

UNIT -I

MARITIME LAW

1 . 0 INTRODUCTION

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3.1 Historical Background

3.3 Nature of Maritime Law

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1.0 INTRODUCTION

Shipping of all industries is the most international. The maritime law has to do with the status and governance of the seas and oceans which cover over 70% of the Earth. It provides the regulatory framework for the growing number of human activities in the marine environment. It affects the political, strategic, economic and other important interests of States. It is one of the oldest parts of the law of nations, having developed slowly through the practice of States over the centuries. The international law of the sea is one of the oldest branches of public international law. Thus, it must be examined from the perspective of the development of international law. Originally the law of the sea consisted of a body of rules of customary law. Later on, these rules were progressively codified.

2 COURSE OBJECTIVE

At the end of this unit, you should be able to: Account for the historical background of maritime law

Differentiate between maritime and admiralty law, though as we know it today, the two

terms are used interchangeably;

Nature of admiralty law

Sources of admiralty law and maritime law

Know the maritime jurisdiction of our courts

3.0 MAIN CONTENT

3.1 HISTORICAL BACKGROUND

Maritime law is an ancient legal system deriving from customs of the early Egyptians, Phoenicians and Greeks who carried an extensive commerce in the Mediterranean Sea. Special tribunals were set up in the Mediterranean port towns to judge disputes arising among seafarers. This activity led to the recording of

individual judgments and the codification of customary rules by which courts become bound.

3.3 NATURE OF ADMIRALTY LAW

The rules governing practice and procedures of admiralty courts constitute the admiralty law. The term maritime is also used comprehensively to include admiralty law, being its procedural or adjective part. Though maritime law is municipal law is municipal in the sense that its authority and enforceability to a national sovereign power and it can be altered, added to or abrogated by a sovereign law making agency, the bulk of its established norms and principles have originated from necessities of sea-borne trade and commerce involving transnational transactions. Maritime law has been developing customs and rules of its own, independently of peoples, sovereign and nation-states, and as such it has grown up as a system by itself to be adopted by all civilised maritime nations of the world. There always existed a common law of sea which did not owe its authority to any superior sovereign power enforcing obedience upon nations of the world, but it was recognised and treated as binding by courts in dealing with maritime cases. The modern instance of recognition by courts of existence of a common law of the sea is to be found in the case of *United Africa Co.Ltd. v. Owners of MV Tolten*. In that case the Court of Appeal in England refused to apply in an admiralty case the common law that English Courts shall not entertain action to recover damages for trespass to land situated abroad demonstrating the incongruity of the rule of common law with the essential nature of admiralty jurisdiction.

Maritime law -is a complete system of law, both public and private, substantive and procedural, national and international, with its own courts and jurisdiction, which goes back to Rhodian law of 800 B.C. and pre-dates both the civil and common laws. Its more modern origins were civilian in nature, as first seen in the *Rôles of Oléron* of circa 1190 A.D. Maritime law was subsequently greatly influenced and formed by the English Admiralty Court and then later by the common law itself. That maritime law is a complete legal system can be seen from its component parts. For centuries maritime law has had its own law of contract:

- contract of sale (of ships),
- contract of service (towage),
- contract of lease (chartering),
- contract of carriage (of goods by sea),
- contract of insurance (marine insurance being the precursor of insurance ashore),
- contract of agency (ship chandlers),
- contract of pledge (bottomry and respondentia),
- contract of hire (of masters and seamen),
- contract of compensation for sickness and personal injury (maintenance and cure) and
- contract of risk distribution (general average).

It is and has been a national and an international law (probably the first private international law). It also has had its own public law and public international law.

3.4 DIFFERENCE BETWEEN ADMIRALTY LAW AND MARITIME LAW

The terms admiralty and maritime law are sometimes used interchangeably, but admiralty originally referred to a specific court in England and the American colonies that had jurisdiction over torts and contracts on the high seas,

whereas substantive maritime law developed through the expansion of admiralty court jurisdiction to include all activities on the high seas and similar activities on Navigable waters because water commerce and navigation often involve foreign nations, much of the U.S. maritime law has evolved in concert with the maritime laws of other countries. The federal statutes that address maritime issues are often customized U.S. versions of the convention resolutions or treaties of international maritime law. The United Nations organizes and prepares these conventions and treaties through branches such as the International Maritime Organization and the International Labour Organization, which prepares conventions on the health, safety, and well-being of maritime workers. The substance of maritime law considers the dangerous conditions and unique conflicts involved in navigation and water commerce. Sailors are especially vulnerable to injury and sickness owing to a variety of conditions, such as drastic changes in climate, constant peril, hard labour, and loneliness.

