be enforced by a suit on the judgment. If such a suit is dismissed, no subsequent application to execute that judgment will lie - for it has become merged in the decree dismissing the suit

This stand is brought out through the Code distinguishing between foreign judgments of countries which are 'reciprocating territories' and those which are not. Section 44A of the Code reads as follows –

1. Where a certified copy of a decree of any of the superior court of any reciprocating territory has been filed in a District Court [of India], the decree may be executed in India as if it had been passed by the District Court
2. Together with the certified copy of the decree shall be filed a certificate from such superior court stating the extent, if any, to which the decree has been satisfied or adjusted and such certificate shall, for the purposes of proceedings under this section, be conclusive proof of the extent of such satisfaction or adjustment

Reciprocating Territory means any country or territory outside India and so notified

Decree for this purpose means a decree or judgment under which a sum of money is payable, not being a sum payable in respect of taxes or other charges of like nature or in respect of a fine or other penalty, but shall in no case include an arbitration award, even if such an award is enforceable as a decree or judgment

From time to time, the Government has issued notifications recognising the following as reciprocating countries: Hong Kong, Singapore, New Zealand, Cook Islands, Trinidad & Tobago, United Kingdom, Northern Ireland, Trust Territory of Western Samoa, Papua New Guinea and Bangladesh.

When a suit emanates from any of these countries, the concerned Indian court will proceed forthwith to enforce the foreign judgment, provided it is not affected by any of the exceptions enumerated in section 13. If it emanates from any other country, the enforcement would have to be sought by filing a suit in India on the foreign judgment. Again, the Indian court would pass a judgment in terms of the foreign judgment, provided it is not affected by the said exceptions

The decree -

- would have to have all the attributes of finality, - would be for payment of a sum of money,
- (passed in a foreign currency) could provisionally be claimed in Indian rupees converted at the rate prevailing on the institution of the proceedings, with a right to claim the amount

due at the rate prevailing on the date of the courts eventual judgment;

- would not proceed for enforcement, and, if proceeded with, such proceedings may be stayed if, in an appeal against it, the judgment-granting country stays its execution;
- would be enforced even though against a state or a state-owned entity, so far as it relates to commercial activities;
- could provide for interest on the money claim, in addition to the original amount. If it is silent, interest could be claimed on the decretal amount from the date of filing the suit in India. Costs could also be awarded in consonance with provisions of the Code

A suit on a foreign judgment must be brought within three years from the date of judgment (Article 101 of the Limitation Act 1963). The pendency of an appeal in the foreign country will not bar a suit on a foreign judgment

Enforcement of Foreign Arbitral Awards

There has been a phenomenal growth in international arbitration involving Indian parties - both the governing law and the venue of arbitration are foreign. An award in such a case would be meaningless, unless it can be enforced without hurdles and with the least inquiry and review by the courts where enforcement is sought

An arbitration award can only be enforced when an order is made by the courts of the country where enforcement is sought. This principle is also reflected in the Indian system. In India, foreign arbitration awards, in terms of enforcement, were governed by the Foreign Awards (Recognition and Enforcement) Act 1961 ("the Act") which gave effect to the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards 1958. India had made two reservations while ratifying the Convention, namely -

- that it would apply the Convention to the recognition and enforcement of an award only if it was made in the territory of another reciprocating contracting state; and
- that it would apply the Convention only to differences arising out of legal relationships which were considered as commercial under Indian law

There is also the Geneva Convention, adopted by India through the Arbitration (Protocol and Convention) Act 1937

Article I(i) of the New York Convention specifically states as follows

This convention shall apply to the recognition and enforcement of arbitral awards made in the territory of the

state other than the state where the recognition and enforcement of such awards is sought, and arising out of differences between persons, whether physical or legal

Section 7 of the Act, which corresponds with the provisions of the New York Convention, specifies that a foreign award may not be enforced if the party against whom the award is sought to be enforced proves to the court enforcing the award any of the following

(1) that the parties to the arbitration agreement were, under the law applicable to them, under some incapacity, or the arbitration agreement was not valid under the law to which the parties have subjected it (or, in the absence of any condition thereon) under the laws of the place of arbitration;

(2) that there was no due compliance with the rules of fair hearing;

(3) the award exceeded the scope of submission to arbitration;

(4) the composition of the arbitral authority or its procedure was not in accordance with the arbitration agreement of the parties or (failing such agreement) was not in accordance with the law of the place of arbitration;

(5) the award has not yet become binding on the parties, or has been set aside, or suspended by a competent authority of the country in which the award was made;

(6) if the court dealing with the award is satisfied that (a) the subject-matter of the difference is not capable of settlement by arbitration under the law in India; or (b) the enforcement of the award will be contrary to public policy

An arbitration award made outside India is distinct from a foreign judgment (see definition of decree above). Identical with foreign judgments, the Act deals with the question of enforcement of awards of a foreign reciprocating territory as defined in it

So far, the Government has notified the following countries for that purpose: United Kingdom, the Netherlands, United States of America, Sweden, Syria, Philippines, Thailand, Austria, Germany, Switzerland, Czechoslovakia, Russia, Finland, Greece, Ecuador, Bulgaria, Romania, Norway, Poland, Hungary, France, Germany, Japan, Tanzania, Nigeria, Tunisia, Ghana and Morocco

Any person interested in enforcing a foreign award may apply in writing to any court having jurisdiction over the subject matter of the award. The application will be numbered and registered in the court as a suit between the applicant as the plaintiff and the other as defendants. The court will direct notice to be given to the parties requiring them to show cause why the award should not be filed. The court, on being satisfied that the foreign award is enforceable under

the Act, will pronounce judgment on it. A decree will follow. No appeal will lie from such a decree except insofar as the decree is in excess of or not in accordance with the award. Several High Courts of the land, including Bombay, have made detailed rules regarding the procedure and the forms to be used for applications for enforcement of foreign awards

The new Arbitration and Conciliation Ordinance 1996 (which follows the UNCITRAL Model Law), while repealing both the 1937 and 1961 Acts, retains the existing law. India continues to be a party to the Conventions. It deletes, however, the old irritant, which provided that the 1961 Act will not apply to an award arising from an arbitration agreement governed by the law of India. This will rectify the alarm generated by the Supreme Court of India decision in *National Thermal Power Corp. v Singer Co.* in which it was held that an award made outside India will still be an award on an arbitration agreement governed by the law of India, if the substantive law of the contract is Indian law.

The emerging legal issues on "jurisdiction" as regards transactions over the internet can hardly ignore the legal aspects involved in the execution/enforcement of foreign decrees. Even after exercise of jurisdiction, the Courts may be unable to help the plaintiff in getting relief in case the local laws of the country concerned have certain restrictions for the execution/enforcement of foreign judgements or decrees in the country.

Under Indian Law, execution of decrees, whether foreign or domestic, is governed by the provisions of the Code of Civil Procedure, 1908 (CPC) (as amended from time to time).

Under the Indian law there are two ways of getting a foreign judgement enforced. Firstly by filing an Execution Petition under Section 44A of the CPC (in case the conditions specified therein are fulfilled). Secondly by filing a suit upon the foreign judgement/decreed.

Under S. 44A of the CPC, a decree of any of the Superior Courts of any reciprocating territory are executable as a decree passed by the domestic Court. Therefore in case the decree does not pertain to a reciprocating territory or a superior Court of a reciprocating territory, as notified by the Central Government in the Official Gazette, the decree is not directly executable in India. In case the decree pertains to a country which is not a reciprocating territory then a fresh suit will have to be filed in India on the basis of such a decree or judgement, which may be construed as a cause of action for the said suit. In the fresh suit, the said decree will be treated as another piece of evidence against the defendant.

However in both the cases the decree has to pass the test of S. 13 CPC which specifies certain exceptions under which the foreign judgement becomes inconclusive and is therefore not executable or enforceable in India.

In this chapter, various decisions of the Supreme Court of India, various High Courts and other Courts are discussed in order to bring the law on the point, in perspective. In order to show a comprehensive view of the law, along with the *ratio decidendi* a short averment of the facts of the case are also given so that the decisions can be rightly appreciated. Each of the aforesaid exceptions, under S. 13 have been dealt with separately and at the end of each discussion, a broad proposition culled out from the decisions of the Courts is laid down so that it is easier to remember the law on the point. However, the proposition may not be exhaustive to cover all circumstances.

It will be seen from the above that even if a judgment or a decree is passed by a foreign Court against an Indian defendant, the judgment or decree may not be enforceable against him due to the operation of S. 13 of CPC. It can be seen that, the plaintiff has to come to the Indian courts to either get the foreign judgment executed under S. 44A or file a fresh suit upon the judgment for its enforcement. Therefore by getting a decree in the foreign Court, the plaintiff only avoids the inconvenience of leading evidence in the Indian Courts but runs a much bigger risk under S. 13. Therefore it may be advisable for a foreign plaintiff to institute claims in India itself in case the defendant is in India. Since international transactions would involve more of documentary evidence and that comparatively leading of evidence may not be that inconvenient, it may be advisable to avoid the risk under S. 13 and file claims in India itself.

The Supreme Court held in *Thyssen Stahlunion GMBH vs. Steel Authority of India Ltd.* that,

“A foreign award given after the commencement of the new Act (i.e. Act of 1996) can be enforced only under the new Act. There is no vested right to have the foreign award enforced under the Foreign Awards Act [i.e. Foreign Awards (Recognition and Enforcement) Act, 1961]”.

In *Fuerst Day Lawson Ltd. vs. Jindal Exports Ltd.* the Supreme Court decided whether a “foreign award” given after the commencement of the Act of 1996, but where the arbitration proceedings started before the commencement of the Act of 1996, will be governed by the Act of 1996.

The learned Judges held that a foreign award passed on 13/8/1996 could be enforced with the same vigour under the Ordinance as it could be under the Act of 1996. The learned Judges held that although the Act of 1996 was brought into force w.e.f.22/8/1996 vide Notification No.GSR 375(E) dt.22/8/1996 published in the Gazette of India, for all practical and legal purposes it shall be deemed to have been effective from 25/1/1996, i.e. the date when the first Ordinance came into force, since the provisions of the said Act and Ordinance are similar and there is nothing in the Act to the contrary so as to make the Ordinance ineffective as to either its coming into force on 25-1-1996 or its continuation upto 22-8-1996. The learned Judges held that the object of the Act of 1996 is to minimise supervisory role

of the court and to give speedy justice. Under the Arbitration Act, 1940 the arbitral award had to be filed in a court to obtain a decree, which is dispensed with under the Act of 1996. In one proceeding there may be different stages. In the first stage, the court may have to decide about the enforceability of the award. Once the court decides that the foreign award is enforceable, there arises no question of making the foreign a rule of court/decreed. If the object and purpose can be served in the same proceedings, there is no need to take two separate proceedings resulting in multiplicity of litigation.

CHAPTER 38

Carriers' Identity

Identification of the carrier may be problematic where goods are carried on a chartered vessel and the bill of lading is in the hands of a shipper or receiver who is not himself party to the charterparty. In this situation, a contract of carriage will exist between the shipowner and the charterer in the form of a charterparty, and between the cargo interest and the 'carrier' in the form of a bill of lading. In the former, one may clearly identify the parties to the contract as being the shipowner and the charterer. In the latter, however, the position may not be as clear because the 'carrier' could be either the shipowner or the charterer, or perhaps even a sub-charterer, as commercial reality often results in the vessel being sub-chartered. Therefore, a vital issue for a cargo claimant often relates to identifying the 'carrier' and thus establishing whom to look to as regards performance of the contract and whom to sue if the cargo is lost or damaged.

The normal rule in English law is that only one party can be liable as a 'carrier' under any individual carriage contract. In contrast, the recent trend in some American courts is to impose 'carrier' status under the Carriage of Goods by Sea Act 1936 (COGSA 1936) on more than one party. Nevertheless, liability for loss or damage under COGSA 1936, as well as for breach of contract, can only be assessed against those defined as a 'carrier' under that Act.

It is therefore important for a claimant in either jurisdiction to decide whether an action should be taken against the charterer or the shipowner (or both under American law) as time and expense may be wasted if the wrong party is pursued or, where applicable, the advantage of suing more than one is ignored. The severity of the problem, in both jurisdictions, will become more acute if the contract is governed by the Hague or Hague Visby Rules because the passage of time may result in the claimant being time barred due to the one year limitation period provided by Art.III r.6 of the Rules.

Ironically, it may be in the interest of the shipowner or the charterer to be deemed a 'carrier' as it might affect matters such as their right to exercise a lien over the cargo or their ability to maintain a claim as a bailee. Moreover, in the absence of 'carrier' status, such a party will lack any contractual privity between itself and the cargo claimant. Faced with an action in tort or bailment, a subcontractor will be unable to rely on the exemption and limitation clauses in its contract of carriage with the head contractor, or those afforded by the mandatory application of the Hague and Hague Visby Rules. It is therefore important for both the shipowner and the charterer to correctly determine their legal status at an early stage and, if necessary, anticipate an action framed in tort or bailment by

including certain terms in their contract of carriage with the head contractor.

Of course, the rights of all the parties may also be affected by the identity of the 'carrier' where the charterer (or indeed the owner himself) becomes insolvent before the goods reach their destination.

However, due to the ambiguous definition of a 'carrier' in the Hague and Hague Visby Rules, the complicated and often misleading documents used by the parties, and the conflicting case law that has derived therefrom, one may only describe English and American law regarding the identity of the 'carrier' as being incomprehensible and, to a certain extent, unpredictable.

In *Samuel v. West Hartlepool*. It was stated obiter that while the authorities in this area appear conflicting, the apparent conflict is a result of the carriers identity being essentially "a question of fact depending upon the documents and circumstances in each case". (Emphasis added)

Justice Walton then clearly defined the parameters of the problem by illustrating an example at each end of the legal spectrum and where the carrier's identity is virtually free of doubt. At one end lies a demise charter and at the other - a charterparty where it is agreed that the charterer shall do no more than undertake that a full cargo shall be shipped, guarantee payment of a certain freight and, upon fulfilment of these obligations, the charterer's liability is to cease. In the former, it is reasonably clear that the contract of carriage is between the charterer and the shipper; whereas in the latter, the shipper would ordinarily have a contract of carriage with the shipowner. However, between the two extremes lie a great variety of 'intermediate cases', of which this particular case was said to be an example.

By applying Walton J's analysis, the case law relevant to this area can be divided into two categories. In the first category are cases where the identity of the carrier is unclear (the intermediate cases) and in the second, are cases that provide examples of the situations in which the carrier can be clearly identified.

In *The Rewia*, Justice Legatt doubted whether the analysis made by Walton J was relevant today and stated that the case law in this area, rather than being conflicting, illustrates a clear pattern. The court concluded that the identity of the contractual carrier depended upon the 'construction' of the bill of lading only and rejected an argument that further investigation into the circumstances of its issue might yield different results.

It is submitted, however, that the case law (in the intermediate category) does not illustrate a clear pattern and will continue to appear conflicting. Thus, while the issue as to the carriers identity is primarily one of construction, a case may warrant (in certain circumstances) a departure from the 'ordinary' principles applied by

the court when construing bills of lading. As a result, one should not infer from *The Rewia* that the carrier's identity will never be affected by the circumstances of a case, which in turn suggests that some conflict is inevitable because a decision reached by the court may ultimately depend upon the case's own individual facts and not the 'ordinary' principles of construction. One must therefore doubt any commercial certainty that may be derived from the application of *The Rewia* in this area.

Furthermore, it is argued that the ambiguous definition of a 'carrier' in the Hague Visby Rules and the confused state of the case law in this area has been, and will continue to be, manipulated by the court in certain circumstances so that a fair result can be achieved. In this respect, an analysis of the case law suggests that in the event of there being more than one possible carrier, and where suing one of them is unrealistic, the English courts are likely to find that the party sued by the claimant is the 'carrier' as long as one can point to a recognisable link connecting the claimant to that defendant.

It is therefore important to establish the connecting factors which have been recognised by the courts as legitimate in identifying the actual defendant as the carrier. Thus, in the case of voyage or time charterparties, one should start with the presumption that the claimant contracts with the shipowner as he is the employer of the master and crew that actually performed the voyage (*Sandeman v. Scurr*). However, such a presumption can be rebutted by the following considerations:-

1 Even where the master signs the bill of lading, the charterer may still be identified as the 'carrier'.

A master is generally deemed to have the implied authority to enter into contracts of carriage on behalf of the shipowner. Thus, without evidence to the contrary, a master who signs the bill of lading does so as agent for, and on behalf of, his employer.

However the courts, while normally attaching considerable weight to the 'construction' of the document, have in appropriate cases taken into consideration the conduct and the role of the charterer in determining whether he can be identified as the 'carrier'. *Thesiger L.J.* stated that "It is open to the [cargo claimant] to negative the presumption of the liability of the [shipowner].....by showing that [the charterers] had so conducted themselves or so contracted with the shippers of the goods as to make themselves personally liable".

This is further illustrated by *Elder Dempster v. Paterson Zochonis* in which the defendant, a well known shipping line, time chartered a vessel in order to supplement its fleet. The shipper had no idea that the vessel was chartered and naturally believed that he was shipping with the charterer. It was held that as the charterer's bill of lading had been used and the master's signature had not been qualified, the contract of carriage, unless clearly indicating otherwise, should be regarded as being with the defendant charterer.

Nevertheless, in the majority of cases where the master has signed bills of lading in his own name, such a signature is likely to result in a contract of carriage existing between the cargo interest and the shipowner. Moreover, Paterson Zochonis must be treated with some care, particularly in light of Justice Legatt's judgement in *The Rewia*.

2 Where the charterer's form of bill of lading is used.

Samuel v. West Hartlepool illustrates that the court will examine the relevant documents applicable to each case. Therefore, if the bill of lading is on a form commonly used by and associated with the charterer, such evidence will be a factor in the determination of the 'carrier' under that bill of lading.

However, it is clear that the above evidence is not always conclusive and just because the name of the charterer or shipowner is at the top of the document, it does not necessarily mean that the court will find them to be the carrier. In fact banner headings are given little weight in decisions where other factors, such as mode of signature, indicate something different.

3 Where the charterer or his agent signs the bill of lading.

Unlike the master, the charterer will have no authority to sign a bill of lading on behalf of the owner unless he has actual or ostensible authority to do so. As a result, when a charterer or his agent signs the bill of lading it may be unclear as to whether he is signing for himself or the owner and much may depend upon the form of his signature.

In *The Okehampton* the Court of Appeal questioned whether the charterer, in signing the bill of lading, was acting as the agent of the shipowner or on his own behalf acting as principal under the contract of carriage. The court acknowledged that a bill of lading signed by the charterer may be on behalf of the shipowner despite the fact that it was signed in the charterer's name. However, by examining the documents and the circumstances of the case, it was held that the charterer was in fact signing on his own behalf. In reaching that decision the court made reference to the fact that the goods were in the hands of the charterer until the vessel arrived and were subsequently placed on board by the charterer's stevedores. Furthermore, the fact that the charterers were well known carrying contractors and were just supplementing their fleet on this occasion also influenced the conclusion that the charterer, and not the unknown owners of the foreign vessel, was the carrier.

Nevertheless, the mere signature of the charterer without any qualifications as to whether it was signed in a representative capacity will not always render the charterer as the 'carrier'. In *The Nea Tyhi* for example, a cargo claimant sued the shipowner for damage that resulted from the cargo being carried on deck when, under the bill of lading, it should have been carried under deck. The shipowner denied liability by arguing that the charterer's agent had no authority to sign bills of lading clausured "shipped under deck" when in fact the goods were not so carried.

In identifying the shipowner as the 'carrier', the court concluded that although the charterer and their agents had no actual authority to make such statements on behalf of the shipowners, they had ostensible authority to do so because the shipowner had represented or permitted it to be represented that they had.

However, it is submitted that while the decisions in *The Okehampton* and *The Nea Tyhi* appear conflicting, the apparent inconsistency is merely a result of a common underlying theme, ie - a desire to provide an innocent claimant with some form of compensation. Thus, one may argue that the main determinant in *The Nea Tyhi* was the fact that the charterer had gone into liquidation. In deciding who should bear the loss resulting from the charterers insolvency, Sheen J stated that it should be the shipowner and not the innocent third party as the former had contracted with the charterer and put trust and confidence in him to the extent of authorising the charterer's agents to issue and sign bills of lading. In *The Okehampton*, the charterer was in fact the claimant in the action, and the defendant was the owner of the vessel which had collided with that chartered by the charterer. As a result, had the charterer not been identified as the 'carrier', it would have lacked sufficient possessory interest in the ship and the goods to mount a claim as bailee for the bill of lading freight lost due to the collision. By contrasting the decisions and the facts of these two cases, it would appear therefore that the court has, in a given set of circumstances, indicated a clear bias towards the innocent claimant.

4 Where the charterer or his agent signs the bill of lading "for the master".

If the charterer qualifies his signature by signing the bill of lading "for the master" (or words similar to that effect) the court would ordinarily find the shipowner to be the carrier. In *Tillmans v. Knuttsford* it was held that by including the words "for captain and owners" the charterers had effectively issued a bill of lading as if it had been signed by the master himself and, in so doing, had rendered the shipowner liable as the 'carrier'.

However, according to *The Venezuela*, the charterer's signature may bind him as the carrier despite the qualification "for the master". The court held that just because the sub-charterparty contemplated that the charterers agents may issue and sign bills of lading for the master, it would not prevent the defendant charterer from making a contract of carriage on its own behalf. From the facts it was clear that the bill had been signed by the defendants agents and that the definition of 'carrier' within the bill 'suggested' that the contract of carriage was with the defendant. Furthermore, Sheen J stated that there was no indication that the vessel had been chartered and if the defendant did not wish to contract as the carrier, he should have made it clear in the bill of lading. The court concluded that until the shipper or holder of the bill of lading knew that the vessel had been chartered there was nothing indicating that the defendant was not the contracting carrier despite the fact that the signatory was expressed to be "as agents for the master".

In particular, Sheen J emphasized that the cargo claimant would otherwise face many difficulties in pursuing a Venezuelan action against a Panamanian one ship company, especially if the ship did not enter the jurisdiction of the Venezuelan court. It is therefore apparent that the court took into consideration the fact that suing the shipowner would be an unrealistic option for the cargo claimant.

While the decision in *Tillmans v. Knuttsford* would appear to offer a more practical and logical explanation as to the effect of the charterer signing the bill "for the master", it would seem to conflict with that in *The Venezuela*. One can only reconcile the conflict by distinguishing the cases on their facts and concluding, perhaps, that the facts of *The Venezuela* provide an exception to an otherwise sensible rule.

The Court of Appeal decision in *The Rewia* 1991 suggests that the correct principle to apply is that illustrated in *Tillmans*. The cargo claimant in the former sought to obtain English jurisdiction to hear his claim by applying the EU Convention on Jurisdiction and Judgements 1968. If he was successful in identifying the charterer as the 'carrier' the English court would have jurisdiction by virtue of an article 17 agreement and the claimant would be able to join the shipowner in the English action by applying article 6. The bills of lading were signed "for the master" by the charterer's agents.

The claimant argued that as the bills were issued by and were in the name of a container line operated by the defendant, there was nothing in those documents to qualify the assumption that it made, ie - that the charterer's were the proper defendants. By applying *The Venezuela* it would seem that, despite the charterer signing for the master, the claimants argument might succeed if the documents and circumstances of the case warranted such a conclusion. In fact Sheen J at first instance held, for those reasons, that the contract of carriage was with the charterers and not the shipowners.

However the Court of Appeal did not take that view. Rejecting the claimants request for further investigation into the circumstances in which the bills were issued; the court doubted the proposition in *Scrutton*, except in so far as it was illustrated by *Harrison v. Huddersfield Steamship Co*, that a masters signature "may in some cases bind the charterer and not the owner". In the latter however, it was specifically agreed that the master was to be the agent of the charterer and would not have any authority to sign on behalf of the shipowner. Furthermore, the words "as Master" had been struck out and were substituted with "as agent for time charterers". Thus, the master in *Harrison v. Huddersfield* was clearly not signing for the shipowner and had no authority to do so.

In doubting whether Walton J's analysis of the problem could be applied today; Legatt LJ stated that the cases since *Samuel v. West Hartlepool*, instead of being conflicting, illustrate a clear pattern. He concluded:

"A bill signed for the master cannot be a charterer's bill unless the contract was made with the charterer's alone, and the person signing has authority to sign, and does sign, on behalf of the charterer and not the shipowner". (Emphasis added)

One may therefore imply from Legatt J's judgement that the court's ability to exercise a discretion with regard to the documents and circumstances of each case, and thus consider the merits of the action, has been removed. However, it is submitted that while the actual decision in *The Rewia* is correct on its facts, the reasoning provided to substantiate it cannot be described as an accurate analysis of the case law in this area. As a result, Justice Legatt's conclusion should be treated with care as it fails to take into consideration the influence which the circumstances of a case might have on the principles applied by the court when construing bills of lading.

In the writers opinion, the Court of Appeal was correct to ignore the circumstances in which the bills were issued (ie. prior negotiations) because the claimant in *The Rewia* was an indorsee. Thus a bill of lading, in the hands of a consignee or indorsee, should be treated as conclusive in regards the contract of carriage as such a party is unlikely to have access to that type of information and may be unfairly prejudiced by it. However, one should not infer from this decision that the circumstances of a case will never have a bearing on the carriers identity. For example, had the claimant in *The Rewia* been a shipper, one might have argued that they should have been allowed to provide evidence of a contract of carriage existing before the bill of lading was issued. Authority for this proposition can be found in *The Ardennes* 1951, where Lord Goddard CJ stated that a bill of lading, in the hands of the shipper, is not conclusive as to the contract of carriage but only excellent evidence of its terms. In holding the carrier bound by an oral promise made by its agent to a shipper, the court confirmed that a contract of carriage may be partly oral and partly written. On this basis, had the claimant in *The Rewia* been a shipper, any prior negotiations between itself and the charterer should not have been ignored as it may have constituted sufficient circumstances to warrant a departure from the 'ordinary' principles applied by the court in construing bills of lading. Nevertheless, the extent to which the court will allow such evidence to be used in identifying the carrier, when it may only serve to complicate matters, remains unclear.

One must also note that the Court of Appeal did not overrule nor doubt the decision in *The Venezuela* and, for those reasons, *The Rewia* and *The Venezuela* would appear to be in conflict with each other. However, the facts of *The Rewia*, unlike those in *The Venezuela* did not concern an innocent third party faced with an unrealistic claim. On the contrary, the claimant was trying to use the lack of clarity in the case law to its own advantage. Furthermore, neither of the potential 'carriers' in *The Rewia* were single ship companies based in jurisdictions where it may have proven difficult to bring an action. In fact, both the charterer and the shipowner were domiciled within the European Union and, as a result, the

enforcement or recognition of a judgement could have easily been established. One may therefore draw a distinction between the two cases by highlighting the potential difficulties faced by the claimant in *The Venezuela* and concluding that, in those circumstances, a departure from the 'ordinary' principles of construction was justified - but not, however, in *The Rewia*.

Thus if one accepts, contrary to the view expressed in *The Rewia*, that the authorities are conflicting and then contrast the decisions in *Paterson Zochonis*, *The Okehampton*, *The Nea Tyhi* and *The Venezuela*; one may argue that the court will, in certain circumstances, do its utmost to ensure that a fair result is achieved. Nevertheless, it would appear that the courts discretion may only be applied in circumstances which merit its indulgence. However this begs the question of whether there are any circumstances involving an innocent claimant faced with an unrealistic claim that would not be considered meritorious?

If Justice Walton's analysis is dissected and then applied to the case law discussed above it would appear that, in the 'intermediate cases', there are two main factors which the court will take into consideration when identifying the contractual 'carrier'. The first factor concerns the documents used and will therefore include; banner headings; clauses defining the 'carrier' or specifying who the contract of carriage is with; and finally, who signed the bill of lading and how (ie qualifications to the signature). However, with the exception of clauses identifying the contractual carrier, the above indicators will not be conclusive individually nor as a group when pointing to a particular party because they may all be defeated by the second factor. This second factor concerns the circumstances of the case and the commercial background to the issue of the bill of lading, it appears to be based upon fairness and represents the underlying consideration of the innocent third party's need for a remedy.

Irrespective of whether the above analysis is accepted, *The Ines* 1995 illustrates that the court will still need, in certain circumstances, to consider both the documents and the circumstances as a whole. While stating obiter that a bill of lading signed "for the Master" would ordinarily be a shipowners bill, Clarke J held that the signature "as agents for carrier Maras Linja" was ambiguous and failed to clearly identify the contractual carrier.

Below the signature was the following: "p.p. Eimskip [the charterer's agents] - Rotterdam", and underneath that, "as agents only". On both sides of the documents the words Maras Linja appeared in large capital letters. The shipowner argued that the signature should be interpreted to mean that the carrier was Maras Linja, namely the charterer, and that the person who signed did so on behalf of Eimskip as agents for Maras Linja the carrier. The charterer's on the other hand contended that the signature was on behalf of Eimskip as agents of Maras Linja, who were in turn, agents for the carrier.

Clarke J stated that both constructions were arguable and, on balance, if it were only a matter of construing the words in the signature box, the charterer would have been identified as the carrier. However, by examining the 'whole document' and considering the 'whole context' in which it came into existence, the court imposed 'carrier' liability on the shipowner.

In relation to the documents, the court found three pointers which indicated that the shipowner was the contractual carrier. The first was an indemnity clause in the charterparty which was interpreted as giving the charterer and their agents implicit authority to sign bills of lading on behalf of the shipowner. The second pointer was the words "In witness whereof the Master or agent of the said vessel has signed...", which were on the face of each bill and the natural meaning of "agent of the vessel" was interpreted by the court to be "agent of the owners of the vessel". The third pointer was a similar indication found in Clause 19 which contained the following: "the contract evidenced by this bill of lading is between the shipper and the owner of the vessel".

In relation to the context in which the bills came into existence, the court emphasised two factors which reinforced the conclusion that the shipowner was the carrier. Firstly, it was clear that the draft bills of lading and the three copies marked "not negotiable" did not pose any such problems as the signature box contained the printed words "Signed (for the master) by"; and secondly, it was only due to the threat of the carrying vessel being late that the received for shipment bills containing the ambiguous wording were issued.

One may therefore draw two clear points from the decision in *The Ines*. The first is that evidence of prior negotiations can, when the bill of lading is in the hands of a shipper, play an important role in the identification of the carrier. The second point is that even if one follows Justice Legatt's conclusion in *The Rewia* as to the decisive effect of signing "for the master", it is clear that other modes of signature may, at the very least, need to be assessed in the light of the whole document and the context in which it came into existence.

5. Charterparty Terms

As between the charterer and the owner, one might be able to establish their intentions as to who would be the contractual carrier, and thus resolve the uncertainty in the 'intermediate cases', by examining the terms of the charterparty. For example, a clause authorising the charterer to sign bills of lading on behalf of the master without prejudice to the charterparty may suggest that it was intended that the shipowner should be the 'carrier'. Furthermore, if the relevant charterparty clauses are expressly incorporated into, and are consistent with, the remaining terms of the bill of lading they will be regarded as part of that contract and therefore legitimate indicators as to the identity of the contractual carrier. This will apply irrespective of whether the bill of lading holder has seen a copy of the charterparty.

However, where the relevant charterparty terms are not expressly incorporated into the bill of lading the position remains unclear. Obiter dicta by Lord Esher in *Baumwoll v. Furness* and the decision in *Manchester Trust v. Furness* would suggest that, irrespective of whether the bill of lading holder had notice of the charterparty, the terms of that agreement would be irrelevant if the holder of the bill was unaware of their content. Nevertheless, if it can be shown that the holder was fully aware of those terms, the court may take them into account in identifying the intentions of the parties especially where the bill of lading is itself ambiguous.

Where the identity of the carrier is clear

The second category of cases are those which are illustrative of the circumstances in which the carrier can be clearly identified. Thus, the following situations are likely to give rise to carrier liability:-

1 Where a 'demise charterparty' exists, the charterer is the carrier.

In determining whether or not the shipowner is the carrier one must examine the charterparty and consider the relationship it creates between the parties. It is clear that the charterparty need not be strictly speaking a 'demise charterparty' in order to relieve the shipowner of 'carrier' liability provided that "the agreement places the vessel altogether out of the power and control of the shipowners and vests it in the charterer's" .

In *Baumwoll v. Furness* the court distinguished between a shipowner being the registered owner and thus having an absolute right to the ship and a charterer who is given, for a limited time, all the rights of ownership from which he may equally be spoken of as the owner. Furthermore, the court acknowledged that while a charterparty may provide the charterer with full power to deal with the vessel and determine its voyage etc, the master and crew may nevertheless remain the true servants of the shipowner who would therefore be open to 'carrier' liability.

However in *Baumwoll*, the charterer had employed and paid the master and crew, gave them orders, and dealt with the vessel in the adventure. As a result, all the rights and obligations of the real owner were transferred to the charterer who therefore became liable, during that period, as the 'carrier' under the bill of lading.

2 Estoppel by silence

Where the 'actual' defendant has held himself out as the carrier and thus cheated the cargo owner of success against the 'proper' defendant, the 'actual' defendant will be deemed the carrier. This is illustrated by *The Henrik Sif* 1982 in which bills of lading issued by the charterer to the claimant contained a demise clause, the effect of which, rendered the shipowner as the carrier and thus the 'proper' defendant. The claimant, however, brought an action against the charterers through the charterer's agents who, aware that a demise clause was in the bill of lading, continued to deal with the claim as if the charterer was the correct defendant and arranged various extensions of time. The claimant eventually issued proceedings against both the shipowner and the charterer, and while the

shipowner was successful in claiming that the proceedings against him were time barred, the charterer's claim (that they were not the carrier) was denied.

It was held that as the agents knew the effect of the demise clause, they were under a duty to alert the claimant of their mistake instead of arranging extensions of time from the wrong party. By holding out the charterer as the proper defendant they had represented that the charterers would not enforce their strict legal rights against the claimants and thus prevented the charterer, on the basis of estoppel, from denying that they were the 'carrier' under the bill of lading.

3 Where there is a 'demise clause' in the bill of lading the shipowner will be the carrier .

A 'demise clause' may be inserted in the bill of lading, the effect of which is to clearly identify the shipowner or demise charterer as the carrier under that particular contract of carriage. It should be distinguished from an identity of the carrier clause which may name either the shipowner or charterer as the carrier. The latter, however, has the same purpose as a demise clause and therefore the same arguments may be used against it.

There are two ways of looking at demise clauses. One is that they merely clarify the carriers identity and are therefore extended definition clauses which offer a positive attempt to fix the shipowner with liability. The other, is that they are really a form of exception clause which seek to remove the potential liability of the charterer.

Some jurisdictions have taken the second view and consider the demise clause as a derogation from the Hague/Hague Visby Rules because it seeks to reduce or remove the liability of a charterer who, but for the clause, might be considered a 'carrier'. Professor Tetley has described them as "misleading, anomalous and invalid" and other writers consider them to be a trap for the unwary as they are often on the back of a form which otherwise indicates that the shipowner is not the carrier. However, in England and Australia the demise clause has been warmly received as a provision eradicating any uncertainty as to the carriers identity.

In *The Berkshire*, a bill of lading on the charterers agents form signed by the charterers sub agents without the qualification "for the master", was found to be a shipowners bill due to the existence of a demise clause. The validity of the demise clause was also upheld in both *The Vikfrost* and *The Jalamohan*, and one may assume from the decision in *The Henrik Sif* that such a clause would have been effective in transferring carrier liability to the shipowner. Hirst J in *The Jalamohan* confirmed what had been assumed to be the English position and specifically rejected an argument based on Professor Tetley's views by concluding that there was nothing anomalous about demise clauses, they merely "spell out in unequivocal terms that the bill of lading is intended to be a shipowners bill". Furthermore, an

identity of the carrier clause was found to be a contributing factor which rendered the shipowner in *The Ines* liable as the carrier.

Nevertheless, although there is no authority to indicate otherwise, a word of caution about the use of demise clauses must be raised. In this respect one may argue that, despite the above authority, it remains open in the English courts to challenge the validity of such clauses where they are used by a party, at the detriment of the claimant, to avoid the liability which it would otherwise have. In each of the cases cited above, the validity of the clause was upheld to the advantage of the cargo interest and did not therefore result in the prevention of a remedy. Thus, the cargo owner in *The Berkshire* was seeking to make the shipowner liable and the question as to the charterer's liability did not arise. The carrier in *The Vikfrost* would have been liable even in the absence of the demise clause and there was no issue as to whether the charterer could have been the carrier. If the shipowner was not found to be the carrier in *The Jalamohan*, the shipper would have had to pay the same amount of freight twice; and the identity of the carrier clause in *The Ines* was only used as one of the indicators that pointed to a decision which probably would have been reached in its absence. Furthermore, although Webster J in *The Henrick Sif* assumed that a demise clause in a charterers bill of lading would be effective to transfer carrier liability to the shipowner, its detrimental effect to the cargo interest was avoided because the court estopped the defendant from relying on it and, as a result, the question as to the validity of the demise clause did not arise.

An objection to demise clauses could be made on the basis of *Interfoto Picture Library Ltd v. Stiletto Visual Programmes Ltd* by arguing that the bill of lading provides inadequate notice of an unreasonable and extortionate clause. The question which should then be asked is, "whether it would in all the circumstances be fair (or reasonable) to hold a party bound by any conditions or by a particular condition of an unusual or stringent nature". The same quare was also raised by Scrutton to which Roskill has replied that "the very purpose of the words in brackets was to put the bill of lading holder on express notice of the possibility that the ship concerned was chartered". Nevertheless whether such a clause, predominantly on the back of a bill of lading, complies with the requirements of sufficiency of notice is a question yet to be decided by an English court. F.M.B. Reynolds concludes that "room must...remain for argument as to whether the clause should always be effective".

On the other hand, if a shipowner wished to ensure that the charterer was clearly identified as the carrier in the bill of lading he could insert a clause in the charterparty placing an obligation on the charterer to clearly identify himself as such. Furthermore, by the use of an incorporation clause in the bill of lading, a term in the charterparty identifying the charterer as the carrier could be expressly incorporated. However, such a clause is likely to conflict and therefore fail to be consistent with the remaining parts of the document if a demise clause has also been included in the bill of

lading, which in turn, would render the conflicting part of the incorporation clause ineffective. Nevertheless it is theoretically possible that one could insert a 'hierarchy' clause into the bill of lading stating that, in the event of conflict between an incorporated term from the charterparty and a provision in the bill of lading, the term in the charterparty is to take precedence.

1. Apart from the three situations described above, the carrier cannot be identified with any degree of certainty under English law and one may only look for indications. In practice, a cargo claimant should sue all the possible defendants and although the court will only find one of these parties to be the true carrier, it will not be clear at the initial stage who is solvent and who is not, who's got assets and where. Upon acquisition of these facts one can fine tune and focus on a particular defendant. Once a defendant has been chosen it will still be necessary to identify that party as the carrier; one must therefore apply the above indicators to the particular circumstances of the case and for this purpose the case law can be used to highlight those links which best suit the claimants cause.

2. A demise clause is valid under English law. However it is arguable that, despite cases such as *The Berkshire* and *The Jalamohan*, one may challenge the validity of a demise clause when it is used by a charterer to avoid a liability which it would otherwise have.

3. It is advisable to sue all parties in contract and the Tort of negligence and, whenever possible, take an action in rem against a vessel in order to provide security. However, the ability to arrest a vessel under English law is dependent upon the owner or demise charterer of that vessel being held liable in personam.

The effect of the UCP 500

The vast majority of documentary credits incorporate the terms of the Uniform Customs and Practice for Documentary Credits published by the ICC. The latest edition of these terms are contained in the UCP 500 which, under Art. 23, provide specific requirements relating to the identification of the carrier in 'non-charterparty bills of lading'. If the bill of lading issued does not comply with these requirements, the shipper may be unable to tender it under the credit and, as a result, will not be entitled to payment.

However, the UCP is not an international convention, nor is it given force of law by any legislation in England and will not therefore directly affect the legal principles discussed above. Nevertheless, it is likely to affect the appearance of bills of lading and the way in which they are signed in cases where the shipper needs to tender them against a documentary credit. This may in turn affect how the legal principles from the above cases are to be applied to any such document in the future.

The requirements of Art.23 have been listed as follows:-

(a) The bill of lading must appear on its face to indicate the name of the carrier; and

(b) The bill of lading must have been signed by any of the following:-

- (i) the carrier, identified as such; or
- (ii) a named agent for the named carrier, identified as such;
or
- (iii) the master, identified as such; or
- (iv) a named agent for the named master, identified as such.

In relation to condition (a), it would appear that a banner heading bearing the carriers name would be sufficient to satisfy this requirement. However such a method would not, in itself, render that party liable as the contractual carrier under the bill of lading as it will be given little weight where other factors pointing to the carriers identity indicate something different.

In the absence of a banner heading or something similar to that effect, the bill of lading will need to have the name of the carrier indicated "on its face" elsewhere. This could be achieved by the inclusion of a clause identifying a particular party to be the carrier which, under the principles discussed above, is likely to render that party liable as the contractual carrier. In this sense, compliance with the UCP 500 will encourage the use of such clauses which may in turn increase the certainty with which the contractual 'carrier' can be correctly identified. Nevertheless, there is an argument that the validity of such clauses should not always be upheld and, as a result, the certainty of the carriers identity may not always be guaranteed. Moreover, banner headings and demise or identity of the carrier clauses are not the only means in which condition (a) can be satisfied, and of course condition (b) must also be fulfilled in order to comply with Art.23.

It would appear, however, that both conditions would be satisfied through either (b)(i) or (b)(ii). In this respect, the bill of lading would bear either the signature of the carrier who would also be identified as such (b(i)), or the signature of his agent who would not only have to name himself but also identify the carrier as the principal (b(ii)). Nevertheless, as most carriers are likely to be companies and therefore incapable of signing documents other than through agents, the type of signature described in (b)(i) is unlikely to be relevant. Furthermore, while the type of signature in (b)(ii) may clearly satisfy the requirements of Art.23 and perhaps enhance the likelihood of the carrier being correctly identified, it will not always render the identity of the carrier free from doubt. Thus, the signature:

"as agents for carrier Maras Linja
p.p. Eimskip - Rotterdam

as agents only"

is likely to be passed by the opening bank as complying with Art.23 but yet fail to clearly identify the contractual carrier (The Ines).

It is also unclear as to what action the bank will take when faced with such a signature indicating the name of one party as the carrier and additional factors, such as banner headings or clauses for example, indicating otherwise. In this context, C. Debattista suggests that these provisions will need to be relaxed in practice if unnecessary rejections are to be avoided. Further to this, Debattista argues, that Art.20(d) "may well be a convenient counterfoil, stating as it does that any condition as to signature will be satisfied if on its face it appears to be so satisfied".

While the type of signature in either (b)(i) or (b)(ii) will, in themselves, satisfy both conditions under Art.23; a signature under (b)(iii) or (b)(iv) will not. In the latter, the carrier will remain unidentified on the face of the bill which would therefore need to contain either a banner heading or a clause indicating "on its face" the name of the carrier for the said requirements to be fulfilled. Again however, mere compliance with Art.23 will not necessarily enable the 'carrier' to be identified in a legal sense. Thus, while the signature of the master or an agent signing on his behalf will ordinarily render the shipowner liable as the carrier, there is authority for the proposition that this will not always be the case.

One must also note that despite the bill of lading appearing "on its face" to indicate the name of the carrier, confusion as to the carrier's identity may result by the inclusion of a clause in the bill of lading incorporating a term or terms from a charterparty which indicate something different.

It would appear therefore that Art.23 will have a very limited effect on the interpretation of the case law relating to the identity of the carrier and the way in which it is applied to bills of lading conforming with the UCP 500.

CHAPTER 39

Indian Ships, Registration

A ship entitled to fly the flag of a country needs to be registered in that country. The object of registration is to ensure that persons who are entitled to the privilege and protection of the Indian flag get them. The registration affords evidence of title off the ship to those who deal with the property in question. It also gives protection to the members of the crew in case of casualties involving injuries and/or loss of life to claim compensation under the provisions of the Indian Acts in Indian courts.

Indian Merchant Shipping Act of 1958, for the first time, dealt with registration of ships. Earlier acts had lacked this aspect totally. Part V of this Act deals with exclusively with the registration of Indian ships, while Part XV deals with registration of sailing vessels and Part XVA deals with the registration of fishing boats. Ships which qualify to be registered are required to be registered only at ports designated as ports of registry. At present Mumbai, Calcutta, Madras, Cochin and Mormugao have been notified as ports of registry and principal officers of Mumbai, Calcutta & Madras and Surveyor in charge of Cochin and Mormugao have been notified as Registrar of Indian ships. In their capacity as registrar of Indian ships, the principal officers are required to maintain a complete record of Ships on register indicating status of the ship on a particular date. A central register is maintained by the Director General of Shipping, which contains all the entries recorded in the register books kept by the registrar at the port of registry in India. The Director General of Shipping, at the request of owners of Indian ships, desiring to be known at sea, allots signal letter & controls the series that may be so issued. Certain formalities are required to be complied with before a ship is registered as an Indian ship and these are laid down in the Merchant Shipping (Registration of ships) rules 1960 as amended from time to time.