ADMIRALTY LAW AS A PART OF THE LAW OF MERCHANT

Maritime and admiralty law, is from the historical standpoint, a part of what is known as law of merchant-universal rules and customs of commerce applicable to all merchant, native or foreign. The law merchant is divisible into two categories: maritime law (including admiralty law) and commercial law; and it is a body of law distinct from common law. The law merchant of primitive times comprised both maritime and commercial law as modern code. Both laws were administered in either the same or similar courts which were distinct from ordinary courts.

The similarity of the surroundings in which both maritime and commercial laws grew up and of the tribunals in which they were administered has tended to foster a close and intimate relationship between the two. In England, they gradually came to be administered in different courts, but even the connections seem to have been maintained. English judges have regarded them as two species of *jus gentium* rather than laws of a particular state. In course of time, a separation came about between the two in a formal sense, with the establishment of a court under Lord High Admiral of England claiming specialisation in maritime matters. Whereas the local mercantile courts, such as "piepowder courts" were reckoned as king's courts subject to the writ jurisdiction of High Court in London, the admiralty court under the Lord Admiral tended to steer clear of the course of the common law jurisdiction of the High Court. The spirit and jurisprudence of admiralty law has greater affinity with law merchant than with common law. Having its origin in law merchant, admiralty law pertains to the domain of private law it deals with rights, duties liabilities or obligations of individuals or bodies of individuals engaged in maritime commerce and merchant shipping.

ADMIRALTY LAW IN RELATION TO COMMON LAW AND CIVIL LAW

Most nations today follow one of two major legal traditions: common law or civil law. The common law tradition emerged in England during the Middle Ages and was applied within British colonies across continents. The civil law tradition developed in continental Europe at the same time and was applied in the colonies of European imperial powers such as Spain and Portugal. Civil law was also adopted in the nineteenth and twentieth centuries by countries formerly possessing distinctive legal traditions, such as Russia and Japan, that sought to reform their legal systems in order to gain economic and political power comparable to that of Western European nation-states.

Common Law

Civil Law, in contrast, is codified. Countries with civil law systems have comprehensive, continuously updated legal codes that specify all matters capable of being brought before a court, the applicable procedure, and the appropriate

punishment for each offense. Such codes distinguish between different categories of law: substantive law establishes which acts are subject to criminal or civil prosecution, procedural law establishes how to determine whether a particular action constitutes a criminal act, and penal law establishes the appropriate penalty. In a civil law system, the judge's role is to establish the facts of the case and to apply the provisions of the applicable code. Though the judge often brings the formal charges, investigates the matter, and decides on the case, he or she works within a framework established by a comprehensive, codified set of laws. The judge's decision is consequently less crucial in shaping civil law than the decisions of legislators and legal scholars who draft and interpret the codes.

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Relation of Admiralty Law

Admiralty and jurisdiction in India has been kept separate from the ordinary civil jurisdiction by the provisions of section 4(1)¹ and section 112(2)² of the Code of the Civil Procedure. Section 140³ of the Code of Civil Procedure.

In the case of *M.V. AlQuamarv. Tsavliris Salvage (International) Ltd.*,⁴ the Supreme Court of India, while holding that a judgement of the High Court in England in an Admiralty action in personam may be executed in India under Section 44A⁵ of the Code of the Civil Procedure, 1908, proceeded from the major premises in India that all the provisions of the Code, except those in Part VII, are applicable in the admiralty jurisdiction.

¹Section 4 provides, "Savings-(1) In the absence of any specific provision to the contrary, nothing in this Code shall be deemed to limit or otherwise affect any special or local law now in force or any special jurisdiction or power conferred, or any special form of procedure prescribed, by or under any other law for the time in force.

(2) In particular and without prejudice to the generality of the proposition contained in sub-section (1) nothing in this Code shall be deemed to limit or otherwise affect any remedy which a landholder or landlord may have under any law for the time being in force for the recovery of rent of agricultural land from the produce of such land".

² Section 112(2) provides that "(2) Nothing herein contained applies to any matter of criminal or admiralty or vice-admiralty jurisdiction or to appeals from orders and decrees of Prize Courts".

³Section 140, "Assessors in causes of salvage etc. — (1) In any admiralty or vice-admiralty cause of salvage, towage or collision, the Court, whether it be 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, in such manner as it may direct or as may be prescribed, two competent assessors; and such assessors shall attend and assist accordingly".

⁴(2000)6 SCC 278: AIR 2000 SC 2826

⁵Section 44A provides that, "Execution of decrees passed by Courts in reciprocating territory.-(1) Where a certified copy of a decree of any of

the superior courts of any reciprocating territory has been filed in a District Court, 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 decrees 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”.

3.5 SOURCES OF MARITIME LAW AND ADMIRALTY LAW

Primary Sources

1 . Written law

In early times Hammurabi's Babylonian laws of 1700 B.C., preserved in cuneiform characters, contained maritime regulations concerning care of goods confided for transport. No traces of similar maritime law subsist from the days of the great Phoenician voyages on the Mediterranean and outside that sea. From the eastern Mediterranean, however, the first known rule concerning general average is preserved, the so-called Rhodian law concerning jettison of cargo. This rule was in time incorporated into Roman law. The hegemony of Athens on the Mediterranean, which reached its peak during the 5th century B.C., left few and indirect traces in the history of maritime law. Some of Demosthenes' speeches, from a somewhat later period show indirectly that Greek maritime law had reached an appreciable development. The maritime legal institution known as bottomry was, for instance, not unknown in Greek law. Roman law, which influences European jurisprudence in so many fields, has not had the same importance in respect of maritime law. The Roman doctrine of the master's responsibility for damage suffered by goods confided to him—a damage for which he was liable only if the loss was not due to *damnum fatale* or *vis major*—has, however, not been without influence on the formation of present-day maritime law. An illustration of this fact is found in the exception clauses in present bills of lading, relieving shipowners from liability for damage due to an “Act of God.” During the Middle Ages the special characteristics of maritime law received stronger impetus, especially during the latter part of the period. Increased trade on the Mediterranean meant the gradual development of a specialized legal practice in the field of maritime commerce. The problem of conflict of laws—that is, which national law shall govern in a certain case—was not as important during the Middle Ages as it was later on, especially after the creation in the 17th century of various national maritime codes. There was evidently no objection during the Middle Ages to adopting and applying a practice that was gradually developing within the common field of navigation, although this practice was not “national” legislation in the modern sense. Certain legal rules or decisions existing on the French Atlantic coast were compiled by an unknown author during the 11th and 12th centuries. It is not known for certain why this compilation got the name of *R61es d'Oleron*, after the Island of Oleron, situated off the west coast of France near the Charente. Perhaps the explanation, as has been suggested, is simply that the authority of a manuscript was confirmed by some magistrate of the law court of that island. These *Rules d'Oleron*, according to one author, met with such approval that they became general rules for the settlement of maritime legal questions. They were accepted not only in France as a common maritime law, but also in one form or another in other European countries. While the development of maritime law in Western and later in Northern Europe was chiefly influenced by the *Rules d'Oleron* the traders of the Mediterranean soon obtained a collection of rules of their own, which became just as famous. The legal practices that had developed in the Italian republics of Genoa, Pisa, Venice and above all in Amalfi, with its *Tabula Analphitan*, from the middle of the 14th century, and in Spain and on the French Mediterranean Coast, were recorded during the latter part of the 14th century by a law clerk in Barcelona. In doing so he also considered the *R6les d'Olgron*. This recording in Catalan was given the name of *Consoato del Mar* and soon became the only maritime law in use in the South. The *Consolato del Mar* exercised a great influence on later maritime legislation and was directly applied by the law courts. It is well known that the inhabitants of Scandinavia were, even in early times, skilful sailors. The art of shipbuilding reached a high standard, as did the art of navigation. Looting and war were not the only objects of the Viking expeditions.

2) Custom

The foregoing outline of the history of maritime law indicates that the rules of maritime law were in the beginning largely built on custom. In spite of the fact that so much contemporary maritime law is codified, custom still plays an important part as a supplementary source of law. Frequent references to legally binding local custom, "custom of the port," are met, but a law court would hardly accept these claims without further proof. A custom must be an accepted local usage and practice in order to become binding in law. It should not represent only what, for instance, the local shippers have found to be in accordance with their interests and declare in writing as "custom of the port." First of all a custom must be so well known that everybody who is affected by it knows about it or ought to know about it. However, a law court would certainly be reluctant to alter a prevalent linguistic usage or increase a contract liability because of a claim of custom, if this custom should seem unreasonable or unfair in the eyes of the court.