Part V of the Merchant Shipping Act, 1958 and Registration of ships rules, 1960 as amended from time to time, are concerned with the Registration of Indian ships.

Status of Indian Ships

The conferment of status of Indian ships is restricted to:

- i) Ships owned by a citizen of India.
- ii) Ships owned by a company or body established by or under any central or state Act which has its principle place of business in India.
- iii) Ships owned by a co-operative society which is registered or deemed to be registered under the Co-operative Society Act, 1912, or

any other law relating to Co-operative Societies for the time being in force in any state.

Qualification required for registration as Indian ships:

Sea going ships fitted with mechanical means of propulsion of 15 tons net and above howsoever employed and those of less than 15 tons net employed otherwise than solely on the coasts of Indian qualify for registration under Part V of the Merchant Shipping Act, 1958. Ships so registerable are required to be registered only at ports designated as ports of registry.

In their capacity as Registrar of ships, the Principal officers and concerned Surveyors In-charge are required to maintain a complete record of ships on register indicating as on a particular date the person/persons, either in their individual capacity or as joint owners or as a corporate body, who have a stake in the ownership of ships. Not more than 10 individuals are entitled to be registered as a owner of a fractional part of a share in a ship, but a maximum of 5 persons could be registered as joint owners of a ship or of any share and shares therein. Joint owners by reason of the position as such cannot, however, dispose off in severalty, any share or interest therein.

Formalities to be observed for registration as Indian ship :

The owner of a ship wishing to have it registered at a port in India has to submit to the concerned Register:

- a) A declaration of ownership – in one or the other prescribe forms, as may be applicable, depending upon whether he is a sole proprietor, joint owner or a company made before a Registrar, Justice of the peace or an Indian Consular Officer.
- b) A certificate signed by the builder (builder's certificate) of the ship containing a true account of the proper denomination and of the tonnage of the ship as estimated by him and the time, when and the place where the ship was built, (for new ship).
- c) The instrument of sale under which the property of the ship was transferred to the applicant who requires it to be registered in his name, (for secondhand ships).
- d) To give a minimum of 14 days notice to the Registrar of the name proposed for the ship. The Registrar before registering the vessel in the name of the applicant shall obtain prior approval of the name from the Director General of Shipping who will also allot an official number for the ship.

7. On being satisfied that the ship, on the strength of the evidence placed before him, is entitled to be Indian ship, the Registrar arranges for survey of the ship by a surveyor for the determination of her tonnage in accordance with the Merchant Shipping (Tonnage Measurement) Rules, 1987 as amended from time to time, for the purpose of issue of a Certificate of Survey.

8. After the formalities enumerated above have been gone through, the Registrar issues a carving and marking note. This note is to be returned to the Registrar after carving and marking have been duly carried out on the ship in the prescribed manner and certified by a Surveyor. The carving and marking involves the carving of the name of the ship conspicuously on each side of her bows as well as insertion permanently on her stern the name of the intended port of registry.

9. On completion of the preliminaries to registry as described in the preceding paragraphs, the Registrar enters the particulars of the ship such as :

- a) Name of the ship and the port to which she belongs.
- b) Details contained in the Surveyors Certificate.
- c) Particulars respecting her origin as revealed in the declaration of ownership.
- d) the name and description of her registered owner and, if there are more owners than one, the number of shares owned by each of them; and
- e) Name of the Master, in the Registry Book. The Registrar issues thereafter to the owners a certificate of registry retaining the Surveyor's certificate, builders certificate, instrument of sale by which the ship was sold, and the declaration of ownership.

Formalities connected with registration of an Indian ship when acquired abroad.

When a ship is built or acquired out of India and becomes the property of a person qualified to own an Indian ship, the owner or the Master of the ship will have to apply to the Indian Consular Officer at the nearest port for the issue of a provisional certificate of Indian registry and such officer, on production of satisfactory proof of ownership, grant the same to the owner or the Master. Such a certificate has all the force of a certificate of registry. It is, however, valid for a period of 6 months from its date of issue or until the arrival of the ship at a port where there is a Registrar whichever first happens and on either of these events happening would cease to have effect. The provisional certificate so issued will have to be exchanged by the owner for a certificate of registry from the concerned Registrar.

Quite often a ship has to set sail from a port where she is built in India to a port where she has to be registered. The owner in such cases or where he has applied to the Registrar for registration but delay in the issue of certificate of registry is anticipated, the Registrar may, on the strength of the authority issued by the Director General of Shipping, issue a temporary pass to enable the ship to ply between the ports in India.

The Certificate of Registry has to be used only for the lawful navigation of the ship and is not to be detained by reason of any lien, mortgage of interest whatsoever claimed by any party.

Anybody having possession of the certificate of registry has to make it over to the person entitled to its custody as otherwise he becomes liable for being summoned before a Magistrate and examined on the issue touching his refusal to surrender the certificate to the one entitled to it.

No change in the name already in the registry is permitted except in accordance with the procedure laid down in the M.S.(Registration of Ships) Rules, as amended from time to time.

Application for the registry of alterations to a ship will have to be made to the Registrar within one month of the alterations.

Where the alterations are material so as to affect the principal dimensions of a ship or the means of propulsion, a ship will have to be registered as new and, in that event, rules applicable for first registry will come into force.

Where a ship is registered under circumstances envisaged in paragraph immediately above this, the original certificate of registry stands cancelled and the existing entries in the registry, remain closed. The original official number allotted to ship, is however, retained.

Where transfer of a port of registry is desired by all the parties having a stake in the ownership or otherwise of the ship, they shall apply to the Registrar of her port of registry, who may, with the prior approval of the Director General of Shipping have no objection to such transfer subject to such formalities as has been laid down in the M.S. (Registration of Ships) Rules and on payment of the requisite fees prescribed thereof.

Whenever there is any change in the Master of an Indian ship, in whatever the way the change has come about, a memorandum of change has to be endorsed and signed on the Certificate of Registry by the Presiding Officer of a Marine Board or a Court if the change of Master is brought about as a result of the findings of the Marine Board of Inquiry or the Registrar or any other officer authorized by the Central Government or the Indian Consular Officer depending upon whether the change has occurred in India or abroad.

In the event of an Indian Ship being either actually or constructively lost, taken by the enemy, burnt or broken up or ceasing for any reason to be an Indian ship, every owner of the ship or any share in the ship is required to give a notice thereof to the Registrar and thereupon the Registrar will make an appropriate entry in the Register Book and the entry of the ship in that book would then be deemed mortgage that lies unsatisfied on that date will, continue to remain in force. The Master of such a ship, if the event accrues in India, will immediately make over the Certificate of Registry to the

Registrar or within a period of 10 days after his arrival in India if the event occurs elsewhere.

Transfer or acquisition of an Indian ship or interest therein :

As per amendment to Section 42 of the M. S. Act no prior permission from the Director General of Shipping is required for creation of any mortgage on a ship except during the period when the security of India or any part of the territory thereof is threatened by war or external aggression. Similarly the Director General of Shipping's prior approval for the sale of the ship is not required provided:

- a) all wages and other amounts due to seamen in connection with their employment on that ship have been paid in accordance with the provisions of this Act.
- b) the owner of the ship has given notice of such transfer or acquisition of the ship to the Director General.

Any such transfer can be effected only by an instrument in writing in the prescribed form and the instrument, as may be so drawn up, has to contain a full description of the ship as is generally contained in the Surveyors ' certificate sufficiency to identify the ship by the Registrar and be in the form (Registration Form No.9) prescribed in the M.S. (Registration of Ship's) Rules, 1960, as amended from time to time. The owner of an Indian ship or a share therein wishing to transfer it in favour of somebody else will have to apply to do so with full particulars of the transferee. Where the instrument of sale refers to a consideration other than money, and if the Registrar has any doubt as to whether that constitutes a good condition, a decision therein will lie on the Director General of Shipping to whom the matter may have to be referred.

If the transaction has been concluded in India, the instrument of Sale referred to above accompanied by a Declaration of Ownership and the prescribed fee thereof has to be produced by the transferee to the Registrar of the port where the ship has been registered who will make appropriate entries in the Register Book and also suitably endorse on the instrument the date and hour of the entry. The Registrar has also to make as soon as possible suitably endorsement on the Ship's Certificate of Registry. Every such transaction has to be reported to the Director General of Shipping.

Transmission of an Indian ship or interest therein :

Where the property in an Indian ship or share therein is transmitted to a person on the death or insolvency of the registered owner or by any lawful means other than a transfer described as above, it would be effected by an application made to the Registrar of the ship's port of registry accompanied by a declaration in the prescribed form identifying the ship and also a statement of the manner in which and the person to whom the property has been transmitted. In the case of transmission consequent on insolvency, a declaration of transmission has to be accompanied by proof of such claim. In the case of transmission as a result of death, the declaration of transmission shall

be accompanied by a Succession certificate, probate or letters of Administration, under the Indian Succession Act, 1925 or a duly certified copy thereof. The Registrar on receipt of the declaration of transmission will make appropriate entry in the register book to give effect to the change in the ownership.

Where as a result of the transmission of property in a ship or share there on death or insolvency or otherwise a ship ceases to be an Indian ship, the Registrar of Port of her registry will have to submit a report to the Central Government through the Director General of Shipping setting out the circumstances in which the ship has ceased to be an Indian ship. On receipt of such a report, Central Government can make an application to the High Court for a direction for the sale of such Ship to any Indian citizen or any Indian company. Such an application may have to be made to the High Court by the Government within 60 days from the date of receipt of the report.

Registry of Government ships

A ship owned by Government is also registered in the same manner as other Indian ships subject to the following modifications :

a) the application for registry has to be made by the Secretary of the Ministry concerned or the Head of the Department to whom the management of the ship is entrusted or any other officer nominated by the Central /State Government with the particulars, as detailed below:

i) name and description of the ships

ii) a statement of the time and the place where the ship was built and, if these particulars are not known, a statement to that effect, and of the former name, if any known:

iii) a statement of the nature of the title to the said ship; and

iv) The name of the Master.

b) No declaration of ownership is necessary.

c) The Registrar on receiving the application and on compliance with the necessary formalities will enter the ship in the registry book as belonging to Government, State or Central.

d) The transfer of a registered Government ship has to be made by an instrument of sale in the prescribed form from which should be omitted the portion relating to the covenant. The instrument will have to be signed on behalf of the transferee by an officer authorised by Government, Central or State.

At the request of the owners of Indian ships desiring to be known at sea, signal letters are allotted by the Director General of Shipping, who will control the series that may be so issued. The allotment of such signal letters are required to be noted in the Register Book and endorsed suitably on the Certificate of Registry. The allotment of

signal letters will form subject matter of a communication by the Director General of Shipping to the Wireless Adviser, Ministry of Communication, New Delhi

There is no bar to re-registration of an abandoned or wrecked ship. In such cases the owner may have to specify whether he desires to retain the ship's previous name or have a change. The formalities to be observed in such cases are the same as are applicable to a ship on first registry but subject to the condition that a ship so coming up for registration is required to be surveyed by a Surveyor and a certificate as to its seaworthiness obtained. All outstanding mortgage or other encumbrances on the ship will continue to be in force and may have to be brought forward in the new registry.

A certified copy of the entries appearing in the register book will be available to any interested party on application accompanied by prescribed fees laid down in the Registration of ships rules. The Registrar can entertain request accompanied by prescribed fees for issue of a new certificate on the plea that the original certificate has been defaced or mutilated. In that event, the certificate so issued will be marked "duplicate" in red ink.

The Director General of Shipping is required to :

(a) Maintain a Central Register which would contain not only the names of all ships but also entries relating to every Indian ship that stand recorded at the various ports of registry. Details of the Registry Of a ship as well as every subsequent entry relating to that ship recorded in the Register Book are required to be communicated to the Director General Of Shipping as and when the events occur. On or before the 15th January of each year, Registrars of each Port are required to submit to the Director General of Shipping a return showing the number of ships with their tonnage registered in the register book during the previous year.

(b) Executive Orders: The Director General of Shipping has assigned the work of maintaining the Central Register of Ships to the Nautical Adviser. All Principal Officers have been directed to send their returns, including the transcript of registry, to the Nautical Adviser so that he should be able to maintain the Central Register.

The following documents are admissible in evidence in respect of any proceedings that may come up in Court touching upon:

(a) Any registry on its production in custody of Registrar or any other person having the lawful custody thereof.

(b) A Certificate of Registry purporting to be signed by the Registrar or any other officer authorised in this behalf by the Central Government.

(c) an endorsement on the Certificate of Registry purporting to be signed by the Registrar or any other officer authorised in this behalf by the Central Government;

(d) Every declaration made in pursuance of provisions contained by Part V of M.S. Act 1958, in respect of an Indian ship.

(e) A certified copy of an entry in the Register book is admissible in evidence in any proceedings in a Court and have the same effect as the original entry in the Register book.

ANNEXURE - 1

Bombay High Court Rules

PART III

ADMIRALTY JURISDICTION

RULES FOR REGULATING THE PROCEDURE AND PRACTICE
IN CASES BROUGHT BEFORE THE HIGH COURT UNDER
THE COLONIAL COURTS OF ADMIRALTY ACT, 1890

(53-54 VICTORIA CH.27)

927. Definitions - In this part, unless there is anything repugnant in the subject or context.

(1) "The Court" means the High Court of Judicature at Bombay;

(2) "Judge" means a Judge of the said Court;

(3) "Judge in Chambers" means the Judge hearing Admiralty matters in Chambers;

(4) "Prothonotary and Senior Master" means the Admiralty Registrar of the Court;

(5) "Registry" means the office of the Prothonotary and Senior Master;

(6) "Sheriff" means the Sheriff of Bombay or the Deputy Sheriff or other officer who may be appointed to execute the process of the Court;

(7) "Suit" means any suit, action or other proceeding instituted in the Court in its Admiralty Jurisdiction.

928. Institution of Suits - A suit shall be commenced by a plaint signed and verified according to the provisions of the Code of Civil Procedure, 1908.

929. Caveat against arrest of property - Any person desiring to prevent the arrest of any property shall file in the registry a praecipe, signed by himself or his advocate, who may be acting for him, requesting that a caveat be entered against the arrest of the said property and undertaking to enter an appearance in person or a Vakalatnama in any suit that may be instituted against the said property and to give security in such suit in a sum not exceeding the amount to be stated in the praecipe or to pay such sum into the registry. A caveat against the issue of a warrant for the arrest of the said property shall thereupon be entered in a book to be kept in the registry, called the "Caveat Warrant Book."

930. Caveat against release of arrest property - Any person desiring to prevent the release of any property under arrest shall file

in the registry a praecipe, signed by himself or his advocate, who may be acting for him, requesting that a caveat be entered against the release of the said property. A caveat against the release of the said property shall thereupon be entered in a book to be kept in the registry, called the "Caveat Release Book."

931. Caveat against payment out of sale proceeds of property - Any person desiring to prevent the payment out of Court of any money in Court representing the proceeds of sale of any property shall file in the registry a praecipe signed by himself or his advocate who may be acting for him, requesting that a caveat be entered against payment out of Court of the said proceeds of sale. A caveat against the payment out of Court of such sale proceeds shall thereupon be entered in a book to be kept in the registry, called the "Caveat Payment Book".

932. Duration of caveat - A caveat, whether against the issue of a warrant, the release of property, or the payment of money out of the registry, shall be valid for six months from the date of its entry.

The period of validity of a caveat shall not be extended, but this provision shall not be taken as preventing the entry of successive caveats.

933. Withdrawal of Caveat - A caveat may be withdrawn by the party on whose behalf it has been entered, but the praecipe to withdraw the caveat shall, unless otherwise permitted by the Prothonotary and Senior Master, be signed by the person who signed the praecipe for entering the caveat.

934. Application to set aside a caveat - An application to set aside a caveat shall be made by Chamber Summons supported by affidavit.

935. Copy of plaint in suit against property to be served before filing plaint, on party who has entered caveat - Any person instituting a suit against any person in respect of which a caveat has been entered in the "Caveat Warrant Book" shall, before filing the plaint, serve a copy thereof upon the party on whose behalf the caveat has been entered or upon his Advocate and annex to the plaint a statement of such service.

936. Party entering caveat to give security on filing of plaint - Within three days from the filing of the plaint, the party on whose behalf the caveat has been entered shall, if the sum in which the suit has been instituted does not exceed the amount for which he has given the undertaking, give security in such sum or pay the same into the registry, or if it exceeds the amount, give security in the sum in which the suit has been instituted or pay the same into the registry.

937. On default suit may proceed ex-parte - After the expiration of three days from the filing of the plaint, if the party on whose behalf the caveat has been entered shall not have give security in such sum or paid the same into the registry, the plaintiff may apply to the Prothonotary and Senior Master to set down the suit forthwith for hearing as an undefended suit: Provided that the Court may on good

cause shown and on such terms as to payment of costs as it may impose extend the time for giving security or paying the money into the registry.

938. Judgment or the claim and enforcement of payment - When the suit comes before the Court, if the Court is satisfied that the claim is well founded, it may pronounce judgment for the amount which appears to be due, and may enforce the payment thereof by order and attachment against the party on whose behalf the caveat has been entered, and by the arrest of the property if it then be or thereafter come within the jurisdiction of the Court.

939. Property may be arrested notwithstanding caveat - The fact that there is a caveat against arrest in force shall not prevent a party from getting a warrant of arrest issued and the property to which the caveat relates, arrested.

940. Remedy where property protected by caveat is arrested without good and sufficient cause - Where property with respect to which a caveat against arrest is in force is arrested in pursuance of a warrant of arrest, the party at whose instance the caveat was entered may apply to the Court by Notice of Motion for an order for release of the property. The Court, unless it is satisfied that the party procuring the arrest of the property had good and sufficient reason for doing so, may order the release of the property and may also order the last mentioned party to pay to the applicant damages in respect of the loss suffered by the applicant as a result of the arrest.

941. Application to arrest property in a suit in rem - If the suit is in rem an application for the arrest of the property proceeded against shall be made to the Judge in Chambers and shall be supported by affidavit. The affidavit shall state the nature of the claim and that it has not been satisfied. It shall also state the nature of the property to be arrested and if the property is a ship, the name and nationality of the ship. There shall be annexed to the affidavit a certificate of the Prothonotary and Senior Master certifying that search has been made in the Caveat Warrant Book and that no caveat has been filed against the issue of a warrant for the arrest of the said property.

A party applying under this rule shall give an undertaking in writing, or through his Advocate, to pay such sum by way of damages as the Court may award as compensation in the event of a party affected sustaining prejudice by such order.

Comments

This rule applies to any application for arrest in an Admiralty Suit, whether made ex parte or where the defendant is present. *Bank of Maharashtra vs. M. V. River Ogbese* AIR 1990 Bom, 107.

942. Nationality of the ship to be stated and notice to be given to Consul in suits for possession, wages or necessities - In a suit for possession or for wages or in respect of necessities supplied, the nationality of the ship proceeded against shall be stated in the plaint, and if the ship is a foreign ship, notice of institution of the suit shall

be given to the Consul of the State to which the ship belongs, if there be one resident in Bombay. A statement of service of such notice or a statement that there is no such Consul shall be made in the affidavit in support of any application for arrest of the ship. If the notice is served on the Consul, a copy of such notice shall be annexed to the affidavit.

943. Warrant with Court's leave though particulars wanting - The Judge in Chamber may in any case allow the warrant of arrest to issue though the affidavit or plaint may not contain all the required particulars, and in a suit for wages may also waive the service of the notice.

944. Sheriff to serve process - The Sheriff shall serve the process of the Court and shall return the process to the Registry within four days from the service thereof.

945. Service of writ or warrant, when dispensed with in suit in rem - In a suit in rem no service of Writ of Summons or Warrant of arrest shall be required, when the Advocate for the defendant agrees to accept service and to give security or to pay money into Court.

946. Service of writ of summons or warrant of arrest in a suit in rem. Service how effected -

(1) In a suit in rem the Writ of Summons or the Warrant of arrest shall be served on the property against which the suit is brought.

(2) Where the property is ship or cargo on board, service shall be effected by affixing the original Writ of Summons or the Warrant of arrest for a short time on any mast of the ship or on the outside of any suitable part of the ship's superstructure, and leaving a duplicate thereof affixed in its place, when removing the original Writ of Summons or the Warrant of arrest.

(3-a) Where the property is cargo which has been landed or transhipped, service shall be effected by placing the original Writ of Summons or the warrant of arrest for a short time on the cargo and leaving a duplicate thereof upon the cargo, when removing the original Writ of Summons or the warrant of arrest.

(3-b) Where the cargo is in the custody of a person who will not permit access to it, service shall be made upon the custodian.

(4) Where the property is freight, service shall be effected by serving on the cargo in respect of which the freight is payable or on the ship in which the cargo was carried, in the manner hereinabove prescribed in this rule for service on a cargo or on a ship.

947. Sheriff may apply for directions - The Sheriff may at any time make a report to the Court and apply for directions with respect to property under arrest in a suit. The Court may direct notice of the application to be given to any person concerned with the property before passing orders on the report.

948. Application for sale of arrested property - In a suit in rem if the property proceeded against has been arrested, the plaintiff may, at any time after service of the Writ of Summons upon the defendant, apply to the Court by Notice of Motion for an order that the arrested property be sold by the Sheriff and the sale proceeds be paid into the registry to the credit of the suit. The Court may make such order on the application as it may think fit.

949. Interveners -

(1) Where property against which a suit in rem is brought is under arrest or money representing the proceeds of sale of that property is in Court, a person who has interest in that property or money but who is not a defendant to the suit may, with the leave of the Judge, intervene in the suit.

(2) An application for the grant of leave under this rule may be made ex-parte by affidavit showing the interest of the applicant in the property against which the suit is brought or in the money in Court.

(3) A person to whom leave is granted to intervene in a suit shall file an appearance in person or a vakalatnama therein within the period specified in the order granting leave. On filing such appearance or vakalatnama, the intervener shall be treated as if he were a defendant in the suit.

(4) The Judge may order that a person to whom he grants leave to intervene in a suit, shall, within such period as may be specified in the order, serve on every other party to the suit such pleading as may be so specified.

950. Judgment for the plaintiff if claim well founded - When the suit comes up for hearing before the Court, if the Judge is satisfied that the plaintiff's claim is well founded, he may pass a decree for the plaintiff and may order the property proceeded against to be sold with or without previous notice and the sale proceeds paid into the registry to the credit of the suit or make such other order in the premises as he may think just.

951. Order for sale of property and determination of priority of claims -

(1) Where in a suit in rem the Court has ordered the property proceeded against to be sold, any party who has obtained or obtains a decree or order against the said property or the proceeds of sale thereof may -

(a) In a case where the order for sale contains the further order referred to in sub-rule (2), after the expiration of the period specified in the order under sub-rule rule (2) (a), or

(b) in any other case, after obtaining judgment, apply to the Court by Notice of Motion for an order determining the order of priority of the claims against the proceeds of sale of the said property.

(2) Where in a suit in rem the Court orders the property proceeded against to be sold, it may further order -

(a) that the order of priority of the claims against the proceeds of sale of the property shall not be determined until after the expiration of ninety days or of such other period as the Court may specify, beginning with the day on which the proceeds of sale are paid into Court;

(b) that any party to the suit or to any other suit in rem against the property proceeded against or the sale proceeds thereof may apply to the Court to extend the period specified in the order;

(c) that within seven days after the date of payment into Court of the proceeds of sale, the Sheriff shall send for publication in such newspapers as the Court may direct a notice complying with the provisions of sub-rule (3).

(3) The notice referred to in sub-rule (2) shall state -

(a) that the property (particulars to be specified) has been sold by the order of the High Court in a suit in rem giving the number of the suit and the names of the parties to the suit;

(b) that the gross proceeds of the sale, specifying the amount thereof, have been paid into Court;

(c) that the order of priority of the claims against the said proceeds will not be determined after the expiration of the period (specifying it) specified in the order for sale;

(d) that any person having a claim against the property or the proceeds of sale thereof, should apply to the Court for leave to intervene and prove his claim before the Court and obtain a decree before the expiration of that period.

(4) The Sheriff shall lodge in the registry a copy of each newspaper in which the notice referred to in sub-rule (2) (c) has appeared.

(5) The expenses incurred by the Sheriff in complying with an order of the Court under this rule shall be included in his expenses relating to the sale of the property.

(6) An application to extend the period referred to in sub-rule (2) (a) shall be made by Notice of Motion, which shall be served on the parties to the suit and on all persons who have obtained leave to intervene in the suit.

952. Property not to be released unless notice is given to the Caveator - No property arrested under a warrant shall be ordered to be released, unless notice is given to the person who has filed a caveat against the release thereof and whose caveat is outstanding in the caveat Release Book.

953. Penalty for delaying release - A party delaying the release of any property by the entry of a caveat shall be liable to be condemned in costs and damages, unless he shall show, to the satisfaction of the Court or the Judge in Chambers, good and sufficient reason for having entered the caveat.

954. Release of arrested property - Subject to the provisions of Rule 952, property arrested under a warrant may be ordered to be released

(i) at the request of the plaintiff, before an appearance in person or a vakalatnama is filed by the defendant; or

(ii) on the defendant paying into Court the amount claimed in the suit; or

(iii) on the defendant giving such security for the amount claimed in the suit as the Court may direct; or

(iv) on any other ground that the Court may deem just.

955. Instrument of release - Property arrested under a warrant shall only be released under the authority of an instrument issued by the Prothonotary and Senior Master, to be called a release.

956. Release by Sheriff on lodging praecipe with release - The release when obtained shall be lodged with a praecipe in the office of the Sheriff by the party obtaining the same who shall also at the same time pay all costs, charges and expenses attending the care and custody of the property whilst under arrest, and the Sheriff shall thereupon release the property.

957. Sales by order of the Court - Every sale under the decree of the Court shall, unless the Judge shall otherwise order, be made by the Sheriff in like manner as a sale of movable property in execution of a decree in an ordinary civil suit, and the Sheriff shall be entitled to receive the same fees and poundage as he would be entitled to in such a case.

958. Procedure by Sheriff on sale of property - The Sheriff shall pay into Court the gross proceeds of sale of any property sold by him, and shall at the same time bring into the registry the account of sale, with vouchers in support thereof, for taxation by the Taxing Master of the Court, to whom the same shall be transmitted by the Prothonotary and Senior Master for that purpose.

959. Appearance before Taxing Master - Any person interested in the proceeds may be heard before the Taxing Master on the taxation of the account of expenses, and an objection to the taxation shall be heard in the same manner as an objection to accounts filed before the Commissioner for Taking Accounts.

960. Payment of moneys - All money to be paid into Court shall be paid to the Prothonotary and Senior Master.

961. Payment of money out of court - Money paid into Court shall not be paid out of Court, except in pursuance of an order of the Court or the Judge in Chambers.

962. Security for latent demands - Security for latent demands shall not, unless the Judge shall otherwise order be required on the payment of money out of Court.

963. Security - If security is to be given, it shall be given according to the rules and practice of the Court regarding the giving of security in suits filed on the Original Side of the Court.

964. Motions - Motions may be made either in Court or to a Judge in Chambers.

965. Fees of Officers, Sheriff and Advocates - The fees to be taken by the officers of the Court, by the Sheriff and by Advocates shall be as prescribed for proceedings under the Original Civil Jurisdiction of the High Court.

966. Rules and practice of the O.S. to apply, if not inconsistent with the rules in this part - The rules and practice of the Court in the manner of suits and proceedings on the Original Side of the Court shall, if not inconsistent with the rules in this part, apply to suits and proceedings on the Admiralty Side of the Court.

967. Forms of Admiralty Division may be followed - The forms used in the Admiralty Division of the Supreme Court in England under the Rules of the Supreme court, for the time being in force may be followed with such variations as the circumstances of each case may require.

968. Supersession of rules - The rules contained in this Part shall apply to suits brought in the Court in the exercise of its Admiralty and Vice-Admiralty Jurisdiction in supersession of all former rules.

ANNEXURE - 2

Madras High Court Rules

ORDER XLII

RULES FOR REGULATING THE PROCEDURE AND PRACTICE IN CASES BROUGHT BEFORE THE HIGH COURT OF JUDICATURE AT MADRAS

IN THE EXERCISE OF ITS ADMIRALTY JURISDICTION

1. In the construction of these rules the following terms shall (if not inconsistent with the context or subject matter) have the respective meaning hereinafter assigned to them, that is to say :

"The Court" shall mean the High Court of Judicature at Madras.

"Judge" shall mean a Judge of the said High Court.

"Registrar" shall mean the Registrar of the said Court, on its Original Side, or other officer who may be authorized to perform the duties of such Registrar.

"Registry" shall mean the office of the Registrar.

"²[Nazir]" shall mean the ²[Nazir] or the Deputy ²[Nazir] of Madras or other officer who may be appointed to execute the process of the said Court.

"Attorney" shall mean any ³[] advocate entitled to practice in the said Court, or the party himself if conducting his suit in person.

"Suit" shall mean any suit, action or other proceeding instituted in the said Court in its Admiralty Jurisdiction.

"Affidavit" shall in addition to its ordinary meaning, include a statement in writing on solemn affirmation wherever by law a person may make a solemn affirmation instead of an oath.

2. A suit shall be instituted by a plaint drawn up, subscribed and verifying according to the provisions of the Code save that if the suit is **in rem**, the defendants may subject to such variation as the circumstances may require, be described as "the owners and parties interested in" the vessel or other property proceeded against instead of by name.

3. In suits **in rem** a warrant for the arrest of property may be issued at the instance either of the plaintiff or of the defendant at any time after the suit has been instituted, but no warrant of arrest shall be issued until an affidavit by the party or his agent has been filed, and the following provisions complied with :

(A) The affidavit shall state the name and description of the party at whose instance the warrant is to be issued, the nature of the claim or counter-claim, the name and nature of the property to be arrested, and that the claim or counter claim has not been satisfied .

(B) In a suit of wages or of possession, the affidavit shall state the national character of the vessel proceeded against; and if against a foreign vessel, that notice of the institution of the suit has been given to the consul of the State to which the vessel belongs, if there be one resident in Madras and a copy of the notice shall be annexed to the affidavit.

(C) In a suit of bottomry, the bottomry bond and if in a foreign language also a notarial transaction thereof, shall be produced for the inspection and perusal of the Registrar, and a copy of the bond, or of the translation thereof, certified to be correct shall be annexed to the affidavit.

(D) In a suit of distribution of salvage, the affidavit shall state the amount of salvage money awarded or agreed to be accepted, and the name and address and description of the party holding the same.

4. The Court or Judge may in any case, if they or he thinks fit, allow the warrant to issue, although the affidavit in Rule 3 mentioned may not contain all the required particulars and in a suit of wages, the Court or Judge may also waive the service of the notice, and in a suit of bottomry the production of the bond.

5. In suits **in rem**, no service of writ of warrant shall be required when the attorney of the defendant waives service and undertakes in writing to appear and to give security or to pay money in to Court in lieu of security.

6. An Attorney not entering appearance or giving security or paying money into Court in lieu of security in a suit **in rem**, in pursuance of his written undertaking so to do shall be liable to attachment.

7. Every writ, warrant and process shall be served by the ¹[Nazir] or his bailiff. Every warrant shall be returned to the Registry within six days from the date thereof.

8. In suits **in rem**, service of summons or warrant against ship, freight or cargo on board is to be effected by nailing or affixing the original writ or warrant for a short time on the main mast or on the single mast of the vessel and by taking off the process leaving a true copy of it nailed or affixed in its place.

9. If the cargo had been landed or transhipped, service of the writ or warrant to arrest the cargo and freight shall be effected by placing the writ of summons or warrant for a short time on the cargo and by on taking off the process, leaving a true copy upon it.

10. If the cargo be in the custody of a person who will not permit access to it, service of the writ or warrant may be made upon the custodian.

11. In a suit **in rem**, any person not named in the writ may intervene and appear on filing an affidavit showing that he is interested in the property under arrest or in the fund in the Registry.
12. After the expiration of twelve days from the return of a warrant, if no appearance shall have been entered in the suit, the attorney for the plaintiff may cause the suit to be set down for hearing.
13. If when the suit comes before the Court, the judge is satisfied that the Plaintiff's claim is well founded, he may pronounce for the claim and may order the property to be sold with or without previous notice and the proceeds paid into the Registry or make such order in the premises as he shall think just.
14. An attorney desiring to enter an appearance in any suit, shall file in the Registry a praecipe a copy of which shall have been previously served on the adverse attorney.
15. The praecipe shall contain the name of the attorney and an address for service in Madras at which it shall be sufficient to leave all instruments and documents in the suit.
16. Where security is to be given in Registry, it shall be given according to these rules and practice of the Court as to security in the case of an attachment before judgment in an ordinary civil suit.
17. Property arrested by warrant shall only be released under the authority of an instrument issued by the Registrar, to be called "release."
18. An attorney at whose instance any property has been arrested may, before an appearance has been entered, obtain the release thereof by filing a praecipe to withdraw the warrant.
19. An Attorney may obtain the release of any property by paying into the Registry the sum in which the suit has been instituted.
20. Cargo arrested for the freight only may be released by an order of a Judge upon proof by affidavit of the value of the freight and by paying the amount of freight into the Registry.
21. In a suit of salvage the value of the property under arrest shall be agreed to or proved by affidavit to the satisfaction of a Judge before the property is released.
22. Where security shall have been given in the sum in which the suit has been instituted, or such sum shall have been paid into the registry and if the suit be one of salvage the value of the property arrested shall have been proved to the satisfaction of a Judge, an Attorney shall be entitled to a release of the same, unless there be a caveat against the release thereof.
23. The release, when obtained, shall be left with a praecipe in the office of the ¹[Sheriff] by the attorney taking out the same, who shall also at the same time pay all the costs, charges and expenses

attending the care and custody of the property whilst under arrest, and the ¹[Sheriff] shall thereupon release the property.

24. An attorney in a suit desiring to prevent the release of any property under arrest, shall file in the Registry a praecipe, and thereupon a Caveat against the release of the property shall be entered in the register of Admiralty suits.

25. A party delaying the release of any property by the entry of a Caveat shall be liable to be condemned in costs and damages, unless he shall show to the satisfaction of the Court or a Judge, good and sufficient reason for having so done.

26. The party desiring to prevent the arrest of any property may cause a Caveat against the issue of a warrant for the arrest thereof to be entered in the Registry.

27. For this purpose he shall cause to be filed in the Registry a notice, signed by himself or by his attorney undertaking to enter an appearance` in any suit that may be instituted against the said property and to give security in such suit in a sum not exceeding an amount to be stated in the notice, or to pay such sum into the Registry, and a Caveat against the issue of a warrant for the arrest of the property shall thereupon be entered in the register of Admiralty suits.

28. Before issuing a warrant for arrest of the property, the Registrar shall ascertain whether or not any Caveat has been entered against the issue of a warrant for the arrest thereof.

29. An attorney instituting a suit against any property in respect of which a Caveat has been entered in the register of Admiralty Suits shall forthwith serve a copy of the plaint upon the party on whose behalf the Caveat has been entered or upon his attorney.

30. Within three days from the service of a copy of the plaint, the party on whose behalf the Caveat has been entered shall, if the sum in which the suit has been instituted does not exceed the amount for which he has undertaken, give security in such sum or pay the same into the Registry, or if it exceeds that amount give security in the sum in which the suit has been instituted or pay the same into the Registry.

31. After the expiration of twelve days from the service of a copy of the plaint, if the party on whose behalf the Caveat has been entered shall not have given security in such sum, or paid the same into the Registry, the Plaintiff's attorney may proceed with the suit by default and have it heard: Provided that the Court may, on good cause shown and on such terms as to payment of costs as it may impose, extend the time for giving security or paying the money into the Registry.

32. If when the suit comes before the Court it is satisfied that the claim is well founded it may pronounce for the amount which appears to be due and may enforce the payment thereof by order and attachment against the party on whose behalf the Caveat has been

entered and by the arrest of the property if it then be or thereafter come within the jurisdiction of the Court.

33. The preceding rules shall not prevent an attorney from taking out a warrant for the arrest of any property, notwithstanding the entry of caveat in the Register of Admiralty suits, but the party at whose instance any property in respect of which a Caveat is entered shall be arrested, shall be liable to be condemned in costs and damages, unless he shall show to the satisfaction of the Court good and sufficient reason for having so done.

34. Every sale under decree of the Court, shall, unless the Judge shall otherwise order, be made by the ¹[Registrar] in like manner as a sale of movable property in execution of a decree in an ordinary civil suit.

²35. [Deleted]

36. Any person interested in the proceeds may be heard before the taxing officer on the taxation of the account of expenses and an objection to the taxation shall be heard in the same manner as an objection to the taxation of a bill of costs.

37. All money paid into Court shall be paid to the Registrar.

38. Money into Court shall not be paid out of Court except in pursuance of an order of the Court or a Judge.

39. Security for latent demands shall not, unless the Judge shall otherwise order, be required on the payment of money out of Court.

40. An attorney desiring to prevent the payment of money out of the Registry shall file a notice and thereupon a Caveat shall be entered in the Register of Admiralty suits.

41. Applications may be made either in Court or to a Judge.

42. Form of praecipes required to be filed in Registry ¹[] may be obtained on application in the registry. They may be varied or altered by a Judge at his discretion.

43. Every praecipe shall be either by the party or by his attorney.

44. If a praecipe be not properly filled up, the Registrar ²[] may refuse to receive the same or to act thereon.

45. A Caveat, whether against the issue of warrant, the release of property, or the payment of money out of the Registry, shall not remain in force for more than six months from the day of the date thereof.

46. A Caveat may be withdrawn by the party on whose behalf it has been entered or by his attorney, but the praecipe to lead the withdrawal thereof shall, save by permission of the Registrar, be signed by the person who signed the praecipe to lead the entry of the Caveat.

47. Application may be made to the Court to overrule any Caveat.

48. The fees of Court and the fees to be allowed to the attorneys shall be those set out in the tables of fees sanctioned for proceedings under the Original Civil Jurisdiction of the High Court. The fees to be³[paid into Court] shall be those set forth in the schedule hereto.

49. The forms used in the Admiralty Division of the Supreme Court in England under the Rules of the Supreme Court shall be adopted and followed as nearly as the circumstances of each case will allow.

50. Where no other provision is made by these rules, proceedings in suits brought in the Court in the exercise of its Admiralty Jurisdiction shall be regulated by the Rules and practice of the Court in suits brought in it in the exercise of its Ordinary Original Civil Jurisdiction.

SPECIAL SUMMARY PROCEDURE.

51. A party to any suit may have the same dealt with, heard and determined in accordance with the following special rules upon filing in the Registry a consent signed by the parties or their attorneys duly authorized in that behalf in the form given below.

52. After such consent has been filed application may be made by any party to the Judge to appoint a day for the hearing and to give directions.

53. There shall be no pleading beyond a statement of claim verified by affidavit, but if there be a counter-claim notice thereof shall be given in writing before such consent as aforesaid is signed.

54. Lists of documents shall be exchanged and mutual inspection of documents granted at or before a time appointed by the Judge on the hearing of the application aforesaid.

55. At the hearing of the application aforesaid, unless it shall sufficiently appear from the statement of claim or otherwise in writing, the plaintiff shall specify the cause or causes of action in respect of which the suit is brought, and, if practicable, the amount actually claimed, and the defendant shall specify the grounds of defence on which he relies and in salvage claims, the plaintiff and the defendant respectively shall at the same time, or within such time as the Judge shall direct, state the value of their property and if required by affidavit. In the case of a counter-claim the cause or causes of action and the claim therein and grounds of defence thereto shall be similarly stated.

56. The Judge shall be at liberty to receive, call for and act upon, such evidence documentary or otherwise, whether legally admissible or not, as he may think fit.

57. If in any suit, the sum awarded, or for which judgment is given exceeds the sum, if any, tendered, the Judge may nevertheless

exercise his discretion as to how and by whom the costs shall be borne.

58. There shall be no appeal from any order or judgment of the judge except on a question of law, and then only by his leave.

59. In other respects the ordinary rules in practice shall apply so far as may be necessary. Notwithstanding anything in these special rules the Judge may, if he thinks fit, make such orders as he might make under the ordinary rules and practice.

60. The foregoing rules shall apply to suits brought in the court in the exercise of its Admiralty Jurisdiction in supersession of all former rules.

Form of consent to the application of Summary Procedure

In the High Court of Judicature at Madras

(As a Court of Admiralty)

Between

xxx Plaintiff.

and

yyy Defendant.

We, the undersigned respectively hereby agree that this cause shall be dealt with, heard and determined according to the Summary Procedure.

Dated this day of 19

... Plaintiff's Attorney.

... Defendant's Attorney

Note – As the abovementioned rules depart from the ordinary rules and practice it will be necessary for attorneys signing this consent to obtain their client's authority to do so.

TABLE OF FEES AND CHARGES ¹[]

Rs. A. P.

1. For serving every writ of summons including Bailiff's charges for serving the same and Making affidavit 1000
2. For every search of service of summons or Other process 100
3. For every ordinary return 100

4. For every special return 200
5. For translation when necessary per folio ... 080
6. For arresting a vessel or goods or person or on the execution of other warrant including Bailiff's charge for executing the same... .. 3200
7. For serving every notice and other judicial process not specified in this schedule for each person served including Bailiff's charge for serving same 500
8. On the execution of any decree, order, commission or other instrument not specifically mentioned In this schedule 1500
9. On delivering up a ship or goods to a purchaser agreeable to the inventory 1500
10. On delivering up a ship or goods to a Purchase agreeable to the inventory 1500
11. On attending the delivery of cargo or sale or removal of a ship of goods per day.. ... 3200
12. On retaining possession of a ship with or without cargo, or to a ship cargo, without a ship, to include the cost of a ship-keeper if required, per day ... 480
13. If the ²[Nazir] or any of his substitutes is required to go a greater distance than five miles from his office to perform any of the above duties, he shall be entitled to his reasonable expenses for travelling, board, and maintenance in addition to the above fees
14. On the sale of any vessel or goods, sold pursuant to a decree or order of the Court or on money realized in execution for every Rs.750 or fraction of Rs.750 realized. 780
15. For release of a vessel, goods or person from arrest 580
16. For every certificate of seizure 500
17. For every other certificate 200

::

Writ of Summons in Admiralty Suits in rem (Rules 8 and 51)

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Between

xxx Plaintiff

And

yyy Defendant

To the owners and parties interested in the ship or vessel _____
of the _____ port or (or cargo and freight, etc., as the
case may be).

Whereas (enter the name, description and address of the plaintiff) has
instituted a suit –

in this Court against you (set out concise statement as appearing in the plaint) you are hereby required to cause an appearance to be entered for you in the Registry i.e. the office of the Registrar of this Court on its Original Side) within _____ days from the service upon you of this summons, exclusive of the day of such service; and are summoned to appear before this Court in person or by an advocate duly instructed to answer the plaintiff's claim on the day the case is set down for hearing, upon which date you must be prepared to produce all your witnesses and all documents in your possession or power upon which you intend to rely in support of your case and you are hereby required to take notice that in default of your causing an appearance to be so entered, the suit will be liable to be heard and determined in your absence.

(Plaint filed 19 _ Summons issued 19 - The defendant is required by the Court to file a written statement within ____ days from the service upon of this writ.)

Witness Chief Justice at Madras the day of in the year of One thousand nine hundred and Registrar.

Note 1 – An appearance in person or through attorney is to be entered in the Registry, within the time limited. In default thereof, the suit will be liable to the heard ex parte.

Note 2 - The written statement called for must be filed within the time limited, the defendant having first entered an appearance. In default thereof the suit will be liable to be heard ex parte.

Note 3 - This writ must be returned to the High Court immediately after the service thereof, or, if not served and the time for the return thereof shall not have been extended on the ____ day of _____ next.

Note 4 – Should your apprehend you witnesses will not attend of their own accord you can have subpoenas from this Court to compel the attendance of any witness and the production of any document that you have a right to call upon the witness to produce, on applying to the Court at any time before the trial, and on payment to them of the fees and expenses prescribed by the Rules of the Court.

Note 5 - If you admit the demand you should pay the money into Court with the costs of the suit to avoid sale of any property in respect of which the suit is brought or execution of the decree which may be against your person or property, or both.

::::::::::::::::::::::::::::::::

Form No.2

PRAECIPE FOR WARRANT (RULE 4)

SUIT NO. OF 19

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Admiralty Jurisdiction

Between

xxx..... Plaintiff

and

yyy..... Defendant

I, _____, attorney for the (state whether plaintiff or defendant), pray a warrant to arrest (state name and nature of property).

Dated the ____ day of _____, 19

(To be signed by the attorney)

::::::::::::::::::::::::::::::::

Form No. 3

WARRANT OF ARREST IN ADMIRALTY in rem. (RULE 4)

SUIT NO. OF 19

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Admiralty Jurisdiction

Between

xxx..... Plaintiff

and

yyy..... Defendant

To,

The ¹[Sheriff of Madras]

You are hereby commanded to arrest the ship or vessel of the port of _____ (and the cargo and freight, etc., as the case may be) and to keep the same under safe arrest, until you shall receive further orders from us.

Witness, etc.

.....