3) Modern Conventions

International organizations, states and classification societies put enormous efforts into prevention of maritime risks. Their efforts are reflected in undertaking various measures and actions, inter alia, in the adoption of technical regulations on the construction and equipment of merchant ships. All of these regulations make a whole and represent the general regime of ship safety. Technical inventories are largely contained in international conventions, but also in regulations of classification societies.

The most important conventions adopted by the IMO relating to the safety of ships are:

- International Convention for the Safety of Life at Sea (SOLAS Convention), 1974 with amendments;
- International Convention on Load Lines, 1966, (LL Convention) and the 1988 Protocol and
- The International Convention for the Prevention of Pollution from Ships 1973/78 (MARPOL Convention).

In addition to these conventions, a significant one for safety of ships is also the International Convention on Tonnage Measurement of Ships, 1969, and as regards fishing vessels the 1977 Torremolinos , International Convention for the Safety of Fishing Vessels occupies a special place.

International Convention on Safety of Life at Sea, 1974, SOLAS Convention

The SOLAS convention with numerous changes and amendments is the most important and the most comprehensive international instrument on maritime safety. At the initiative of the British government, in 1913, an international conference attended by representatives of the thirteen states was held. Conference resulted in the adoption of the International Convention for the Safety of Life at Sea in 1914. The Convention has never entered into force due to the outbreak of the First World War. Once again, at the initiative of the British government in 1929, the second convention was convened and was attended by representatives from eighteen countries. At this conference the second International Convention for the Safety of Life at Sea was adopted. The Convention came into force in countries that have acceded to it and has undergone several changes and amendments. Therefore, in 1948 and 1960 a new convention under the same name was adopted, except that the 1960 Conventions was repeatedly amended,

As follows: in 1968, 1969, 1971 and in 1973. In 1974, the fifth SOLAS Convention was signed, which entered into force on 25 May 1980 and has been in force since then, naturally with numerous changes and amendments.

This Convention was amended with two protocols: Protocols of 1978 and 1988. The Protocol of 1978 was adopted at the International Conference on Tanker Safety and Pollution Prevention and became an integral

part of the Convention. It entered into force on 1 May 1981. Soon after, the International Conference on the Harmonized System of Survey and Certification was held. At this conference, on 11 November 1988, the second Protocol was adopted, which entered into force on 3 February 2000.

The main objective of the SOLAS Convention is to ensure minimum standards regarding construction of ships, their equipment and usage in accordance with their safety. According to the SOLAS Convention the flag States are responsible for ensuring that ships under their flag comply with the requirements of the Convention and a number of certificates are prescribed in the Convention as proof that this had been done. Especially significant are the control provisions, which stipulate that States Parties have the right to inspect ships of other Contracting states, if there several changes and amendments.

The SOLAS Convention contains twelve chapters followed by an Annex with certificates, as well as annexes of resolutions and recommendations. Chapters of the SOLAS Conventions are as follows: Chapter I – contains general provisions, i.e. provisions concerning the survey of the various types of ships and the issuing of documents (certificates) signifying that the ship meets the requirements of the Convention, as well as the provisions for the control of ships in ports of other Contracting Governments; Chapter II 1. Construction (subdivision and stability, machinery and electrical installations); 2. Construction (Fire protection, fire detection and fire extinction); Chapter III – Life-saving appliances and arrangements; Chapter IV – Radio-communications; Chapter V – Safety of navigation; Chapter VI – Carriage of Cargoes; Chapter VII – Carriage of dangerous goods; Chapter VIII – Nuclear ships; Chapter IX – Management for the Safe Operation of Ships (ISM Code); Chapter X – Safety measures for high-speed craft (HSC Code); Chapter XI – 1. Special measures to enhance maritime safety, 2. Special measures to enhance maritime security; Chapter XII – Additional safety measures for bulk carriers. The SOLAS Convention has still been changed and amended. IMO Regulations stipulate that the Convention may be amended also without convening international conferences. Namely, amendments to the SOLAS Convention are accepted in the process of tacit acceptance, which means that all changes enter into force on a specified date, unless an agreed number of States Parties object within the term of one year. In this way all States Parties of the SOLAS Convention are able to monitor all innovations and overall development in the field of safe and secure construction of ships.