Form No.4

PRAECIPE FOR SERVICE BY THE ¹[SHERIFF] OF ANY INSTRUMENT in rem, OTHER THAN A WARRANT (RULE 8)

SUIT NO. OF 19

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Admiralty Jurisdiction

Between

xxx Plaintiff

and

yyy Defendant

I, _____, attorney for the (state whether plaintiff or defendant), pray that the (state nature of instrument) let herewith be duly executed.

Dated the _____ day of _____ 19

(To be signed by the attorney)

.....

Form No.5

PRAECIPE FOR APPEARANCE (RULE 15)

SUIT NO. OF 19

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Admiralty Jurisdiction

Between

xxx Plaintiff

and

yyy Defendant

Enter an appearance for _____ in this suit.

Dated the _____ day of _____ 19

(signed)

Attorney for the said defendant

Whose address for service is

.....

Form No.6

PRAECIPE FOR RELEASE (RULES 19 and 24)

SUIT NO. OF 19

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Admiralty Jurisdiction

Between

xxx..... Plaintiff

and

yyy..... Defendant

I, _____, attorney for the (state whether plaintiff or defendant), in a suit (state the nature of suit), commenced on behalf of _____ against the (state name and nature of property), now under arrest by virtue of a warrant issued from the Registry, pray a release of the said _____, (bail having been given, or the suit having been withdrawn by me before an appearance was entered therein, etc. as the case may be), and there being no caveat against the release thereof outstanding.

Dated the _____ day of _____ 19

(To be signed by the attorney)

.....

Form No.7

Release (RULE 18)

SUIT NO. OF 19

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Admiralty Jurisdiction

To

The ¹[Sheriff],

Whereas in a suit of _____ commenced in our said High Court on behalf of _____ against _____, you were commanded to arrest the said _____ and to keep the same under safe arrest until you should receive further orders from us. Now you are hereby commanded to release the said _____ from the arrest effected by virtue of the warrant in the said suit, upon payment being made to you of all costs, charges and expenses attending the care and custody of the property whilst under arrest in that suit.

Witness etc.

Release

Taken out by on the day of 19, the ____ or vessel _____ (or cargo and freight, etc. as the case may be) released from arrest pursuant to his instrument of release.

.....

Form No.8

PRAECIPE FOR CAVEAT RELEASE (RULE 24)

SUIT NO. OF 19

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Admiralty Jurisdiction

Between

xxx Plaintiff

and

yyy Defendant

I, _____, attorney for the plaintiff in this action, pray a caveat against the release of the (state name and nature of the property).

Dated the _____ day of _____ 19

(To be signed by the attorney)

.....

**PRAECIPE FOR CAVEAT WARRANT BY PLAINTIFF
(RULE 27)
SUIT NO. OF 19
IN THE HIGH COURT OF JUDICATURE AT MADRAS
Admiralty Jurisdiction**

.....

**PRAECIPE FOR CAVEAT WARRANT BY PLAINTIFF
(RULE 27)
SUIT NO. OF 19
IN THE HIGH COURT OF JUDICATURE AT MADRAS
Admiralty Jurisdiction**

.....

Between

and

I, _____, attorney (state whether plaintiff of defendant), pray that the caveat against (state tenor of caveat) entered by me on the ____ day of _____ 19__ on behalf of (state name) may be withdrawn.

(To be signed by the person by whom the Praeipice for the entry of the caveat was signed)

• • • • •

In the exercise of its admiralty jurisdiction

¹O.42, Rule 34 : word 'Sheriff' substituted by word 'Registrarr' by Roc.86/94, Part III, Sec.2 Page 40, Tamil Nadu Government Gazette issue No.39, dated 5.10.1994.

²O.42, Rule 35 : Deleted by *ibid*.

¹O.42, Rule 42 : Words 'or the Sheriff's office' deleted by *ibid*.

²O.42, Rule 44 : Words 'or the Sheriff' as the case may be' deleted by Roc.86/94, Part III, Sec.2, Page 40, Tamil Nadu Government Gazette issued No.39, dated 5.10.1994.

³O.42, Rule 48 : Words 'taken by the Sheriff' substituted by the words 'paid into court' by *ibid*.

¹ Words "to be allowed to the sheriff", occurring in the Heading deleted by R. Dis.86/94, Part III, Section 2, Page 40, Tamil Nadu Government Gazette, Issue No.39, dated 5.10.1994.

² Item 13. Word 'Sheriff' substituted by word 'Nazir' by Roc. No.86/94 Part III, Section 2, Page 40, Tamil Nadu Gazette, Issue No.39 dated 5.10.1994.

ANNEXURE 3

ADMIRALTY COURT ACT, 1861

24 Vict. c. 10

AN ACT TO EXTEND THE JURISDICTION AND IMPROVE THE PRACTICE OF THE HIGH COURT OF ADMIRALTY

[17th May, 1861]

WHEREAS it is expedient to extend the Jurisdiction and improve the Practice of the High Court of Admiralty of *England*: Be it therefore enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows :

1. This Act may be cited for all Purposes as "The Admiralty Court Act, 1861." *[Short Title]*

2. In the Interpretation and for the Purposes of this Act (if not inconsistent with the Context or subject) the following Terms shall have the respective Meanings herein-after assigned to them; that is to say; *[Interpretation of Terms]*

"Ship" shall include any Description of Vessel used in Navigation not propelled by Oars:

"Cause" shall include any Cause, Suit, Action or other Proceeding in the Court of Admiralty.

3. This Act shall come into operation on the First Day of June, One Thousand Eight Hundred and Sixty One. *[Commencement of Act.]*

4. The High Court of Admiralty shall have Jurisdiction over any claim for the building, equipping, or repairing of any Ship, if at the Time of the Institution of the Cause the Ship or the Proceeds thereof are under Arrest of the Court. *[As to Claims for building, equipping, and c. ships.]*

5. The High Court of Admiralty shall have Jurisdiction over any Claim for Necessaries supplied to any Ship elsewhere than in the Port to which the Ship belongs, unless it is shown to the Satisfaction of the Court that at the Time of the Institution of the Cause any Owner or Part Owner of the Ship is domiciled in England or Wales : Provided always, that if is any such Causes the Plaintiff do not recover twenty pounds he shall not be entitled to any costs, charges or expenses incurred by him therein, unless the Judge shall certify that the Cause was a fit one to be tried in the said Court. *[As to claims for necessities].*

6. The High Court of Admiralty shall have jurisdiction over any claim by the owner or consignee or assignee of any bill of lading of any goods carried into any port in England or Wales in any ship for damage done to the goods or any part thereof by the negligence or misconduct of or for any breach of duty or breach of contract on the part of the owner, master or crew of the ship, unless it is shown to the satisfaction of the Court that at the time of the institution of the cause any owner or part owner of the ship is domiciled in England or Wales : Provided always that if in any such cause the Plaintiff do not recover twenty pounds he shall not be entitled to any costs, charges or expenses incurred by him therein, unless the judge shall certify the cause was a fit one to be tried in the said Court. *[As to the claims for damage to cargo Imported]*.

7. The High Court of Admiralty shall have jurisdiction over any claim for damage done by any ship. *[As to claims for damage by any ship]*.

8. The High Court of Admiralty shall have jurisdiction to decide all questions arising between the co-owners, or any of them, touching the ownership, possession, employment, and earnings of any ship registered at any port in England or Wales, or any share thereof, and may settle all accounts outstanding and unsettled between the parties in relation thereto, and may direct the said ship or any share thereof to be sold, and may make such order in the premises as to it shall seem fit. *[High Court of Admiralty to decide questions as to ownership & c. of ships]*.

9. All the provisions of "The Merchant Shipping Act, 1854", in regard to Salvage of Life from any Ship or Boat within the limits of the United Kingdom, shall be extended to the Salvage of Life from any British Ship or Boat, wheresoever the Services may have been rendered, and from any Foreign Ship or Boat, where the Services have been rendered either wholly or in part in British Waters. *[Extending 17 & 18 Vict. c. 104, 25 to Claims for salvage of life]*.

10. The High Court of Admiralty shall have jurisdiction over any claim by a seaman of any ship for wages earned by him on board the ship, whether the same be due under a special contract or otherwise, and also over any claim by the master of any ship for wages earned by him on board the ship, and for disbursements made by him on account of the ship : Provided always that if in any such cause the plaintiff do not recover fifty pounds he shall not be entitled to any costs, charges or expenses incurred by him therein, unless the judge shall certify that the cause was a fit one to be tried in the said Court. *[As to claims for wages and for disbursements by transfer of a ship]*.

11. The High Court of Admiralty shall have jurisdiction over any claim in respect of any mortgage duly registered according to the provisions of "The Merchant Shipping Act, 1854" whether the ship or the proceeds thereof be under arrest of the said Court or not. *[In regard to mortgages extended to Court of Admiralty]*.

12. The High Court of Admiralty shall have the same powers over any British ship or any share therein, as are conferred upon the High Court of Chancery in England by the Sixty-Second, Sixty-third, Sixty-fourth and Sixty-fifth Sections of "The Merchant Shipping Act, 1854." [17 & 18 Vict. ---- extended].

13. Whenever any ship or vessel, or the proceeds thereof, are under arrest of the High Court of Admiralty, the said court shall have the same powers as are conferred upon the High Court of Chancery in England by the ninth party of "The Merchant Shipping Act, 1854." [Part 9 of 17 & 18 Vict. c. 104, extended to Court of Admiralty].

14. The High Court of Admiralty shall be a Court of Record for all Intents and purposes. [Court to be a Court of Record].

15. All Decrees and Orders of the High Court of Admiralty whereby any sum of Money or any costs, charges or expenses shall be payable to any Person, shall have the same Effect as Judgments in the Superior Courts of Common Law, and the persons to whom any such monies or costs, charges or expenses shall be payable, shall be deemed Judgment Creditors and all powers of enforcing Judgments possessed by the Superior Courts of Common Law, or any Judge thereof, with respect to matters depending in the same Courts as well against the Ships and Goods arrested as against the Person of the Judgment Debtor, shall be possessed by the said Court of Admiralty with respect to Matters therein depending; and all Remedies at Common Law possessed by Judgment Creditors shall be in like manner possessed by Persons to whom any monies, costs, charges or expenses are by such Orders or Decrees of the said Court of Admiralty directed to be paid. [Decrees & Orders of Court of Admiralty to have effect of Judgments at Common Law].

16. If any claim shall be made to any goods or chattels taken in execution under any process of the High Court of Admiralty, or in respect of the seizure thereof, or any act or matter connected therewith, or in respect of the proceeds or value of any such goods or chattels, by any landlord for rent, or by any person not being the party against whom the process has issued, the registrar of the said court may, upon application of the officer charged with the execution of the process, whether before or after any action brought against such officer, issue a summons calling before the said Court both the party issuing such process and the party making the claim, and thereupon any action which shall have been brought in any of Her Majesty's superior Courts of Record, or in any local or inferior court, in respect of such claim, seizure, act or matter as aforesaid, shall be stayed and the court in which such action shall have been brought or any judge thereof, on proof of the issue of such summons, and that the goods and chattels were so taken in execution, may order the party bringing the action to pay the costs of all proceedings had upon the action after issue of the summons out of the said Admiralty Court, and the judge of the said Admiralty Court shall adjudicate upon the claim, and make such order between the parties in respect thereof and of the costs of the proceedings, as to him shall seem fit, and such order shall be enforced in like manner as any order made in any suit brought in

the said Court. Where any such claim shall be made as aforesaid the claimant may deposit with the officer charged with the execution of the process either the amount or value of the goods claimed, the value to be fixed by appraisement in case of dispute, to be by the officer paid into court to abide the decision of the judge upon the claim, or the sum which the officer shall be allowed to charge as costs for keeping possession of the goods until such decision can be obtained, and in default of the claimant so doing the officer may sell the goods as if no such claim had been made, and shall pay into court the proceeds of the sale, to abide the decision of the Judge. *[as to claims to goods taken in execution]*.

17. The Judge of the High Court of Admiralty shall have all such powers as are possessed by any of the Superior Courts of Common Law or any Judge thereof to compri either party in any cause or matter to answer interrogatories, and to enforce the Production, Inspection and Delivery of Copies of any Document in his possession or power. *[Powers of Superior Courts extended to Court of Admiralty]*.

18. Any party in a cause in the High Court of Admiralty shall be at liberty to apply to the said court for an order for the inspection by the Trinity Masters or others appointed for the trial of the said cause, or by the party himself or his witnesses, of any ship or other personal or real property, the inspection of which may be material to the issue of the cause, and the court may make such order in respect of the costs arising thereout as to it shall seem fit. *[Party in Court of Admiralty may apply for an order for inspection by Trinity Masters]*.

19. Any party in a cause in the High Court of Admiralty may call on any other Party in the Cause by Notice in Writing to admit any Document, moving all just Exceptions, and in case of Refusal or Neglect to admit, the Costs of proving the document shall be paid by the Party so neglecting or refusing whatever the Result of the Cause may be, unless, at the Trial the Judge shall certify that the Refusal to admit was reasonable. *[Admission of Documents]*.

20. Whenever it shall be made to appear to the Judge of the High Court of Admiralty that reasonable Efforts have been made to effect personal service of any Citation, Monition, or other Process issued under Seal of the said Court, and either that the same has come to the knowledge of the Party thereby cited or monished, or that he wilfully evades service of the same, and has not appeared thereto, the said Judge may order that the Party on whose behalf the Citation, Monition or other Process was issued be at liberty to proceed as if personal service had been effected, subject to such conditions as to the Judge may seem fit and all proceedings thereon shall be as effectual as if personal service of such citation, monition, or other process had been effected. *[Power to Court of Admiralty when personal service of Citation has not been effected to order parties to _____]*.

21. The service in any part of Court Britain or Ireland of my writ of subpuena ad testificandum or subpuena ducos tocum, issued under

seal of the High Court of Admiralty, shall be as effectual as if the same had been served in England or Wales. *[As to the service of subpuena out of England and Wales]*.

22. Any new writ or other process necessary or expedient for giving Effect to any of the Provisions of this Act may be issued from the High Court of Admiralty in such Form as the Judge of the said Court shall from time to time direct. *[Power to issue new Writs or other process]*

23. All the powers possessed by any of the Superior Courts of Common Law or any Judge thereof, under the Common Law Procedure Act, 1854, and otherwise, with regard to Reference to Arbitration, Proceedings thereon and the enforcing of awards of arbitrators, shall be possessed by the Judge of the High Court of Admiralty in all causes and matters depending in the said court, and the Registrar of the said Court of Admiralty shall possess as to such matters the same powers as are possessed by the masters of the said superior Courts of Common Law in relation thereto. *[Judge and Registrar to have same power as to arbitration as Judges and masters at Common Law]*.

24. The Registrar of the High Courts of Admiralty shall have the same Powers under the Fifteenth Section of the Merchant Shipping Act, 1854, as are by the said Section conferred on the Masters of Her Majesty's Court of Queen's Bench in England and Ireland. *[17 & 18 Vict. c. 104 s.15 extended to Registrar of Courts]*.

25. The Registrar of the High Court of Admiralty may exercise, with reference to causes and matters in the said court, the same powers as any surrogate of the judge of the said court sitting in chambers might or could have heretofore lawfully exercised; and all powers and authorities by this or any other Act conferred upon or vested in the registrar of the said High Court of Admiralty may be exercised by any deputy or assistant registrar of the said Court. *[Powers of registrar and of deputy or assistant registrar]*.

26. The registrar of the said Court of Admiralty shall have power to administer Oaths in relation to any cause or matter depending in the said court; and all powers and authorities by this or any other Act conferred upon or vested in the registrar of the said High Court of Admiralty may be exercised by any deputy or assistant registrar of the said Court, or before any person authorised to administer oaths in the said Court, shall be deemed to be guilty of perjury and shall be liable to all the pains and penalties attaching to willful and corrupt perjury. *[False oath or affirmation deemed perjury]*.

27. Any advocate, barrister-at-law, proctor, attorney, or solicitor of ten years standing may be appointed registrar or assistant or deputy registrar of the said court. *[Appointment of Registrar and of deputy or assistant registrar]*.

28. Any advocate, barrister-at-law, proctor, attorney, or solicitor may be appointed an examiner of the High Court of Admiralty. *[Appointment of Examiners].*

29. Any person who shall have paid on his Admission in any Court as a Proctor, Solicitor or Attorney, the full stamp duty of Twenty Five pounds, and who has been or shall hereafter be admitted a Proctor, Solicitor or Attorney (if in other respects entitled to be so admitted), shall be liable to no further Stamp Duty in respect of such subsequent admission. *[Stamp duty no payable on subsequent admissions & c.]*

30. Any Proctor of the High Court of Admiralty may act as Agent of any Attorney or Solicitor, and allow him to participate in the profits of and incident to any Cause or matter depending in or connected with the said Court; and nothing contained in the Act of the fifty-fifth year of the Reign of King George the Third, Chapter One hundred and sixty, shall be construed to extend to prevent any Proctor from so doing, or to render him liable to any Penalty in respect thereof. *[Proctor may act as Agent of Solicitors].*

31. The Act passed in the Second year of the Reign of King Henry the Fourth, intituled A Itemedy for him who is wrongfully pursued in the Court of Admiralty, is hereby repealed. *[2 Hen. 4.c.11. repealed].*

32. Any Party aggrieved by any order or decree of the Judge of the said Court of Admiralty, whether made ex parte or otherwise, may, with the Permission of the Judge, appeal thereupon to Her Majesty in Council, as fully and effectually as from any final Decree or Sentence of the said Court. *[Power of Appeal interested in matter].*

33. In any cause in the High Court of Admiralty bail may be taken to answer the judgment as well of the said court as of the Court of Appeal, and the said High Court of Admiralty may withhold the release of any property under its arrest until such bail has been given; and in any appeal from any decree or order of the High Court of Admiralty the Court of Appeal may make and enforce its order against the surety or sureties who may have signed any such bail bond in the same manner as if the bail had been given in the Court of Appeal. *[Bail given in the Court of Admiralty good in the Court of Appeal].*

34. The High Court of Admiralty may, on the application of the defendant in any cause of damage, and on his instituting a crew cause for the damage sustained by him in respect of the same collision, direct that the principal cause and the cross cause be heard at the same time and upon the same evidence; and if in the principal cause the ship of the defendant has been arrested or security given by him to answer judgment, and in the cross cause the ship of the plaintiff cannot be arrested, and security has not been given to answer judgment therein, the Court may, if it thinks fit, suspend the proceedings in the principal cause, until security has been given to answer judgment in the cross cause. *[As to the hearing of cause and cross causes].*

35. The jurisdiction conferred by this Act on the High Court of Admiralty may be exercised either by proceedings in rem or by proceedings in personam. [*Jurisdiction of the Court*].

ANNEXURE - 4

[THE] COLONIAL COURTS OF ADMIRALTY ACT, 1890

(53 AND 54 VICT., C.27)

[25th July, 1890].

[The text of the Act printed here is as on 31-12-1990]

An Act to amend the law respecting the exercise of Admiralty Jurisdiction in Her Majesty's Dominions and elsewhere out of the United Kingdom.

1. **Short Title** - This Act may be cited as The Colonial Courts of Admiralty Act, 1890.

2. **Colonial Courts of Admiralty** - (1) Every Court of law in a British possession, which is for the time being declared in pursuance of this Act to be a Court of Admiralty, or which, if no such declaration is in force in the possession, has therein original unlimited civil jurisdiction, shall be a Court of Admiralty, with the jurisdiction in this Act mentioned, and may for the purpose of that jurisdiction, exercise all the powers which it possesses for the purpose of its other civil jurisdiction and such Court in reference to the jurisdiction conferred by this Act is in this Act referred to as a Colonial Court of Admiralty. Where in a British possession the Governor is the sole judicial authority the expression "Court of law" for the purpose of this section includes such Governor.

(2) The jurisdiction of a Colonial Court of Admiralty shall, subject to the provisions of this Act, be over the like places, persons, matters and things as the Admiralty jurisdiction of the High Court in England, whether existing by virtue of any statute or otherwise and the Colonial Courts of Admiralty may exercise such jurisdiction in like manner and to as full an extent as the High Court in England, and shall have the same regard as that Court to international law and the comity of nations.

(3) Subject to the provisions of this Act any enactment referring to a Vice-Admiralty Court, which is contained in an Act of the Imperial Parliament or in a Colonial law, shall apply to a Colonial Court of Admiralty, and be read as if the expression "Colonial Court of Admiralty" were therein, substituted for "Vice-Admiralty Court" or for other expressions respectively referring to such Vice-Admiralty Courts or the Judge thereof, and the Colonial Courts of Admiralty shall have jurisdiction accordingly :

Provided as follows :-

(a) Any enactment in an Act of the Imperial Parliament referring to the Admiralty Jurisdiction of the High Court in England when applied to Colonial Courts of Admiralty in a British possession, shall

be read as if the name of that possession were therein substituted for England and Wales and

(b) A Colonial Courts of Admiralty shall have under the Naval Prize Act, 1864, and under the Slave Trade Act, 1873 and any enactment relating to prize or the slave trade the jurisdiction thereby conferred on a Vice-Admiralty Court and not the jurisdiction thereby conferred exclusively on the High Court of Admiralty or the High Court of Justice; but unless for the time being duly authorised, shall not by virtue of this Act exercise any jurisdiction under the Naval Prize Act, 1864, or otherwise in relation to prize; and

(c) A Colonial Courts of Admiralty shall not have jurisdiction under this Act to try or punish a person for an offence which according to the law of England is punishable on indictment; and

(d) A Colonial Courts of Admiralty shall not have any greater jurisdiction in relation to the laws and regulations relating to Her Majesty's Navy at sea or under any Act providing for the discipline of Her Majesty's Navy than may be from time to time conferred on such Court by Order in Council.

(4) Where a Court in a British possession exercises in respect of matters arising outside the body of a country or other like part of a British possession any jurisdiction exercisable under this Act, that jurisdiction shall be deemed to be exercised under this Act and not otherwise.

3. Power of Colonial legislature as to Admiralty jurisdiction - The legislature of a British possession may by any Colonial law :

(a) declare any Court of unlimited civil jurisdiction, whether original or appellate, in that possession to be a Colonial Court of Admiralty, and provide for the exercise by such Court of its jurisdiction under this Act, and limit territorially or otherwise, the extent of such jurisdiction; and

(b) confer upon any inferior or subordinate Court in that possession such partial or limited Admiralty jurisdiction under such regulations and with such appeal (if any) as may seem fit:

Provided that any such Colonial law shall not confer any jurisdiction which is not by this Act conferred upon a Colonial Court of Admiralty.

4. Reservation of Colonial law for Her Majesty's assent - Every Colonial law which is made in pursuance of this Act, or affects the jurisdiction of or practice or procedure in any Court of such possession in respect of the jurisdiction conferred by this Act, or alters any such Colonial law as above in this section mentioned, which has been previously passed, shall unless previously approved by Her Majesty through a Secretary of State, either be reserved for the signification of Her Majesty's pleasure thereon, or contain a suspending clause providing that such law shall not come into operation until Her Majesty's pleasure thereon has been publicly signified in the British possession in which it has been passed.

^a[This section shall not apply to Indian laws ^b[* *].]

[^a] Inserted by A.O. (P).

[^B] The words "or Burma laws" were repealed by the Burma Independence Act, 1947, S.5(3) and Sch.II Part I.

5. Local Admiralty appeal - Subject to rules of Court under this Act, judgments of a Court in a British possession given or made in the exercise of the jurisdiction conferred on it by this Act, shall be subject to the like local appeal, if any, as judgment of the Court in the exercise of its ordinary civil jurisdiction, and the Court having cognizance of such appeal shall for the purpose thereof possess all the jurisdiction by this Act conferred upon a Colonial Court of Admiralty.

6. Admiralty appeal to the Queen in Council - (1) The appeal from a judgment of any Court in a British possession in the exercise of the jurisdiction conferred by this Act either where there is as of right no local appeal or after a decision on local appeal, lies to Her Majesty the Queen in Council.

(2) Save as may be otherwise specially allowed in a particular case by Her Majesty the Queen in Council, an appeal under this section shall not be allowed.

(a) from any judgment not having the effect of a definitive judgment unless the Court appealed from has given leave for such appeal, nor

(b) from any judgment unless the petition of appeal has been lodged within the time prescribed by rules, or if no time is prescribed within six months from the date of the judgment appealed against, or if leave to appeal has been given then from the date of such leave.

(3) For the purpose of appeals under this Act, Her Majesty the Queen in Council and the Judicial Committee of the Privy Council shall, subject to rules under this section, have all such powers for making and enforcing judgments, whether interlocutory or final, for punishing contempts, for requiring the payment of money into Court, or for any other purpose, as may be necessary, or as were possessed by the High Court of Delegates before the passing of the Act transferring the powers of such Court to Her Majesty in Council, or as are for the time being possessed by the High Court in England or by the Court repealed from in relation to the like matters as those forming the subject of appeals under this Act.

(4) All orders of the Queen in Council or the Judicial Committee of the Privy Council for the purposes aforesaid or otherwise in relation to appeals under this Act shall have full effect throughout Her Majesty's dominions and in all places where Her Majesty has jurisdiction.

(5) This section shall be in addition to and not in derogation of the authority of Her Majesty in Council or the Judicial Committee of the Privy Council arising otherwise than under this Act, and all enactments relating to appeals to Her Majesty in Council or to the

powers of Her Majesty in Council or the Judicial Committee of the Privy Council in relation to those appeals, whether for making rules and orders or otherwise, shall extend, save as otherwise directly by Her Majesty in Council, to appeals to Her Majesty in Council under this Act.

7. Rules of Court - (1) Rules for regulating the procedure and practice (including fees and costs) in a Court in a British possession in the exercise of the jurisdiction conferred by this Act, whether original or appellate, may be made by the same authority and in the same manner as rules touching the practice, procedure, fees and costs in the said Court in the exercise of its ordinary civil jurisdiction respectively are made :

Provided that the rules under this section shall not, save as provided by this Act, extend to matters relating to the slave trade, and shall not (save as provided by this section) come into operation until they have been approved by Her Majesty in Council, but on coming into operation shall have full effect as if enacted in this Act, and any enactment inconsistent therewith shall, so far as it is so inconsistent, be repealed.

(2) It shall be lawful for Her Majesty in Council, in approving rules made under this section, to declare that the rules so made with respect to any matters which appear to Her Majesty to be matters of detail or of local concern may be revoked, varied, or added to without the approval required by this section.

(3) Such rules may provide for the exercise of any jurisdiction conferred by this Act by the full Court, or by any Judge or judges thereof, and subject to any rules, where the ordinary civil jurisdiction of the Court can in any case be exercised by a single judge, any jurisdiction conferred by this Act may in the like case be exercised by a Single Judge.

8. Droits of Admiralty and of the Crown - (1) Subject to the provisions of this Section nothing in this Act shall alter the application of any droits of Admiralty or droits of or forfeitures to the Crown in a British possession; and such droits and forfeitures, when condemned by a Court of a British possession in the exercise of the jurisdiction conferred by this Act, shall, save as is otherwise provided by any other Act, be notified, accounted for and dealt with in such manner as the Treasury from time to time direct, and the officers of every Colonial Courts of Admiralty and of every other Court in a British possession exercising Admiralty Jurisdiction shall obey such directions in respect of the said droits and forfeitures as may be from time to time given by the Treasury.

(2) It shall be lawful for Her Majesty the Queen in Council by order to direct that, subject to any conditions, exceptions, reservations, and regulations contained in the Order, the said droits and forfeitures condemned by a Court in a British possession shall form part of the revenues of that possession either for ever or for such limited term or subject to such revocation as may be specified in the order.

(3) If and so long as any of such droits or forfeitures by virtue of this or any other Act for part of the revenues of the said possession the same shall subject to the provisions of any law for the time being applicable thereto, be notified, accounted for, and dealt with in manner directed by the Government of the possession and the Treasury shall not have any power in relation thereto.

9. Power to establish Vice-Admiralty Court - (1) It shall be lawful for Her Majesty, by commission under the Great Seal, to empower the Admiralty to establish in a British possession and Vice-Admiralty Court or Courts.

(2) Upon the establishment of a Vice-Admiralty Court in a British possession, the Admiralty by writing under their hands and the seal of the office of Admiralty, in such form as the Admiralty direct, may appoint a Judge, registrar, marshal and other officers of the Court, and may cancel any such appointment : and in addition to any other jurisdiction of such Court may (subject to the limits imposed by this Act or the said commission from Her Majesty) vest in such Court the whole or any part of the jurisdiction by or by virtue of this Act conferred upon any courts of that British possession and may vary or revoke such vesting, and while such vesting is in force the power of such last mentioned Courts to exercise the jurisdiction so vested shall be suspended.

Provided that -

(a) nothing in this section shall authorise a Vice-Admiralty Court so established in India ^a[^b* *] or in any other British possession] having a representative legislature, to exercise any jurisdiction, except for such purpose relating to prize, to Her Majesty's Navy, to the slave trade, to the matters dealt with by the Foreign Enlistment Act, 1870, or the Pacific Islanders Protection Acts, 1872 and 1875, or to matters in which questions arise relating to treaties or conventions with foreign countries, or to international law : and

(b) in the event of a vacancy in the office of Judge, registrar, marshal, or other officer of any Vice-Admiralty Court in a British Possession, the Governor of that possession may appoint a fit person to fill the vacancy until an appointment to the office is made by the Admiralty.

(3) The provisions of this Act with respect to appeals to Her Majesty in Council from Courts in British possessions in the exercise of the jurisdiction conferred by this Act shall apply to appeals from Vice-Admiralty Courts but the rules and orders made in relation to appeals from Vice-Admiralty Courts may differ from the rules made in relation to appeals from the said Courts in British possessions.

(4) If Her Majesty at any time by commission under the Great Seal so directs, the Admiralty shall by writing under their hands and the seal of the office of Admiralty abolish a Vice-Admiralty Courts established in any British possession under this section, and upon such abolition the jurisdiction of any Colonial Court of Admiralty in that possession which was previously suspended shall be revived.

[^a] Substituted by A.O. (P).

[^B] The words "or in Burma" were repealed by the Burma Independence Act, 1947, S.5 and Sch.II Part I.

10. Power to appoint a Vice - Admiral - Nothing in this Act shall affect any power of appointing a vice-admiral in and for any British possession or any place therein; and whenever there is not a formally appointed vice-admiral in a British possession or any place therein, the Governor of the possession shall be ex officio vice-admiral thereof.

11. Exception of Channel Islands and other possessions.-

(1) The provisions of this Act with respect to Colonial Courts of Admiralty shall not apply to the Channel Islands.

(2) It shall be lawful for the Queen in Council by order to declare, with respect to any British possession which has not a representative legislature, that the jurisdiction conferred by this Act on Colonial Courts of Admiralty shall not be vested in any Court of such possession, or shall be vested only to the partial or limited extent specified in the Order.

12. Application of Act to Courts under Foreign Jurisdiction Acts - It shall be lawful for Her Majesty by the Queen in Council by Order to direct that this Act shall, subject to the conditions, exceptions, and qualifications (if any) contained in the Order, apply to any court established by Her Majesty for the exercise of jurisdiction in any place out of Her Majesty's dominions which is named in the Order as if that Court were a Colonial Courts of Admiralty and to provide for carrying into effect such application.

13. Rules for procedure in slave trade matters - (1) It shall be lawful for Her Majesty the Queen in Council by Order to make rules as to the practice and procedure (including fees and costs) to be observed in and the returns to be made from Colonial Courts of Admiralty and Vice-Admiralty Courts in the exercise of their jurisdiction in matters relating to the slave trade, and in and from East African Courts as defined by the Slave Trade (East African Courts) Acts, 1873 and 1879.

(2) Except when inconsistent with such Order in Council, the rules of Court for the time being in force in a Colonial Court of Admiralty or Vice-Admiralty Courts shall, so far as applicable, extend to proceedings in such Court in matters relating to the slave trade.

(3) The provisions of this Act with respect to appeals to Her Majesty in Council, from Courts in British possessions in the exercise of the jurisdiction conferred by this Act, shall apply with the necessary modifications, to appeals from judgments of any East African Court made or purporting to be made in exercise of the jurisdiction under the Slave Trade (East African Courts) Act, 1873 and 1879.

14. Orders in Council - It shall be lawful for Her Majesty in Council from time to time to make orders for the purposes authorised by this Act, and to revoke and vary such orders, and every such order while in operation shall have effect as if it were part of this Act.

15. Interpretation - In the construction of this Act, unless the context otherwise requires -

The expression "representative legislature" means, in relation to a British possession, a legislature comprising a legislative body of which at least one-half are elected by inhabitants of the British possession.

The expression "unlimited civil jurisdiction" means civil jurisdiction unlimited as to the value of the subject matter at issue, or as to the amount that may be claimed or recovered.

The expression "judgment" includes a decree, order and sentence.

The expression "appeal" means any appeal, rehearing or review, and the expression "local appeal" means an appeal to any Court inferior to Her Majesty in Council.

The expression "Colonial law" means any Act, ordinance, or other law having the force of legislative enactment in a British possession and made by any authority, other than the Imperial Parliament of Her Majesty in Council, competent to make laws for such possession.

16. Commencement of Act - (1) This Act shall save as otherwise in this Act provided, come into force in every British possession on the first day of July, One thousand eight hundred and ninety one.

Provided that -

(a) This Act shall not come into force in any of the British possession named in the First Schedule to this Act until Her Majesty so directs by Order in Council and until the day named in that behalf in such Order; and

(b) If before any day above mentioned rules of Court for the Colonial Court of Admiralty in any British possession have been approved by Her Majesty in Council, this Act may be proclaimed in that possession by the Governor thereof, and on such proclamation shall come into force on the day named in the proclamation.

(2) The day upon which this Act comes into force in any British possession shall, as regards that British possession, be deemed to be the commencement of this Act.

(3) If, on the commencement of this Act in any British possession, rules of Court have not been approved by Her Majesty in pursuance of this Act, the rules in force at such commencement under the Vice-Admiralty Courts Act, 1863, and in India the rules in force at such commencement regulating the respective Vice-Admiralty Courts or Courts of Admiralty in India, including any rules made with reference to proceedings instituted on behalf of Her Majesty's ships, shall, so far as applicable, have effect in the Colonial Courts or

Courts of Admiralty of such possession, and in any Vice-Admiralty Court established under this Act in that possession, as rules of Court under this Act, and may be revoked and varied accordingly; and all fees payable under such rules may be taken in such manner as the Colonial Court may direct, so however that the amount of each such fee shall so nearly as practicable be paid to the same officer or person who but for the passing of this Act would have been entitled to receive the same in respect of like business. So far as any such rules are inapplicable or do not extend, the rules of Court for the exercise by a Court of its ordinary civil jurisdiction shall have effect as rules for the exercise by the same Court of the jurisdiction conferred by this Act.

(4) At any time after the passing of this Act any Colonial law may be passed, and any Vice-Admiralty Court may be established and jurisdiction vested in such Court but any such law, establishment, or vesting shall not come into effect until the commencement of this Act.

17. Abolition of Vice-Admiralty Courts - On the commencement of this Act in any British possession, but subject to the provisions of this Act, every Vice-Admiralty Court in that possession shall be abolished : subject as follows :-

(1) All judgments of such Vice-Admiralty Court shall be executed and may be appealed from in like manner as if this Act had not been passed, and all appeals from any Vice-Admiralty Court pending at the commencement of this Act shall be heard and determined, and the judgment thereon executed as may be in like manner as if this Act had not been passed;

(2) All proceedings pending in the Vice-Admiralty Court in any British possession at the commencement of this Act shall, notwithstanding the repeal of any enactment by this Act, be continued in a Colonial Court of Admiralty of the possession in manner directed by rules of Court, and, so far as no such rule extends, in a like manner as nearly as may be, as if they had been originally begun in such Court;

(3) Where any person holding an office, whether that of Judge, Registrar or Marshal, or any other office in any such Vice-Admiralty Court in a British possession, suffers any pecuniary loss in consequence of the abolition of such Court, the Government of the British possession, on complaint of such person, shall provide that such person shall receive reasonable compensation (by way of an increase of salary or a capital sum, or otherwise) in respect of his loss, subject nevertheless to the performance, if required by the said Government of the like duties as before such abolition;

(4) All books, papers, documents, office furniture and other things at the commencement of this Act belonging or appertaining to any Vice-Admiralty Court shall be delivered over to the proper officer of the Colonial Court of Admiralty, or be otherwise dealt with in such manner as, subject to any directions from Her Majesty, the Governor may direct;

(5) Where, at the commencement of this Act in a British possession, any person holds a commission to act as advocate in any Vice-Admiralty Court abolished by this Act, either for Her Majesty or for the Admiralty, such commission shall be of the same avail in every Court of the same British possession exercising jurisdiction under this Act, as if such Court were the Court mentioned or referred to in such commission.

18. Repeal - The Acts specified in Second Schedule to this Act shall, to the extent mentioned in the third column of that schedule, be repealed as respects any British possession as from the commencement of this Act in that possession, and as respects any court out of Her Majesty's dominions as from the date of any Order applying this Act :

Provided that -

(a) Any appeal against a judgment made before the commencement of this Act may be brought and any such appeal and any proceedings or appeals pending at the commencement of this Act may be carried on and completed and carried into effect as if such repeal had not been enacted; and

(b) All enactments and rules at the passing of this Act in force touching the practice, procedure, fees, costs, and returns in matters relating to the slave trade, in Vice-Admiralty Courts and in East African Courts shall have effect as rules made in pursuance of this Act, and shall apply to Colonial Courts of Admiralty, and may be altered and revoked accordingly.

SCHEDULES

FIRST SCHEDULE

SECTION 16, BRITISH POSSESSIONS IN WHICH OPERATION OF ACT IS DELAYED

New South Wales

Victoria

St. Helena

British Honduras

SECOND SCHEDULE

SECTION 18. ENACTMENTS REPEALED

Session and TITLE OF ACT Extent of Chapter Repeal

56 Geo.3,c.82 An Act to render valid the The Whole Act judicial Acts of Surrogates of Vice-Admiralty Courts abroad, during vacancies in office of Judges of such Courts.

2 & 3 Will.4,c.51 An Act to regulate the practice The Whole Act and the fees in the Vice Admiralty Courts abroad, and to obviate doubts as to their jurisdiction.

3 & 4 Will.r,c.41 An Act for the better adminis- Section 2 tration of justice in His Majesty's Privy Council.

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6 & 7 Vict.c.38 An Act to make further In Section 2,the words regulations for facilitating "or from any Admira- the hearing appeals and lty Courts" and the other matters by the words "or the Lords Judicial Committee of Commissioners of the Privy Council. Appeals in prize causes or their surro- gates."

In section 3, the words "and the High Court of Admiralty of England." and the words "and from any Admiralty or Vice-Admiralty Courts."

In Section 5, from the first "the High Court of Admiralty" to the end of the Section.

In Section 7, the words "and from Admiralty or Vice-Admiralty Court."

Section 9 and 10, so far as relate to maritime causes.

In section 12, the words "or maritime."

In Section 15, the words "and Admiralty and Vice - Admiralty."

7 & 8 Vict.c.69 An Act for amending In Section 12, the words an Act passed in the "and from the admiralty fourth year of the reign and vice-admiralty of His late Majesty, enti- Courts." and so much tled, "An Act for the of the rest of the better administration of section as relates to justice in His Majesty's maritime causes. Privy Council" and to extend its jurisdiction and powers.

26 Vict.,c.24 The Vice-Admiralty Courts The Whole Act Act, 1863.

30 & 31 Vict.c.45 The Vice-Admiralty Courts The Whole Act (Amendment) Act, 1867.

36 & 37 Vict,c.59 The Slave Trade (East Sections 4 and 5 African Courts) Act, 1867.

36 & 37 Vict.c.88 The Slave Trade Act,1873. Section 20 as far as relates to the taxation of any costs, charges and expenses which can be taxed in pur- suance of this Act.

Section 23 the words "under the vice- Admiralty Courts Act, 1863."

38 & 39 Vict.c.51 The Pacific Islanders So much of Section 6 as Protection Act, 1875. authorises Her Majesty to confer Admiralty jurisdiction on any Court.

Preamble

(1) In any admiralty suit in rem, the High Court had no jurisdiction to order the arrest of any ship other than the ship in respect of which the cause of action had arise.

(1983) 2 Ca. I J 229 (238).

(2) Once a vessel is arrested by the Court in its Admiralty jurisdiction, the court in its inherent jurisdiction has always, the power to modify, reduce the amount of security and also to waive it altogether.

(1981) 2 Cal I J 129 (141, 142).

(3) With regard to admiralty Orissa High Court is a Court of prescribed jurisdiction. It cannot go beyond the instrumentalities of internal Municipal Law which has conferred upon it the admiralty jurisdiction.

AIR 1982 Orissa 57 (66) : H.R. (1981) 2 Cut 391 (DB).

Section 2

(1) The jurisdiction of the High Court in India in relation to necessities supplied to a ship rests on the provisions of this Act, which vests in it, inter alia, the power described in S.5 of the Admiralty Court Act, 1861 (24 & 25 Vict. c. 10). And under Section 5 of the latter statute the High Court in India, in the Admiralty Side, has jurisdiction over any claim for necessities supplied to any ship elsewhere than in the port to which the ship Court belongs.

AIR 1951 Cal. 681 (683, 684)

(2) Claim for necessities can be enforced in a Colonial Court of Admiralty by a suit in rem, and such a suit can presumably be instituted in any Admiralty Court within whose jurisdiction the ship happens to be at the time when the suit is instituted. Before there can be an action in rem there must be a personal liability on the part of the owner.

AIR 1923 Rang 163 (165).

(3) In order to render a ship liable for maritime lien for injury caused, the ship itself must be the instrument which caused the damage. The old law of arresting any other ship instead has now become obsolete even in England AIR 1937 Cal 122 (124).

(4) To establish a maritime lien for damage against a ship, the damage must be the direct result of some unskillful or negligent conduct or those in charge of the ship which does the mischief, the ship herself being the instrument of mischief

H. R. (1902) 29 Cal 402 (407).

(5) Colonial Courts of Admiralty (India) Act (16 of 1981) Section 2 Admiralty jurisdiction of Bombay High Court. Not circumscribed by Merchant Shipping Act, 1958. Can entertain claim based on foreign ship mortgages executed abroad.

AIR 1983 Bom 178 (185) : (1983) 85 Bom I. R. 250.

(6) The Admiralty Court exercises jurisdiction when a claim arises pertaining to the vessel and it cannot be said that every claim arising out of a charter party agreement can only be entertained by Admiralty Court even if the claim is for realisation of monetary claim

(1989) I Goa I.T 75 (48) (DB).

Section 3

(1) The High Court of jurisdiction of Bombay as a Colonial Court of Admiralty had the same jurisdiction as was then exercised by the High Court of England in its admiralty jurisdiction.

AIR 1973 Bom 18 (23).

(2) With regard to admiralty Orissa High Court is a Court of prescribed jurisdiction. It cannot go beyond the instrumentalities of Internal Municipal Law which has conferred upon it the admiralty jurisdiction.

AIR 1982 Orissa 57 (66) : ILR (1981) 2 Cut 391 (DB).

Section 6

(1) Section 6 of the Act is confined to suits where damage is done to goods shipped and cannot be extended to cover where damages are claimed only on a breach of contract without any damages to goods. (1981) 1 Cal HN 373 (378).

Section 7

(1) The appeal filed without leave of the trial Court would not be maintainable in view of absolute bar to that effect under R.59 of the Rules made under S.7 of the Act for regulating the procedure in cases brought before the High Court of judicature of Madras under the Colonial Courts of Admiralty Act, 1890.

AIR 1989 AP 255 (257) : (1989) I APLJ (HC) 547 (DB).

(2) Where there was breach of contract by the owner of the ship and no damage was done to goods shipped, the damage by breach of contract cannot be said to be damage done by any ship and therefore the suit for recovery of such damages would not fall under S.7 of the Act. However, the High Court has concurrent jurisdiction to try such a suit either in its Admiralty jurisdiction or in its ordinary original civil jurisdiction (1981) 1 Cal HN 373 (378).

ANNEXURE- 5

[THE] COLONIAL COURTS OF ADMIRALTY (INDIA) ACT, 1891

(ACT NO.16 OF 1891)^a

[14th May, 1891.]

An Act to declare certain Courts in ^b[India] to be Colonial Courts of Admiralty.

Whereas it is provided by the Colonial Courts of Admiralty Act, 1890 that the Legislature of a British possession may by any colonial law declare any Court of unlimited civil jurisdiction in that possession to be a Colonial Court of Admiralty;

And whereas it is expedient, in pursuance of that provision, to declare certain Courts in ^b[India] to be Colonial Courts of Admiralty;

It is hereby enacted as follows :-

[^a] For Statement of Objects and Reasons, see Gazette of India, 1891, Part V, p. 140; for Proceedings in Council, see *ibid*; p.116.

[^b] Adapted by A.C.A.O., 1948.

1. Title and commencement - (1) This Act may be called The Colonial Courts of Admiralty (India) Act, 1891; and

(2) It shall come into effect -

(a) If Her Majesty's pleasure thereon has been signified, by notification^a in the ^b[Official Gazette], on or before the first day of July, 1891, then on that day, or

(b) If Her Majesty's pleasure thereon has been signified on or before that day, then on the date on which Her Majesty's pleasure shall be signified by such a notification as aforesaid.

[^a] For notification publishing Her Britannic Majesty's Assent to this Act, see Gazette of India, 1891, Pt.I, p.371.

[^b] Adapted by A.L.O., 1937.

2. Appointment of Colonial Courts of Admiralty - The following Courts of unlimited civil jurisdiction are hereby declared to be Colonial Courts of Admiralty, namely :-

(1) the High Court of Judicature at Fort William in Bengal;

(2) the High Court of Judicature at Madras, ^a[and]

(3) the High Court of Judicature at Bombay, ^b[*]

^c[* * * * *]

[^a] Inserted by A.C.A.O., 1948.

[^b] The word "and" was repealed by A.C.A.O., 1948.

[^c] The words and figures "(4)the High Court of Judicature at Rangoon, (5) the Court of the Resident at Aden and" were repealed by A.O., 1937 and "(6) the District Court of Karachi" repealed by A.C.A.O., 1948.

3. Construction of Indian Acts referring to Admiralty and Vice-Admiralty Courts - The expressions "Court having Admiralty jurisdiction" and "Admiralty Court" and the expression "Admiralty or Vice-Admiralty cause" and other expressions referring to Admiralty or vice-Admiralty Courts or causes, shall, wherever any such expression occurs in any ^a[Indian law], be deemed to include a Colonial Court of Admiralty and a Colonial Court of Admiralty cause, and to refer to a Colonial Court of Admiralty or a Colonial Court of Admiralty cause, respectively.

[^a] Substituted by A.O. 1937 for "enactment of the Governor-General-in-Council or of a Governor-in-Council or Lieutenant-Governor-in-Council]"

4. Court-fees in suits in the Colonial Courts of Admiralty at Karachi - [Repealed by A.C.A.O., 1948]

5. Repeal - [Repealed by the Repealing and Amending Act, 1914 (10 of 1914)].

THE SCHEDULE [ENACTMENTS REPEALED]. [Repealed by the Repealing and Amending Act, 1914 (10 of 1914).]

Section 2

(1) A Suit for damages to the cargo can be entertained by the High Court in exercise of the admiralty jurisdiction of the High Court in view of S.6 of the Admiralty Courts Act, 1861 and S.2(2) of Colonial Courts of Admiralty Act, 1891.

AIR 1986 AP. 184 (187) : (1986) 1 Andh W R 474 (DB).

(2) The suit relating to the mortgage of a foreign vessel and arising between foreigners, filed in the Bombay High Court by the consent of parties since the dispute arose when the vessel arrived at Bombay port. Held, that the Court had jurisdiction to entertain the suit.

AIR 1983 Bom 178 (185) : (1983) 85 Bom LR 250

(3) A suit for damage to the cargo imported from Indian Port to foreign country can be entertained by the Bombay High Court in exercise of the admiralty jurisdiction of the High Court.

AIR 1973 Bom 18 (24).

(4) Where the suit was filed by plaintiff under admiralty jurisdiction of Bombay High Court for recovery of certain amount in respect of various spare parts supplied and repairs carried out to the vessel of defendants of Hamburg and elsewhere and the defendant owner of vessel having their office, elsewhere filed a counter-claim in the suit claiming damages from plaintiff, for defective repairs to the suit ship, the counter-claim of the defendant directly relating to same repairs could be entertained by Bombay High Court under O.8, R.6 and it could not be strike off on grounds that it did not arose under admiralty jurisdiction of Bombay High Court.

AIR 1988 Bom 380 (383) : (1988) Mah. LJ 728.

ANNEXURE 6

THE MAJOR PORT TRUSTS ACT, 1963

[Act No. 38 of 1963 dated 16th. October, 1963]

An Act to make provision for the constitution of port authorities for certain major ports in India and to vest the administration, control and management of such ports in such authorities and for matters connected therewith.

Be it enacted by Parliament in the Fourteenth Year of the Republic of India as follows: -

CHAPTER I: PRELIMINARY

1. Short title commencement and application

(1) This Act may be called the Major Port Trusts Act, 1963.

(2) It shall come into force on such date¹ as the Central Government may, by notification in the Official Gazette, appoint.

(3) It applies in the first instance to the major ports of Cochin, Kandla and Visakhapatnam and the Central Government may, by notification in the Official Gazette, apply² the provisions of this Act to such other major port 3[***], and with effect from such date, as may be specified in the notification.

2. Definitions

In this Act, unless the context otherwise requires,-

(a) "appointed day", in relation to a port, means the date on which this Act is made applicable to that port;

4(aa) "Authority" means the Tariff Authority for Major Ports constituted under section 47A;

(b) "Board", in relation to a port, means the Board of Trustees constituted under this Act for that port;

(c) "Chairman" means the Chairman of a Board and includes the person appointed to act in his place under section 14;

(d) "Collector of Customs" has the same meaning as in the Customs Act, 1962;

(e) "Deputy Chairman" means 5[the Deputy Chairman, or, as the case may be, a Deputy Chairman of a Board] and includes the person appointed to act in his place under section 14;

(f) "dock" includes all basins, locks, cuts, entrances, graving docks, graving blocks, inclined planes, slipways, gridirons, moorings, transit-sheds, warehouses, tramways, railways and other works and things appertaining to any dock, and also the portion of the sea enclosed or protected by the arms or groynes of a harbour;

(g) "foreshore", in relation to a port, means the area between the high-water mark and the low-water mark relating to that port;

(h) "goods" includes livestock and every kind of movable property;

(i) "high-water mark", in relation to a port, means a line drawn through the highest points reached by ordinary spring-tides at any season of the year at the port;

6[(ia) "immovable property" includes wharfage-rights and all other rights exercisable on, over, or in respect of, any land, wharf, dock or pier;]

(j) "Indian Ports Act" means the Indian Ports Act, 1908;

(k) "land" includes the bed of the sea or river below high-water mark, and also things attached to the earth or permanently fastened to anything attached to the earth;

(l) "low-water mark", in relation to a port, means a line drawn through the lowest points reached by ordinary spring-tides at any season of the year at that port;

(m) "major port" has the same meaning as in the Indian Ports Act;

(n) "master", in relation to any vessel or any aircraft making use of any port, means any person having for the time being the charge or control of such vessel or such aircraft, as the case may be, except a pilot, harbour master, assistant harbour master, dock master or berthing master of the port;

(o) "owner", (i) in relation to goods, includes any consignor, consignee, shipper or agent for the sale, custody, loading or unloading of such goods; and (ii) in relation to any vessel or any aircraft making use of any port, includes any part-owner, charterer, consignee, or mortgagee in possession thereof,

(p) "pier" includes any stage, stairs, landing place, hard, jetty, floating barge, 7[transhipper] or pontoon, and any bridges or other works connected therewith.

7[Explanation.-For the purposes of this clause, "transhipper" means a floating craft or vessel, whether dumb or self-propelled, on which gears are provided for discharging cargo from a barge or wharf and loading it into a ship;]

(q) "port" means any major port to which this Act applies within such limits as may, from time to time, be defined by the Central Government for the purposes of this Act by notification in the Official Gazette, and, until a notification is so issued, within such limits as may have been defined by the Central Government under the provisions of the Indian Ports Act;

(r) "port approaches", in relation to a port, means those parts of the navigable rivers and channels leading to the port, in which the Indian Ports Act is in force;

(s) "Port Trust security" means debentures, bonds or stock certificates issued by a Board in respect of any loan contracted by it under the provisions of this Act or issued by any other authority for the payment of which the Board is liable under this Act;

(t) "prescribed" means prescribed by rules or regulations made under this Act;

(u) "public securities" means-

(i) promissory notes, debentures, stock or other securities of the Central Government or of any State Government.

Provided that securities, both the principal whereof and the interest whereon have been fully and unconditionally guaranteed by any such Government, shall be deemed, for the purposes of this clause, to be securities of such Government;

(ii) debentures or other securities for money issued by or on behalf of any municipal body, Improvement Trust or Port Trust under the authority of any law for the time being in force in India (including the Port Trust securities);

(v) "rate" includes any toll, due, rent, rate, fee, or charge leviable under this Act;

(w) "regulations" means regulations made under this Act;

(x) "rules" means rules made by the Central Government under this Act;

(y) "Trustee", in relation to a port, means a member of the Board constituted for the port;

8[(z) "vessel" includes anything made for the conveyance, mainly by water, of human beings or of goods and a caisson;]

(za) "wharf" includes any wall or stage and any part of the land or foreshore that may be used for loading or unloading goods, or for the embarkation or disembarkation of passengers and any wall enclosing or adjoining the same.

CHAPTER II : BOARD OF TRUSTEES AND COMMITTEES THEREOF

3. Constitution of Board of Trustees

(1) With effect from such date as may be specified by notification in the Official Gazette, the Central Government shall cause to be constituted in respect of any major port a Board of Trustees to be called the Board of Trustees of that port, which shall consist of the following Trustees, namely:-

(a) a Chairman to be appointed by the Central Government;

9[(b) one Deputy Chairman or more, as the Central Government may deem fit to appoint;]

10[(c) not more than nineteen persons in the case of each of the ports of Bombay,

Calcutta and Madras and not more than seventeen persons in the case of any other port who shall consist of-

(i) such number of persons, as the Central Government may, from time to time, by notification in the Official Gazette, specify, to be appointed by that Government from amongst persons who are in its opinion capable of representing any one or more of such of the following interests as may be specified in the notification, namely:-

(1) labour employed in the port;

(2) the Mercantile Marine Department;

(3) the Customs Department.,

(4) the Government of the State in which the port is situated;

(5) the Defence Services;

(6) the Indian Railways; and

(7) such other interests as, in the opinion of the Central Government, ought to be represented on the Board.

Provided that before appointing any person to represent the labour employed in the port, the Central Government shall obtain the opinion of the trade unions, if any, composed of persons employed in the port and registered under the Trade Unions Act, 1926 (16 of 1926), and that the number of persons so appointed shall not be less than two;

(ii) such number of persons, as the Central Government may, from time to time, by notification in the Official Gazette, specify, to be elected by such bodies and representing any one or more of such of the following interests as may be specified in the notification from among themselves, namely:-

(1) ship owners;

(2) owners of sailing vessels;

(3) shippers; and

(4) such other interests as, in the opinion of the Central Government, ought to be represented on the Board:

Provided that in a case where any such body is an undertaking owned or controlled by the Government, the person to be elected by such body shall be appointed by the Central Government.]

(2) A Trustee appointed by the Central Government under this Act may be appointed by name or by virtue of office.

(3) Every notification issued under 11[sub-clause (ii) of clause (c) of sub-section (1)] may also specify the number of Trustees that each of the bodies referred to in that clause may elect.

(4) The election of Trustees under 11[sub-clause (ii) of clause (c) of sub-section (1)] shall be held within such period as may, from time to time, be specified by the Central Government.

(5) The chief executive authority of every electing body shall communicate forthwith to the Central Government the result of any election held in pursuance of sub-section (4).

(6) The names of persons appointed or elected as Trustees shall be notified by the Central Government in the Official Gazette.

4. First Board of Trustees

(1) Notwithstanding anything contained in section 3, the Central Government may, by notification in the Official Gazette, constitute in respect of any major port the first Board of Trustees thereof consisting of-

(a) a Chairman to be appointed by the Central Government;

(b) a Deputy Chairman, if the Central Government deems fit to appoint one; and

(c) such number of other Trustees, 12[not exceeding seventeen], as that Government may deem expedient, to be appointed by that Government from amongst persons who are in its opinion capable of representing,-

- (i) labour employed in the port;
- (ii) Government of the State in which the port is situated;
- (iii) Government departments specified 13[in sub-clause (i) of clause (c)] of sub-section (1) of section 3; and
- (iv) such other interests as, in the opinion of the Central Government, ought to be represented on the Board.

(2) Subject to the provisions of sub-section (3), the persons appointed as Trustees under sub-section (1) shall hold office during the pleasure of the Central Government.

(3) On the constitution of the Board under section 3, the first Board of Trustees shall cease to exist.

5. Board to be body corporate

Every Board constituted under this Act shall be a body corporate having perpetual succession and a common seal with power, subject to the provisions of this Act, to acquire, hold or dispose of property and may by the name by which it is constituted, sue or be sued.

6. Disqualification for office of Trustee

A person shall be disqualified for being chosen as a Trustee, if he-

(a) has been convicted and sentenced to imprisonment for an offence which, in the opinion of the Central Government, involves moral turpitude; or

(b) is an undischarged insolvent; or

(c) holds any office of profit under the Board:

14[Provided that this disqualification shall not apply to the Chairman, Deputy Chairman or a Trustee who has been appointed to represent the labour employed in the port or appointed by virtue of office as officer or member of an association formed for the purpose of promoting the interests or welfare of any class of employees of the Board;]

(d) has, directly or indirectly, any share or interest in any work done by order of the Board, or in any contract or employment, with, by, or on behalf of the Board;]

Provided that no person shall be deemed to have a share or interest in such work, contract or employment by reason only of his-

(i) having a share in any company or firm which may contract with or be employed by or on behalf of the Board, or

(ii) having a share of interest in any newspaper in which any advertisement relating to the affairs of the Board may be inserted, or

(iii) being interested in any loan of money to the Board, or

(iv) having a share or interest in any lease, sale, exchange or purchase of immovable property or any agreement for the same, or

(v) having a share or interest in any licence by the Board, or right by agreement or otherwise, with the Board to the sole or preferential use of any railway siding or any berth for vessels in the docks belonging to the Board, or

(vi) having a share or interest in the occasional sale to the Board, to a value not exceeding ten thousand rupees in any one financial year, of any article in which he trades.

7. Term of office of Trustees

(1) The Chairman and the Deputy Chairman shall hold office during the pleasure of the Central Government.

(2) Subject to the provisions of this Act,-

(a) every person elected or appointed by name to be a Trustee shall hold office to which he is elected or so appointed, for a term of two years commencing on the 1st day of April next following his election or appointment, as the case may be :

Provided that the term of office of a member elected to represent any body of persons shall come to an end as soon as he ceases to be a member of that body;

(b) a person appointed by virtue of an office to be a Trustee shall, until the Central Government by notification in the official Gazette otherwise directs, continue to be a Trustee so long as he continues to hold that office.

8. Vacation of office of Trustees

(1) The Central Government shall remove a Trustee if he-

(a) becomes subject to any of the disqualified mentioned section 6; or

15[(aa) has, in the opinion of the Central Government, ceased to represent the interest by virtue of which he was appointed or elected; or]

(b) refuses to act or becomes incapable of acting; or

(c) is, without the permission of the Board previously obtained, absent from six consecutive ordinary meetings of the Board; or

(d) is absent from the meetings of the Board for a period exceeding six consecutive months; or

(e) acts in contravention of the provisions of section 19

(2) A Trustee may resign his office by giving notice in writing to the Chairman who shall forward the same to the Central Government, and on such resignation being accepted by that Government he shall be deemed to have vacated his office.

9. Eligibility of Trustee for re-appointment or re-election

Any person ceasing to be a Trustee shall, unless disqualified under section 6, be eligible for re-appointment or re-election.

10. Filling of vacancies in office of Trustee

(1) In the case of a vacancy in the office of a Trustee appointed by name or an elective Trustee caused by the expiration of the term of office of such Trustee, the appointment to fill such vacancy shall be made or an election to fill such vacancy shall be completed, as the case may be, within two months immediately preceding the date of expiration of such term.

(2) In the case of a vacancy in the office of a Trustee appointed by the Central Government by virtue of an office, the appointment to fill such vacancy shall be made within one month of the occurrence of such vacancy.

(3) In the case of a casual vacancy in the office of a Trustee appointed by name or an elective Trustee caused by the death of such Trustee or by virtue of the provisions of section 8, such vacancy shall be filled within one month of the occurrence thereof by appointment for election, as the case may be, in the manner herein before specified:

Provided that the Trustee so appointed or elected shall retain his office so long only as the vacating Trustee shall have retained the same if such vacancy had not occurred :

Provided further that no such casual vacancy occurring within three months of the date of expiry of the normal term of office of the vacating Trustee shall be filled up under this sub-section.

11. Saving provision for appointment of Trustee by Central Government after prescribed period

Nothing in the foregoing provisions shall prevent a person being appointed by the Central Government to fill any vacancy in the office of a Trustee appointed by the Central Government after the expiration of the period specified in section 10, if for any reason it has not been possible for the Central Government to make the appointment within the said period.

12. Power of Central Government to extend time for election or appoint Trustees in default of election

(1) If the Central Government is satisfied that an electing body has failed to elect a Trustee within the period specified therefor in sub-section (4) of section 3 or section 10 for reasons beyond its control,

the Central Government may, by notification in the Official Gazette, direct that the election shall be held on or before such date as may be specified in the notification.

(2) In the event of default being made in electing any Trustee within the period specified therefor under sub-section (4) of section 3 or under section 10, or as the case may be, on or before the date specified in the notification issued under sub-section (1), it shall be lawful for the Central Government to appoint a person by notification in the Official Gazette and the person so appointed shall be deemed to be an elective Trustee.

13. Term of office In case of certain trustees

Where a Trustee is appointed under section 11 or under sub-section (2) of section 12 or elected in pursuance of a direction issued under sub-section (1) of section 12, the term of office of such Trustee shall commence on the date on which his appointment or election, as the case may be, is notified in the Official Gazette and shall expire on the date on which his term of office would have expired if his appointment or election had been made within the period specified under section 10, or, as the case may be, under sub-section (4) of section 3.

14. Absence of Chairman and Deputy Chairman

If the Chairman or the Deputy Chairman is, by infirmity or otherwise, rendered incapable of carrying out his duties or is absent on leave or otherwise, in circumstances not involving the vacation of his appointment, or is sent on deputation outside India for any of the purposes of this Act, the Central Government may appoint another person to act in his place during his absence:

Provided that the Chairman or the Deputy Chairman, while on deputation outside India may, if the Central Government by order so directs and subject to such conditions and restrictions as may be specified in that order, exercise such of the powers and perform such of the duties conferred or imposed on the Chairman or the Deputy Chairman, as the case may be, by or under this Act as he may deem necessary, and the Chairman or Deputy Chairman while exercising such powers and performing such duties shall be deemed to be a Trustee notwithstanding anything to the contrary contained in this Act.

14 A. Acting Chairman or Deputy Chairman

The Central Government may, pending the consideration of the question as to who may be appointed as Chairman or Deputy Chairman of a Board under section 3 or section 4, appoint a person to be the acting Chairman or Deputy Chairman thereof and notify his name in the Official Gazette and the person so appointed shall, until the Central Government by notification in the Official Gazette otherwise directs, be deemed for the purposes of this Act to be the Chairman or Deputy Chairman of such Board appointed under section 3 or section 4, as the case may be.]

15. Conditions of service of Chairman and Deputy Chairman

The Chairman and the Deputy Chairman shall be paid such salary and be governed by such terms and conditions of service as may, from time to time, be determined by the Central Government.

16. Meetings of Board

(1) A Board shall meet at such times and places and shall, subject to the provisions of subject to the provision of sub-section (2), (3) and (4), observe such rules of procedure in regard to the transaction of business at its meetings as may be provided by rules made under this Act.

(2) The Chairman or, in his absence, the Deputy Chairman, and in the absence of both, any person chosen by the Trustees present from among themselves, shall preside at meetings of the Board.

(3) All questions at a meeting of the Board shall be decided by a majority of the votes of the Trustees present and voting and, in the case of an equality of votes, the person presiding shall have a second or casting vote.

(4) No business shall be transacted at any meeting of the Board unless not less than five Trustees are present throughout such meeting.

17. Committees of Board

(1) A Board may, from time to time, constitute from amongst the Trustees one or more committees, each consisting of such number as the Board may consider necessary, for the purpose of discharging such of its functions as may be delegated to such of its function as may be delegated to such committee or committees by the Board.

17[(1A) Notwithstanding anything contained in sub-section (1) or any other provision of this Act, the Board may appoint a person who is not a Trustee to be a member of any Committee constituted under that sub-section and a person so appointed shall, for the purpose of the discharge of his functions as such member, be deemed to be a Trustee.]

(2) A committee constituted under this section shall meet at such time and at such places and shall observe such rules of procedure in regard to the transaction of business its meeting (including the quorum) as may be provided by regulations made under this Act.

18. Fees and allowances payment Trustees

18[(1)] The Trustees shall be paid by the Board such fees and allowances for attending the meetings of the Board or of any of its committees and for attending to any other work of the Board as may be provided by rules made under this Act :

Provided that no fees shall be payable to the Chairman, Deputy Chairman or any other Trustee who is a servant of the Government.

18[(2) A member of a committee appointed under sub-section (1A) of section 17 shall be paid the same fees and allowances for attending the meetings of the committee and for attending to any other work of the Board as are payable to a Trustee under sub-section (1) :

Provided that the Board may, with the prior approval of the Central Government, pay to any such member fees and allowances at a rate higher than that provided in the case of Trustees.]

19. Restriction of power of Trustees to vote in certain cases

No Trustee shall vote or take part in the discussion of any matter coming up for consideration at a meeting of the Board or any of its committees if the matter is one in which he has any direct or indirect pecuniary interest by himself or his partner, or in which he is interested professionally on behalf of a client or as agent for any person other than the Government 20[or an undertaking owned or controlled by the Government] or a local authority or a trade union registered under 21[the Trade Unions Act, 1926 (16 of 1926)], or other than as officer or member of an association formed for the purpose of promoting the interests or welfare of any class of employees of the Board].

20. Defects in appointments or election not to invalidate acts, etc

No act or proceeding of a Board or of any of its committees shall be invalid merely by reason of-

- (a) any vacancy therein or any defect in the constitution thereof, or
- (b) any defect in the election or appointment of a person as a member thereof, or
- (c) any Trustee having acted or taken part in any proceedings in contravention of section 19, or
- (d) any irregularity in its procedure not affecting the merits of the case.

21. Delegation of powers

A Board may, with the approval of the Central Government, specify-

- (a) the powers and duties conferred or imposed upon the Board by or under this Act, which may also be exercised or performed by the Chairman; and
- (b) the powers and duties conferred or imposed on the Chairman by or under this Act, which may also be exercised or performed by the Deputy Chairman or any officer of the Board and the conditions and restrictions, if any, subject to which such powers and duties may be exercised and performed:

Provided that any powers and duties conferred or imposed upon the Deputy Chairman or any officer of the Board under clause (b)

shall be exercised and performed by him subject to the supervision and control of the Chairman.

22. Duties of Chairman and Deputy Chairman

(1) It shall be the duty of the Chairman and the Deputy Chairman to attend every meeting of the Board unless prevented by sickness or other reasonable cause.

(2) The Chairman shall, as soon as possible, transmit to the Central Government a copy of the minutes of every meeting of the Board and shall furnish to that Government such reports, returns, documents or other information as it may, from time to time, call for.

(3) The Chairman shall exercise supervision and control over the acts of all employees of the Board in matters of executive administration and in matters concerning the accounts and records of the Board.

CHAPTER III : STAFF OF THE BOARD

23. Schedule of Board's staff

A Board shall, from time to time, prepare and sanction a Schedule of the employees of the Board whom it deems necessary and proper to maintain for the purposes of this Act and such Schedule shall indicate therein the designations and grades of employees and the salaries, fees and allowances which are proposed to be paid to them :

22[Provided that the previous sanction of the Central Government shall be obtained for the inclusion in the said Schedule of those designations and grades of employees and the salaries, fees and allowances payable to them which the Central Government may, by order, specify, and where no such order is made, of such posts (including the salaries and allowances attached thereto) which are required to be created by the Central Government, or for the creation of which the previous sanction of the Central Government is required, under this Act.]

24. Power to make appointments :

(1) Subject to the provisions of the Schedule for the time being in force sanctioned by a Board under section 23, the power of appointing any person to any Post, whether temporary or permanent, shall-

(a) in the case of a post-

(i) the incumbent of which is to be regarded as the Head of a department; or

(ii) to which such incumbent is to be appointed; or

(iii) the maximum of the pay scale of which (exclusive of allowances) exceeds such amount as the Central Government may, by notification in the Official Gazette, fix,]

be exercisable by the Central Government after consultation with the Chairman;]

(b) in the case of any other post, be exercisable by the Chairman or by such authority as may be prescribed by regulations:]

Provided that no person shall be appointed as a pilot at any port, who is not for the time being authorised by the Central Government under the provisions of the Indian Ports Act to pilot vessels 26[at that or any other port].

(2) The Central Government may, by order, specify any post the incumbent of which shall, for the purposes of this Act, be regarded as the Head of a department.

25. Power to grant leave, etc.; to employees of Board

(1) Subject to any regulations made under section 28, the power of 27[***] granting extension of service to, granting leave to, suspending, reducing, 28[compulsorily retiring,] removing or dismissing or of disposing of any other question relating to the services of, the employees of a Board, including the power of dispensing with the services of any such employee otherwise than by reason of the misconduct of such employee, shall be exercised-

29[(a) in the case of an employee holding a post referred to in clause (a) of sub-section (1) of section 24, by the Chairman;

(b) in any other case, by the Chairman or by such authority as may be prescribed by regulations:]

Provided that no such order, so far as the same involves extension of service, suspension, reduction in rank, 30[compulsory retirement,] removal or dismissal of 31[an employee referred to in clause (a)], shall have effect until it is approved by the Central Government.

(2) Any employee of a Board 32[***] aggrieved by an order involving his reduction in rank, 30[compulsory retirement,] removal or dismissal of may, within such time and in such manner as may be provided for by regulations, prefer an appeal-

33[(a) to the Central Government, where such order is passed by the Chairman;

(b) to the Chairman, where such order is passed by any such authority as is prescribed by regulations under clause (b) of sub-section (1):]

Provided that where the person who passed the order becomes, by virtue of his subsequent appointment as the Chairman, the appellate authority in respect of the appeal against the order such person shall forward the appeal to 34[the Central Government] and 34[the Central

Government] in relation to that appeal shall be deemed to be the appellate authority for the purposes of this section.

26. Consulting Engineer to Board

A Board may appoint any person as Consulting Engineer to the Board otherwise than on the basis of payment of a monthly salary, but every such appointment shall be subject to the sanction of the Central Government.

27. Power to create posts

Notwithstanding anything contained in section 23, the power to create any post, whether temporary or permanent, shall,-

(a) in the case of a post the holder of which is to be regarded as the Head of a department or in the case of a post the maximum of the pay-scale of which (exclusive of allowances) 36[exceeds such amount as the Central Government may, by notification in the Official Gazette, fix, be exercisable by that Government;]

(b) in the case of a post [other than a post referred to in clause (a)], the maximum of the pay-scale of which exceeds such amount as the Central Government may, from time to time by order fix in this behalf, or where no such amount has been fixed, is not less than one thou. sand rupees, be exercisable by the Board with the previous sanction of the Central Government;

(c) in the case of any other post, be exercisable by the Chairman.]

28 Power to make regulations

A Board may make regulations, not inconsistent with this Act, to provide for any one or more of the following matters, namely:-

(a) the appointment, promotion , suspension, 37[reduction in rank, compulsory retirement,] removal and dismissal of its employees;

(b) their leave, leave allowances, pensions, gratuities, compassionate allowances and travelling allowances and the establishment and maintenance of a Provident Fund or any other fund for their welfare;

(c) the terms and conditions of service of persons who become employees of the Board under clause (f) of sub-section (1) of section 29;

(d) the time and manner in which appeals may be preferred under sub-section (2) of section 25 and the procedure for deciding such appeals;

(e) any other matter which is incidental to, or necessary for, the purpose of regulating the appointment and conditions of service of its employees.

CHAPTER IV : PROPERTY AND CONTRACTS

29. Transfer of assets and liabilities of Central Government, etc., to Board

(1) As from the appointed day in relation to any port-

(a) all property, assets and funds ³⁸[and all rights to levy rates] vested in the Central Government or, as the case may be, any other authority for the purposes of the port immediately before such day, shall vest in the Board;

(b) all debts, obligations and liabilities incurred, all contracts entered into and all matters and things engaged to be done, by, with or for the Central Government or, as the case may be, the other authority immediately before such day, for or in connection with the purposes of the port, shall be deemed to have been incurred, entered into and engaged to be done by, with or for the Board;

(c) all non-recurring expenditure incurred by the Central Government or any State Government for or in connection with the purposes of the port up to such day and declared to be capital expenditure by the Central Government shall be treated as the capital provided by the Central Government or, as the case may be, the State Government to the Board;

(d) all rates, fees, rents and other sums of money due to the Central Government or, as the case may be, the other authority in relation to the port immediately before such day shall be deemed to be due to the Board;

(e) all suits and other legal proceedings instituted by or against the Central Government or, as the case may be, the other authority immediately before such day for any matter in relation to the port may be continued by or against the Board;

(f) every employee serving under the Central Government or, as the case may be, the other authority immediately before such day solely or mainly for or in connection with the affairs of the port shall become an employee of the Board, shall hold his office or service therein by the same tenure and upon the same terms and conditions of service as he would have held the same if the Board had not been established and shall continue to do so unless and until his employment in the Board is terminated or until his tenure, remuneration or terms and conditions of service are duly altered by the Board:

Provided that the tenure, remuneration and terms and conditions of service of any such employee shall not be altered to his disadvantage without the previous sanction of the Central Government.

(2) Notwithstanding anything contained in the Industrial Disputes Act 1947 (14 of 1947) or in any other law for the time being in force,

the transfer of the services of any employees under this section to the Board shall not entitle such employee to any compensation under that Act Or other law, and no such claim shall be entertained by any court, tribunal or other authority.

39(3) Notwithstanding anything contained in clause (a) of sub-section (1), the right to fix rates vested in the Board shall vest in the Authority as from the date it is constituted under sub-section (1) of section 47A.

30. Existing rates, etc., to continue until altered by board

As from the appointed day, all rates, fees and other charges in relation to any port, shall, unless and until they are varied by the competent authority in accordance with the provisions of this Act, Continue to be levied and collected at the same rate at which they were being levied and collected by the Central Government or, as the case may be, any other authority immediately before such day.

31. Repayment of capital with interest

A Board shall repay, at such intervals and on such terms and conditions as the Central Government may determine, the amount of capital provided under clause (c) of sub-section (1) of section 29 with interest at such rate as may be fixed by that Government and such repayment of capital or payment of interest shall be deemed to be part of the expenditure of the Board.

32. Acquisition of immovable property for the Board

40[When any immovable property is required for the purposes of the Board], the Central Government may, at the request of the Board, procure the acquisition thereof under the provisions of the Land Acquisition Act, 1894 (1 of 1894), and the payment by the Board of the compensation awarded under that Act and of the charges incurred by the Government in connection with the proceedings, the land shall vest in the board.

33. Contracts by Board

Subject to the provisions of section 34, a Board shall be competent to enter into and perform any contract necessary for the performance of its functions under this Act.

34. Mode of executing contracts on behalf of Board

(i) Every contract shall, on behalf of a Board, be made by the Chairman 41[or by any such officer of the Board not below the rank of the Head of a department as the Chairman may, by general or special order, authorise in this behalf] and shall be scaled with the common seal of the Board:

Provided that no contract whereof the value or amount exceeds such value or amount as the Central Government may from time to time fix in this behalf shall be made unless it has been previously approved by the Board:

Provided further that no contract for the acquisition or sale of immovable property or for the lease of any such property for a term exceeding thirty years, and no other contract whereof the value or amount exceeds such value or amount as the Central Government may from time to time fix in this in this behalf, shall be made unless it has been previously approved by the Central Government.

(2) Subject to the provisions of sub-section (1), the form and manner in which any contract shall be made under this Act shall be such as may be prescribed by regulations made in this behalf.

(3) No contract which is not made in accordance with the provisions of this Act and the regulations made thereunder shall be binding on the Board.

CHAPTER V : WORKS AND SERVICES TO BE PROVIDED AT PORTS

35. Power of Board to execute works and provide appliances

(1) A Board may execute such works within or without the limits of the port and provide such appliances as it may deem necessary or expedient.

(2) Such works and appliances may include-

(a) wharves, quays, docks, stages, jetties, piers and other works within the port or port approaches or on the foreshore of the port or port approaches, with all such convenient arches, drains, landing places, stairs, fences, roads, railways, bridges, tunnels and approaches and buildings required for the residence of the employees of the Board as the Board may consider necessary;

(b) buses, railways, locomotives, rolling stock, sheds, hotels, warehouses and other accommodation for passengers and goods and other appliances for carrying passengers and for conveying, receiving and storing goods landed, or to be shipped or otherwise;

(c) moorings and cranes, scales and all other necessary means and appliances for loading and unloading vessels;

(d) reclaiming, excavating, enclosing and raising any part of the foreshore of the port or port approaches which may be necessary for the execution of the works authorised by this Act, or otherwise for the purposes of this Act;

(e) such breakwaters and other works as may be expedient for the protection of the port;

(f) dredgers and other machines for cleaning, deepening and improving any portion of the port or port approaches or of the foreshore of the port or port approaches;

(g) lighthouses, lightships, beacons, buoys, pilot boats and other appliances necessary for the safe navigation of the port and of the port approaches;

(h) vessels, tags or other boats for use within the limits of the port or beyond those limits, whether in territorial waters or otherwise, for the purpose of towing or rendering assistance to any vessel, whether entering or leaving the port or bound elsewhere, and for the purpose of saving or protecting life or property and for the purpose of landing, shipping or transshipping passengers or goods under section 42;

(i) sinking of tube-wells, and equipment, maintenance and use of boats, barges and other appliances for the purpose of the supply of water at the port;

(j) engines and other appliances necessary for the extinguishing of fires;

42[(k) construction of models and plans for carrying out hydraulic studies;

(1) dry docks, slipways, boat basins and workshops to carry out repairs or overhauling of vessels, tugs, boats, machinery or other appliances.]

35A. Power with respect to landing places and bathing ghats
Without prejudice to the powers exercisable under section 35, the Board of Trustees for the port of Calcutta may, if it considers it necessary so to do for the purposes of this Act,-

(i) provide for sufficient number of public landing places from and upon which the public shall be permitted to embark and to land free of charge;

(ii) occupy any bathing ghat, or remove any landing place, within the port and thereafter prohibit the public from resorting to or using the same :

Provided that the Board shall not exercise any power under this section unless it reserves, sets out, makes and provides for the use of the public, such number of bathing ghats within the port as the Central Government may direct.]

36. Power of Board to undertake certain works

44[(1)] A Board may undertake to carry out on behalf of any person any works or services or any class of works or services, on such terms and conditions as may be agreed upon between the Board and the person concerned.

45[(2) A Board may, if it considers it necessary or expedient in the public interest so to do, lend any of its vessels or appliances or the

services of any of its employees to any person for such period not exceeding three months and on such terms and conditions as may be agreed upon between the Board and the person concerned.]

37. Power of Board to order sea-going vessels to use docks, wharves, etc

(1) When any dock, berth, wharf, quay, stage, jetty or pier erected at any port or port approaches under the provisions of this Act has been completed with sufficient warehouses, sheds and appliances for receiving, landing or shipping goods or passengers from and upon sea-going vessels, the Board may, after obtaining the approval of the Collector of Customs and by notification published in three consecutive issues of the Official Gazette, declare that such dock, berth, wharf, quay, stage, jetty or pier is ready for receiving, landing and shipping or for landing or for shipping goods or passengers from and upon sea-going vessels.

(2) As from the date of the publication of such notification for the third time, it shall be lawful for the Board, from time to time, when there is room at such dock, berth, wharf, quay, stage, jetty or pier, to order to come alongside of such dock, berth, wharf, quay, stage, jetty or pier for the purpose of landing and shipping goods or passengers or for landing or for shipping the same, any sea-going vessel within the port or port approaches which has not commenced to discharge goods or passengers, or which being about to take in goods or passengers, has not commenced to do so :

Provided that before making such order, the Board shall have regard, as far as possible, to the convenience of such vessel and of the shippers, in respect of the use of any particular dock berth, wharf, quay, stage, jetty or pier :

Provided further that if the Board is not the conservator of the port, the Board shall not itself make the order as aforesaid but shall require the conservator of the port, or other person exercising the rights, powers, and authorities of the conservator of the port, to make such order.

38. If accommodation sufficient, all sea-going vessels compelled to use docks, wharves; etc

When a sufficient number of docks, berths, wharves, quays, stages, jetties or piers have been provided at any port or port approaches as aforesaid, the Board may, after obtaining the approval of the Collector of Customs and by notification published in three consecutive issues of the official Gazette, direct that no goods or passengers shall be landed or shipped from or upon any sea-going vessel within the port or port approaches otherwise than at such docks, berths, wharves, quays, stages, jetties or piers, except with the sanction of the Board and in accordance with Such conditions as the Board may specify.

39. Power to order vessels not to come alongside of, or to be removed from, docks, wharves, etc

Any officer appointed by the Board in this behalf may, in cases of emergency or for any reason which appears to him sufficient, by notice in writing, order the master or owner or agent of any sea-going vessel not to bring such vessel alongside of, or to remove such vessel from, any dock, berth, wharf, quay, stage, jetty or pier belonging to or under the control of the Board, and, if such notice is not complied with, 46[the Board may charge, by way of penalty, in respect of such vessel such sum as it thinks fit, not exceeding ten thousand rupees] for each day of twenty-four hours, or portion of such day, during which such vessel remains at such dock, berth, wharf, quay, stage, jetty or pier :

Provided that in the case of a vessel ordered to be removed, such charge shall not commence to be made till after the expiry of twelve hours from the service of such notice as aforesaid on the master or owner or agent of the vessel.

40. Power of Central Government to exempt from obligation to use docks, wharves, etc

Notwithstanding anything contained in sections 37 and 38, the Central Government may, if in its opinion it is necessary in the public interest so to do, by general or special order, from time to time, permit certain specified vessels or classes of vessels to discharge or ship goods or certain specified goods or classes of goods, at such place in a port or within the port approaches, in such manner, during such period and subject to such payments to the Board and on such conditions as the Central Government may think fit.

41. Board to declare when vessels other than sea-going vessels compelled to use docks, wharves, etc.

(1) When any dock, berth, wharf, quay, stage, jetty or pier for receiving, landing or shipment of goods or passengers from or upon vessels, not being sea-going vessels, has been made and completed with all proper appliances in that behalf, the Board may, after obtaining the approval of the Collector of Customs, by order published in three consecutive issues of the Official Gazette,-

(i) declare that such dock, berth, wharf, quay, stage, jetty or pier is ready for receiving, landing or shipment of goods or passengers from or on vessels, not being sea-going vessels, and

(ii) direct that within certain limits to be specified therein it shall not be lawful, without the express sanction of the Board, to land or ship any goods or passengers out of, or into, any vessel, not being a sea-going vessel, of any class specified in such order, except at such dock, berth, wharf, quay, stage, jetty or pier.

(2) As from the date of the publication of the order mentioned in sub-section (1) for the third time, it shall not be lawful, without the consent of the Board, for any vessel of such class-

(i) to land or ship any goods or passengers at any place within the limits so specified, except at such dock, berth, wharf, quay, stage, jetty or pier; or

(ii) while within such limits, to anchor, fasten or lie within fifty yards of the ordinary low-water mark.

(3) If after the publication of such order, any such vessel shall, while within the limits so specified, so anchor, fasten or lie, it shall be lawful for the Board to cause the same to be removed out of the sail limits at the expense of the master or owner or agent of the vessel.

42. Performance of services by Board or other person

(1) A Board shall have power to undertake the following services:-

(a) landing, shipping or transshipping passengers and goods between vessels in the port and the wharves, piers, quays or docks belonging to or in the possession of the Board;

(b) receiving, removing, shifting, transporting, storing or delivering goods brought within the Board's premises;

(c) carrying passengers by rail or by other means within the limits of the port or port approaches, subject to such restrictions and conditions as the Central Government may think fit to impose;
47[***]

(d) receiving and delivering, transporting and booking and despatching goods originating in the vessels in the port and intended for carriage by the neighbouring railways, or vice versa, as a railway administration under the Indian Railways Act, 1890 (9 of 1890);
48[***]

49[(e) piloting, hauling, mooring, remooring, hooking, or measuring of vessels or any other service in respect of vessels.
49A[and].

49B[(f) developing and providing, subject to the previous approval of the Central Government, infrastructure facilities for ports.]

(2) A Board may, if so requested by the owner, take charge of the goods for the purpose of performing the service or services and shall give a receipt in such form as the Board may specify.

(3) Notwithstanding anything contained in this section, the Board may, with the previous sanction of the Central Government, authorise any person to perform any of the services mentioned in sub-section (1) on such terms and conditions as may be agreed upon.

49C[(3A) Without prejudice to the provisions of sub-section (3), a Board may, with the previous approval of the Central Government,

enter into any agreement or other arrangement, whether by way of partnership, joint venture or in any other manner) with, any body corporate or any other person to perform any of the services and functions assigned to the Board under this Act on such terms and conditions as may be agreed upon.]

(4) No person authorised under sub-section (3) shall charge or recover for such service any sum in excess of the amount 49[specified by the Authority, by notification in the Official Gazette.]

(5) Any such person shall, if so required by the owner, perform in respect of goods any of the said services and for that purpose take charge of the goods and give a receipt in such form as the Board may specify.

(6) The responsibility of any such person for the loss, destruction or deterioration of goods of which he has taken charge shall, subject to the other provisions of this Act, be that of a bailee under sections 151, 152 and 161 of the Indian Contract Act, 1872.

(7) After any goods have been taken charge of and a receipt given for them under this section, no liability for any loss or damage which may occur to them shall attach to any person to whom a receipt has been given or to the master or owner of the vessel from which the goods have been landed or transhipped.

43. Responsibility of Board for loss, etc., of goods

(1) Subject to the provisions of this Act, the responsibility of any Board for the loss, destruction or deterioration of goods of which it has taken charge shall,-

(i) in the case of goods received for carriage by railway, be governed by the provisions of the Indian Railways Act, 1890 (9 of 1890); and

(ii) in other cases, be that of a bailee under sections 151, 152 and 161 of the Indian Contract Act, 1872 (9 of 1872), omitting the words "in the absence of any special contract" in section 152 of that Act :

50[provided that no responsibility under this section shall attach to the Board-

(a) until a receipt mentioned in sub-section (2) of section 42 is given by the Board; and

(b) after the expiry of such period as may be prescribed by regulations from the date of taking charge of such goods by the Board.]

(2) A Board shall not be in the way responsible for the loss, destruction or deterioration of, or damage to, goods of which it has taken charge, unless notice of such loss or damage has been given

within such period as may be prescribed by regulations made in this behalf 51[from the date of taking charge of such goods by the Board] under sub-section (2) of section 42.

44. Accommodation to be provided for customs officers in wharves, etc., appointed under Customs Act

Where the Collector of Customs has, under the provisions of any Act for the levy of duties of customs, appointed any dock, berth, wharf, quay, stage, jetty, pier, warehouse or shed or a portion of any warehouse or shed provided. at any port under the provisions of this Act for the use of sea-going vessels to be an approved place for the landing or shipping of goods or a warehouse for the storing of dutiable goods on the first importation thereof without payment of duty, within the meaning of the first-mentioned Act, the Board shall set apart and maintain such place on or adjoining such dock, wharf, quay, stage, jetty or pier, or in such warehouse or shed or portion thereof, for the use of officers of customs as may be necessary.

45. Dues at customs wharves, etc

Notwithstanding that any dock, berth, wharf, quay, stage, jetty, pier, warehouse or shed or portion thereof at any port has, under the provisions of section 44, been set apart for the use of the officers of customs at the port, all rates and other charges payable under this Act in respect thereof, or for the storage of goods therein, shall be payable to the Board, or to such person or persons as may be appointed by the Board to receive the same.

46. Power to permit erection of private wharves, etc., within a port subject to conditions

(1) No person shall make, erect or fix within the limits of a port or port approaches any wharf, dock, quay, stage, jetty, pier, erection or mooring 52[or undertake any reclamation of foreshore within the said limits] except with the previous permission in writing of the Board and subject to such conditions, if any, as the Board may specify.

(2) if any person makes, erects or fixes any wharf, dock, quay, stage, jetty, pier, erection or mooring 52[or undertakes any reclamation of foreshore] in contravention of sub-section (1), the Board may, by notice, require such person to remove it within such time as may be specified in the notice and if the person fails so to remove it, the Board may cause it to be removed at the expense of that person.

47. Compensation payable in certain cases where use of any private wharf, etc., rendered unlawful

(1) Where, as a result of an order published under section 38 or section 41, the use of any wharf, dock, berth, quay, stage, jetty or pier, made, fixed or erected by any person is rendered unlawful, the Board may, after hearing the person concerned, by order, close, remove, fill up or destroy such wharf, dock, berth, quay, stage, jetty or pier, or permit the use thereof to such person on payment of such rates and charges as the Board may, with the previous sanction of the Central Government, determine.

(2) Save as otherwise provided under sub-section (3) no person shall be entitled to claim compensation for any injury, damage or loss caused or alleged to have been caused by an order made under sub-section (1).