International Convention on Load Lines, 1966 and the Protocol of 1988, LL Convention

One of the most effective ways to improve safety of ships is the limitation of draught on which the ship can sail. In fact, every merchant ship must have a load line assigned. Load line is a marking indicating the extent to which the weight of a load may safely submerge a ship. In ancient times, many shipwrecks were caused by the negligence and it could be said by the greed of shippers, who overloaded their ships with the aim to increase its exploitation disregarding their safety. Therefore, the need for adoption of certain regulations that would regulate these issues emerged. In the nineteenth century, in England, a member of the Parliament Samuel Plasmon, promoting his national campaign against the so-called coffin ships, fought for passing the Law in the Parliament. In fact, at that time, the practice of overloading of cargo ships was widespread. Unscrupulous owners of such boats would subsequently overinsure their boats, securing at the same time extra profits for themselves from maritime voyages, thus exposing the ship's crew to mortal danger. The adoption of such regulations continued in 1930 when the first International Convention on Load Lines, LL Convention was adopted. The aim of its adoption was improving safety of ships, preventing overloading cargo onboard, as well as preventing forcing the ship into danger. In 1966, at the international conference held in London, the regulations of 1930 LL Convention were reviewed and modified and a new LL Convention was adopted on 5 April 1966. The Convention entered into force on 21 July 1968. The Convention was amended six times, as follows: 1971, 1975, 1979, 1983, 1995 and in 2003. Amendments adopted in 1971, 1975, 1979 and in 1983 have never entered into force, since they were not accepted by the required number of states. Two-thirds of the state Parties was needed to accept the amendments to come into force. The Convention states ships it obliges, as well as determination and control of freeboard. The LL Convention includes three annexes:

Annex I – Regulation for determining load lines – contains regulations under which load lines are determined particularly determining the minimum freeboard depending on the length and type of ship. Annex I is divided into four chapters. Chapter I – contains general provisions; Chapter II – contains conditions of assignment of freeboard; Chapter III – contains provisions related to free-boards; Chapter IV – contains special requirements for ships assigned timber freeboards. Annex II – covers Zones areas and seasonal periods – contains geographical distribution, contains regulations as regards the load line to which ships may be loaded in some parts of the world in a certain season; Annex III – Certificate – contains certificates, including the International Load Line Certificate. In 1988 the Protocol to 1966 LL Convention was adopted and entered into force on 3 February 2000. The Protocol was adopted in order to harmonize the Convention’s survey and certification requirement with those contained in the SOLAS and MARPOL conventions. Protocol of 1988 revised certain regulations in the technical Annexes to the Load Line Convention. The procedure of tacit acceptance, changes and amendments to the Convention was also introduced. The LL Convention was further amended in 1995. However, those changes and amendments have not entered into force, but new amendments to the Convention were adopted in 2003 and entered into force on 1 January 2005. The amendments, which make up a comprehensive review of technical provisions to the LL Convention, do not affect the Convention of 1966, but it was stipulated that changes apply only to those ships flying under the flags of states bound by the Protocol of 1988. However, it should be borne in mind that the number of Parties to the Protocol of 1988 has risen so far and represents more than 90% of world tonnage, while states parties of the LL Convention cover more than 99% of world tonnage. The amendments to Annex B to the 1988 Load Lines Protocol include a number of important revisions, in particular to regulations concerning: strength and intact stability of ships; definitions; superstructure and bulkheads; doors; position of hatchways, doorways and ventilators; hatchway coamings; hatch covers; machinery space openings; miscellaneous openings in freeboard and super-structure decks; cargo ports and other similar openings; spurling pipes and cable lockers; side scuttles; windows and skylights; calculation.

Few other conventions

- International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (“Hague Rules”), and Protocol of Signature-(Brussels, 25 August 1924)
- Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading (“Visby Rules”)-(Brussels, 23 February 1968)
- United Nations Convention on the Carriage of Goods by Sea (“Hamburg Rules”)-(Hamburg, 31 March 1978)
- International Convention on the Arrest of Ships-(Geneva, March 12, 1999)
- International Convention Relating to the Arrest of Sea-Going Ships-Brussels, May 10, 1952
- United Nations Convention on International Multimodal Transport of Goods-(Geneva, 24 May 1980)
- Convention on the Contract for the International Carriage of Goods by Road (CMR) (Geneva 1956) at Lex Mercatoria
- United Nations Convention on Contracts for the International Sale of Goods (Vienna 1980)
- United Nations Convention on the Liability of Operators of Transport Terminals in International Trade (Vienna 1991) United Nations

(UNCTAD) Minimum Standards for Shipping Agents (1988) at Lex

Mercatoria Convention on a Code of Conduct for Liner

Conferences (Geneva 1974) International Convention on Safe

Containers (Geneva 1972) See also the 1993 Amendments.