(3) If it is proved to the satisfaction of the Board that any such wharf, dock, berth, quay, stage, jetty or pier, was made, fixed or erected by any person with the previous permission of the authority competent to grant such permission, he shall be paid by the Board compensation the amount of which shall be determined in the manner and in accordance with the principles hereinafter set out, that is to say-

(a) in computing the compensation, there shall not be taken into account any rates or other charges which such person shall be liable to pay for using an wharf, dock, berth, quay, stage, jetty or pier provided by the Board;

(b) the amount of compensation shall be calculated with reference to the cost of construction of such wharf, dock, berth, quay, stage, jetty or pier;

(c) where the amount of compensation can be fixed by agreement, it shall be paid in accordance with such agreement;

(d) where no such agreement can be reached, the Central Government shall appoint as arbitrator, a person who is, or has been, or is qualified for appointment as, a Judge of a High Court;

(e) the Central Government may, in any particular case, nominate a person possessing special knowledge of any matter relating to any case under inquiry to assist the arbitrator in determining any question which has to be decided by him under this section, and where such nomination is made the person to be compensated may also nominate an assessor for the same purpose;

(f) at the commencement of the proceeding before the arbitrator, the Board and the person to be compensated shall state what in their respective opinion is a fair amount of compensation;

(g) the arbitrator shall, after hearing the dispute, make an award determining the amount of compensation which appears to him to be just and specify the person or persons to whom such compensation shall be paid;

(h) where there is a dispute as to the person or persons who are entitled to the compensation, the arbitrator shall decide such dispute and if the arbitrator finds that more persons than one are entitled to compensation, he shall apportion the amount thereof among such persons;

(i) nothing in 53[The Arbitration and Conciliation Act, 1996 (26 of 1996)] shall apply to arbitrations under this section;

(j) the arbitrator appointed under this section, while holding arbitration proceedings under this Act, shall have all the powers of a Civil Court while trying a suit under the Code of Civil Procedure, 1908 (5 of 1908) in respect of the following matters, namely:-

(i) summoning and enforcing the attendance of any person and examining him on oath;

(ii) requiring the discovery and production of documents;

(iii) receiving evidence on affidavits;

(iv) issuing commissions for examination of witnesses or documents;

(k) every award shall also state the amount of costs incurred in the arbitration proceedings under this section and by what persons and in what proportions they are to be paid;

(l) any person aggrieved by an award of the arbitrator made under this section may, within thirty days from the date of the award, prefer an appeal to the High Court within whose jurisdiction the port is situated :

Provided that the High Court may entertain the appeal after the expiry of the said period of days if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal in time.

CHAPTER VA : TARIFF AUTHORITY FOR MAJOR PORTS

47A. Constitution and incorporation of Tariff Authority for Major Ports

(1) With effect from such date as the Central Government may, by notification in the Official Gazette, appoint there shall be constituted for the purposes of this Act an Authority to be called the Tariff Authority for Major Ports.

(2) The Authority shall be a body corporate by the name aforesaid having perpetual succession and a common seal and shall by the said name sue and be sued.

(3) The head office of the Authority shall be at such place as the Central Government may decide from time to time.

(4) The Authority shall consist of the following Members to be appointed by the Central Government, namely:-

(a) a Chairperson from amongst persons who is or who has been a Secretary to the Government of India or has held any equivalent post in the Central Government and who has experience in the management and knowledge of the functioning of the ports;

(b) a Member from amongst economists having experience of not less than fifteen years in the field of transport or foreign trade;

(c) a Member from amongst persons having experience of not less than fifteen years in the field of finance with special reference to investment or cost analysis in the Government or in any financial institution or industrial or services sector.

47B. Term of office, conditions of service, etc., of Chairperson and other Members

(1) The Chairperson or a Member shall hold office for a term of five years from the date on which he enters upon his office or until he attains the age of sixty-five years, whichever is earlier.

(2) The salaries and allowances payable to and other conditions of service of the Chairperson and the other Members shall be such as may be prescribed by the Central Government.

(3) Notwithstanding anything contained in sub-section (1), the Chairperson or a Member may-

(a) relinquish his office by giving in writing to the Central Government a notice of not less than three months; or

(b) be removed from his office in accordance with the provisions of section 47D.

(4) If a casual vacancy occurs in the office of the Chairperson or any Member, whether by reason of his death, resignation or inability to discharge his functions owing to illness or other incapacity, such vacancy shall be filled up by the Central Government by making a fresh appointment and the Chairperson or the Member so appointed shall hold office for the remainder of the term of office of the person in whose place he is so appointed.

47C. Disqualification for the office of Chairperson and Member

A person shall be disqualified for being appointed as a Chairperson or as a Member of the Authority if he is disqualified for being chosen as a Trustee under section 6.

47D. Removal, etc., of Chairperson and Members

(1) The Central Government shall remove from the Authority the Chairperson or any Member, if he-

(a) becomes subject to any disqualification under section 47C;

(b) refuses to act or becomes incapable of acting;

(c) in the opinion of the Central Government has so abused his position as to render his continuance in office detrimental to the public interest, or

(d) is otherwise unsuitable to continue as the Chairperson or as a Member.

(2) The Central Government may suspend the Chairperson or any Member pending an inquiry against him.

(3) No order of removal under this section shall be made unless the Chairperson or the Member concerned, as the case may be, has been given an opportunity to submit his explanation to the Central Government and when such order is passed, the seat of the Chairperson or Member removed shall be declared vacant.

(4) The Chairperson or a Member who has been removed under this section shall not be eligible for re-appointment as a Chairperson or as a Member or in any other capacity under the Authority.

47E. Meetings

The Authority shall meet at such times and places, and shall observe such rules of procedure in regard to the transaction of business at its meetings as may be specified by regulations.

47F. Authentication of all orders and decisions of the Authority

All orders and decisions of the Authority shall be authenticated by the signature of the Chairperson or any other Member authorised by the Authority in this behalf.

47G. Vacancy, etc., not to invalidate proceedings of the Authority

No act or proceeding of the Authority shall be invalidated merely by reason of-

(a) any vacancy in, or any defect in, the constitution of the Authority; or

(b) any defect in the appointment of a person acting as a Chairperson or a Member of the Authority; or

(c) any irregularity in the procedure of the Authority not affecting the merits of the case.

47H. Officers and employees of the Authority

(1) The Authority may appoint officers and such other employees as it considers necessary for the efficient discharge of its functions under this Act.

(2) The salary and allowances payable to and the other conditions of service of the officers and other employees of the Authority appointed under sub-section (1) shall be such as may be specified by regulations.]

CHAPTER VI : IMPOSITION AND RECOVERY OF RATES AT PORTS

48. Scales of rates for services performed by Board or other person

55[(1) The Authority shall from time to time, by notification in the Official Gazette, frame a scale of rates at which, and a statement of conditions under which, any of the services specified hereunder shall be performed by a Board or any other person authorised under section 42 at or in relation to the port or port approaches]-

(a) transshipping of passengers or goods between vessels in the port or port approaches;

(b) landing and shipping of passengers or goods from or to such vessels to or from any wharf, quay, jetty, pier, dock, berth, mooring, stage or erection, land or building in the possession or occupation of the Board or at any place within the limits of the port or port approaches;

(c) carnage or portage of goods on any such place;

(d) wharfage, storage or demurrage of goods on any such place;

(e) any other service in respect of vessels, passengers or goods,
56[***]

(2) Different scales and conditions may be framed for different classes of goods and vessels.

49. Scale of rates and statement of conditions for use of property belonging to Board

55[(1) The Authority shall from time to time, by notification in the Official Gazette, also frame a scale of rates on payment of which, and a statement of conditions under which, any property belonging to, or in the possession or occupation of, the Board, or any place within the limits of the port or the port approaches may be used for the purposes specified hereunder]:-

(a) approaching or lying at or alongside any buoy, mooring, wharf, quay, pier, dock, land, building or place as aforesaid by vessels;

(b) entering upon or plying for hire at or on any wharf, quay, pier, dock, land, building, road, bridge or place as aforesaid by animals or vehicles carrying passengers or goods;

(c) leasing of land or sheds by owners of goods imported or intended for export or by steamer agents;

(d) any other use of any land, building, works, vessels or appliances belonging to or provided by the Board.

(2) Different scales and conditions maybe framed for different classes of goods and vessels.

57[(3) Notwithstanding anything contained in sub-section (1), the Board may, by auction or by inviting tenders, lease any land or shed belonging to it or in its possession or occupation at a rate higher than that provided under sub-section (1).]

49A. Fees for pilotage and certain other services

(1) Within any port, fees may be charged for pilotage, hauling, mooring, re-mooring, hooking, measuring and other services rendered to vessels, at such rates as the Authority may fix.

(2) The fees now chargeable for such services shall continue to be chargeable unless and until they are altered in exercise of the power conferred by sub-section (1).

(3) The Central Government may, in special cases, remit the whole or any portion of the fees chargeable under sub-section (1) or sub-section (2).

49B. Fixation of port-dues

(1) The Authority shall from time to time, by notification in the Official Gazette, fix port-dues on vessels entering the port.

(2) An order increasing or altering the fees for pilotage and certain other services or port-dues at every port shall not take effect until the expiration of thirty days from the day on which the order was published in the Official Gazette.]

50. Consolidated rates for combination of services

The Authority may, from time to time, by notification in the Official Gazette, from a consolidated scale of rates for any combination of service specified in section 48 or for any combination of such service or services with any user or permission to use any property belonging to or in the possession or occupation of the Board, as specified in section 49 or the fees to be charged for pilotage, hauling, mooring, re-mooring, hooking, measuring and other services rendered to vessels as specified in section 49A or the port dues to be fixed on vessels entering the port and for the duration of such dues as specified in section 49B.]

50A. Port-due on vessels in ballast

A vessel entering any port in ballast and not carrying passengers shall be charged with a port-due at a rate to be determined by the Authority and not exceeding three-fourths of the rate with which she would otherwise be chargeable.

50B. Port-due on vessels not discharging or taking in cargo

When a vessel enters a port but does not discharge or take in any cargo or passengers therein, with the exception of such unshipment and reshipment as may be necessary for purposes of repair), she shall be charged with a port-due at a rate to be determined by the Authority and not exceeding half the rate with which she would otherwise be chargeable.

50C. Publication of orders of Authority

Every notification, declaration, order and regulation of the Authority made in pursuance of this Act shall be published in the Official Gazette and a copy thereof shall be kept in the office of the conservator and at the custom-house, if any, of every port to which the declaration, order or rule relates, and shall there be open at all reasonable times to the inspection of any person without payment of any fee.]

51. Power to levy concessional rates in certain cases

In framing scales under any of the foregoing provisions of this Chapter, the 61[Authority] may prescribe a lower rate in respect of,-

(a) coastal goods, that is to say, goods, other than imported goods as defined in the Customs Act, 1962 (52 of 1962), carried in a vessel from one Indian port to another Indian port :

Provided that the 61[Authority] shall not make any discrimination between one Indian port and another such port in prescribing a lower rate under this section;

(b) other goods, in special cases.

52. [*]**

53. Exemption from, and remission of, rates or charges

A Board may, in special cases and for reasons to be recorded in writing, exempt either wholly or partially any goods or vessels or class of goods or vessels from the payment of any rate or of any charge leviable in respect thereof according to any scale in force under this Act or remit the whole or any portion of such rate or charge so levied.

54. Power of Central Government, to require modification or cancellation of rates

(1) Whenever the Central Government considers it necessary in the public interest so to do, it may, by order in writing together with a statement of reasons therefore, 63[Authority] to cancel any of the scales in force or modify the same, such period as that Government may specified in the order.

(2) 64[If the Authority fails or neglects to comply with the direction under sub-section (1)] within the specified period, the Central Government may cancel any of such scales or make such modification therein as it may think fit;

Provided that before so cancelling or modifying any scale the Central Government shall consider any objection or suggestion which may be made by 65[the Authority] during the specified period.

(3) When in pursuance of this section any of the scales has been cancelled or modified, such cancellation or modification, shall be published by the Central Government in the Official Gazette and shall thereupon have effect accordingly.

55. Refund of overcharges

No person shall be entitled to a refund of an overcharge made by a Board unless this claim to the refund has been preferred in writing by him or on his behalf to the Board within six months from the date of payment duly supported by all relevant documents:

Provided that a Board may of its own motion remit overcharges made in its bills at any time.

56. Notice of payment of charges short-levied or erroneously refunded

(1) When any Board is satisfied that any charge leviable under this Chapter has been short-levied or erroneously refunded, it may issue a notice to the person who is liable to pay such charge or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice :

Provided that no such notice shall be issued after the expiry of two years,-

(a) when the charge is short-levied, from the date of the payment of the charge;

(b) where a charge has been erroneously refunded, from the date of the refund.

(2) The Board may, after considering the representation, if any, made by the person to whom notice is issued under sub-section (1), determine the amount due from such person and thereupon such person shall pay the amount so determined.

57. Board not to lease rates without sanction

66[The Authority shall not lease], farm, sell or alienate any power vested in it under this Act of levying rates without the prior sanction of the Central Government.

58. Time for payment of rates on goods

Rates in respect of goods to be landed shall be payable immediately on the landing of the goods and rates in respect of goods to be removed from the premises of a Board, or to be shipped for export, or to be transhipped, shall be payable before the goods are so removed or shipped or transhipped.

59. Board's lien for rates

(1) For the amount of all rates 67[leviable under this Act] in respect of any goods, and for the rent due to the Board for any buildings, plinths stacking areas, or other premises on or in which any goods may have been placed, the Board shall have a lien on such goods, and may seize and detain the same until such rates and rents are fully paid.

(2) Such lien shall have priority over all other liens and claims, except for general average and for ship-owner's lien upon the said goods for freight and other charges where such lien exists and has been preserved in the manner provided in sub-section (1) of section 60, and for money payable to the Central Government 68[under any law for the time being in force relating to customs, other than by way of penalty or fine].

60. Ship-owner's lien for freight and other charges

(1) if the master or owner of any vessel or his agent, at or before the time of landing from such vessel any goods at any dock, wharf, quay, stage, jetty, berth, mooring or pier belonging to or in the occupation of a Board, gives to the Board a notice in writing that such goods are to remain subject to a lien for freight or other charges payable to the ship-owner, to an amount to be mentioned in such notice, such goods shall continue to be liable to such lien to such amount.

(2) The goods shall be retained in the custody of the Board at the risk and expense of the owners of the goods until such lien is discharged as hereinafter mentioned; and godown or storage rent shall be payable by the party entitled to such goods for the time during which they may be so retained.

(3) Upon the production before any officer appointed by the Board in that behalf of a document purporting to be a receipt for, or release from, the amount of such lien, executed by the person by whom or on whose behalf such notice has been given, the Board may permit such goods to be removed without regard to such lien, provided that the Board shall have used reasonable care in respect to the authenticity of such document.

61. Sale of goods after two months if rates or rent are not paid or lien for; freight is not discharged

(1) A Board may, after the expiry of two months from the time when any goods have passed into its custody, or in the case of animals and perishable or hazardous goods after the expiry of such shorter period not being less than twenty-four hours after the landing of the animals or goods as the Board may think fit, sell by public auction 69[or in such cases as the Board considers it necessary so to do, for reasons to be recorded in writing, sell by tender, private agreement or in any other manner] such goods or so much thereof as, in the opinion of the Board, may be necessary-

(a) if any rates payable to the Board in respect of such goods have not been paid, or

(b) if any rent payable to the Board in respect of any place on or in which such goods have been stored has not been paid, or

(c) if any lien of any ship-owner for freight or other charges of which notice has been given has not been discharged and if the person claiming such lien for freight or other charge has made to the Board an application for such sale.

(2) Before making such sale, the Board shall give ten days' notice of the same by publication thereof in 70[the Port Gazette, or where there is no Port Gazette, in the Official Gazette] and also in at least one of the principal local daily newspapers :

Provided that in the case of animals and perishable or hazardous goods, the Board may give such shorter notice and in such manner as, in the opinion of the Board, the urgency, of the case admits of.

(3) if the address of the owner of the goods has been stated on the manifest of the goods or in any of the documents which have come into the hands of the Board, or is otherwise known notice shall also be given to him by letter delivered at such address, or sent post, but the title of a bona fide purchaser of such goods shall not be invalidated by reason of the omission to send such notice, nor shall any such purchaser be bound to inquire whether such notice has been sent.

(4) Notwithstanding anything contained in this section, arms and ammunition and controlled goods may be sold at such time and in such manner as the Central Government may direct.

Explanation.-In this section and section 62-

(a) "arms and ammunition" have the meanings respectively assigned to them in the Arms Act, 1959 (54 of 1959);

(b) "controlled goods" means goods the price or disposal of which is regulated under any law for the time being in force.

62. Disposal of goods not removed from premises of Board within time limit

(1) Notwithstanding anything contained in this Act, where any goods placed in the custody of the Board upon the landing thereof are not removed by the owner or other person entitled thereto from the premises of the Board within one month from the date on which such goods were placed in their custody, the Board may, if the address of such owner or person is known, cause a notice to be served upon him by letter delivered at such address or sent by post, or if the notice cannot be so served upon him or his address is not known, cause a notice to be published in 71[the Port Gazette or where there is no Port Gazette, in the Official Gazette] and also in at least one of the principal local daily newspapers, requiring him to remove the goods forthwith and stating that in default of compliance therewith the

goods are liable to be sold by public auction 72[or by tender, private agreement or in any other manner] :

Provided that where all the rates and charges payable under this Act in, respect of any such goods have been paid, no notice of removal shall be so served or published under this sub-section unless two months have expired from the date on which the goods were placed in the custody of the Board.

(2) The notice referred to in subsection (1) may also be served agents of the vessel by which such goods were landed.

(3) If such owner or person does not comply with the requisition in the notice served upon him or published under sub-section (1), the Board may, at any time after the expiration of two months from the date on which such goods were placed in its custody sell the goods by public auction 73[or in such cases as the Board considers it necessary so to do, for reasons to be recorded in writing sell by tender, private agreement or in any other manner] after giving notice of the sale in the manner specified in sub-sections (2) and (3) of section 61.

(4) Notwithstanding anything contained in sub-section (1) or sub-section (3)-

(a) the Board may, in the case of animals and perishable or hazardous goods, give notice of removal of such goods although the period of one month or, as the case may be, of two months specified in sub-section (1) has not expired or give such shorter notice of sale and in such manner as, in the opinion of the Board, the urgency of the case requires;

(b) arms and ammunition and controlled goods may be sold in accordance with the provisions of sub-section (4) of section 61.

(5) The Central Government may, if it deems necessary so to do in the public interest, by notification in the Official Gazette, exempt any goods or classes of goods from the operation of this section.

63. Application of sale proceeds

(1) The proceeds of every sale under section 61 or section 62 shall be applied in the following order-

(a) in payment of the expenses of the sale;

(b) in payment, according to their respective priorities, of the liens and claims excepted in sub-section (2) of section 59 from the priority of the lien of the Board;

(c) in payment of the rates and expenses of landing, removing, storing or warehousing the same, and of all other charges due to the Board in respect thereof 74[including demurrage (other than penal

demurrage) payable in respect of such goods for a period of four months from the date of landing];

74[(d) in payment of any penalty or fine due to Central Government under any law for the time being in force relating to customs;

(e) in payment of any other sum due to the Board.]

75[(2) The surplus, if any, shall be paid to the importer, owner or consignee of the goods or to his agent, on an application made by him in this behalf within six months from the date of the sale of the goods.

(3) Where no application has been made under sub-section (2), the surplus shall be applied by the Board for the purposes of this Act.]

64. Recovery of rates and charges by distraint of vessel

(1) if the master of any vessel in respect of which any rates or penalties are payable under this Act, or under any regulations or orders made in pursuance thereof, refuses or neglects to pay the same or any part thereof on demand, the Board may distrain or arrest such vessel and the tackle, apparel and furniture belonging thereto, or any part thereof, and detain the same until the amount so due to the Board, together with such further amount as may accrue for any period during with such further amount as may accrue for any period during which the vessel is under distraint or arrest, is paid.

(2) In case any part of the said rates or penalties, or of the cost of the distress or arrest, or of the keeping of the same, remains unpaid for the space of five days next after any such distress or arrest has been so made, the Board may cause the vessel or other thing so distrained or arrested to be sold, and, with the proceeds of such sale, shall satisfy such rates or penalties and costs, including the costs of sale remaining unpaid, rendering the surplus (if any) to the master of such vessel on demand.

65. Grant of port-clearance after payment of rates and realisation of damages, etc .

If a Board gives to the officer or the Central Government whose duty it is to grant the port-clearance to pay to any vessel at the port, a notice stating,-

(i) that an amount specified therein is due in respect of rates, fines, penalties or expenses chargeable under this Act or under any regulations or orders made in pursuance thereof, against such vessel, or by the owner or master of such vessel in respect thereof, or against or in respect of any goods on board such vessel; or

(ii) that an amount specified therein is due in respect of any damage referred to in section 116 and such amount together with the cost of the proceedings for the recovery very thereof before a Magistrate under that section has not been realised,

such officer shall not grant such port-clearance until the amount so chargeable or due has been paid or, as the case may be, the damage and cost have been realised.]

CHAPTER VII : BORROWING POWERS OF BOARD

66. Power to raise loans

(1) A Board may, with the previous sanction of the Central Government and after due notification in the Official Gazette, raise loans for the purposes of this Act :

Provided that no such notification shall be necessary if a loan is obtained from the Central Government or a State Government.

(2) Loans may be raised by a Board in the open market on Port Trust securities issued by it or may be obtained from the Central Government or a State Government.

(3) The terms of all loans shall be subject to the approval of the Central Government.

67. Port Trust securities

(1) A Board may, with the sanction of the Central Government, prescribe the form in which Port Trust securities shall be issued by it and the mode in which, and the conditions is subject to which, they may be transferred.

(2) The holder of any Port Trust security in any form may obtain in exchange therefore, upon such terms as the Board may from time to time determine, a Port Trust security in any other form proscribed by regulations.

(3) The right to sue in respect of moneys secured by Port Trust securities shall be exercisable by the holders thereof for the time being without preference in respect of priority of date.

68. Right of survivors of joint or several payees of securities

(1) Notwithstanding anything contained in section 45 of the Indian Contract Act, 1872 (9 of 1872)-

(a) when any Port Trust security is payable to two or more persons jointly, and either or any of them dies, the Port Trust security shall be payable to the survivor or survivors of those persons, and

(b) when any such security is payable to two or more persons severally and either or any of them dies, the security shall be payable to the survivor or survivors of those persons, or to the representatives of the deceased, or to any of them.

(2) This section shall apply whether such death occurred or occurs before or after the appointed day.

(3) Nothing herein contained shall affect any claim which any representative of a deceased person may have against the survivor or survivors under or in respect of any security to which sub-section (1) applies.

(4) For the purpose of this section, it body incorporated or deemed to be incorporated under the Companies Act, 1956 (1 of 1956), or the co-operative Societies Act, 1912 (2 of 1912) or any other enactment for the time being in force, whether within or without India, shall be deemed to die when it is dissolved.

69. Power of one or two or more joint holders to grant receipts

Where two or more persons are joint holders of any Port Trust security, any one of those persons may give an effectual receipt for any interest payable in respect of such security unless notice to the contrary has been given to the Board by any other of the holders.

70. Indorsements to be made on security itself

Notwithstanding anything in section 15 of the Negotiable Instruments Act, 1881 (26 of 1881), no indorsement of a Trust security, which is transferable by indorsement, shall be valid unless made by the signature of the holder inscribed on the back of the security itself.

71. Indorser of security not liable for amount thereof

Notwithstanding anything in the Negotiable instruments Act, 1881 (26 of 1881), a person shall not by reason only of his having indorsed any Port Trust security be liable to pay any money due, either as principal or as interest, thereunder.

72. Impression of signature on securities

(1) The signature of the person authorised to sign port Trust security on behalf of the Board may be printed, engraved or lithographed or impressed by such other mechanical process, as the Board may direct, on such securities.

(2) A Signature so printed, engraved, lithographed or otherwise impressed shall be as valid as if it had been inscribed in the proper handwriting of the person so authorised.

73. Issue of duplicate securities

(1) When any Port Trust security is alleged to have been lost, stolen or destroyed either wholly or in part, and a person claims to be the person to whom but for the loss, theft or destruction it could be payable, he may, on application to the Board and on producing proof to its satisfaction of the loss, theft or destruction and of the justice of the claim and on payment of such fee, if any, as may be prescribed by regulations, obtain from the Board an order for-

(a) the payment of interest in respect of the security said to be lost, stolen or destroyed, pending the issue of a duplicate security; and

(b) the issue of a duplicate security payable to the applicant.

(2) An order shall not be passed under sub-section (1) until after the issue by the Board of the prescribed notification of the loss, theft or destruction.

(3) A list of the securities in respect of which an order is passed under sub-section (1) shall be published in such manner as the Board may prescribe.

(4) if at any time before the board becomes discharged under the provisions of this Act from liability in respect of any security the whole of which is alleged to have been lost, stolen or destroyed, such security is found, any order passed in respect thereof under this section shall be cancelled.

74. Issue of converted, etc. securities

(1) A Board may, subject to such conditions as it may prescribe, on the application of a person claiming to be entitled to a Port Trust security or securities issued by it, on being satisfied on the justice of the claim and on delivery of the security or securities receipted in such manner and on payment of such fee, if any, as it may prescribe convert, consolidate or sub-divide the security or securities, and issue to the applicant a new security securities accordingly.

(2) The conversion, consolidation or sub-division referred to in sub-section (1) may be into security or securities of the same or different classes or of the same or different loans.

74A. Recognition as holder of Port Trust securities in certain cases

The person to whom a duplicate security has been issued under section 73 or a new security or securities has or have been issued under section 74 shall be deemed for the purposes of section 74 B to have been recognised by the Board as the holder of the security or securities; and a duplicate security or a new security or securities so issued to any person shall be deemed to constitute a new contract between the Board and such person and all persons deriving title thereafter through him.

74B. Legal effect of recognition by the Board under section 74A

No recognition by the Board of a person as the holder of a Port Trust security or securities shall be called in question by any court so far as such recognition affects the relations of the Board with the person recognise by it as the holder of a Port Trust security or securities or with any person claiming an interest in such security or securities; and any such recognition by the Board of any person shall operate to confer on that person a title to the security or securities subject only to a personal liability to the rightful owner of the security or securities for money had and received on his account.]

75. Discharge in certain cases

Notwithstanding anything contained in 78[the Limitation Act, 1963 (36 of 1963)]-

(i) on payment of the amount due on a Port Trust security on or after the date on which payment becomes due, or

(ii) when a duplicate security has been issued under section 73, or

(iii) when a new security or securities has or have been issued upon conversion, consolidation or sub-division under section 74,

the Board shall be discharged from all liability in respect of the security or securities so paid or in place of which a duplicate or new security or securities has or have been issued-

(a) in the case of payment-after the lapse of six years from the date on which payment was due;

(b) in the case of a duplicate security-after the lapse of six years from the date of the publication under sub-section (3) of section 73 of the list in which the security is first mentioned or from the date of the last payment of interest on the original security, whichever date is later;

(c) in the case of a new security issued upon conversion, consolidation or sub-division after the lapse of six years from the date of the issue thereof.

76. power of Board to make regulations

A Board may, from time to time, make regulations to provide for all or any of the following matters, namely:-

(a) the person, if any, authorised to sign, and the mode of affixing the corporate seal and of attestation of documents relating to Port Trust securities issued or to be issued by the Board;

(b) the manner in which payment of interest in respect of such Port Trust securities is to be made, recorded and acknowledged;

(c) the circumstances and the manner in which such Port Trust securities may be renewed;

(d) the circumstances in which such securities must be renewed before further payment of interest there on can be claimed;

(e) the form in which such securities delivered for renewal, conversion, consolidation or sub-division are to be receipted;

(f) the proof which is to be produced by a person applying for duplicate securities;

(g) the form and manner of publication of the notification mentioned in sub-section of section 73 and the manner of publication of the list mentioned in sub-section (3) of that section;

(h) the nature and amount of indemnity to be given by a person applying for the payment of interest on Port Trust securities alleged to have been wholly or partly lost, stolen or destroyed, or for the issue of duplicate Port Trust securities;

(i) the conditions subject to which Port Trust securities may be converted, consolidated or sub-divided;

(j) the amounts for which stock certificate may be issued;

(k) generally, all matters connected with the grant of duplicate, renewed, converted, consolidated and sub-divided securities;

(l) the fees to be paid in respect of the issue of duplicate securities and of the renewal, conversion, consolidation and sub-division of Port Trust securities;

(m) the fees to be levied in respect of the issue of stock certificates.

77. Place and currency of loans raised by Board

All loans contracted by a Board under this Act shall be raised in India, and in Indian currency, unless the Central Government, by notification in the Official Gazette, otherwise directs.

78. Security for loans taken out by Board

All loans raised by a Board under this Act shall be a first charge on-

(a) the property vested, or which may hereafter during the currency of the loans become vested, in the Board 79[other than-

(i) any sum set apart by the Board-

(1) as the sinking fund for the purpose of paying off any loan;
or

(2) for the payment of pension to its employees; or

(ii) the provident or pension fund established by the Board; and]

(b) the rates leviable by the Board under this Act.

79. Remedies of Government in respect of loans made to Boards

The Central Government or a State Government shall have in respect of loans made by it to a Board, or of loans made to any other authority for the repayment of which the Board is legally liable, the same remedies as holders of Port Trust securities issued by the Board; and such Government shall not be deemed to possess any prior or greater rights in respect of such loans than holders of such Port Trust securities :

Provided that where the terms of any such loan made before the appointed day expressly provide that the loan shall have priority over

all other loans in the matter of repayment by the Board, such loan shall have priority.

80. Power of Board to repay loans before due date

A Board may, with the previous sanction of the Central Government, apply any sums, out of moneys which may come into its hands under the provisions of this Act and which can be so applied without prejudicing the security of the other holders of Port Trust securities, in repaying to the Government any sum which may remain due to it in respect of the principal of any loan although the time fixed for the repayment of the same may not have arrived :

Provided that no such repayment shall be made of any sum less than ten thousand rupees; and that, if such repayment is made, the amount of interest in each succeeding instalment shall be so adjusted as to represent exactly the interest due on the outstanding principal.

81. Establishment of sinking fund

(1) In respect of every loan raised by a Board under this Act, which is not repayable before the expiration of one year from the date of the loan, the Board shall set apart half-yearly out of its income as a sinking fund a sum sufficient to liquidate the loan within a period which shall not in any case, unless the previous consent of the Central Government has been obtained, exceed thirty years; but the maximum period shall not in any case exceed sixty years:

Provided that a sinking fund need not in the absence of any stipulation to that effect be established in the case of loans taken by the Board from the Central Government or any State Government.

(2) Where any sinking fund has, before the appointed day, been established by any authority in respect of a loan raised by it for which loan the Board is liable under this Act, the sinking fund so established by that authority shall be deemed to have been established by the Board under this section.

82. Investment and application of sinking fund

(1) The sums so set apart by A Board under sub-section (1) of section 81 and the sums forming part of any sinking fund referred to in sub. section (2) of that section shall be invested in public securities or in such other securities as the Central Government may approve in this behalf, and shall be held in trust for the purposes of this Act 80[by the Board].

(2) A Board may apply the whole or any part of the sums accumulated in any sinking fund in or towards the discharge of the moneys for the repayment of which the fund has been established:

Provided that it pays into the fund in each year, and accumulates until the whole of the moneys borrowed are discharged a sum equivalent to the interest which would have been produced by the sinking fund, or the part of the sinking fund so applied.

83. Examination of sinking fund

(1) A sinking fund established for the liquidation of any loan shall be subject to annual examination by such person as may be appointed by the Central Government in this behalf, and the person so appointed shall ascertain whether the cash and the current market value of the securities at the credit of the fund are actually equal to the amount which would have been accumulated had investment been regularly made and had the rate of interest as originally estimated been obtained thereon.

(2) A Board shall pay forthwith into the sinking fund any amount which the person appointed under sub-section (1) to conduct the annual examination of the fund may certify to be deficient, unless the Central Government specifically sanctions a gradual readjustment.

(3) if the cash and the current market value of the securities at the credit of a sinking fund are in excess of the amount which should be at its credit, the person appointed under subsection (1) shall certify the amount of this excess, and the Board may, with the previous sanction of the Central Government,-

(a) withdraw the whole or any part of the certified excess in which case the Trustees in whose names the sinking fund is invested under sub-section (1) of section 82, shall forthwith transfer securities of the requisite current market value, or cash and securities of the requisite current market value, to the Board, of

(b) reduce or discontinue the half-yearly contributions to the sinking fund required under section 81, or

(c) adopt a combination of these measures.

84. Power of Board to raise loans on short-term bills

Nothing contained in this Act shall be deemed to affect the power of the Board to raise loans under the Local Authorities Loans Act, 1914 (9 of 1914)

85. Power of Board to take temporary loans or overdrafts

Notwithstanding anything contained in this Act, a Board may borrow moneys by means of temporary overdraft or otherwise by pledging the securities hold by the Board in its reserve funds or on the security of the fixed deposits of the Board in its banks :

Provide that such temporary overdrafts or other loans-

(a) shall not at any time have a longer currency than six months; and

(b) shall not be taken, without previous sanction of the Central Government, if at any time in any year the amount of such overdrafts or other loans exceeds 81[such amount as the Central Government may fix in this behalf and different amounts may be fixed with respect to different Boards]:

Provided further that all moneys so borrowed by temporary overdrafts or otherwise shall be expended for the purposes of this Act.

86. Powers of Board to borrow money from International Bank for Reconstruction and Development or other foreign institutions
Notwithstanding anything contained in this Act or any other law for the time being in force, a Board may, with the previous sanction of the Central Government and on such terms and conditions as may be approved by that Government, raise for the purposes of this Act loans in any currency or currencies from the International Bank for Reconstruction and Development or from any other bank or institution in any country outside India; and no other provisions of this Chapter shall apply to or in relation to any such loan unless the terms and conditions of the loan or the approval thereof by the Central Government otherwise provide.

CHAPTER VIII : REVENUE AND EXPENDITURE

87. General account of Port

All moneys received by or on behalf of a Board under the provisions of this Act, and all moneys received by it as the Conservator of the port and of the Port approaches or as the body appointed under sub-section (1) of section 36 of the Indian Ports Act 82[***] shall be credited to a fund called the general account of the Port.

88. Application of moneys in general account

(1) The moneys credited to the general account under section 87, shall, subject to the provisions of section 89 of this Act and of section 36 of the Indian Ports Act, be applied by the Board in payment of the following charges, namely:-

(a) the interest and instalments of principal due in respect of any loan that may have been raised or obtained by the Board or for the repayment of which the Board may be liable, and payments to the sinking fund established for such loan;

(b) the salaries, fees, allowances, pensions, gratuities, compassionate allowances or other moneys due to-

(i) the Chairman, Deputy Chairman and other Trustees;

(ii) the employees of the Board; and

(iii) the surviving relatives, if any of such employees;

(c) the contributions, if any, payable to the Central Government or any State Government on account of the pension and leave allowance of any officer lent to the Board by such Government;

(d) the cost and expenses, if any, incurred by the Board in the conduct and administration of any provident or welfare fund or loan or special fund established by the Board;

(e) the contributions, if any, duly authorised to be made by regulations made under this Act to any such fund as is referred to in clause (d);

(f) any charges for which the Board may be liable under section 108 or section 109;

83(g) such sums as may, from time to time, be agreed upon by the Board and a State Government or the Central Government or any other authority, as a reasonable contribution payable by the Board towards the expenses in connection with the watch and ward functions of the police force or the Central Industrial Security Force or any other force which the State Government or the Central Government or the other authority, as the case may be, may establish and maintain for the protection of the port and the docks, warehouses and other property of the Board;]

(h) the cost of repairs and maintenance of property belonging to or vested in Board and all charges upon the same and all working expenses;

(i) the cost of the execution and provision of any new work or appliance specified in section 35 which the Board may determine to charge to revenue;

(j) any expenditure incurred under section 36;

(k) any other expenditure which may be incurred by the Board generally for the purposes of this Act.,

(1) any other charge which may on the application of the Board 84[or otherwise] be specially sanctioned by the Central Government or for which the Board may be legally liable.

(2) 85[Subject to such general or special directions as the Central Government may, for the purpose of maintenance or development of major ports in the country or generally for the development of shipping and navigation, give in this behalf, all moneys standing at the credit of the Board] which cannot immediately be applied in the manner or for the purposes specified in sub-section (1) shall-

(a) be deposited in the State Bank of India or in such 86[corresponding new bank or banks] and subject to such conditions as may, from time to time, be specified by the Central Government; or

(b) be invested in public securities or in such other securities as the Central Government may approve in this behalf, and the said securities shall be held in trust by the Board for the purpose of this Act; 87[or].

88[(c) be given as a loan to the Board of another port for the development of that port.

88A[(d) be invested, in any manner, in an arrangement referred to in sub-section (3A) of section 42;

(e) be invested, in any manner, in the development or management of any port including a port other than a major port on such terms and conditions as may be approved by the Central Government.]

Explanation.- For the purposes of this sub-section, "corresponding new bank" means a corresponding new bank as defined in the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970 (5 of 1970) or the Banking Companies (Acquisition and Transfer Undertakings) Act, 1980 (40 of 1980).]

87[(3) Every direction issued by the Central Government under sub-section (2) shall be complied with by the Board and shall not be called in question in any court on any ground.

(4) No suit or other legal proceeding shall lie against the Central Government, the Board or any officer or other employee of the Board authorised by it in this behalf for any loss or damage caused or likely to be caused by anything which is in good faith done or intended to be done in pursuance of any direction issued under sub-section (2).]

89. Repealed by the Indian Ports Amendment Act, 1992, w.e.f. 12th. August, 1992

90. Establishment of reserve funds

(1) A Board may, from time to time, set apart such sums out of its surplus income as it thinks fit, as a reserve fund or funds for the purpose of expanding existing facilities or creating new facilities at the port or for the purpose of providing against any temporary decrease of revenue or increase of expenditure from transient causes or for purposes of replacement or for meeting expenditure arising from loss or damage from fire, cyclones, shipwreck or other accident or for any other emergency arising in the ordinary conduct of its work under this Act :

Provided that the sums set apart annually in respect of, and the aggregate at any time of, any such reserve fund or funds shall not exceed such amounts as may, from time to time, be fixed in that behalf by the Central Government.

(2) Any such reserve fund or funds may be invested in public securities or in such other securities as the Central Government may approve in this behalf.

91. Power to reserve Port Trust securities for Board's own investments

(1) For the purposes of any investment which a Board is authorised to make by this Act, it shall be lawful for every Board to reserve and set apart any securities to be issued by it on account of any loan to which the consent of the Central Government has been given, provided that the intention to so reserve and set apart such securities has been notified as a condition to the issue of the loan.

(2) The issue by any Board of any such securities direct to and in the name of the Board shall not operate to extinguish or cancel such securities, but every security so issued shall be valid in all respects as if issued to, and in the name of, any other person.

(3) The purchase by a Board, or the transfer, assignment or indorsement to a Board or to the Trustees of the sinking fund set up by a Board, of any security issued by the Board, shall not operate to extinguish or cancel any such security but the same shall be valid and negotiable in the same manner and to the same extent as if held by, or transferred or assigned or indorsed to, any other person.

92. Prior sanction of Central Government to charge expenditure to capital

(1) No expenditure shall be charged by a Board to capital without the previous sanction of the Central Government:

Provided that a Board may without such sanction charge to capital expenditure not exceeding such limit as may be specified, and subject to such conditions as may be imposed, by the Central Government.

(2) Nothing in sub-section (1) shall be deemed to require the further sanction of the Central Government in any case where the actual expenditure incurred as a charge to capital exceeds the expenditure sanctioned in this behalf by the Central Government unless the excess is more than ten per cent. of the expenditure so sanctioned.

93. Works requiring sanction of Board of Central Government

(1) No new work or appliance, the estimated cost of which exceeds such amount as may be fixed by the Central Government in this behalf, shall be commenced or provided by a Board, nor shall any contract be entered into by a Board in respect of any such new work or appliance until a plan of, and estimate for, such work or appliance has been submitted to, and approved by, the Board; and, in case the estimate cost of any such new work or appliance exceeds such amount as may, from time to time, be fixed by the Central Government in this behalf, the sanction of the Central Government to the plan and estimate shall be obtained before such work is commenced or appliance provided.

(2) Nothing in sub-section (1) shall be deemed to require the further sanction of the Central Government in any case where the actual expenditure incurred does not exceed by more than ten per cent., the estimated cost so sanctioned.

94. Powers of Chairman as to execution of works

Notwithstanding anything contained in section 93, the Chairman may direct the execution of any work the cost of which does not exceed such maximum limit as may be fixed by the Central Government in this behalf, and may enter into contracts for the execution of such works but in every such case the Chairman shall, as soon as possible, make a report to the Board of any such directions given or contract entered into by him.

95. Power of Board to compound or compromise claims

Every Board may compound or compromise any claim or demand or any action or suit instituted by or against it for such sum of money or other compensation as it deems sufficient

Provided that no settlement shall be made under this section without the previous sanction of the Central Government if such settlement involves the payment by the Board of a sum exceeding such amount as may be specified by the Central Government in this behalf.

96. Writing off of losses

(1) Subject to such conditions as may be specified by the Central Government, where a Board is of opinion that any amount due to or any loss, whether of money or of property, incurred by, the Board is irrecoverable, the Board may, with the previous approval of the Central Government, sanction the writing off finally of the said amount or loss :

88[Provided that no such approval of the Central Government shall be necessary where such irrecoverable amount or loss does not exceed, in any individual case and in the aggregate in any year, such amounts as the Central Government may, from time to time, by order, fix and different amounts may be fixed with respect to different Boards.]

(2) Notwithstanding anything contained in sub-section (1), where the Chairman is of opinion that any amount due to, or any loss, whether of money or of property, incurred by the Board is irrecoverable, the Chairman may sanction the writing off finally of such amount or loss provided that 89[such amount or loss does not exceed, in any individual case and in the aggregate in any year, such amounts as the Central Government may, from time to time, by order, fix and different amounts may be fixed with respect to different Boards.]

90[(3) In every case in which the Chairman sanctions the writing off of any amount or loss under sub-section (2), he shall make a report to the Board giving reasons for such sanction.]

97. Powers, etc., of Board as Conservator or body appointed under section 36 of Indian Ports Act

All the powers, authorities and restrictions contained in this Act in respect of the works by this Act authorised, shall apply to the works which may be executed by the Board as the Conservator of the port

or as the body appointed under sub-section (1) of section 36 of the Indian Ports Act 82[***] and also to the sanction of such works, the estimates therefor, and the expenditure thereunder.

98. Budget estimates

(1) A Board shall, on or before the thirty-first day of January in each year, hold a special meeting at which the Chairman of the Board shall submit an estimate of the income and expenditure of the Board for the next financial year, in such form as the Central Government may specify.

(2) A copy of such estimate shall be sent by post or otherwise to each Trustee so as to reach him not less than ten clear days prior to the date appointed for the special meeting referred to in sub-section (1).

(3) The Board shall consider the estimate at such meeting and may provisionally approve of it with or without modifications.

(4) The Board shall, on or before the tenth day of February, cause a copy of such estimate as provisionally approved by it, to be sent to the Central Government.

(5) The Central Government may sanction the estimate or may return it with remarks and may call for such additional information as it may deem necessary.

(6) When an estimate is returned under sub-section (5), the Board shall proceed to reconsider the estimate with reference to such remarks and shall furnish such additional information as the Central Government may call for and shall, if necessary, modify or alter the estimate and resubmit it to the Central Government.

(7) The Central Government shall sanction the estimate with or without modifications.

(8) Where any such estimate is not sanctioned by the Central Government before the commencement of the financial year to which it relates, the Central Government may authorise the Board to incur such expenditure as may be necessary in the opinion of the Central Government until such time as the approval of the estimate by the Central Government is communicated to the Board.

99. Preparation of supplemental estimate

A Board may in the course of any year for which an estimate has been sanctioned by the Central Government cause one or more supplemental estimates for the residue of such year to be prepared, and the provisions of section 98 shall, so far as may be, apply to such estimate as if it were an original annual estimate.

100. Re-appropriation of amounts in estimate

Subject to any directions which the Central Government may give in this behalf, any sum of money or part thereof of which the

expenditure has been authorised in an estimate for the time being in force sanctioned by the Central Government and which has not been so spent, may at any time be re-appropriated by the Board to meet any excess in any other expenditure authorised in the said estimate :

Provided that no such re-appropriation shall be made from one Major head of expenditure to another such head without the previous sanction of the Central Government.

101. Adherence to estimate except in emergency

(1) Subject to the provisions of section 100, no sum exceeding such amount as the Central Government may fix in this behalf shall, save in cases of pressing emergency, be expended by, or on behalf of, any Board unless such sum is included in some estimate of the Board at the time in force which has been finally sanctioned by the Central Government.

(2) If any sum exceeding such limit as may have been fixed in this behalf under sub-section (1) is so expended by any Board on a pressing emergency, the circumstances shall be forthwith reported by the Chairman to the Central Government, together with an explanation of the way in which it is proposed by the Board to cover such extra expenditure.

102. Accounts and audit

(1) A Board shall maintain proper accounts and other relevant records and prepare the annual statement of accounts, including the balance-sheet in such form as may be specified by the Central Government in consultation with the Comptroller and Auditor-General of India.

91[(2) The accounts of the Board shall be audited-

(i) once in every year; and

(ii) if so required by the Comptroller and Auditor-General of India, concurrently with the compilation of such accounts,

by the Comptroller and Auditor-General of India or such other persons as may be appointed by him in this behalf and any amount payable to him by the Board in respect of such audit shall be debitable to the general account of the Board.]

(3) The Comptroller and Auditor-General of India or any person appointed by him in connection with the audit of the accounts of a Board shall have the same rights, privileges and authority in connection with such audit as the Comptroller and Auditor-General of India has in connection with the audit of Government amounts and, in particular, shall have the right to demand the production of books of accounts, connected vouchers and other documents of the Board.

103. Publication of audit report

(1) Within fourteen days after the audit and examination of the accounts of a Board have been completed, the Comptroller and Auditor-General of India shall forward copies of the audit report to the Central Government and to the Board.

(2) The Central Government shall cause every audit report to be laid for not less than thirty days before each House of Parliament as soon as may be after such report is received by that Government.

104. Board to remedy defects and irregularities pointed out in audit report

Every Board shall forthwith take into consideration any defects or irregularities that may be pointed out by the Comptroller and Auditor-General of India in the audit report on the income and expenditure of the Board and shall take such action thereon as the Board may think fit and shall also send a report of the action so taken to the Central Government.

105. Central Government to decide difference between Board and auditors

If there is a difference of opinion between any Board and the Comptroller and Auditor-General of India on any point included in the audit report, and the Board is unable to accept and implement the recommendations, if any, made by him on such point, the matter shall forthwith be referred to the Central Government which shall pass final orders thereon and the Board shall be bound to give effect to such orders.

CHAPTER IX : SUPERVISION AND CONTROL OF CENTRAL GOVERNMENT

106. Administration report

As soon as may be after the first day of April in every year and not later than such date as may be fixed in this behalf by the Central Government, every Board shall submit to the Central Government a detailed report of the administration of the port during the preceding year ending on the thirty-first day of March, in such form as the Central Government may direct.

107 Submission of statements of income and expenditure to Central Government

(1) Every Board shall annually, or oftener if directed by the Central Government so to do, submit statements of its income and expenditure in such form and at such time as that Government may direct.

(2) A copy of all such statements shall be open to the inspection of the public at the office of the Board during office hours on payment of such fee for each inspection as may from time to time be fixed by the Board.

108. Power of Central Government to order survey or examination of works of Board

The Central Government may, at any time, order a local survey or examination of any works of a Board, or the intended site thereof and the cost of such survey and examination shall be borne and paid by the Board from and out of the moneys credited to the general account of the port.

109. Power of Central Government to restore or complete works at the cost of Board

If, at any time, any Board -

(a) allows any work or appliance constructed or provided by, or vested in, the Board to fall into disrepair ; or

(b) does not, within a reasonable time, complete any work commenced by the Board or included in any estimate sanctioned by the Central Government; or

(c) does not, after due notice in writing, proceed to carry out effectively any work or repair or to provide any appliance which is necessary in the opinion of the Central Government for the purposes of this Act,

the Central Government may cause such work to be restored or completed or carried out, or such repairs to be carried out or such appliance to be provided and the cost of any such restoration, completion, construction, repair or provision shall be paid by the Board from and out of the moneys credited to the general account of the port.

110. Power of Central Government to supersede Board

(1) if, at any time, the Central Government is of opinion-

(a) that on account of a grave emergency, any Board is unable to perform the duties imposed on it by or under the provisions of this Act or of any other law, or

(b) that the Board has persistently made default in the performance of the duties imposed upon it by or under the provisions of this Act or of any other law and as a result of such default, the financial position of the Board or the administration of the port has greatly deteriorated the Central Government may, by notification in the Official Gazette, supersede the Board for such period, not exceeding six months at a time, as may be specified in the notification :

Provided that before issuing a notification under this sub-section for the reasons mentioned in clause (b), the Central Government shall give a reasonable time of not less than three months to the Board to show cause why it could not be superseded and shall consider the explanations and objections, if any, of the Board.

(2) Upon the publication of a notification under sub-section (1) superseding the Board,-

(a) all the Trustees shall, as from the date of supersession, vacate their offices as such Trustees;

(b) all the powers and duties which may, by or under the provisions of this Act or of any other law, be exercised or performed by or on behalf of the Board, shall until the Board is reconstituted under clause (b) or clause (c) of sub-section (3) be exercised and performed by such person or persons as the Central Government may direct;

(c) all property vested in the Board shall, until the Board is reconstituted under clause (b) or clause (c) of sub-section (3), vest in the Central Government.

(3) on the expiration of the period of supersession specified in the notification issued under sub-section (1), the Central Government may-

(a) extend the period of supersession for such further term, not exceeding six months, as it may consider necessary, or

(b) reconstitute the Board by fresh appointment and fresh election, and in such case, any persons who vacated their offices under clause (a) of sub-section (2) shall not be deemed disqualified for appointment or election, as the case may be, or

(c) reconstitute the Board by appointment only for such period as it may consider necessary and in such a case, the persons who vacated their offices under clause (a) of sub-section (2) shall not be deemed disqualified for such appointment merely because they were Trustees when the Board was superseded

Provided that the Central Government may, at any time before the expiration of the period of supersession, whether as originally specified under sub-section (1) or as extended under this sub-section, take action under clause (b) or clause (c) of this sub-section.

(4) The Central Government shall cause a notification issued under sub-section (1) and a full report of any action taken under this section and the circumstances leading to such action to be laid before each House of Parliament at the earliest possible opportunity.

110A. Power of Central Government to supersede the Authority

(1) If the Central Government is of the opinion that the Authority is unable to perform, or has persistently made default in the performance of, the duty imposed on it by or under this Act or has exceeded or abused its powers, or has wilfully or without sufficient cause, failed to comply with any direction issued by the Central Government under section 111, the Central Government may, by notification in the Official Gazette, supersede the Authority for such period as may be specified in the notification:

Provided that, before issuing a notification under this sub-section, the Central Government shall give reasonable opportunity to the Authority to show cause why it should not be superseded and shall consider the explanation and objections, if any, of the Authority.

(2) Upon the publication of a notification under sub-section (1) superseding the Authority,-

(a) the Chairperson and the Members of the Authority shall, notwithstanding that their term of office has not expired as from the date of supersession, vacate their offices as such Chairperson or Members as the case may be;

(b) all the powers and duties which may, by or under provisions of this Act, be exercised or performed by or on behalf of the Authority shall, during the period of supersession, be exercised and performed by such person or persons as the Central Government may direct.

(3) On the expiration of the period of supersession specified in the notification issued under sub-section (1), the Central Government may-

(a) extend the period of supersession for such further period as it may consider necessary; or

(b) reconstitute the Authority in the manner provided in section 47A.]

111. Power of Central Government to issue directions to Board

93[(1) Without prejudice to the foregoing provisions of this Chapter, the Authority and every Board shall, in the discharge of its functions under this Act be bound by such directions on questions of policy as the Central Government may give in writing from time to time:

Provided that the Authority or the Board, as the case may be, shall be given opportunity to express its views before any direction is given under this sub-section.]

(2) The decision of the Central Government whether a question is one of policy or not shall be final.

CHAPTER X : PENALTIES

112. Every person employed by the Authority of this Act to be a public servant

Every person employed by the Authority or by a Board under this Act shall, for the purposes of sections 166 to 171 (both inclusive), 184, 185 and 409 of Indian Penal Code and for the purposes of the Prevention of Corruption Act, 1988 be deemed to be a public servant within the meaning of section 21 of the said Code.]

113. Penalty for contravention of sections 37, 38, 40 and 41

Whoever contravenes the provisions of any order issued under section 37 or section 38 or section 41 or fails to comply with any condition imposed under section 40 shall be punishable with fine which may extend to 95[ten thousand rupees], and where the contravention or failure is a continuing one, with further fine which may extend to 96[one thousand rupees] for every day after the first during which such contravention or failure continues.

114. Penalty for setting up wharves, quays, etc., without permission

Any person, who contravenes the provisions of section 46 shall be punishable with fine which may extend to 97[ten thousand rupees] for the first contravention, and with a further fine which may extend to 97[one thousand rupees] for every day after the first during which the contravention continues.

115. Penalty for evading rates, etc

Any person who, with the intention of evading payment of the rates lawfully due, in respect of any goods or vessel carrying any goods, to the Board -

(a) understates or incorrectly gives the weight, quantity, value or description of such goods or the tonnage of such vessel in any document presented to any employee of the Board for the purpose of enabling him to determine such rates; or

(b) removes or attempts to remove or abets the removal of such goods or such vessel.;

shall be punishable with fine which may extend to 98[ten times] the amount of rates so due subject to a minimum of 99[five hundred rupees].

116. Recovery of value of damage to property of Board

If, through the negligence of any person having the guidance or command of any vessel, or of any of the mariners or persons employed on such vessel, any damage is caused to any dock, wharf, quay, mooring, stage, jetty, pier or other work in the possession of any Board 100[or any movable property be belonging to any Board,] the amount of such damage shall, on the application of the Board be recoverable, together with the cost of such recovery, by distress and sale, under a Magistrate's warrant, of a sufficient portion of the boats, masts, spares, ropes, cables, anchors or stores belonging to such vessel:

Provided that no Magistrate shall issue such a warrant until the master of the vessel has been duly summoned to appear before him and, if he appears, until he has been heard; and provided also that no such warrant shall issue if the vessel was at the time under the orders of a duly authorised employee of the Board and the damage caused

was attributable to the order, act or improper omission of such employee.

117. Other offences

Any person who contravenes any of the provisions of this Act or of any rule, regulation or order made thereunder, for the contravention of which no penalty is expressly provided thereunder, shall be punishable with fine which may extend to 101[two thousand rupees].

102[117A. Person interested in contracts, etc., with the Board to be deemed to have committed an offence under section 168 of the Indian Penal Code

Any person who, being a Trustee or an employees of the Board, acquires, directly or indirectly, any share or interest in any contract or employment with, by or on behalf of, any Board, shall be deemed to have committed an offence under section 168 of the Indian Penal Code (45 of 1860):

Provided that nothing in this section shall apply to a person who deemed not to have a share or interest in any contract or employment under the proviso to clause (d) of section 6,]

118. Cognizance of offences

No court inferior to that of a 103[Metropolitan Magistrate or Judicial Magistrate of the first class] shall try any offence punishable under this Act or any rule or regulation made thereunder.

119. Offences by companies

(1) If the person committing an offence under this Act is a company, every person who, at the time the offence was committed was in charge of, and was responsible to, the company for the conduct of business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:

Provided that nothing contained in this sub-section shall render any such person liable to such punishment provided in this Act if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.

(2) Notwithstanding anything contained in sub section (1), where an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or that the commission of the offence is attributable to any negligence on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary, or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation -For the purposes of this section,-

(a) "company" means a body corporate and includes a firm or other association of individuals; and

(b) "director", in relation to a firm, means a partner in the firm.

CHAPTER XI : MISCELLANEOUS

120. Limitation of proceedings in respect of things done under the Act

No suit or other proceeding shall be commenced against a Board or any member or employee thereof for anything done, or purporting to have been done, in pursuance of this Act until the expiration of one month after notice in writing has been given to the Board or him stating the cause of action, or after six months after the accrual of the cause of action.

121. Protection of acts done in good faith

No suit or other legal proceeding shall lie 104[against the Authority a Board or any member] or employee thereof in respect of anything which is in good faith done or intended to be done under this Act or any rule or regulation made thereunder, or for any damage sustained by any vessel in consequence of any defect in any of the moorings, hawsers or other things belonging to or under the control of the Board.

122. Power of Central Government to make rules

(1) The Central Government may, by notification in the Official Gazette, make rules for all or any of the following purposes, namely:-

(a) the times and places of the meetings of a Board and the procedure to be followed for the transaction of business at such meetings;

(b) the fees and allowances payable to the members of a Board or of its committees;

105[(ba) the salaries, allowances payable to and the other terms and conditions of the Chairperson and member of the Authority;]

(c) any other matter in respect of which rules may be made by the Central Government.

(2) The power to make rules under this section is subject to the condition of the rules being made after previous publication.

(3) Every rule made under this Act shall be laid, as soon as may be after it is made, before each House of Parliament while it is in session for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session 106[immediately following the session] or the successive sessions aforesaid, both Houses agree in making any modification in the rule or both Houses agree that the rule should not

be made, the rule shall thereafter have effect only in such modified form or b.. of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

123. General Power of Board to make regulations

Without prejudice to any power to make regulations contained elsewhere in this Act, a Board may make regulations consistent with this Act for all or any of the following purposes, namely:-

(a) for the times and places of the meetings of its committees and for the procedure to be followed for the transaction of business at such meetings;

(b) for the form and manner in which contracts shall be made by the Board;

(c) for the form of receipt to be given under sub-section (2) of section 42;

(d) for the period within which notice may be given under sub-section (2) of section 43;

(e) for the guidance of persons employed by the Board under this Act;

107[(f) for the safe, efficient and convenient use, management and control of the docks, wharves, quays, jetties, railways, tramways, buildings and other works constructed or acquired by, vested in, the Board, or of any land or foreshore acquired by, or vested in, the Board under this Act;]

(g) for the reception, portage, storage and removal of goods brought within the premises of the Board, for the exclusive conduct of these operations by the Board or persons employed by the Board; and for declaring the procedure to be followed for taking charge of goods which may have been damaged before landing, or may be alleged to have been so damaged;

(h) for keeping clean the port, river or basins or the bank of the river and the works of the Board, and for preventing filth or rubbish being thrown therein or thereon;

(i) for the mode of payment of rates leviable by the Board under this Act.

(j) for regulating, declaring and defining the docks, wharves, quays, jetties, stages and piers vested in the Board on which goods shall be landed from vessels and shipped on board vessels;

(k) for regulating the manner in which, and the conditions under which, the loading and unloading of all vessels within the port or port approaches shall be carried out;

(1) for regulating the lighterage of cargo between ships or between ships and shore or between shore and ships;

(m) for the exclusion from the premises of the Board of disorderly or other undesirable persons and of trespassers;

(n) for ensuring the safety of the port;

(o) generally, for the efficient and proper administration of the port.

123A. Power of Authority to make regulations

The Authority may make regulations consistent with this Act for all or any of the following purposes, namely:-

(a) the times and place of meetings of the Authority and the procedure to be followed at such meetings under section 47E;

(b) the salaries and allowances payable to and the other conditions of services of officers and other employees of the Authority under sub-section (2) of section 47H.]

124. Provisions with respect to regulations

(1) No regulation made by the Board under this Act 109[other than a regulation made under, sub-section (2) of section 17,] shall have effect until it has been approved by the Central Government and until such approval has been published in the Official Gazette.

(2) No such regulation 110[other than a regulation made under section 28.] shall be approved by the Central Government until the same has been published by the Board for two weeks successively in the Official Gazette and until fourteen days have expired from the date on which the same had been first published in that Gazette.

(3) Any regulation made under this Act other than a regulation made under section 28 may provide that a breach thereof shall be punishable with fine which may extend to 111[two Thousand rupees], and where the breach is a continuing one, with further fine which may extend to 112[five hundred rupees] for every day after the first during which such breach continues.

110[(4) Every regulation made under this Act shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry cat the session or the successive sessions aforesaid, both Houses agree in making any modification in the regulation or both Houses agree that the regulation should not be made, the regulation shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that regulation.]

125. Power of Central Government to direct regulations to be made or make regulations

(1) Whenever the Central Government consider necessary in the public interest so to do, it may, be order in writing together with a statement of reasons therefor, direct any Board to make any regulations for all or any of the matters specified in section 28 or section 76 or section 123 or to amend any regulations, within such period as the Central Government may specify In this behalf

Provided that the Central Government may extend the period specified by it by such period or periods as it may consider necessary.

(2) If any Board, against whom a direction is issued by the Central Government under sub-section (1), fails or neglects to comply with such direction within the period allowed under sub-section (1), that Government may make the regulations or amend the regulations, as the case may be, either in the form specified in the direction or with such modifications thereof as the Central Government may think fit:

Provided that before so making or amending the regulations the Central Government shall consider any direction or suggestion made by the Board within the said period.

(3) Where in pursuance of sub-section (2), any regulations have been made or amended, the regulations so made or amended shall be published by the Central Government in the Official Gazette and shall thereupon have effect accordingly.

126. Power of Central Government to make first regulations

Notwithstanding anything contained in this Act, the first regulations under this Act shall be made by the Central Government and shall have effect on being published in the Official Gazette.

127. Posting of Certain regulations, etc.

The text of the regulations made under clauses (e) to (n) or section 123 and the scale of rates together with a statement of conditions framed by any Board under Chapter VI shall be prominently posted by the Board in English, in Hindi and in the regional language on special boards to be maintained for the purpose at the wharves, docks, piers and other convenient places on the premises of the Board.

128. Saving of right of Central Government and municipalities to use wharves, etc., for collecting duties and of power of Customs Officers

Nothing in this Act shall affect-

(1) the right of the Central Government to collect customs duties or of any municipality to collect town duties at any dock, berth, wharf, quay, stage, jetty or pier in the possession of a Board, or

(2) any power or authority vested in the customs authorities under any law for the time being in force.

129. Application of certain provisions of the Act to aircraft

The provisions of sections 35, 37, 38, 39, 40, 41, 42, 48, 49, 50, 64, 65, 115, 121, 123 and 124 shall apply in relation to all aircraft making use of any part while on water as they apply in relation to vessels.

130. Power to evict certain persons from the premises of Board

(1) Notwithstanding anything contained in any other law for the time being in force, if a Board in exercise of the powers conferred on it by regulations made under this Act cancel the allotment of any premises made to any employee of the Board, the Board may, by notice in writing, order such allottee or any other person who may be in occupation of the whole or any part of the premises to surrender or deliver possession thereof to the Board or a person appointed by the Board in that behalf within such period as may be specified in the notice.

Explanation.- For the purposes of this section, "premises" means any building or part of a building and includes -

(i) the gardens, grounds and out-houses, if any, appertaining to such building or part of a building;

(ii) any fittings affixed to such building or part of a building for the more beneficial enjoyment thereof; and

(iii) any furniture, books or other things belonging to the Board and found in such building or part of a building.

(2) If any allottee or other person refuses or fails to comply with an order made under sub-section (1), any magistrate of the first class may, on application made by or on behalf of the Board, order any police officer, with proper assistance, to enter into the Premises and evict any person from, and take possession of, the premises and to deliver the same to the Board or a person appointed by the Board in that behalf and the police officer may, for the purpose, use such force as may be necessary.

(3) Any such notice as is referred to in sub-section (1) may be served -

(a) by delivering or tendering it to the allottee or any other person who may be in occupation of the whole or any part of the premises, or

(b) if it cannot be so delivered or tendered, by affixing it on the outer door or some other conspicuous part of the premises, or

(c) by registered post.

131. Alternative remedy by suit

Without prejudice to any other action that may be taken under this Act, a Board may recover by suit any rates, damages, expenses, costs, or in the case of sale the balance thereof, when the proceeds of sale are insufficient, or any penalties payable to, or recoverable by, the Board under this Act or under any regulations made in pursuance thereof.

132. Requirements as to publication of notifications, orders, etc., in the Official Gazette

(1) Any requirement in this Act that a notification, order, rule or regulation issued or 113[made by a Board or the Authority or the Central Government] shall be published in the Official Gazette, shall, unless otherwise expressly provided in this Act, be construed as a requirement that the notification, order, rule or regulation shall-

(a) where it is issued or made by the Board Published in the Official Gazette of the State in which the port is situated, and

(b) where it is issued or by 113[made by the Authority or the Central Government], be published in the Gazette of India.

(2) Any notification, order, rule or regulation issued or 113[made by the Authority or the Central Government] shall, for general information, be also republished in the Official Gazette of the state in which the port is situated.

133. Repeal

(1) On the application of this Act to the port of Kandla, the Bombay Landing and Wharfage Fees Act, 1882 (Bombay Act 7 of 1882) shall cease to have force in relation to that part.

(2) On the application of this Act to the ports of Cochin and Visakhapatnam, the Madras Outports Landing and Shipping Fees Act, 1885 (Madras Act 3 of 1885) shall cease to have force in relation to those ports.

114[(2A) On the application of this Act to the port of Bombay the Bombay, Port Trust Act, 1879 (Bombay Act 6 of 1879), except the provisions thereof relating to municipal assessment of the properties of the port of Bombay and matters connected therewith, shall cease to have force in relation to that port.

(2B) On the application of this Act to the port of Calcutta, the Calcutta Port Act, 1890 (Bengal Act 3 of 1890), except the Provisions thereof relating to municipal assessment of the properties of the port of Calcutta and matters connected therewith, shall cease to have force in relation to that port.

(2C) On the application of this Act to the port of Madras, the Madras Port Trust Act, 1905 (Madras Act 2 of 1905), shall cease to have force in relation to that port.

(2D) Notwithstanding anything contained in sub-sections (2A), (2B) and (2C),-

(a) every Trustee of the Board of Trustees of the port of Bombay or Madras holding office as such immediately before the application of this Act to the Port of Bombay or Madras, as the case may be, shall be deemed to have been appointed or elected as such under this Act and shall continue to hold such office after such application until a Board of Trustees in respect of that port is constituted under the provisions of this Act;

(b) every Commissioner of the port of Calcutta holding office as such immediately before the application of this Act to that port shall be deemed to have been appointed or elected as a Trustee under the provisions of this Act and shall continue to hold such office after such application until a Board of Trustees in respect of that port is constituted under the provisions of this Act.

(c) anything done or any action taken or purported to have been done or taken (including any rule, regulation, bye-law, notification, order or notice made or issued or any resolution passed or any appointment or declaration made or any licence, permission or exemption granted or any rates, charges or duties levied or any penalty or fine imposed) under the Acts referred to in sub-sections (2A) (2B) and (2C) shall, in so far as it is not inconsistent with the provisions of this Act, be deemed to have been done or taken under the corresponding provisions of this Act.

(2E) Upon the cesser of operation of the provisions of the Acts referred to in sub-sections (2A), (2B) and (2C), the provisions of section 6 of the General Clauses Act, 1897 (10 of 1897), shall apply as if the provisions first-mentioned were provisions contained in a Central Act and such cesser of operation were a repeal; and the mention of particular matters in sub-section (2D) shall not be held to prejudice or affect the general application of the said section 6 with regard to the effect of repeals.]

(3) If immediately before the application of this Act to any other port, there is in force in that port any law which corresponds to this Act or to any provision thereof, that corresponding law shall, on such application, cease to have force in relation to that port 115[and section 6 of the General Clauses Act, 1897 (10 of 1897), shall apply as if such corresponding law were a Central Act and such cesser of operation were a repeal.]

134. Power to remove difficulties

If any difficulty arises in giving effect to the provisions of this Act, particularly in relation to the transition from the enactment repealed by this Act to the provisions of this Act, the Central Government may, by general or special order, do anything not inconsistent with such provisions which appears to it to be necessary or expedient for the purpose of removing the difficulty:

[Provided that no such order shall be made in respect of a port after the expiry of a period of two Years from the appointed day.]

Foot Notes

1. *Appointed date is 29th. February, 1964 vide Notification No. G.S.R. 296 dated 28th February, 1964, see GOI, Ext., Pt. 11, Sec. 3 (i), p. 79.*

2. *The Act has been extended to apply to -*

Major Port of Mormugao, w.e.f. 1st July, 1964 by Notification No. G.S.R. 922, dated 22nd June, 1964, GOI, Pt. II, Section 3 (i), p. 951.

Major Port of Paradip, w.e.f. 1st November, 1967 by Notification No. G.S.R. 1516, dated 27th September, 1967, GOI; pt. II, Section 3 (i), p. 1646

3. *The brackets and words "(not being the major port of Bombay, Calcutta or Madras)" omitted by Act No. 29 of 1974, w.e.f. 1st February, 1975.*

4. *Inserted by the Port Laws (Amendment) Act, 1997, (Act No. 15 of 1997) dated 25th. March 1997.*

5. *Substituted by Act No. 17 of 1982 for the words "the Deputy Chairman of a Board ", w.e.f. 31st May, 1982)*

6. *Inserted by Act No. 29 of 1974, w.e.f. 1st February, 1975.*

7. *Inserted by Act No. 17 of 1982, w.e.f. 31st May, 1982.*

8. *Substituted by Act No. 29 of 1974 for earlier clause (z), w.e.f. 1st February, 1975.*

9. *Substituted by Act No. 17 of 1982 for earlier clause (b), w.e.f. 31st May, 1982.*

10. *Substituted by Act No. 29 of 1974 for earlier clauses (c) and (d), w.e.f. 1st February, 1975.*

11. *Substituted by Act No. 29 of 1974 for the words, figure and brackets "clause (d) of sub-section (1)", w.e.f. 1st February, 1975.*

12. *Substituted by Act No. 29 of 1974 for the words "not exceeding twenty-two", w.e.f. 1st February, 1975.*

13. *Substituted by Act No. 29 of 1974 for for the words, figure and brackets "in sub-clauses (ii), (iii), (v) and (vi) of clause (c)" w.e.f. 1st February, 1975.*

14. *Substituted by Act No. 29 of 1974 for the earlier proviso, w.e.f. 1st February, 1975.*

15. *Inserted by Act No. 29 of 1974, w.e.f. 1st February, 1975.*
16. *Inserted by Act No. 17 of 1982, w.e.f. 31st May, 1982.*
17. *Inserted by Act No. 17 of 1982, w.e.f. 31st May, 1982.*
18. *Section 18 renumbered as sub-section (1) thereof by Act No. 17 of 1982, w.e.f. 31st May, 1982.*
19. *Inserted by Act No. 17 of 1982, w.e.f. 31st May, 1982.*
20. *Inserted by Act No. 29 of 1974, w.e.f. 1st February, 1975.*
21. *Substituted by Act No. 29 of 1974, for the words and figure "the Indian Trade Unions Act, 1926", w.e.f. 1st February, 1975.*
22. *Added by Act No. 29 of 1974, w.e.f. 1st February, 1975.*
23. *Substituted by Act No. 29 of 1974 for earlier clause (a), w.e.f. 1st February, 1975.*
24. *Substituted by Act No. 17 of 1982 for earlier sub-clause (iii), w.e.f. 31st May, 1982.*
25. *Substituted by Act No. 29 of 1974 for earlier clauses (b) and (c), w.e.f. 1st February, 1975.*
26. *Substituted by Act No. 17 of 1982 for the words "at that port", w.e.f. 31st May, 1982.*
27. *The word "Promoting" omitted by Act No. 29 of 1974, w.e.f. 1st February, 1975.*
28. *Inserted by Act No. 17 of 1982, w.e.f. 31st May, 1982.*
29. *Substituted by Act No. 29 of 1974, for clauses (a) and (b), w.e.f. 1st February, 1975.*
30. *Inserted by Act No. 17 of 1982, w.e.f. 31st May, 1982.*
31. *Substituted by Act No. 29 of 1974, for the words "a Head of a department", w.e.f. 1st February, 1975.*
32. *The brackets and words "(not being a Head of a department)" omitted by Act No. 29 of 1974, w.e.f. 1st February, 1975.*
33. *Substituted by Act No. 29 of 1974, for clauses (a), (b) and (c), w.e.f. 1st February, 1975.*
34. *Substituted by Act No. 29 of 1974, for the words "the Board", w.e.f. 1st February, 1975.*

35. *Substituted by Act No. 29 of 1974 for earlier section 27, w.e.f. 1st February, 1975.*
36. *Substituted by Act No. 17 of 1982, w.e.f. 31st May, 1982.*
37. *Inserted by Act No. 29 of 1974, w.e.f. 31st May, 1982.*
38. *Inserted by Act No. 29 of 1974, w.e.f. 1st February, 1975.*
39. *Inserted by Act No. 15 of 1997, dated 25th March 1997.*
40. *Substituted by Act No. 29 of 1974, w.e.f. 1st February, 1975.*
41. *Inserted by Act No. 17 of 1982, w.e.f. 31st May, 1982.*
42. *Inserted by Act No. 29 of 1974, w.e.f. 1st February, 1975.*
43. *Inserted by Act No. 29 of 1974, w.e.f. 1st February, 1975.*
44. *Section 36 renumbered as sub-section (1) thereof by Act No. 29 of 1974, w.e.f. 1st February, 1975.*
45. *Inserted by Act No. 29 of 1974, w.e.f. 1st February, 1975.*
46. *Substituted by Act No. 17 of 1982, w.e.f. 31st May, 1982.*
47. *The word "and" omitted by Act No. 29 of 1974, w.e.f. 1st February, 1975.*
48. *The word "and" omitted by the Major Ports Trusts (Amendment) Act 2000, (Act No. 22 of 2000) dated 9th June, 2000.*
- 48A. *The word "and" inserted at the end of clause (e) by Act No. 22 of 2000 dated 9th June, 2000.*
- 48B. *Clause (f) inserted by Act No. 22 of 2000 dated 9th June, 2000.*
- 48C. *Sub-section (3A) inserted by Act No. 22 of 2000 dated 9th June, 2000.*
49. *Substituted by Act No. 15 of 1997, dated 25th March 1997 for the words and figures "leviable according to the scale framed under section 48 or section 49 or section 50".*
50. *Substituted by Act No. 29 of 1974, w.e.f. 1st February, 1975.*
51. *Substituted by Act No. 29 of 1974, w.e.f. 1st February, 1975.*
52. *Inserted by Act No. 29 of 1974, w.e.f. 1st February, 1975.*
54. *Chapter VA inserted by Act No. 15 of 1997, dated 25th March 1997.*

55. *Substituted by Act No. 15 of 1997, dated 25th March 1997.*

56. *The words "excepting the services in respect of vessels for which fees are chargeable under the Indian Ports Act" omitted by Act No. 15 of 1997 dated 25th March 1997.*

57. *Inserted by Act No. 17 of 1982, w.e.f. 31st May, 1982.*

58. *Section 49A and section 49B inserted by Act No. 15 of 1997, dated 25th March 1997.*

59. *Substituted by Act No. 15 of 1997 dated 25th March 1997.*

60. *Sections 50A, 50B and 50C inserted by Act No. 15 of 1997, dated 25th March 1997.*

61. *Substituted by Act No. 15 of 1997 dated 25th March 1997 for the word "Board".*

62. *Section 52 omitted by Act No. 15 of 1997, dated 25th March 1997.*

63. *Substituted by Act No. 15 of 1997, dated 25th March 1997, for the words "direct any Board".*

64. *Substituted by Act No. 15 of 1997, dated 25th March 1997, for the words, bracket and figure "If any Board against whom a direction is made under sub-section (1) fails or neglects to comply with such direction".*

65. *Substituted by Act No. 15 of 1997, dated 25th March 1997 for the words "the Board".*

66. *Substituted by Act No. 15 of 1997, dated 25th March, 1997 for the words "A Board shall not lease".*

67. *Substituted by Act No. 15 of 1997, dated 25th March 1997 for the words "leviable by a Board under this Act".*

68. *Substituted by Act No. 29 of 1974, section 21, for the words "under any law for the time being in force", w.e.f. 1-2-1975)*

69. *Inserted by Act No. 29 of 1974, w.e.f. 1st. February, 1975.*

70. *Substituted by Act No. 29 of 1974 for the words "the Official Gazette", w.e.f. 1st. February, 1975.*

71. *Substituted by Act No. 29 of 1974, for the words "the Official Gazette", w.e.f. 1st February, 1975.*

72. *Inserted by Act No. 29 of 1974, w.e.f. 1st February, 1975.*

73. *Inserted by Act No. 29 of 1974, w.e.f. 1st February, 1975.*

74. *Inserted by Act No. 29 of 1974, w.e.f. 1st February, 1975.*
75. *Substituted by Act No. 29 of 1974 for sub-section (2), w.e.f. 1st February, 1975.*
76. *Substituted by Act No. 29 of 1974, w.e.f. 1st February, 1975.*
77. *Inserted by Act No. 29 of 1974, w.e.f. 1st February, 1975.*
78. *Substituted by Act No. 29 of 1974 for the words, figure and brackets "the Indian Limitation Act, 1908 (9 of 1908)", w.e.f. 1st February, 1975.*
79. *Substituted by Act No. 29 of 1974, w.e.f. 1st February, 1975.*
80. *Substituted by Act No. 29 of 1974, w.e.f. 1st February, 1975.*
81. *Substituted by Act No. 17 of 1982, w.e.f. 31st May, 1982.*
82. *Omitted by Act No. 23 of 1992, w.e.f. 12th August, 1992.*
83. *Substituted by Act No. 29 of 1974 for clause (g), w.e.f. 1st February, 1975.*
84. *Inserted by Act No. 29 of 1974, w.e.f. 1st February, 1975.*
85. *Substituted by Act No. 12 of 1988, w.e.f. 28th January, 1988.*
86. *Substituted by Act No. 12 of 1988 for the words "scheduled bank or banks" w.e.f. 28th January, 1988.*
87. *Inserted by Act No. 12 of 1988, w.e.f. 28th January, 1988.*
88. *Substituted by Act No. 17 of 1982, for the earlier proviso, w.e.f. 31st May, 1982.*
- 88A. *Clauses (d) and (e) inserted by Act No. 22 of 2000, dated 9th June, 2000.*
89. *Substituted by Act No. 17 of 1982, w.e.f. 31st May, 1982.*
90. *Inserted by Act No. 17 of 1982.*
91. *Substituted by Act No. 29 of 1974, for sub-section (2), w.e.f. 1st February, 1975.*
92. *Section 110A inserted by Act No. 15 of 1997 dated 25th March 1997.*
93. *Substituted by Act No. 15 of 1997 dated 25th March, 1997 for earlier sub-section (1).*

94. Substituted by Act No. 15 of 1997 dated 25th March 1997 for earlier section 112.
95. Substituted by Act No. 17 of 1982, for the words "one thousand rupees", w.e.f. 31st May, 1982.
96. Substituted by Act No. 17 of 1982, for the words "one hundred rupees", w.e.f. 31st May, 1982.
97. Substituted by Act No. 17 of 1982, for the words "one thousand rupees", w.e.f. 31st May, 1982.
98. Substituted by Act No. 17 of 1982, for the words "twice", w.e.f. 31st May, 1982.
99. Substituted by Act No. 17 of 1982, for the words "fifty rupees", w.e.f. 31st May, 1982.
100. Inserted by Act No. 29 of 1974, w.e.f. 1st February, 1975.
101. Substituted by Act No. 17 of 1982, for the words "two hundred rupees", w.e.f. 31st May, 1982.
102. Inserted by Act No. 29 of 1974, w.e.f. 1st February, 1975.
103. Substituted by Act No. 29 of 1974 for the words "magistrate of the first class", w.e.f. 1st February, 1975.
104. Substituted by Act No. 15 of 1997 dated 25th March 1997 for the words "against a Board or any member".
105. Clause (ba) inserted by Act No. 15 of 1997, dated 25th March 1997.
106. Substituted by Act No. 29 of 1974, for the words "in which it is so laid", w.e.f. 1st February, 1975.
107. Substituted by Act No. 29 of 1974 for earlier clause (f), w.e.f. 1st February, 1975.
108. Section 123A inserted by Act No. 15 of 1997, dated 25th March 1997.
109. Inserted by Act No. 29 of 1974, w.e.f. 1st February, 1975.
110. Inserted by Act No. 17 of 1982, w.e.f. 31st May, 1982.
111. Substituted by Act No. 17 of 1982, for the words "two hundred rupees", w.e.f. 31st May, 1982.
112. Substituted Act No. 17 of 1982, for the words "fifty rupees", w.e.f. 31st May, 1982.

113. Substituted by Act No. 15 of 1997, dated 25th March 1997 for the words "made by a Board or by the Central Government".

114. Inserted by Act No. 29 of 1974, w.e.f. 1st February, 1975.

115 Inserted by Act No. 17 of 1978, w.e.f. 4th May, 1980.

116. Inserted by Act No. 29 of 1974, w.e.f. 1st February, 1975.

ANNEXURE 7

THE INDIAN PORTS ACT, 1908

(Act No. 15 of 1908)

An Act to consolidate the Enactments relating to Ports and Port-charges.

Whereas it is expedient to consolidate the enactments relating to ports and port-charges;

It is hereby enacted as follows: -

CHAPTER I: PRELIMINARY

1. Title and extent

(1) This Act may be called the Indian Ports Act, 1908.

(2) It shall extend, save as otherwise appears from its subject or context,-

(a) to the ports mentioned in the first schedule, and to such parts of the navigable rivers and channels leading to such ports respectively as have been declared, to be subject to Act XXII of 1855 (for the Regulation of Ports and Port-dues) or to the Indian Ports Act, 1875 (12 of 1875), or to the Indian Ports Act, 1889 (10 of 1889);

(b) to the other ports or parts of navigable rivers or channels to which the 2[Government] in exercise of the power hereinafter conferred, extends this Act.

(3) But nothing in section 31 or section 32 shall apply to any port, river or channel to which the section has not been specially extended by the 2[Government].

2. Saving

Nothing in this Act shall-

(i) apply to any vessel belonging to, or in the service of, 3[the Central Government or a State Government] 4[***] or to any vessel of war belonging to any Foreign Prince or State, or

(ii) deprive any person of any right of property or other private right, except as hereinafter expressly provided, or

(iii) affect any law or rule relating to the customs or any order or direction lawfully made or given pursuant thereto.

3. Definitions

In this Act, unless there is anything repugnant in the subject or context,-

5[(1) "Magistrate" means a person exercising powers under the Code of Criminal Procedure, 1973]

(2) "master", when used in relation to any vessel 6[or any aircraft making use of any port], means , subject to the provisions of any other enactment for the time being in force, any person (except a pilot or harbour-master 6[of the port]) having for the time being the charge or control of the vessel 6[or the aircraft, as the case may be] ;

(3) "pilot" means a person for the time being authorised by the 2[Government] to pilot vessels.

(4) "port" includes also any part of a river or channel in which this Act is for the time being in force;

(5) "port-officer" is synonymous with master-attendant;

(6) "ton" means a ton as determined or determinable by the rules for the time being in force for regulating the measurement of the net tonnage of British ships; and

(7) "vessel" includes anything made for the conveyance 6[mainly] by water of human beings or of property;

7[(8) "major port" means any port which the Central Government may by notification in the Official Gazette declare, or may under any law for the time being in force have declared, to be a major port;

(9) "Government", as respects major ports, for all purposes, and, as respects other ports for the purposes of making rules under clause (p) of section 6(1) and of the appointment and control of port health officers under section 17, means the Central Government, and save as aforesaid, means the State Government.]

8[***]

4. Power to extend or withdraw the Act or certain portions thereof

(1) 9[***] 2[Government] may, by notification in the Official Gazette,-

(a) extend this Act to any port in which this Act is not in force or to any part of any navigable river or channel which leads to a port and in which this Act is not in force;

(b) specially extend the provisions of section 31 or section 32 to any port to which they have not been so extended;

(c) withdraw this Act or section 31 or section 32 from any port or any part thereof in which it is for the time being in force.

(2) A notification under clause (a) or clause (b) of sub-section (1) shall define the limits of the area to which it refers.

(3) Limits defined under sub-section (2) may include any piers, jetties, landing-places, wharves, quays, docks and other works made on behalf of the public for convenience of traffic, for safety of vessels or for the improvement, maintenance or good government of the port and its approaches whether within or without high-water-mark, and, subject to any rights of private property therein, any portion of the shore or bank within fifty yards of high-water-mark.

(4) In sub-section (3) the expression "high-water-mark" means the highest point reached by ordinary spring tides at any season of the year.

5. Alteration of limits of ports

(1) The 2[Government] may, 10[***] subject to any rights of private property, alter the limits of any port in which this Act is in force.

11[Explanation.- For the removal of doubts, it is hereby declared that the power conferred on the Government by this sub-section includes the power to alter the limits of any port by uniting with that port any other port or any part of any other port.]

(2) When the 2[Government] alters the limits of a port under sub-section (1), it shall declare or describe, by notification in the Official Gazette, and by such other means, if any, as it thinks fit, the precise extend of such limits.

6. Power to make part-rules

(1) The 2[Government] may, in addition to any rules which it may make under any other enactment for the time being in force, make such rules, consistent with this Act, as it thinks necessary for any of the following purposes, namely :-

(a) for regulating the time and hours at and during which, the speed at which, and the manner and conditions in and on which, vessels generally or vessels of any class defined in the rules, may enter, leave or be moved in any port subject to this Act;

(b) for regulating the berths, stations and anchorages to be occupied by vessels in any such port;

(c) for striking the yards and top masts, and for rigging-in the booms and yards, of vessels in any such port, and for swining or taking-in davits, boats and other things projecting from such vessels;

(d) for the removal or proper hanging or placing of anchors, spars and other things being in or attached to vessels in any such port;

(e) for regulating vessels whilst taking-in or discharging passengers, ballast or cargo, or any particular kind of cargo, in any such port, and the stations to be occupied by vessels whilst so engaged;

12[(ee) for regulating the manner in which oil or water mixed with oil shall be discharged in any such port and for the disposal of the same;]

13[(eee) for regulating the bunkering of vessels with liquid fuel in any such port and the description of barges, pipe lines or tank vehicles to be employed in such bunkering;]

(f) for keeping free passages of such width as may be deemed necessary within any such port and along or near to the piers, jetties, landing-places, wharves, quays, docks moorings and other works in or adjoining to the same, and for marking out the spaces so to be kept free;

(g) for regulating the anchoring, fastening, mooring and un-mooring of vessels in any such port;

(h) for regulating the moving and warping of all vessels within any such port and the use of warps therein;

(i) for regulating the use of the mooring buoys, chains and other moorings in any such port;

(j) for finding the rates to be paid 14[in a port other than a major port] for the use of such moorings when belonging to the 15[Government], or of any boat, hawser or other thing belonging to the Government];

16[(jj) for regulating the use of piers, jetties, landing places, wharves, quays, warehouses and sheds when belonging to the Government;

(jja) for fixing the rates to be paid for the use of piers, jetties, landing places, wharves, quays, warehouse and sheds of any port, other than a major port, when belonging to the Government;]

17[(k) for licensing and regulation catamarans plying for hire, and flats and cargo, passenger and other boats plying, whether for hire or not, and whether regularly or only occasionally, in or partly within and partly without any such port, and for licensing and regulating the crews of any such vessels; and for determining the quantity of cargo or number of passengers or of the crews to be carried by any such vessels and the conditions under which such

vessels shall be compelled to ply for hire and further for conditions under which any licence may be revoked;

(kk) for providing for the fees payable in respect of the services specified in clause (k) for any port, other than a major port;]

(l) for regulating the use of fires and lights within any such port;

(m) for enforcing and regulating the use of signals or signal-lights by vessels by day or by night in any such port;

(n) for regulating the number of. the crew which must be, on board any vessel afloat within the limits of any such port;

(o) for regulating the employment of persons engaged in cleaning or painting vessels, or in working in the bilges, boilers or double bottoms of vessels in any such port;

18[(p) 19[***] for the prevention of danger arising to the public health by the introduction and the spread of any infectious or contagious disease from vessels arriving at, or being in, any such and for the prevention of the conveyance of infection or contagion by means of any vessel sailing from any such port, and in particular and without prejudice to the generality of this provision, for-

(i) the signals to be hoisted and the places of anchorage to be taken up by such vessels having any case, or suspected case, of any infectious or contagious disease on board, or arriving at such port from a port in which, or in the neighbourhood of which, there is believed to be, or to-have been at the time when the vessel left such port, any infectious or contagious disease;

(ii) the medical inspection of such vessels and of persons on board such vessels;

(iii) the questions to be answered and the information to be supplied by masters, pilots and other persons on board such vessels;

(iv) the detention of such vessels and of persons on board such vessels;

(v) the duties to be performed in cases of any such disease by masters, pilots and other persons on board such vessels;

(vi) the removal to hospital or other place approved by the health-officer and the detention therein of any person from any such vessel who is suffering or suspected to be suffering from any such disease;

(vii) the cleansing, ventilation and disinfection of such vessels or any part thereof and or of any articles therein likely to retain infection or contagion, and the destruction of rats or other vermin in such vessels; and

(viii) the disposal of the dead on such vessels; and]

(q) for securing the protection from beat of the officers and crew of vessels in any such port by requiring the owner or master of any such vessel:-

(i) to provide curtains and double awnings for screening from the sun's rays such portions of the deck as are occupied by, or are situated immediately above, the quarters of the officers and crew,

(ii) to erect windsails so far as the existing portholes or apertures in the deck admit of their being used for ventilating the quarters of the officers and crew;

(iii) when the deck is made of iron and not wood-sheathed, to cover with wooden planks or other suitable non-conducting material such portions of the deck as are situated immediately above the quarters of the officers and crew;

(iv) when the quarters used by the crew and the galley are separated by an iron bulk-head only to furnish a temporary screen of some suitable non-conducting material between such quarters and the galley.

20[***]

(2) The power to, make rules under Sub-section (1) 21[***] is subject to the condition of the rules being made after previous publication:

Provided that nothing in this sub-section shall be construed to affect the validity of any rule in force immediately before the commencement of the Indian Ports Act, 1889 (10 of 1889), and continued by section 2, sub-section (2), of that Act.

22[(2A) Every rule made by the State Government under this Act shall be laid as soon as may be after it is made, before the State Legislature.

(2B) Every rule made by the Central Government under this Act shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session, immediately following the session or the successive Sessions aforesaid, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification, or annulment shall be without prejudice to the validity of anything previously done under that rule].

(3) If any person disobeys any rule made under clause (p) of subsection (1), he shall be punishable for every such offence with fine which may extend to one thousand rupees.

(4) If a master fails wholly or in part to do any act prescribed by any rule made under clause (p) of sub-section (1) the health-officer shall cause such act to be done, and the reasonable expenses incurred in doing such act shall be recoverable by him from such master.

7. Appointment of conservator

(1) The 2[Government] shall appoint some officer or body of persons to be conservator of every part subject to this Act.

(2) Subject to any direction by the 20[Government] to the contrary,-

(a) in ports where there is a port-officer, the port-officer shall be the conservator;

(b) in ports where there is no port-officer, but where there is a harbour-master, the harbour master shall be the conservator.

(3) Whom the, harbour-master is not conservator, the harbour-master and his assistants shall be subordinate to, and subject to the control of, the conservator.

(4) The conservator shall be subject to the control of the 2[Government], or of any intermediate authority which 23[the Government] may appoint.

8. Power of conservator to give and enforce directions for certain specified purposes

(1) The conservator of any port subject to this Act may, with respect to any vessel within the-port, give directions for carrying into effect any rule for the time being in force therein under section 6.

(2) If any person wilfully and without lawful excuse refuses or neglects to obey any lawful direction of the conservator, after notice thereof has been given to him, he shall, for every such offence, be punishable with fine which may extend to one hundred rupees, and in the case of a continuing offence with a further fine which may extend to one hundred rupees for every day during which, after such notice as aforesaid, he is proved to have wilfully and without lawful. excuse continued to disobey the direction.

(3) In case of such refusal or neglect, the conservator may do, or cause to be done, all act necessary for the purpose of carrying the direction into execution, and may hire and employ proper persons for that purpose, and all reasonable expenses incurred in doing such acts shall be recoverable by him from the person so refusing or neglecting to obey the direction.

9. Power to cut warps and ropes

The conservator of any such port may, in case of urgent necessity, cut or cause to be cut, any warp, rope cable or hawser endangering the safety of any vessel in the port or at or near to the entrance thereof.

10. Removal of obstructions within limits of port

(1) The conservator may remove, or caused to be removed, any timber, raft or other thing, floating or being in any part of any such port, which in his opinion obstructs or impedes the free navigation thereof or the lawful use of any pier, jetty, landing-place wharf, quay, dock, mooring or other work on any part of the shore or bank which has been declared to be within the limits of the port and is not private property.

(2) The owner of any such timber, raft or other thing shall be liable to pay the reasonable expenses of the removal thereof, and if such owner or any other person has without lawful excuse caused any such obstruction or impediment, or causes any public nuisance affecting or likely to affect such free navigation or lawful use, he shall also be punishable with fine which may extend to one hundred rupees.

(3) The conservator or any Magistrate having jurisdiction over the offence may cause any such nuisance to be abated.

11. Recovery of expenses of removals

If the owner of any such timber, raft or other thing, or the person who has caused any such obstruction, impediment or public nuisance as is mentioned in the last foregoing section, neglects to pay the reasonable expenses incurred in the removal thereof, within one week after demand, or within fourteen days after such removal has been notified in the official Gazette or in such other manner as the 2[Government] by general or special order, directs, the conservator may cause such timber, raft or other thing, or the materials of any public nuisance so removed, or so much thereof as may be necessary, to be sold by public auction;

and may retain all the expenses of such removal and sale out of the proceeds of the sale, and shall pay the surplus of such proceeds, or deliver so much of the thing or materials as may remain unsold, to the person entitled to receive the same;

and, if no such person appears, shall cause the same to be kept and deposited in such manner as the 2[Government] directs;

and may, if necessary from time to time, realise the expenses of keeping the same, together with the expenses of sale, by a further sale of so much of the thing or materials as may remain unsold.

12. Removal of lawful obstructions

(1) If any obstruction or impediment to the navigation of any port subject to this Act has been lawfully made, or has become lawful by reason of the long continuance of such obstruction or impediment, or otherwise, the conservator shall report the same for the information

of the 2[Government], and shall, with the sanction of 23[the Government], cause the same to be removed or altered, making reasonable compensation to the person suffering damage by such removal or alteration.

(2) Any dispute arising concerning such compensation shall be determined according to the law relating to like disputes in the case of land required for public purposes.

13. Fouling of Government moorings

(1) If any vessel hooks or gets foul of any of the buoys or moorings laid down by or by the authority of the 2[Government] in any such port, the master of such vessel shall not, nor shall any other person, except in case of emergency, lift the buoy or mooring for the purpose of unhooking or getting clear from the same without the assistance of the conservator.

and the conservator, immediately on receiving notice of such accident, shall assist and superintend the clearing of such vessel;

and the master of such vessel shall, upon demand, pay such reasonable expenses as may incurred in clearing the same.

(2) Any master or other person offending against the provisions of this section shall, for every such offence, be punishable with fine which may extend to one hundred rupees.

14. Raising or removal or wreck impeding navigation within limits of port

(1) If any vessel is wreck stranded or sunk in any such port so as to impede, or be likely to impede, the navigation thereof, the conservator may cause the vessel to be raised, removed or destroyed.

(2) If any property recovered by a conservator acting under sub-section (1) is unclaimed or the person claiming it fails to pay the reasonable expenses incurred by the conservator under that sub-section and a further sum of twenty per cent. of the amount of such expenses, the conservator may sell the property by public auction, if the property is of a perishable nature, forthwith, and, if it is not of a perishable nature, at any time not less than 24[two months] after the recovery thereof.

(3) The expenses and further sum aforesaid shall be payable to the conservator out of the sale proceeds of the property, and the balance shall be paid to the person entitled to the property recovered or if no such person appears and claims the balance, shall be held in deposit for payment, without interest, to any person thereafter establishing his right thereto:

Provided that the person makes his claim within three years from the date of the sale.

25[(4) Where the sale proceeds of the property are not sufficient to meet the expenses and further sum aforesaid, the owner of the vessel at the time the vessel was wrecked, stranded or sunk shall be liable to pay the deficiency to the conservator on demand, and if the deficiency be not paid within

One month of such demand the conservator may recover the deficiency from such owner in the manner laid down in sub-section (2) of section 57 for recovery of expenses and damages or in any other manner according as the deficiency does not or does exceed one thousand rupees.]

15. Power to board vessels and enter buildings

(1) The conservator or any of his assistant may, whenever he suspects that any offence against this Act has been, or is about to be, committed or whenever it is necessary for him so to do in the performance of any duty imposed upon him by this Act,

and the person appointed under this act to receive any port dues, fees or other charges payable in respect of any vessel, may, whenever it is necessary for him so to do in the performance of any duty imposed upon him by this Act,

either alone or with any other person, board any vessel, or enter any building or place, within the limits of any port subject to this Act.

(2) If the master of the vessel, or any person in possession or occupation of the building or place, without lawful excuse, refuses to allow any such person as is mentioned in sub-section (1) to board or enter such vessel, building or place in the performance of any duty imposed upon him by this Act, he shall for every such offence be punishable with fine which may extend to two hundred rupees.

16. Power to require crews to prevent or extinguish fire

(1) For the purpose of preventing or extinguishing fire in any port subject to this Act, the conservator or port-officer may require the master of any vessel within the port to place at his disposal such number as he requires, not exceeding three-fourths, of the crew then under the orders of such master.

(2) Any master refusing or neglecting to comply with such requisition shall be punishable with fine which may extend to five hundred rupees, and any seaman then under his orders who, after being directed by the master to obey the orders of the conservator or port-officer for the purpose aforesaid, refuses to obey such orders, shall be punishable with fine which may extend to twenty-five rupees.

17. Appointment and powers of health-officer

(1) The 2[Government] may appoint at any port subject to this Act an officer to be called the health-officer.

(2) A health-officer shall, subject to the control of the 2[Government], have the following powers, within the limits of the port for which he is appointed, namely

(a) with respect to any vessel, the powers conferred on a shipping-master by the Indian Merchant Shipping Act, 1859²⁶ (1 of 1859), section 71;

(b) power to enter on board any vessel and medically examine all or any of the seaman or apprentices on board the vessel;

(c) power to require and enforce the production of the log-book and any other books, papers or documents which he thinks necessary for the purpose of enquiring into the health and medical condition of the persons on board the vessel;

(d) power to call before him and question for any such purpose all or any of those persons and to require true answers to any questions which he thinks fit to ask

(e) power to require any person so questioned to make and subscribe a declaration of the truth of the statements made by him.

18. Indemnity of Government against act or default of port-official or pilot

The Government shall not be responsible for any act or default of any conservator, port-officer or harbour-master, of any port subject to this Act, or of any deputy or assistant of any of the authorities aforesaid, or of any person acting under the control or direction of any such authority, deputy or assistant, or for any act or default of any pilot, or for any damage sustained by any vessel in consequence of any defect in any of the moorings, hawsers or other things belonging to the Government which may be used by the vessel

Provided that nothing in this section shall protect 27[the Government] from a suit in respect of any act done by or under the express order or sanction of the Government

CHAPTER IV: RULES FOR THE SAFETY OF SHIPPING AND THE CONSERVATION OF PORTS

General Rules

19. Injuring buoys, beacons and moorings

(1) No person shall, without lawful excuse, lift, injure, loosen or set adrift any buoy, beacon or mooring fixed or laid down by, or by the authority, of the 2[Government] in any port subject to this Act.

(2) If any person offends against the provisions of this section, he shall for every such offence be liable, in addition to the payment of the amount of damage done, to fine which may extend to two

thousand rupees, or to imprisonment for a term which may extend to two years.

20. Wilfully loosening vessel from moorings

If any person wilfully and without lawful excuse loosens or removes from her moorings any vessel within any such port without leave or authority from the owner or master of the vessel, he shall, for every such offence, be punishable with fine which may extend to two hundred rupees, or with imprisonment for a term which may extend to six months.

21. Improperly discharging ballast

(1) No ballast or rubbish, and no other thing likely to form a bank or shoal or to be detrimental to navigation, shall, without lawful excuse, be cast or thrown into any such port or into or upon any place on shore from which the same is liable to be washed into any such port, either by ordinary or high tides, or by storms or land-floods 28[and no oil or water mixed with oil shall be discharged in or into any such port, to which any rules made under clause (ee) of sub-section (1) of section 6 apply, otherwise than in accordance with such rules].

(2) Any person who by himself or another so casts or throws any ballast or rubbish or any such other thing 28[or so discharges any oil or water mixed with oil], and the master of any vessel from which the same is so cast, 29[thrown or discharged], shall be punishable with fine which may extend to five hundred rupees, and shall pay any reasonable expenses which may be incurred in removing the same.

(3) If after receiving notice from the conservator of the port to desist from so casting or throwing any ballast or rubbish or such other thing 28[or from so discharging any oil or water mixed with oil], any master continues so to cast, 30[throw or discharge the same], he shall also be liable to simple imprisonment for a term which may extend to two months.

(4) Nothing in this section applies to any case in which the ballast or rubbish or such other thing is cast or thrown into 28[or the oil or water mixed with oil is discharged in or into] any such port with the consent in writing of the conservator, or within any limits within which such act may be authorised by the 2[Government].

22. Graving vessel within prohibited limits

If any person graves, breams or smokes any vessel in any such port, contrary to the directions of the conservation, or at any time or within any limits at or within which such act is prohibited by the 2[Government], he and the master of the vessel shall for every such offence be punishable with fine which may extend to five hundred rupees each.

23. Boiling pitch on board vessel within prohibited limits

If any person boils or heats any pitch, tar, resin, dammer, turpentine, oil, or other such combustible matter on board any vessel within any

such port, or at any place within its limits where such act is prohibited by the 2[Government], or contrary to the directions of the conservator, he and the master of the vessel shall for every such offence be punishable with fine which may extend to two hundred rupees each.

24. Drawing spirits by unprotected artificial light

If any person, by an unprotected artificial light, draws off spirits on board any vessel within any port subject to this Act, he and the master of the vessel shall for every such offence be punishable with fine which may extend to two hundred rupees each.

25. Warping

(1) Every master of a vessel in any port subject to this Act shall, when required so to do by the conservator, permit warps or hawsers to be made fast to the vessel for the purpose of warping any other vessel in the port, and shall not allow any such warp or hawser to be let go until required so to do.

(2) A master offending against sub-section (1) shall be punishable for every such offence with fine which may extend to two hundred rupees.

26. Leaving out warp or hawser after sunset

(1) A master of a vessel shall not cause or suffer any warp or hawser attached to his vessel to be left out in any port subject to this Act after sunset in such a manner as to endanger the safety of any other vessel navigating in the port.

(2) A master offending against sub-section (1) shall be punishable for every such offence with fine which may extend to two hundred rupees.

27. Discharge of fire-arms in port

If any person, without lawful excuse, discharges any firearm in any port subject to this Act or on or from any pier, landing place, warp or quay thereof, except a gun loaded only with gunpowder for the purpose of making a signal of distress, or for such other purposes as may be allowed by the 2[Government], he shall for every such offence be punishable with fine which may extend to fifty rupees.

28. Penalty on master omitting to take order to extinguish fire

If the master of any vessel in which fire takes place while lying in any such port wilfully omits to take order to extinguish the fire or obstructs the conservator or the port-officer, or any person acting under the authority of the conservator or port-officer, in extinguishing or attempting to extinguish the fire, he shall be punishable with imprisonment which may extend to six months, or with fine which may extend to one thousand rupees or with both.

29. Unauthorised person not to search for lost stores

(1) No person, without the permission of the conservator, shall, in any port subject to this Act, creep or sweep for anchors, cables or other stores lost or supposed to be lost therein.

(2) If any person offends against the provisions of sub-section (1), he shall be punishable with fine which may extend to one hundred rupees.

30. Removing stones or. injuring shores of port prohibited

(1) No person without the permission of the conservator shall in any port subjects to this Act remove or carry away any rock, stones, shingle, gravel, sand or soil or any artificial protection from any part of the bank or shore of the port.;

and no person shall sink or bury in any part of such bank or shore, whether the game is public or private property, any mooring-post, anchor or any other thing or do any other thing which is likely to injure or to be used so as to injure such bank or shore, except with the permission of the conservator, and with the aid or under the inspection of such person, if any, as the conservator may appoint to take part in or overlook the performance of such work.

(2) If any person offends against sub-section (1), he shall for every such offence be punishable with fine which may extend to one hundred rupees and shall pay any reasonable expenses which may be incurred in repairing any injury done by him to the bank or shore.

Special rules

31. Moving of vessels without pilot or permission of harbour master

(1) No vessel of the measurement of two hundred tons or upwards shall enter, leave or be moved in any port to which this section has been especially extended without having a pilot, harbour-master or assistant of the port-officer or harbour-master on board.

31[and no mechanically propelled vessel of any measurement less than two hundred tons and no other vessel of any measurement less than two hundred tons and exceeding one hundred tons] shall enter, leave or be moved in any such port without having a pilot, harbour-master or assistant of the port officer or harbour-master on board, unless authority in writing so to do has been obtained from the conservator or some officer empowered by him to give such authority.

32[Provided that the 33[Government] may, by notification in the Official Gazette, direct that in any port specified in such notification the provisions of this sub-section shall not apply to sailing vessels of any measurement not exceeding a measurement go specified].

34(2) Notwithstanding anything in sub-section (1), the owner or master of a vessel which is by that sub-section required to have a pilot, harbour-master or assistant of the port-officer or harbourmaster

on board, shall be answerable for any loss or damage caused by the vessel or by any fault of the navigation of the vessel, in the same manner as he would have been if he had not been go required by that sub-section:

Provided that the provisions of this sub-section shall not take effect till the first day of January, 1918, or such earlier date as the Central Government may notify in that behalf in the Official Gazette.]

35[(3)] If any vessel, except in case of urgent necessity, enters, leaves or is moved in the port contrary to the provisions of subsection (1), the master of the vessel shall for every such offence be punishable with fine which may extend to two hundred rupees, unless upon application to the proper officer the master was unable to procure a pilot, harbour-master or assistant of the port-officer or harbour-master to go on board the vessel.

36[***]

32. Provision of certain vessels with fire extinguishing apparatus

(1) Every vessel exceeding the measurement of two hundred tons and lying in any port to which this section has been specially extended shall be provided with a proper force-pump and hose and appurtenances, for the purpose of extinguishing any fire which may occur on board.

(2) The master of such a vessel who, having been required by the conservator to comply with the provisions of sub-section (1), neglects or refuses, without lawful excuse, so to do for the space of seven days after such requisition, shall be punishable with fine which may extend to five hundred rupees.

CHAPTER V: PORT-DUES, FEES AND OTHER CHARGES

33. Levy of port-dues

(1) 37[Subject to the provisions of sub-section (2)], in each of the ports mentioned in the first schedule 14[other than a major port] such port-due, not exceeding the amount specified for the part in the third column of the schedule as the 2[Government] directs, shall be levied on vessels entering the port and described in the second column of the schedule, but not oftener than the time fixed for the port in the fourth column of the schedule.

37[(2) The 2[Government] may, by notification in the Official Gazette, alter or add to any entry in the first schedule relating to ports 38[in 39[any State] or, as the case may be, in the State], and this power shall include the power to regroup any such ports.:

40[***]

41[(3)] Whenever the 2[Government] 42[***] declares any other port 14[other than a major port] to be subject to this Act it may, 42[***] by the same or any subsequent declaration further declare,-

(a) in the terms of any of the entries in the second column of the first schedule, the vessels which are to be chargeable with port-dues on entering the port.

(b) the highest rates at which such dues may be levied in respect of vessels chargeable there with, and

(c) the times at which such vessels are to be so chargeable.

43[***]

41[(4)] All port-dues now leviable in any port shall continue to be so leviable until it is otherwise declared in exercise of the powers conferred by this section.

41[(5)] An order increasing or imposing port-dues under this section shall not take effect till the expiration of sixty days from the day on which the order was published in the Official Gazette.

34. Variation of port-dues by Government

The Government may after consulting,-

(a) in case of ports other than major ports, the authority appointed under section 36;

(b) in case of major ports, the Authority constituted under section 47A of the Major Port Trust Act, 1963,

exempt, subject to such conditions, if any, as it thinks fit to impose, any vessel or class of vessels entering a port subject to this Act from payment of port-dues and cancel the exemption, or may vary the rates at which port-dues are to be fixed in the port, in such manner as, having regard to the receipts and charges on account of the port it thinks expedient, by reducing or raising the dues, or any of them or may extend the periods for which any vessel or class of vessels entering a port shall be exempt from liability to pay port-dues:

Provided that the rates shall not in any case exceed the amount authorized to be taken by or under by or under this Act.]

35. Fees for pilotage and certain other services

(1) Within any port subject to this Act, 14[not being a major port] fees may be charged for pilotage, hauling, mooring, re-mooring, hooking, measuring and other services rendered to vessels, at such rates as the 2[Government] may direct

45[***]

(2) The fees now chargeable for such services shall continue to be chargeable unless and until they are altered in exercise of the power conferred by sub-section (1).

46[(3) The Government may, in special cases, remit the whole or any portion of the fees chargeable under sub-section (1), or sub-section (2).]

36. Receipt, expenditure and account of port-charges

(1) The 2[Government] shall appoint some officer or body of persons at every port at which any dues, fees or other charges are authorised to be taken by or under this Act to receive the same and, subject to the control of the 2[Government], to expend the receipts on any of the objects authorized by this Act.

(2) Such officer or body shall keep for the port a distinct account, to be called the port fund account, showing in such detail as the 2[Government] prescribes, the receipts and expenditure of the port, and shall publish annually as soon after the first day of April as may be practicable an abstract, in such form as 47[the Government] prescribes, of the account for the past financial year

48[Provided that the port fund account for any port may, if so authorized under the provisions of any Act relating to such port, be merged with the general account of that port, and in such a case, the provisions of sub-section (6) shall not apply and the provisions of sub-sections (4) and (5) shall have effect as if for the words "the port fund account of the port" therein, the words "the general account of the port" had been substituted.]

49[***]

(4) All money received under this Act at or on account of any port subject to this Act, excluding receipts on account of pilotage but including

50[(a) fines other than those creditable to the pilotage account of the port under sub-section (5a)],

(b) proceeds of waifs, and

(c) any balance of the proceeds of a sale under section 14 where no right to the balance has been established on a claim made within three years from the date of the sale, shall be credited in the port fund account of the port.

(5) All expenses incurred for the sake of any such port, excluding expenses on account of pilotage but including-

(a) the pay and allowances of all persons upon the establishment of the port,

(b) the cost of buoys, beacons, lights and all other works maintained chiefly for the benefit of vessels being in or entering or leaving the port or passing through the rivers or channels leading thereto,

(c) pensions, allowances and gratuities of persons who have been employed in the port under this or any other enactment relating to ports and port-dues, or such portion of those pensions, allowances and gratuities as the 2[Government] may by rule determine.

(d) with the previous sanction of the 2[Government], contributions towards the support of public hospitals or dispensaries suitable for the reception or relief of seamen or otherwise towards the provision of sanitary superintendence and medical aid for the shipping in the port and for seamen whether ashore or afloat, belonging to vessels in the port, and

(e) with the like sanction, contributions towards sailors' homes, institutes, rest-house and coffee-houses and for other purposes connected with the health, recreation and temporary well-being of sailors,

shall be charged to the port fund account of the port.

51[(5a) All fees charged for pilotage at any port subject to this Act and all fines and penalties levied under the Act or under any other Act relating to the port from pilots or other persons employed in the pilot service other than fines and penalties imposed by a court, shall be credited to a distinct account to be called the pilotage account of the port.

(5b) All sums so credited to the pilotage account may be applied, in such proportions as the Government may from time to time direct, to the following purposes, namely

(a) the purchase and maintenance in repair of such vessels, and the supply of such materials, stores or other things as the officer or body appointed under sub-section (1) may deem it necessary to purchase, maintain or supply for the efficiency of the pilot service;

(b) the payment of the salaries, wages and allowances of pilots and other persons employed in the pilot service or in the supervision thereof;

(c) the payment of pensions, retiring gratuities, compassionate allowances or bonuses to pilots and other persons engaged in the pilot service, and of the contributions, if any, duly authorized to be made in their behalf to any provident fund or welfare fund;

(d) the payment of pensions, gratuities and compassionate allowances granted by the officer or body appointed under sub-section (1) to pilots and other persons engaged in the pilot service who have been injured in the execution of their duty and to the

surviving relatives of pilots and other persons so engaged who have been killed in the execution of their duty or who may die while still in the service of such officer or body;

(e) the provision of educational, recreational and other amenities for pilots and other persons employed in the pilot service;

(f) the payment of contributions or appropriations to any special fund or funds established under the provisions of any other Act relating to the port to which the officer or body appointed sub-section (1) considers contributions or appropriations should be made from the pilotage account;

(g) any other expenditure which may, with the previous sanction of the Government, be incurred in respect of the pilot service,

(5c) If the officer or body appointed under sub-section (1) at any port is also the authority responsible for maintaining the general account of the port, then notwithstanding the absence of any provision in that behalf in the Act under which such general account is maintained, such officer or body may, with the previous sanction of the Government, apply any sum out of the moneys credited to such general account towards meeting deficits, if any, in the pilotage account of the port, or transfer the whole or any part of any surplus funds, in the pilotage account to the general account of the port.]

(6) Subject to the provisions of any local law as to the disposal of any balance from time to time standing to the credit of a port fund account 48[or of a pilotage account], any such balance may be temporarily invested in such manner as the 2[Government] may direct

37. Grouping of ports

(1) The State Government may direct that for the purposes of the last foregoing section any number of ports 52[in the State not being major ports] shall be regarded as constituting a single port, and thereupon all moneys to be credited to the port fund account under sub-section (4) of that section shall form a common port fund account which shall be available for the payment of all expenses incurred for the sake of any of the ports:

53[***]

(2) Where ports are grouped by or under this Act, the following consequences ensue, namely

(a) the State Government, in the exercise of its control over expenditure debitable to the common port fund account of the group, may, 54[***] make rules with respect of the expenditure of the fund for the sake of the several ports of the group on the objects authorized by this Act 54[***]; and

(b) the State Government may exercise its authority under section 34 as regards all the ports in, the group collectively or as regards any of them separately.

38. Receipts for port-charges

The person to whom any dues, fees or other charges authorized to be taken by or under this Act are paid shall grant to the person paying the same a proper voucher in writing under his hand, describing the name of his office, the port or place at which the dues, fees or other charges are paid, and the name, tonnage and other proper description of the vessel in respect of which the payment is made.

39. Master to report arrival

(1) Within twenty-four hours after the arrival within the limit of any port subject to this Act of any vessel liable to the payment of port-dues under -this Act, the master of the vessel shall report her arrival to the conservator of the port.

(2) A master failing without lawful excuse to make such within the time aforesaid shall for every such offence be punishable with, fine which may extend to one hundred rupees.

(3) Nothing in this section applies to tug-steamers, ferry steamers or river steamers plying to and from any of the ports subject to this Act 55[***]

40. Conservator may in certain cases ascertain draught and charge expense to master

If any vessel liable to the payment of port-dues is in any such port without proper marks on the stem and stem posts thereof for denoting her draught, the conservator may cause the same to be ascertained by means of the operation of hooking, and the master of the vessel shall be liable to pay the expenses of the operation.

41. Ascertainment of tonnage of vessel liable to port-dues

In order to ascertain the tonnage of any vessel liable to pay port-dues the following rules shall be observed, namely

(1) (a) If the vessel is a British registered vessel or a vessel registered under the Indian Registration of Ships Act, 1841 (10 of 1841), or the Indian Registration of Ships Act (1841) Amendment Act, 1850 (11 of 1850), or under any other law for the time being in force for the registration of vessels in 56[India], the conservator may require the owner or master of the vessel or any person having possession of her register to produce the register for inspection.

(b) If the owner or master of such person neglects or refuses to produce the register or otherwise to satisfy the conservator as to what is the true tonnage of the vessel in respect of which the port-dues are payable, he shall be punishable with fine which may extend to one hundred rupees, and the conservator may cause the vessel to be measured, and the tonnage thereof to be ascertained, according to the mode of measurement prescribed by the rules for the time being in

force for regulating the measurement of British vessels, and in such case the owner or master of the vessel shall also be liable to pay the expenses of the measurement.

(2) If the vessel is not a British registered vessel or a vessel registered under the Indian Registration of Ships Act, 1841, (10 of 1841), or the Indian Registration of Ships Act (1841) Amendment Act, 1850 (11 of 1850), or under any other law for the time being in force for the registration of vessels in 56[India], and the owner or master thereof fails to satisfy the conservator as to what is her true tonnage according to the mode of measurement prescribed by the rules for the time being in force for regulating the measurement of British vessels, the conservator shall cause the vessel to be measured and the tonnage thereof to be ascertained according to the mode aforesaid and in such case owner or master of the vessel shall be liable to pay the expenses or the measurement.

(3) If the vessel is a vessel of which the tonnage cannot be ascertained according to the mode of measurement mentioned in clauses (1) and (2), the tonnage of the vessel shall be determined by the conservator on such an estimate as may seem to him to be just.

42. Distraint and sale on refusal to pay port-charges

If the master of any vessel in respect of which any port-dues, fees or other charges are payable under this Act, refuses or neglects to pay the same on demand, the authority appointed to receive such port-dues, fees or other charges may distrain or arrest the vessel, and the tackle apparel and furniture belonging thereto or any part thereof, and detain the same until the amount due is paid;

and in case any part of the port-dues fees or other charges or of the costs of the distress or arrest or of the keeping of the vessel or other thing distrained or arrested remains unpaid for the space of five days next after any such distress or arrest, may cause the vessel or other thing distrained or arrested to be sold, and with the proceeds of such sale may satisfy the port-dues, fees or other charges and the cost including the costs of sale remaining unpaid, and shall render the surplus, if any, to the master of the vessel upon demand.

43. No port-clearance to be granted until port-charges are paid

The officer of 57[the Government whose duty it is to grant a port-clearance for any vessel shall not grant such clearance-

(a) until her owner or master, or some other person, has paid or secured to the satisfaction of such officer the amount of all port-dues, fees and other charges, and of all fines penalties and expenses to which the vessel or her owner or master is liable under this Act.;

(b) until all expenses which by the Merchant Shipping Act, 1894, (57 & 58 Vict., C. 60) section 207, are to be borne by her owner incurred since her arrival in the port from which he seeks clearance, have been paid.

44. Port-charges payable in one port recoverable at any other port

(1) If the master of any vessel in respect of which any such sum as is mentioned in the last foregoing section is payable causes her to leave any port without having paid the sum the authority appointed to receive port-dues, fees and other charges at the port under this Act may require in writing the authority appointed to receive port-dues, fees and other charges under this Act at any other port in 56[India] to which she may proceed or in which she may be, to levy the sum.

(2) The authority to whom the requisition is directed shall proceed to levy such sum in the manner prescribed in section 42, and a certificate purporting to be made by the authority appointed to receive port-dues, fees and other charges at the port where such sum as is mentioned in the last foregoing section became payable stating the amount payable, shall be sufficient prime facie proof of such amount in any proceeding under section 42 and also (in case the amount payable is disputed) in any subsequent proceeding under section 59.

45. Penalty for evading payment of port-charges

(1) If the master of a vessel evades the payment of any such sum as is mentioned in section 43 he shall be punishable with fine which may extend to five times the amount of the sum.

(2) In any proceeding before a Magistrate on a prosecution under sub-section (1) any such certificate as is mentioned in, section 44, sub-section (2), stating that the master has evaded such payment, shall be sufficient prima facie proof of the evasion, unless the master shows to the satisfaction of the Magistrate that the departure of the vessel without payment of the sum was caused by stress of weather, or that there was lawful or reasonable ground for such departure.

(3) Any Magistrate having jurisdiction under this Act in any port to which the vessel may proceed, or in which she may be found, shall be deemed to have jurisdiction in any proceeding under this section.

46. Port-due on vessels in ballast

A vessel entering any port 14[not being a major port] subject to this Act 19[***] in ballast and not carrying passengers shall be charged with a port-due at a rate to be determined by the 58[Government] and not exceeding three-fourths of the rate with which she would otherwise be chargeable.

47. Port-due on vessels not discharging or taking in cargo

When a vessel enters a port 14[not being a major port] subject to this Act but does not discharge or take in any cargo or passengers therein (with the exception of such unshipment and reshipment as may be necessary for purposes of repair) she shall be charged with a port-due at a rate to be determined by the 58[Government] and not exceeding half the rate with which she would otherwise be chargeable.

48. Port-due not to be chargeable in certain cases

No port-due shall be chargeable in respect of-

(a) any pleasure-yacht, or

(b) any vessel which, having left any port., is compelled to re-enter it by stress of weather or in consequence of having sustained any damage, or

(c) any vessel which, having entered 59[any port 60[in the territories which, immediately before the 1st November, 1956, were comprised in the States of Madras and Andhra] or the Port of Gopalpur in the State of Orissa], leaves it within forty-eight hours without discharge or taking in any passengers or cargo.

49. Power to impose hospital port-dues

(1) The 2[Central Government] may, by notification in the Official Gazette, order that there shall be paid in respect of every vessel entering any port subject to this Act, within a reasonable distance of which there is a public hospital or dispensary suitable for the reception or relief of seamen requiring medical aid such further port-dues not exceeding one anna per ton as the 2[Central Government] thinks fit.

(2) Such port-dues shall be called hospital port-dues, and the 2[Central Government] shall, in making any order under sub-section (1), have regard to any contributions made under section 36, sub-section (5), clause (d).

(3) An order imposing or increasing hospital port-dues shall not take effect till the expiration of sixty days from the day on which the order was published in the Official Gazette.

(4) Whenever the 2[Central Government] is satisfied that proper provision has been made by the owners or agents of any class of vessels or giving medical aid to the seamen employed on board such class of vessels, or that such provision is unnecessary in the case of any class of vessels, it may, by notification in the Official Gazette, exempt such class of vessels from any payment under this Sections.

50. Application and account of hospital port-dues

(1) Hospital port-dues shall be applied, as the 2[Central Government] may direct, to the support of any such hospital or dispensary as aforesaid, or otherwise for providing sanitary superintendence and medical aid for the shipping in the port in which they are levied and for the seamen belonging to the vessels therein, whether such seamen are ashore or afloat.

(2) The 2[Central Government] shall publish annually in the Official Gazette, as soon after the first day of April as may be, an account, for the past financial year, of the sums received as hospital port-dues at each port where such dues are payable, and of the expenditure charged against these receipts.

(3) Such account shall be published as a supplement to the abstract published under section, 36, sub-section (2).

51. Master to hoist number of vessel

(1) The master of every inward or outward bound vessel, on arriving within signal distance of any signal-station established within the limits of the river Hooghly, or within the limits of any part of a river or channel leading to a port subject to this Act, shall, on the requisition of the pilot in charge of the vessel, signify the name of the vessel by hoisting the number by which she is known, or by adopting such other means to this end as may be practicable and usual, and shall keep the signal flying until it is answered from the signal-station.

(2) If the master of a vessel arriving as aforesaid offends against sub-section (1), he shall be punishable for every such offence with fine which may extend to one thousand rupees.

52. Pilot to require master to hoist number

(1) Every pilot in charge of a vessel shall require the number of the vessel to be duly signalled as provided by the last foregoing, section.

(2) When, on such requisition from the pilot; the master refuses to hoist the number of a vessel, or to adopt such other means of making her name known as may be practicable and usual, the pilot may, on arrival at the first place of safe anchorage, anchor the vessel and refuse to proceed on his course until the requisition has been complied with

53. Penalty on pilot disobeying provisions of this Chapter

Any pilot in charge of a vessel who disobeys, or abets disobedience to, any of the provisions of this Chapter, shall be punishable with fine which may extend to five hundred rupees for each instance of such disobedience or abetment, and, in addition, shall be liable to have his authority to act as a pilot withdrawn.

CHAPTER VII: PROVISIONS WITH RESPECT TO PENALTIES

54. Penalty for disobedience to rules and orders of the Government

If any person disobeys any rule or order which a 2[Government] has made in pursuance of this Act and for the punishment of disobedience to which express provision has not been made elsewhere in this Act, he shall be punishable for every such offence with fine which may extend to one hundred rupees.

55. Offences how triable, and penalties how recovered

All offences against this Act shall be triable by a Magistrate, and any Magistrate may, by warrant under his hand, cause the amount of any fine imposed upon the owner or master of any vessel, for any offence committed on board of the vessel or in the management thereof or otherwise in relation thereto, whereof the owner or master is

convicted. to be levied by distress and sale of the vessel, and the tackle apparel and furniture thereof, or so much thereof as is necessary.

56. Costs of conviction

(1) In case of any conviction under this Act, the convicting Magistrate may order the offender to pay the costs of the conviction in addition to any fine or expenses to which he may be liable.

(2) Such costs may be assessed by the Magistrate and may be recovered in the same manner as any fine under this Act

57. Ascertainment and recovery of expenses and damages payable under this Act

(1) If any dispute arises as to the sum to be paid in any case as expenses or damages under this Act, it shall be determined by a Magistrate upon application made to him for that purpose by either of the disputing parties.

(2) Whenever any person is liable to pay any sum, not exceeding one thousand rupees, as expenses or damages under this Act, any Magistrate, upon application made to him by the authority to whom the sum is payable, may, in addition to or instead of any other means for enforcing payment, recover the sum as if it were a fine.

58. Cost of distress

Whenever any fine,, expenses or damages is or are levied under this Act, by distress and sale, the cost of the distress and sale may be levied in addition to such fine. expenses or damages, and in the same manner.

59. Magistrate to determine the amount to be levied in case of dispute

If any dispute arises concerning the amount leviable by any distress or arrest under this Act or the costs payable under the last foregoing section, the person making the distress or using the arrest may detain the goods distrained or arrested, or the proceeds of the sale thereof, until the amount to be levied has been determined by a Magistrate, who, upon application made to him for that purpose, may determine the amount, and award such costs to be paid by either of the parties to the other of them as he thinks reasonable and payment of such costs, if not paid on demand, shall be enforced as if they were a fine.

60. Jurisdiction over offences beyond local limits of jurisdiction

(1) Any person offending against the provisions of this Act in any port subject to this Act shall be punishable by any Magistrate having jurisdiction over any district or place adjoining the port.

(2) Such Magistrate may exercise all the powers of a Magistrate under this Act, in the same manner and to the same extent as if the offence had been committed locally within the limits of his jurisdiction, notwithstanding that the offence may not have been committed locally within such limits, and, in case any such

Magistrate exercises the jurisdiction hereby vested in him, the offence shall be deemed, for all purposes, to have been committed locally within the limits of his jurisdiction.

61. Conviction to be quashed on merits only

(1) No conviction, order or judgement of any Magistrate under this Act shall be quashed for error of form or procedure, but only on the merits, and it shall not be necessary to state, on the face of the conviction, order or judgement, the evidence on which it proceeds.

(2) If no jurisdiction appears on the face of the conviction, order or judgement, but the depositions taken supply that defect, the conviction, order or judgement shall be aided by what so appears in the depositions.

CHAPTER VIII: SUPPLEMENTAL PROVISIONS

62. Hoisting unlawful colours in port

(1) If any vessel belonging to 61[any citizen of India or common wealth citizen] sailing under 62[Indian or British colours], hoists, carries or wears, within the limits of any port subjects to this Act, any flag, jack, pennant or colours, the use whereof on board such vessel has been prohibited by the, Merchant Shipping Act, 1894 (57 & 58 Vict., c. 60) or any other Statute now or hereafter to be in force, or by any proclamation made or to be made in pursuance of any such Statute, or by any of 63[the regulations] in force for the time being, the master of the vessel shall, for every such offence, be punishable with fine which may extend to fifty rupees.

(2) Such fine shall be in addition to any other penalty recoverable in respect of such an offence.

(3) The conservator of the port, or any officer of 64[the Indian Navy], may cater on board any such vessel and seize and take away any flag, jack, pennant or colours so unlawfully hoisted, carried or worn on board the same.

63. Foreign deserters

Any Magistrate, upon an application being made to him by the Consul of any Foreign Power to which section 238 of the Merchant "Shipping Act, 1894 (57 & 58 Vict., c. 60) has, by an Order in Council 65[or order], been, or shall hereafter be, declared to be applicable, or by the representative of such Consul, and upon complaint on oath of the desertion of any seaman, not being a slave, from any vessel of such Foreign Power, may, until a revocation of such Order in Council 65[or order] has been publicly notified, issue his warrant for the apprehension of any such deserter, and, upon due proof of the desertion, may order him to be conveyed on board the vessel to which he belongs or, at the instance of the Consul, to be detained in custody until the vessel is ready to sail, or, if the vessel has sailed, for a reasonable time not exceeding one month:

Provided that a deposit be first made of such sum as the Magistrate deems necessary for the subsistence of the deserter during the detention and that the detention of the deserter shall not be continued beyond twelve weeks.

64. Application of sections 10 and 21

(1) The provisions of section 10 and 21 shall be applicable to all ports heretofore or hereafter declared by the 2[Government] to be parts for the shipment and landings of goods but not otherwise subject to this Act, and may be enforced by any Magistrate to whose ordinary jurisdiction any such port is subject.

(2) Any penalties imposed by him, and any expenses incurred by his order, under the said provisions, shall be recoverable respectively in the manner provided in sections 55 and 57.

(3) In any of the said ports for the shipment and landing of goods the consent referred to in section 21, sub-section (4), may be given by the principal officer of customs at such port or by any other officer appointed in that behalf by the 2[Government].

65. Grant of sites for sailors institutes

Any local authority in which any immovable property in or near a port is vested may, 66[with the previous sanction, in the case of a cantonment authority or the port authority of a major port, of the Central Government, and in other cases, of the State Government], appropriate and either retain and apply, or transfer by way of gift or otherwise, the whole or any part of the property as a site for, or for use as, a sailors' home or other institution for the health, recreation and temporal well-being of sailors.

66. Exercise of powers of conservator by his assistants

(1) All acts, orders or directions by this Act authorized to be done or given by any conservator may, subject to his control, be done or given by any harbour-master or any deputy or assistant of such conservator or harbour-master.

(2) Any person authorised by this Act to do any act may call to his aid such assistance as may be necessary.

67. Service of written notices of directions

Any written notice of a direction given under this -Act, left for the master of any vessel with any person employed on board thereof, or affixed on a conspicuous place on board of the vessel, shall, for the purposes of this Act, be deemed to have been given to the master thereof.

68. Publication of orders of Government

Every declaration, order and rule of a 2[Government] made in pursuance of this Act shall be published in the Official Gazette, and a copy thereof shall be kept in the office of the conservator and at the custom-house, if any, of every port to which the declaration, order or

rule relates, and shall there be open at all reasonable times to the inspection of any person without payment of any fee.

68A. Authorities exercising jurisdiction in ports to co-operate in manoeuvres for defence of port

Every authority exercising any powers or jurisdiction in, or relating to, any port to which this Act for the time being applies shall, if so required by an officer authorized by general or special order of the Central Government in this behalf, co-operate in such manner, as such officer may direct, in carrying out any manoeuvres in connection with any scheme or preparations for the defence of the said port in time of war, and for this purpose shall, if so required, temporarily place at the disposal of such officer the services of any of its staff and the use of any of its vessels, property, equipment or other material:

Provided, firstly that if any vessels are placed at the disposal of such officer in accordance with this section, the Central Government shall, in respect of the period during which they are so at his disposal bear the running expenses of such vessels, and be responsible for any damage thereto.

Explanation.-The expression 'running expenses' in this proviso includes all outlay incurred in connection with the use of vessels other than any charges for their hire, or for the wages of the officer and crews of such vessels :

Provided, secondly, that any officer making a requisition under this section shall exercise his powers in such a way as to cause as little disturbance to the ordinary business of the port as is compatible with the exigencies of the efficient carrying out of the manoeuvres

Provided, thirdly, that no suit or other legal proceeding shall lie against any authority for any default occurring by reason only of compliance with a requisition under this section.

68B. Duties of the said authorities in an emergency

Whenever the Central Government is of opinion that an emergency has arisen which renders it necessary that the duties imposed for the purposes specified in section 68A on the authorities therein mentioned, or other duties of a like nature, should be imposed on such authorities continuously during the existence of the emergency, it may, by general or special order, authorise any officer to require the said authorities to perform such duties until the Central Government is of opinion that the emergency has passed and he said authority shall comply accordingly, and the provisions of the said section shall apply subject to the following modification, namely:-

The Central Government shall pay any authority, on whom a requisition has been made, such compensation for any loss or damage attributable to such requisition, and for any services rendered or expenditure incurred in complying therewith as, in default of agreement, shall be decided to be just and reasonable, having regard

to the circumstances of the case, by the arbitration of a person to be nominated in this behalf by the Central Government, and the decision of such person shall be final.]

68C. Application of certain provisions of the Act to aircraft

(1) The provisions of sections 6, 13 to 16 (both inclusive), 18, 21 and 28, sub-section (2) of section 31 and sections 33, 34, 35, 39, 42 to 48 (both inclusive) and 55 shall apply in relation to all aircraft making use, of any part subject to this Act, while on water as they apply in relation to vessels.

(2) No such aircraft shall enter or leave any port subject to this Act, except with the permission granted by the Conservator of the Port or by such other officer as may be authorized in this behalf by the Conservator.]

[Section 69 repealed by the Repealing Act, 1938 (1 of 1938)]

Foot Notes

1. Enacted w.e.f. 18th December, 1908.
2. Substituted by the A.O. 1937, for the words "Local Government".
3. Substituted by the A.O. 1950, for the words "His Majesty".
4. The words "or the Government of India" omitted by the A.O. 1937.
5. Substituted by the Port Laws (Amendment) Act, 1997 (Act No. 15 of 1997) dated 25th March, 1997 for clause (1).
6. Inserted by Act 35 of 1951, section 188.
7. Inserted, *ibid*.
8. Clause (10) omitted by Act 3 of 1951.
9. Omitted by Act 6 of 1916.
10. Omitted by Act 6 of 1916.
11. Inserted by Act 17 of 1978.
12. Inserted by Act 39 of 1923.
13. Inserted by Act 9 of 1925.
14. Inserted by Act No. 15 of 1997, dated 25th March, 1997.
15. Substituted by the A.O. 1950, for the word "Crown" which had been Substituted by the A.O. 1937, for the word "Government."

16. *Substituted by Act No. 15 of 1997, dated 25th March, 1997 for clause (jj).*
17. *Substituted by Act 15 of 1997, dated 25th March, 1997 for clause (k).*
18. *Substituted by Act 4 of 1911, section 2 for clause (p).*
19. *Omitted by the A.O. 1937.*
20. *Sub-section (1A) omitted by Act 26 of 1938.*
21. *The words, brackets, figure and letter "and sub-section (1A)" Inserted by Act 15 of 1922 omitted, ibid.*
22. *Inserted by Act 20 of 1983, w.e.f. 15th. March, 1984.*
23. *Substituted, ibid., for the words "that Government".*
24. *Substituted by Act 55 of 1952, for the words "six months".*
25. *Inserted by Act 55 of 1952.*
26. *See now the Merchant Shipping Act, 1958 (44 of 1958).*
27. *The words "the Secretary of State for India in Council" successively Substituted by the A.O. 1937 and the A.O. 1950 to read as above.*
28. *Inserted by Act 39 of 1923.*
29. *Substituted, ibid., for the words "or thrown".*
30. *Substituted, ibid., for the words "or throw it".*
31. *Substituted by Act 55 of 1952.*
32. *Inserted by Act 36 of 1925.*
33. *Substituted by the A.O. 1937, for the words "Governor-General in Council".*
34. *Inserted by Act 6 of 1916.*
35. *Sub-sections (2), (3) and (4) re-numbered as sub-sections (3), (4) and (5) respectively by Act No. 6 of 1916.*
36. *Sub-sections (4) and (5), as re-numbered by Act 6 of 1916, omitted by Act 36 of 1925.*
37. *Inserted by Act 6 of 1916.*
38. *Substituted ibid, for the words "within its own province."*

39. *The words "British India" successively Substituted by the A.O. 1948 and the A.O. 1950 to read as above.*
40. *Proviso omitted by the A.O. 1937.*
41. *Sub-sections (2), (3) and (4) re-numbered as sub-sections (3), (4) and (5) respectively by Act 6 of 1916.*
42. *Certain words omitted by Act 6 of 1916.*
43. *Proviso omitted by the A. O. 1937.*
44. *Earlier section 34 substituted by Act No. 15 of 1997, dated 25th March, 1997.*
45. *Proviso omitted by the A. O. 1937.*
46. *Inserted by Act 35 of 1951, section 190.*
47. *Substituted by the A.O. 1937, for the words "that Government".*
48. *Inserted by Act 35 of 1951.*
49. *Sub-section (5) omitted by Act 6 of 1916.*
50. *Substituted by Act 35 of 1951, 191 for clause (a).*
51. *Inserted by Act 35 of 1951.*
52. *Inserted, ibid.*
53. *Proviso omitted, ibid.*
54. *Omitted, ibid.*
55. *Omitted by the A.O. 1948.*
56. *The words "British India" submissively amended by the A.O. 1948, the A.O. 1950 and Act 3 of 1951.*
57. *The word "Government" successively Substituted by the A. O. 1937 and the A. O. 1950.*
58. *Substituted ibid., for the words "Local Government".*
59. *Substituted by Act 35 of 1950.*
60. *Substituted by the A. O. (No. 2), 1956, for the words "in the State of Madras or in the State of Andhra".*
61. *Substituted by the A. O. 1950, for the words "any of His Majesty's subjects".*

62. Substituted, *ibid.*, for the words "British colours".
63. Substituted, *ibid.*, for the words "His Majesty's regulations."
64. Substituted by the A. O. 1250, for the words "His Majesty's Navy or the Royal Indian Navy".
65. Inserted, *ibid.*
66. Substituted *ibid.*, for the words "with the previous sanction of the Local Government".
67. Inserted by Act 6 of 1916.
68. Ins by Act 35 of 1951.
69. This Schedule is liable to variation by notifications of State Government, and for any change thereof notification of the State concerned should be consulted.
70. Substituted by notification No. G.S.R. 257 (E) dated 1st. May, 1978, Gazette of India, Pt. II, s. 3 (i) p. 398, for the heading and major ports of Calcutta and Paradip and the entries relating thereto.
71. Entries under columns 2, 3 and 4 omitted by Act No. 15 of 1997, dated 25th March 1997.
72. Added by notification No. 1317 PD, dated 29th. April, 1978, Gazette of Orissa.
73. Added by notification No. G.O. Ms. 253 dated 28th. April, 1968, Gazette of Andhra Pradesh.
74. Added by notification No.11. (2)/ TRA/ 1914(c)/ 78, dated 1st. May, 1978, Gazette of Tamil Nadu.
75. Inserted by notification No. G.O. Ms. 70/78-Pt., dated 1st. May, 1978, Gazette of Pondicherry.
76. Added by notification No. S.R.O. 373/78 dated 26th. January, 1978, Gazette of Kerala.
77. Inserted by notification No. P.W.D 42 PSP 77 dated 29th. April, 1978, Gazette of Karnataka (Extraordinary) Part IV-2 c(ii).
78. Inserted by notification No. 1/605/78/IPD, dated 1st. May, 1978, Gazette of Goa, Daman and Diu.
79. Inserted by notification No. IPA 1077/264/36-TR, dated 21st. March, 1978, Gazette of Maharashtra.

80. Inserted by Notification No. G/ J/ 16/ IPA/ 1077/ 95 M dated 1st. May, 1978, Gazette of Gujrat, Extraordinary, Part IV-A.

ANNEXURE - 8

ARREST OF SEAGOING SHIPS, 1952

INTERNATIONAL CONVENTION FOR THE UNIFICATION OF CERTAIN RULES RELATING TO THE ARREST OF SEAGOING SHIPS, BRUSSELS, MAY 10, 1952

The High Contracting Parties,

Having recognised the desirability of determining by agreement certain uniform rules of law relating to the arrest of seagoing ships, have decided to conclude a convention, for this purpose and thereto have agreed as follows :-

Article 1

In this Convention the following words shall have the meanings hereby assigned to them :

(1) "Maritime Claim" means a claim arising out of one or more of the following :

(a) damage caused by any ship either in collision or otherwise;

(b) loss of life or personal injury caused by any ship or occurring in connection with the operation of any ship;

(c) salvage;

(d) agreement relating to the use or hire of any ship whether by charterparty or otherwise;

(e) agreement relating to the carriage of goods in any ship whether by charterparty or otherwise;

(f) loss of or damage to goods including baggage carried in any ship;

(g) general average;

(h) bottomry;

(i) towage;

(j) pilotage;

(k) goods or materials wherever supplied to a ship for her operation or maintenance;

(l) construction, repair or equipment of any ship or dock charges and dues;

(m) wages of Masters, Officers, or crew;

(n) Master's disbursements, including disbursements made by shippers, charterers or agents on behalf of a ship or her owner;

- (o) disputes as to the title to or ownership of any ship;
 - (p) disputes between co-owners of any ship as to the ownership, possession employment or earnings of that ship;
 - (q) the mortgage or hypothecation of any ship.
- (2) "Arrest" means the detention of a ship by judicial process to secure a maritime claim, but does not include the seizure of a ship in execution or satisfaction of a judgment.
- (3) "Person" includes individuals, partnerships, and bodies corporate, Governments, their Departments and Public Authorities.
- (4) "Claimant" means a person who alleges that a maritime claim exists in his favour.

Article 2

A ship flying the flag of one of the Contracting States may be arrested in the jurisdiction of any of the Contracting States in respect of any maritime claim, but in respect of no other claim; but nothing in this Convention shall be deemed to extent or restrict any right or powers vested in any Governments or other Departments, Public Authorities, or Dock or Harbour Authorities under their existing domestic laws or regulations to arrest, detain or otherwise prevent the sailing of vessels within their jurisdiction.

Article 3

- (1) Subject to the provisions of para (4) of this Article and of Article 10, a claimant may arrest either the particular ship in respect of which the maritime claim arose, or any other ship which is owned by the person who was, at the time when the maritime claim arose, the owner of the particular ship, even though the ship arrested be ready to sail; but no ship, other than the particular ship in respect of which the claim arose, may be arrested in respect of any of the maritime claims enumerated in Article 1 (1) (o), (p) or (q).
- (2) Ships shall be deemed to be in the same ownership when all the shares therein are owned by the same person or persons.
- (3) A ship shall not be arrested, nor shall bail or other security be given more than once in any one or more of the jurisdictions of any of the Contracting States in respect of the same maritime claim by the same claimant: and, if a ship has been arrested in any one of such jurisdictions, or bail or other security has been given in such jurisdiction either to release the ship or to avoid a threatened arrest, any subsequent arrest of the ship or of any ship in the same ownership by the same claimant for the same maritime claim shall be set aside, and the ship released by the Court or other appropriate judicial authority of that State, unless the claimant can satisfy the Court or other appropriate judicial authority that the bail or other security had been finally released before the subsequent arrest or that there is other good cause for maintaining that arrest.

(4) When in the case of a charter by demise of a ship the charterer and not the registered owner is liable in respect of a maritime claim relating to that ship, the claimant may arrest such ship or any other ship in the ownership of the charterer by demise, subject to the provisions of this Convention, but no other ship in the ownership of the registered owner shall be liable to arrest in respect of such maritime claims.

The provisions of this paragraph shall apply to any case in which a person other than the registered owner of a ship is liable in respect of a maritime claim relating to that ship.

Article 4

A ship may only be arrested under the authority of a Court or of the appropriate judicial authority of the Contracting State in which the arrest is made.

Article 5

The Court or other appropriate judicial authority within whose jurisdiction the ship has been arrested shall permit the release of the ship upon sufficient bail or other security being furnished, save in cases in which a ship has been arrested in respect of any of the maritime claims enumerated in Article 1(1)(o) and (p). In such cases the Court or other appropriate judicial authority may permit the person in possession of the ship to continue trading the ship, upon such person furnishing sufficient bail or other security, or may otherwise deal with the operation of the ship during the period of the arrest.

In default of agreement between the parties as to the sufficiency of the bail or other security, the Court or other appropriate judicial authority shall determine the nature and amount thereof.

The request to release the ship against such security shall not be construed as an acknowledgment of liability or as a waiver of the benefit of the legal limitation of liability of the owner of the ship.

Article 6

All questions whether in any case the claimant is liable in damages for the arrest of a ship or for the costs of the bail or other security furnished to release or prevent the arrest of a ship, shall be determined by the law of the Contracting State in whose jurisdiction the arrest was made or applied for.

The rules of procedure relating to the arrest of a ship, to the application for obtaining the authority referred to in Article 4, and to all matters of procedure which the arrest may entail, shall be governed by the law of the Contracting State in which the arrest was made or applied for.

Article 7

(1) The Courts of the country in which the arrest was made shall have jurisdiction to determine the case upon its merits if the domestic law of the country in which the arrest is made gives jurisdiction to such Courts, or in any of the following cases namely :

(a) if the claimant has his habitual residence or principle place of business in the country in which the arrest was made;

(b) if the claim arose in the country in which the arrest was made;

(c) if the claim concerns the voyage of the ship during which the arrest was made;

(d) if the claim arose out of a collision or in circumstances covered by Article 13 of the International Convention for the unification of certain rules of law with respect to collisions between vessels, signed at Brussels on September 23, 1910;

(e) if the claim is for salvage;

(f) if the claim is upon a mortgage or hypothecation of the ship arrested.

(2) If the Court within whose jurisdiction the ship was arrested has no jurisdiction to decide upon the merits, the bail or other security given in accordance with Article 5 to procure the release of the ship shall specifically provide that it is given as security for the satisfaction of any judgment which may eventually be pronounced by a Court having jurisdiction so to decide; and the Court or other appropriate judicial authority of the country in which the arrest is made shall fix the time within which the claimant shall bring an action before a Court having such jurisdiction.

(3) If the parties have agreed to submit the dispute to the jurisdiction of a particular Court other than within whose jurisdiction the arrest was made or to arbitration, the Court or other appropriate judicial authority within whose jurisdiction the arrest was made may fix the time within which the claimant shall bring proceedings.

(4) If, in any of the cases mentioned in the two proceeding paragraphs, the action or proceedings are not brought within the time so fixed, the defendant may apply for the release of the ship or of the bail or other security.

(5) This article shall not apply in cases covered by the provisions of the revised Rhine Navigation Convention of October 17, 1868.

Article 8

(1) The provisions of this Convention shall apply to any vessel flying the flag of a Contracting State in the jurisdiction of any Contracting State.

(2) A ship flying the flag of a non-Contracting State may be arrested in the jurisdiction of any Contracting State in respect of any of the maritime claims enumerated in Article 1 or of any other claim for which the law of the Contracting State permits arrest.

(3) Nevertheless any Contracting State shall be entitled wholly or partly to exclude from the benefits of this Convention any Government of a non-Contracting State or any person who has not, at the time of the arrest, his habitual residence or principal place of business in one of the Contracting States.

(4) Nothing in this Convention shall modify or affect the rules of law in force in the respective Contracting States relating to the arrest of any ship within the jurisdiction of the State of her flag by a person who has his habitual residence or principal place of business in that State.

(5) When a maritime claim is arrested by a third party other than the original claimant, whether by subrogation, assignment or otherwise, such third party shall for the purpose of this Convention, be deemed to have the same habitual residence or principal place of business as the original claimant.

Article 9

Nothing in this Convention shall be construed as creating a right of action, which, apart from the provisions of this Convention, would not arise under the law applied by the Court which had seisin of the case, nor as creating any maritime liens which do not exist under such law or under the Convention on Maritime Mortgages and Liens, if the latter is applicable.

Article 10

The High Contracting Parties may at the time of signature, deposit or ratification or accession, reserve

(a) the right not to apply this Convention to the arrest of a ship for any of the claims enumerated in paragraphs (o) and (p) of Article 1, but to apply their domestic laws to such claims;

(b) the right not to apply the first paragraph of Article 3 to the arrest of a ship, within their jurisdiction, for claims set out in Article 1, paragraph (1).

Article 11

The High Contracting Parties undertake to submit to arbitration any disputes between States arising out of the interpretation or application of this Convention, but this shall be without prejudice to the obligations of those High Contracting Parties who have agreed to submit their disputes to the International Court of Justice.

Article 12

This Convention shall be open for signature by the State represented at the Ninth Diplomatic Conference on Maritime Law. The protocol of signature shall be drawn up through the good offices of the Belgian Minister of Foreign Affairs.

Article 13

This Convention shall be ratified and the instruments of ratification shall be deposited with the Belgian Ministry of Foreign Affairs which shall notify all signatory and acceding States of the deposit of any such instruments.

Article 14

(a) This Convention shall come into force between the two States which first ratify it, six months after the date of the deposit of the second instrument of ratification.

(b) This Convention shall come into force in respect of each signatory State which ratifies it after the deposit of the second instrument of ratification six months after the date of the deposit of the instrument of ratification of that State.

Article 15

Any State not represented at the Ninth Diplomatic Conference on Maritime Law may accede to this Convention.

The accession of any State shall be notified to the Belgian Ministry of Foreign Affairs which shall inform through diplomatic channels all signatory and acceding States of such notification.

The Convention shall come into force in respect of the acceding State six months after the date of the receipt of such notification but not before the Convention has come into force in accordance with the provisions of Article 14(a).

Article 16

Any High Contracting Party may three years after the coming into force of this Convention in respect of such High Contracting Party or at any time thereafter request that a conference be convened in order to consider amendments to the Convention.

Any High Contracting Party proposing to avail itself of this right shall notify the Belgian Government which shall convene the conference within six months thereafter.

Article 17

Any High Contracting Party shall have the right to denounce this Convention at any time after the coming into force thereof in respect of such High Contracting Party. This denunciation shall take effect one year after the date on which notification thereof has been received by the Belgian Government which shall inform through diplomatic channels all the other High Contracting Parties of such notification.

Article 18

(a) Any High Contracting Party may at the time of its ratification of or accession to this Convention or at any time thereafter declare by written notification to the Belgian Ministry of Foreign Affairs that the Convention shall extend to any of the territories for whose international relations it is responsible. The Convention shall six months after the date of the receipt of such notification by the Belgian Ministry of Foreign Affairs extend to the territories named therein, but not before the date of the coming into force of the Convention in respect of such High Contracting Party.

(b) A High Contracting Party which has made a declaration under paragraph (a) of this Article extending the Convention to any territory for whose international relations it is responsible may at any time thereafter declare by notification given to the Belgian Ministry of Foreign Affairs that the Convention shall cease to extend to such territory and the Convention shall one year after the receipt of the notification by the Belgian Ministry of Foreign Affairs cease to extend thereto.

(c) The Belgian Ministry of Foreign Affairs shall inform through diplomatic channels all signatory and acceding States of any notification received by it under this Article.

Done in Brussels, on May 10, 1952, in the French and English languages, the two texts being equally authentic.

Signatories : Federal Republic of Germany⁸², Belgium, Brazil⁸², Spain⁸², France, Greece, Italy, Monaco, Nicaragua, United Kingdom of Great Britain and Northern Ireland, Yugoslavia⁸³.

82 Ad referendum

83 For later ratification

Private Maritime Law, Miscellaneous Conventions, etc.

Ratifications and Accessions as on January 1, 1981

RATIFICATION

Belgium April 10, 1961

Egypt August 24, 1955

France May 25, 1957

Germany (F.R.) October 6, 1972

Great Britain and Northern Ireland March 18, 1959

Greece February 27, 1967

Holy See August 10, 1956

Italy November 9, 1979

Portugal May 4, 1957

Spain December 8, 1953

Yugoslavia July 25, 1967

ACCESSION

Algeria August 18, 1964

Bahamas⁸⁵ May 12, 1965

Benin⁸⁴ April 23, 1958
 Cameroon⁸⁴ April 23, 1958
 Centrafrica Republic⁸⁴ April 23, 1958
 Comore Isles⁸⁴ April 23, 1958
 Congo Popular Republic⁸⁴ April 23, 1958
 Costa Rica July 13, 1955
 Djibouti⁸⁴ April 23, 1958
 Dominican Republic⁸⁵ May 12, 1965
 Fiji October 10, 1970
 France
 Overseas Territories April 23, 1958
 Gabon⁸⁴ April 23, 1958
 Germany
 Land Berlin October 6, 1972
 Great Britain and Northern Ireland

 (Overseas Territories)
 Antiqua, Cayman Islands, Motserrat
 St. Cristopher Nevis, Anguilla May 12, 1965
 St. Helena, St. Lucia, Belize,
 Turk's Isles and Caecos September 21, 1965
 Bermuda May 30, 1963
 British Virgin Islands May 29, 1963
 Falkland Islands and dependencies October 17, 1969
 Gibraltar, Hong Kong March 29, 1963
 Guernsey December 8, 1965
 Grenada⁸⁷ May 12, 1965
 Guiana⁸⁸ March 29, 1963
 Guianea Republic⁸⁶ April 23, 1958
 Haï ti November 4, 1954
 Haute - Volta⁸⁶ April 23, 1958
 Ivory Coast⁸⁶ April 23, 1958
 Khmere Republic November 12, 1956
 Kiribati⁸⁸ September 2, 1965
 Malgache Republic^{86, 87} April 23, 1958
 Mauritania⁸⁶ April 23, 1958
 Mauritius⁸⁸ March 29, 1963
 Niger⁸⁶ April 23, 1958
 Nigeria November 7, 1963
 North Borneo⁸⁸ March 29, 1963
 Paraguay November 22, 1967
 Poland July 16, 1976
 Sarawak⁸⁸ September 28, 1962
 Senegal⁸⁶ April 23, 1958
 Seychelles⁸⁸ March 29, 1963
 Solomon Isles⁸⁸ September 21, 1965
 St. Lucia⁸⁸ May 12, 1965
 Sudan⁸⁶ April 23, 1958
 Switzerland May 28, 1954
 Syrian Arabic Republic February 3, 1972
 Tchad⁸⁶ April 23, 1958
 Togo⁸⁶ April 23, 1958
 Tonga June 13, 1978

Tuvalu⁸⁸ September 21, 1965

Zaï re Republic July 17, 1967

⁸⁴ *By the accession of France*

⁸⁵ *By the accession of Great Britain*

⁸⁶ *By the accession of France*

⁸⁷ *Formal confirmation by the Malgache Rep. registered 13.7.65*

⁸⁸ *By the accession of Great Britain.*

ANNEXURE - 9

International Convention on the Arrest of Ships

(Geneva, March 12, 1999)

The States Parties to this Convention, Recognizing the desirability of facilitating the harmonious and orderly development of world seaborne trade, Convinced of the necessity for a legal instrument establishing international uniformity in the field of arrest of ships which takes account of recent developments in related fields,

Have agreed as follows:

Article	1
Definitions	

For the purposes of this Convention:

1. "Maritime Claim" means a claim arising out of one or more of the following:

- (a) loss or damage caused by the operation of the ship;
- (b) loss of life or personal injury occurring, whether on land or on water, in direct connection with the operation of the ship;
- (c) salvage operations or any salvage agreement, including, if applicable, special compensation relating to salvage operations in respect of a ship which by itself or its cargo threatened damage to the environment;
- (d) damage or threat of damage caused by the ship to the environment, coastline or related interests; measures taken to prevent, minimize, or remove such damage; compensation for such damage; costs of reasonable measures of reinstatement of the environment actually undertaken or to be undertaken; loss incurred or likely to be incurred by third parties in connection with such damage; and damage, costs, or loss of a similar nature to those identified in this subparagraph (d);
- (e) costs or expenses relating to the raising, removal, recovery, destruction or the rendering harmless of a ship which is sunk, wrecked, stranded or abandoned, including anything that is or has been on board such ship, and costs or expenses relating to the preservation of an abandoned ship and maintenance of its crew;
- (f) any agreement relating to the use or hire of the ship, whether contained in a charter party or otherwise;
- (g) any agreement relating to the carriage of goods or passengers on board the ship, whether contained in a charter party or otherwise;
- (h) loss of or damage to or in connection with goods (including luggage) carried on board the ship;

- (i) general average;
- (j) towage;
- (k) pilotage;
- (l) goods, materials, provisions, bunkers, equipment (including containers) supplied or services rendered to the ship for its operation, management, preservation or maintenance;
- (m) construction, reconstruction, repair, converting or equipping of the ship;
- (n) port, canal, dock, harbour and other waterway dues and charges;
- (o) wages and other sums due to the master, officers and other members of the ship's complement in respect of their employment on the ship, including costs of repatriation and social insurance contributions payable on their behalf;
- (p) disbursements incurred on behalf of the ship or its owners;
- (q) insurance premiums (including mutual insurance calls) in respect of the ship, payable by or on behalf of the shipowner or demise charterer;
- (r) any commissions, brokerages or agency fees payable in respect of the ship by or on behalf of the shipowner or demise charterer;
- (s) any dispute as to ownership or possession of the ship;
- (t) any dispute between co-owners of the ship as to the employment or earnings of the ship;
- (u) a mortgage or a "hypothèque" or a charge of the same nature on the ship;
- (v) any dispute arising out of a contract for the sale of the ship.

2. "Arrest" means any detention or restriction on removal of a ship by order of a Court to secure a maritime claim, but does not include the seizure of a ship in execution or satisfaction of a judgment or other enforceable instrument.

3. "Person" means any individual or partnership or any public or private body, whether corporate or not, including a State or any of its constituent subdivisions.

4. "Claimant" means any person asserting a maritime claim.

5. "Court" means any competent judicial authority of a State.

Article 2

Powers of arrest

1. A ship may be arrested or released from arrest only under the authority of a Court of the State Party in which the arrest is effected.

2. A ship may only be arrested in respect of a maritime claim but in respect of no other claim.

3. A ship may be arrested for the purpose of obtaining security notwithstanding that, by virtue of a jurisdiction clause or arbitration clause in any relevant contract, or otherwise, the maritime claim in respect of which the arrest is effected is to be adjudicated in a State other than the State where the arrest is effected, or is to be arbitrated, or is to be adjudicated subject to the law of another State.

4. Subject to the provisions of this Convention, the procedure relating to the arrest of a ship or its release shall be governed by the law of the State in which the arrest was effected or applied for.

Article 3

Exercise of right of arrest

1. Arrest is permissible of any ship in respect of which a maritime claim is asserted if:

(a) the person who owned the ship at the time when the maritime claim arose is liable for the claim and is owner of the ship when the arrest is effected; or

(b) the demise charterer of the ship at the time when the maritime claim arose is liable for the claim and is demise charterer or owner of the ship when the arrest is effected; or

(c) the claim is based upon a mortgage or a "hypothèque" or a charge of the same nature on the ship; or

(d) the claim relates to the ownership or possession of the ship; or

(e) the claim is against the owner, demise charterer, manager or operator of the ship and is secured by a maritime lien which is granted or arises under the law of the State where the arrest is applied for.

2. Arrest is also permissible of any other ship or ships which, when the arrest is effected, is or are owned by the person who is liable for the maritime claim and who was, when the claim arose:

(a) owner of the ship in respect of which the maritime claim arose; or

(b) demise charterer, time charterer or voyage charterer of that ship.

This provision does not apply to claims in respect of ownership or possession of a ship.

3. Notwithstanding the provisions of paragraphs 1 and 2 of this article, the arrest of a ship which is not owned by the person liable for the claim shall be permissible only if, under the law of the State where the arrest is applied for, a judgment in respect of that claim can be enforced against that ship by judicial or forced sale of that ship.

Article 4

Release from arrest

1. A ship which has been arrested shall be released when sufficient security has been provided in a satisfactory form, save in cases in which a ship has been arrested in respect of any of the maritime claims enumerated in article 1, paragraphs 1 (s) and (t). In such cases, the Court may permit the person in possession of the ship to continue trading the ship, upon such person providing sufficient security, or may otherwise deal with the operation of the ship during the period of the arrest.

2. In the absence of agreement between the parties as to the sufficiency and form of the security, the Court shall determine its nature and the amount thereof, not exceeding the value of the arrested ship.

3. Any request for the ship to be released upon security being provided shall not be construed as an acknowledgement of liability nor as a waiver of any defence or any right to limit liability.

4. If a ship has been arrested in a non-party State and is not released although security in respect of that ship has been provided in a State Party in respect of the same claim, that security shall be ordered to be released on application to the Court in the State Party.

5. If in a non-party State the ship is released upon satisfactory security in respect of that ship being provided, any security provided in a State Party in respect of the same claim shall be ordered to be released to the extent that the total amount of security provided in the two States exceeds:

(a) the claim for which the ship has been arrested, or

(b) the value of the ship, whichever is the lower. Such release shall, however, not be ordered unless the security provided in the non-party State will actually be available to the claimant and will be freely transferable.

6. Where, pursuant to paragraph 1 of this article, security has been provided, the person providing such security may at any time apply to the Court to have that security reduced, modified, or cancelled.

Article 5

Right of rearrest and multiple arrest

1. Where in any State a ship has already been arrested and released or security in respect of that ship has already been provided to secure a maritime claim, that ship shall not thereafter be rearrested or arrested in respect of the same maritime claim unless:

(a) the nature or amount of the security in respect of that ship already provided in respect of the same claim is inadequate, on condition that the aggregate amount of security may not exceed the value of the ship; or

(b) the person who has already provided the security is not, or is unlikely to be, able to fulfil some or all of that person's obligations; or

(c) the ship arrested or the security previously provided was released either:

(i) upon the application or with the consent of the claimant acting on reasonable grounds, or

(ii) because the claimant could not by taking reasonable steps prevent the release.

2. Any other ship which would otherwise be subject to arrest in respect of the same maritime claim shall not be arrested unless:

(a) the nature or amount of the security already provided in respect of the same claim is inadequate; or

(b) the provisions of paragraph 1 (b) or (c) of this article are applicable.

3. "Release" for the purpose of this article shall not include any unlawful release or escape from arrest.

Article 6

Protection of owners and demise charterers of arrested ships

1. The Court may as a condition of the arrest of a ship, or of permitting an arrest already effected to be maintained, impose upon the claimant who seeks to arrest or who has procured the arrest of the ship the obligation to provide security of a kind and for an amount, and upon such terms, as may be determined by that Court for any loss which may be incurred by the defendant as a result of the arrest, and for which the claimant may be found liable, including but not restricted to such loss or damage as may be incurred by that defendant in consequence of:

(a) the arrest having been wrongful or unjustified; or

(b) excessive security having been demanded and provided.

2. The Courts of the State in which an arrest has been effected shall have jurisdiction to determine the extent of the liability, if any, of the claimant for loss or damage caused by the arrest of a ship, including but not restricted to such loss or damage as may be caused in consequence of:

(a) the arrest having been wrongful or unjustified, or

(b) excessive security having been demanded and provided.

3. The liability, if any, of the claimant in accordance with paragraph 2 of this article shall be determined by application of the law of the State where the arrest was effected.

4. If a Court in another State or an arbitral tribunal is to determine the merits of the case in accordance with the provisions of article 7, then proceedings relating to the liability of the claimant in accordance with paragraph 2 of this article may be stayed pending that decision.

5. Where pursuant to paragraph 1 of this article security has been provided, the person providing such security may at any time apply to the Court to have that security reduced, modified or cancelled.

Article 7

Jurisdiction on the merits of the case

1. The Courts of the State in which an arrest has been effected or security provided to obtain the release of the ship shall have jurisdiction to determine the case upon its merits, unless the parties validly agree or have validly agreed to submit the dispute to a Court of another State which accepts jurisdiction, or to arbitration.

2. Notwithstanding the provisions of paragraph 1 of this article, the Courts of the State in which an arrest has been effected, or security provided to obtain the release of the ship, may refuse to exercise that jurisdiction where that refusal is permitted by the law of that State and a Court of another State accepts jurisdiction.

3. In cases where a Court of the State where an arrest has been effected or security provided to obtain the release of the ship:

(a) does not have jurisdiction to determine the case upon its merits; or

(b) has refused to exercise jurisdiction in accordance with the provisions of paragraph 2 of this article, such Court may, and upon request shall, order a period of time within which the claimant shall bring proceedings before a competent Court or arbitral tribunal.

4. If proceedings are not brought within the period of time ordered in accordance with paragraph 3 of this article then the ship arrested or the security provided shall, upon request, be ordered to be released.

5. If proceedings are brought within the period of time ordered in accordance with paragraph 3 of this article, or if proceedings before a competent Court or arbitral tribunal in another State are brought in the absence of such order, any final decision resulting therefrom shall be recognized and given effect with respect to the arrested ship or to the security provided in order to obtain its release, on condition that:

(a) the defendant has been given reasonable notice of such proceedings and a reasonable opportunity to present the case for the defence; and

(b) such recognition is not against public policy (ordre public).

6. Nothing contained in the provisions of paragraph 5 of this article shall restrict any further effect given to a foreign judgment or arbitral award under the law of the State where the arrest of the ship was effected or security provided to obtain its release.

Article 8

Application

1. This Convention shall apply to any ship within the jurisdiction of any State Party, whether or not that ship is flying the flag of a State Party.
2. This Convention shall not apply to any warship, naval auxiliary or other ships owned or operated by a State and used, for the time being, only on government non-commercial service.
3. This Convention does not affect any rights or powers vested in any Government or its departments, or in any public authority, or in any dock or harbour authority, under any international convention or under any domestic law or regulation, to detain or otherwise prevent from sailing any ship within their jurisdiction.
4. This Convention shall not affect the power of any State or Court to make orders affecting the totality of a debtor's assets.
5. Nothing in this Convention shall affect the application of international conventions providing for limitation of liability, or domestic law giving effect thereto, in the State where an arrest is effected.
6. Nothing in this Convention shall modify or affect the rules of law in force in the States Parties relating to the arrest of any ship physically within the jurisdiction of the State of its flag procured by a person whose habitual residence or principal place of business is in that State, or by any other person who has acquired a claim from such person by subrogation, assignment or otherwise.

Article 9

Non-creation of maritime liens

Nothing in this Convention shall be construed as creating a maritime lien.

Article 10

Reservations

1. Any State may, at the time of signature, ratification, acceptance, approval, or accession, or at any time thereafter, reserve the right to exclude the application of this Convention to any or all of the following :
 - (a) ships which are not seagoing;
 - (b) ships not flying the flag of a State Party;
 - (c) claims under article 1, paragraph 1 (s).
2. A State may, when it is also a State Party to a specified treaty on navigation on inland waterways, declare when signing, ratifying, accepting, approving or acceding to this Convention, that rules on jurisdiction, recognition and execution of court decisions provided

for in such treaties shall prevail over the rules contained in article 7 of this Convention.

Article 11

Depositary

This Convention shall be deposited with the Secretary-General of the United Nations.

Article 12

Signature, ratification, acceptance, approval and accession

1. This Convention shall be open for signature by any State at the Headquarters of the United Nations, New York, from 1 September 1999 to 31 August 2000 and shall thereafter remain open for accession.

2. States may express their consent to be bound by this Convention by:

(a) signature without reservation as to ratification, acceptance or approval; or

(b) signature subject to ratification, acceptance or approval, followed by ratification, acceptance or approval; or

(c) accession.

3. Ratification, acceptance, approval or accession shall be effected by the deposit of an instrument to that effect with the depositary.

Article 13

States with more than one system of law

1. If a State has two or more territorial units in which different systems of law are applicable in relation to matters dealt with in this Convention, it may at the time of signature, ratification, acceptance, approval or accession declare that this Convention shall extend to all its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time.

2. Any such declaration shall be notified to the depositary and shall state expressly the territorial units to which the Convention applies.

3. In relation to a State Party which has two or more systems of law with regard to arrest of ships applicable in different territorial units, references in this Convention to the Court of a State and the law of a State shall be respectively construed as referring to the Court of the relevant territorial unit within that State and the law of the relevant territorial unit of that State.

Article 14

Entry into force

1. This Convention shall enter into force six months following the date on which 10 States have expressed their consent to be bound by it.

2. For a State which expresses its consent to be bound by this Convention after the conditions for entry into force thereof have been met, such consent shall take effect three months after the date of expression of such consent.

Article 15

Revision and amendment

1. A conference of States Parties for the purpose of revising or amending this Convention shall be convened by the Secretary-General of the United Nations at the request of one-third of the States Parties.

2. Any consent to be bound by this Convention, expressed after the date of entry into force of an amendment to this Convention, shall be deemed to apply to the Convention, as amended.

Article 16

Denunciation

1. This Convention may be denounced by any State Party at any time after the date on which this Convention enters into force for that State.

2. Denunciation shall be effected by deposit of an instrument of denunciation with the depositary.

3. A denunciation shall take effect one year, or such longer period as may be specified in the instrument of denunciation, after the receipt of the instrument of denunciation by the depositary.

Article 17

Languages

This Convention is established in a single original in the Arabic, Chinese, English, French, Russian and Spanish languages, each text being equally authentic.

DONE AT Geneva this twelfth day of March, one thousand nine hundred and ninety-nine.

IN WITNESS WHEREOF the undersigned being duly authorized by their respective Governments for that purpose have signed this Convention.

ANNEXURE - 10

SHIPPING GLOSSARY

ACCOMODATION The living place onboard the ship is called Accomodation.

BALLAST WATER TANK Ballast Water Tanks are the tanks into which the Sea Water or any other Water is filled for improving the Stability of the ship. These tanks can be located anywhere on the Ship.

BRIDGE The place from where the ship is Navigated as well as where the Chart Room and Wheel House are are situated is called Bridge.

BROKEN STOWAGE The space left between cargo due to the Shape of Cases or Packages or because of uneven shape of the Cargo Hold or space in which the cargo is being loaded is called the Broken Stowage. This is given in percentage of Stowage Factor for different Cargo.

BUNKERS Bunkers means the oil or Fuel which a ship needs for running its engines to move from one place to another or within the Port.

BILL OF LADING Bill of Lading is a document which shows that the cargo has been received on the ship by the Master or the Agent on behalf of the Ship Owner. It is also accepted as a Negotiable Document in case the Cargo is to be sold or transferred to the new buyer. This is a Contract between the Shipper and the Ship Owner, with the Terms and Conditions stated therein.

CARGO MANIFEST This is a document which shows the list of Cargo on board the Ship indicating Marks and Numbers, Quantity, Weight Place of storage and is called the Cargo Manifest. This is prepared from the Bill of Lading. For Dangerous Cargo a separate Cargo Manifest has to be prepared.

CARGO HOLD The space on the Ship for stowage of Cargo for earning Freight is Called Cargo Hold.

CARGO SPACE Commercial purpose.

CAPACITY OF A HOLD The amount of Cargo a "Cargo Hold" can accommodate is called the Capacity of the Cargo Hold. It may be expressed in Cu. M. or in m.t.

CONTAINERS Containers are the units of Standard Sizes of 20 ft., 40 ft. or 45 ft. used for carriage of cargo inside them. They are usually carried by the Container Vessels.

CARGO BATTENS These are removable wooden battens fitted across the inner edges of frames in a cargo hold to prevent contact between cargo and the shipside. They also provide flow of air (ventilation) cargo and shipside, thus preventing the damages to the cargo by sweat.

CARGO DEADWEIGHT The weight expressed in tonnes of any cargo, package or parcel.

GRAIN CAPACITY Space available from ship side to ship side and from Double Bottom Top to under the Deck and Hatch Covers MINUS space occupied by Beams, Wooden Battens, Frames, Stiffeners, and Wooden sheathing is called GRAIN SPACE. Cargo loaded to Grain Capacity are:- Grain in Bulk, Fertilizers in Bulk etc.

BALE CAPACITY Space available between the Wooden Sheathing, side battens and under side of the Beams and Stiffeners is called the Bale capacity.
Cargo loaded to Bale Capacity are:- Cases, Cartons, Drums etc.

CHART ROOM This is situated on the Bridge Deck. Chart Room is the place where the Navigational Charts are kept and the ship's position is plotted from time to time by the Navigating Officer while maneuvering

CRANE These are used for lifting off and on of cargo from / to the jetty or the ship. Generally their capacity is much more than Derricks. They move with the cargo and are easy to handle.

DECK The Floors of the ship are called the Deck.

DERRICK The Equipments which lifts the cargo off or onto the ship is called Derrick. They are used in pairs. They are of smaller capacity than the cranes.

DOUBLE BOTTOM TANK The lower most Tanks under the Cargo Hold are called the Double Bottom Tanks. They are like double skin to the ship and protect ship's bottom.

DEEP TANK Deep Tanks are situated in the Cargo Hold of the Ship. They are High Tanks and are usually utilised for Vegetable oils, fats, and any other consumable liquid products.

DAMAGES TO CARGO Handling - If the Cargo is damaged while handling due to improper slinging or using improper equipments or is not being handled as per the instructions indicated on the Cargo is termed as Handling Damages.

Dragging - When the Cargo is pulled out of its stowed space and is damaged the damage is termed as "Damages due to Dragging". This may also happen when the wires to drag out the Cargo are not placed properly or put at a wrong angle.

Crushing - When the Packages of fragile nature or weak cases are over stowed by heavier goods are called Crushing Damage.

Sweat - When the Cargo is damaged due to the sweating of Cargo or the Ship due to change in internal and external temperature of the Cargo space is called Damage by Sweat.

Contamination - Some Cargoes can be damaged because of the strong smell of the other Cargoes, loaded in the same space. For example Tea loaded with Cloves or Turmeric, etc. It may also happen if the Cargo space is not cleaned and cleared up of the strong smell of previous cargo.

DEMMURAGE The amount paid to the Shipowner by a Charterer for any delays in loading or discharging of Cargo within stipulated time as mentioned in the Charter Party is called Demmuraage..

DESPATCH MONEY A bonus paid by the Shipowner to the Charterer of his ship, if the loading or discharging of cargo is completed much earlier than the stipulated time as mentioned in the Charter Party is called Despatch money.

DUNNAGE These are the wooden planks or pices genrally used to avoid damages to the Cargo and also to prevent skidding of Packages while stored on-board the Ship. The Dunnage protects the Cargo as well as the various parts of the ship coming in direct touch with each other.

ECHOSOUNDER Echo Sounder is an equipment which runs electonically and indicates the depth of water below the ship's bottom.

FIRE SCAPE Fire Scape is an exit from an enclosed area on board the ship, which can be used for getting out of the area in case of Fire or other emergencies.

FREIGHT CHARGES The Charges levied on any Cargo for Carriage from one Port to another Port are Called the Freight Charges, these charges are charged on following:

Deadweight Cargo Freight: The Cargo which has the Freight Charges levied according to it's weight is called a Deadweight Cargo. Example - Steel.

Measurement Cargo Freight: The Cargo which has the Freight Charges levied according to it's measurement is called a Measurement Cargo. Example - cotton.

FRESH WATER TANK The Tanks on the ship into which the Fresh Water for drinking or for human consumption is kept are called Fresh Water Tanks.

FUNNEL The Funnel is found on the top Deck connected to the Ship's Engine Room for the exhaust of Smoke, Gases & Shute.

GALLEY The Kitchen of the ship is called Galley.

GANGWAY The ladder leading from the Jetty to the ship Enterance is called the Gangway. It is the main ladder of a ship.

GROSS WEIGHT Gross weight is the weight of the packing or casing + the contents inside it.

HATCH The place where the cargo is loaded or stowed is called Hatch.

HATCH COVERS The fixed or foldable type of covers of the Hatch on the deck are called Hatch Covers. These could be operated manually or mechanically. They make the Hatches water tight.

LAY DAYS The period agreed between Ship owner and the Charterer of the ship to load or discharge the cargo is called the Lay Days.

LIFE BOAT A boat available on board the ship, to accommodate all the Passengers and the Crew in case of any Emergency is called a Life Boat.

LOWER HOLD The lowest Compartment of a Hatch is called the Lower Hold. Generally it is on top of the Double Bottom Tanks.

LOAD DENSITY Maximum Weight which can be loaded safely in an Area of 1 Sq. M. without causing any Damages to that area is called the Load Density of the area. It is given in Ship's Stability Booklet and is expressed in m.t./Sq. M.

MATE'S RECEIPT This is a document signed by the Chief Officer or Cargo Officer or Mate of the Ship as the Receipt of Cargo which is loaded on board the ship. The Mate's Receipt contains the description of the Cargo which is to be loaded on board the Ship, and as a rule it should be made available to the Chief Officer before Cargo work starts. On the basis of this receipt they decide the stowage of the Cargo and also instruct the Duty Officer or the Ship Surveyor to check for the expected damages and the quality and quantity of the Cargo. These remarks are put by the Chief Officer while signing the Mate's Receipt as acceptance of Cargo on board the Ship. This is exchanged by the Shipper for the Bill of Lading and handed over to the Agent.

MAST The tall post on which the Derricks or the Navigation lights are fitted are called Mast.

NAVIGATION LIGHTS The Lights exhibited during the night for Navigation purpose are the lights required as per the Rules are called the Navigation Lights.

NAVIGATION CHARTS Navigation Charts are the Charts, which can be used for plotting the position of the Ship or can be used to know exact details of depths and locations.

NETT WEIGHT Weight of the contents packed inside a case or packing is called the Nett weight.

OPTIONAL CARGO It is the cargo loaded on a ship, having an option of off loading at any one of the port which is decided from the list of optional port by the Consignee. Is called Optional Cargo.

OVER CARRIED CARGO A cargo not discharged at the destination port and is carried by mistake or oversight to other port is called Over carried cargo.

PALLET A tray generally made out of wood, on which the various packages, cases, bags are stacked for easy quantity handling of cargo to avoid damages is called Pallet.

PILOT LADDER Pilot Ladder is a ladder which is of a Particular specification as per specification, and is kept tied to a safe landing place on board the ship, specially for Pilot's Boarding & leaving Ship.

RADAR Radar is an equipment which shows the objects above water on its screen giving the Bearing and the distance from the ship or between the objects.

REFRIGERATED SPACE Refrigerated Space is a space where, any cargo which needs cooling below the normal temperature can be maintained. The temperature of this space can be brought down as per the cargo carriage requirements.

SEPRATION This is used to separate cargo with different marks, port, shipper or consignee. It is also used for separating cargo to avoid contamination.

STERN The after most part of the ship is called Stern.

STEVEDORES The persons in port handling loading and discharging of cargo on ship are called Stevedores.

STOWAGE FACTOR It is the Space Occupied by one m.t. of Cargo and is expressed in m³ / m.t. Each cargo has a different Stowage Factor (SF). Lighter Cargo has a larger SF than that of a Cargo which is Heavier than it. For Example Stowage Factor of Cotton is much more than Steel.

SUPER CARGO A person incharge appointed by Shipowner or Charterer to supervise handling of cargo in a port is called Supercargo or Cargo Superintendent.

STOWAGE PLAN A plan of the ship showing various cargo compartment position along with the cargo loaded on the ship for various ports. This also shows the space occupied as well as the quantity and the weight of the stowed cargo in the space

TALLY CLERK The cargo when loaded or discharged has to be counted, so that the number of packages can be compared with

number mentioned in shipping bill etc.to find out Over landing or Short Landing of cargo. The person who does the work of counting is called Tally Clerk.

TIDE TABLES The tables stipulated by Hydrgraphic Surveyors, giving Time & Height of Low & High Tides of any Port on any Given day of the Year, are called Tide Tables.

TWEEN DECK The Compartment below Main Deck and above Lower Hold of the Hatch is called the Tween Deck.

ULLAGE The distance between the upper level of any liquid in a tank or in a can or in a barrel and the inside of the tank or the can or the barrel is called Ullage. On a ship mostly the tanks which carry liquid have Ullage Tables.

WHEEL HOUSE This is generally situated on the Bridge of the ship. The Steering Wheel is fitted in this space, and the ship is maneuvered from here. This space is called the Wheel House.

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