Convention relating to Civil Liability in the Field of Maritime

Carriage of Nuclear Material (Brussels 1971) CMI Rules for

Electronic Bills of Lading at CMI CMI Uniform Rules for

Seawaybills at CMI Inter-Club New York Produce Exchange

Agreement (1996) International Commercial Terms 1990

(INCOTERMS) at Lex Mercatoria Convention Relating to the

Carriage of Passengers and their Luggage by Sea (Athens 1974)

COLLISSION Convention for the Unification of Certain Rules of

Law with Respect to Collisions between Vessels (Brussels 1910)

Convention on the International Regulations for Preventing

Collisions at Sea (COLREGS) (London 1972) Convention on

Facilitation of International Maritime Traffic (London 1965) LAW

OF SEA

- United Nations Convention on the Law of the Sea (UNCLOS) -The UN Convention on the Law of the Sea (UNCLOS) was open for signature in December, 1982, and came into force on November 16, 1994.

LIEN AND MORTGAGES International Convention on Maritime Liens and Mortgages (1993)

International Convention for the Unification of Certain Rules relating to Maritime Liens and

Mortgages (Brussels 1967)

United Nations Convention on Conditions for Registration of Ships (Geneva 1986)

Convention relating to Registration of Rights in respect of Vessels under Construction

(Brussels 1967) LIMITATION OF

LIABILITY International Convention relating to

the Limitation of Liability of Owners of Sea-Going

Ships (Brussels 1957)

Convention on Limitation of Liability for Maritime Claims (London 1976)

POLLUTION AND ENVIRONMENT

- International Convention on Civil Liability for Oil Pollution (Brussels 1969) See also the 1976 Protocol and 1992 London Protocol.
- International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (Brussels 1971) See also the 1976 London Protocol and the 1992 London Protocol.
- International Convention for the Prevention of Pollution from Ships (1973) (MARPOL) as amended by the Protocol of 1978 (London) at the Australian Treaties Library
- International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties (Brussels 1987)
- International Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (London Convention) (London 1972) .
- International Convention for the Prevention of Pollution of the Sea by Oil (OILPOL) (London 1954)
- International Convention on Oil Pollution Preparedness, Response and Co-Operation (London 1990)
- International Convention on Liability and Compensation for Damage in connection with the Carriage of Hazardous and Noxious Substances by Sea (London 1996)

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UNIT – II

MARITIME BOUNDARY AND DELIMITATION

- 2 . 1 Introduction
- 2 . 2 History of admiralty law in England, other parts of the world and in India

2.3 History of admiralty jurisdiction of High Courts of India

2.4 Admiralty courts

2.5 Immunity of Government ships.

2.6 Conclusion

2.1 INTRODUCTION

Maritime law is an ancient legal system deriving from customs of the early Egyptians, Phoenicians and Greeks who carried an extensive commerce in the Mediterranean Sea. Special tribunals were set up in the Mediterranean port towns to judge disputes arising among seafarers. This activity led to the recording of individual judgments and the codification of customary rules by which courts become bound.

The world of international shipping is peopled by individuals from many profession engaged in various and diverse activities. Almost every commodity is capable of being moved by sea, and immense quantities and variety of goods are daily purchased and sold on terms which include sea borne transportation. Maritime organizations are organizations established by national and international legislative instruments that enable

them to provide policies, formulated into laws, rules, regulations, guidelines, standards, codes that are binding or obligatory on member nations internationally and domestically.

2.2 HISTORY OF ADMIRALTY LAW IN ENGLAND AND OTHER PARTS OF WORLD Eleanor of

Aquitaine, ordered records to be made of judgments of Maritime Court of Oleron to serve as law amongst mariners of Western Sea. Earliest collection of "Laws of Oleron," is described in Black Book of the Admiralty. In England, justiciaries of the King were instructed to declare and uphold laws and statutes, made to maintain peace and justice amongst people of every nation passing through 'Sea of England'. An English translation made by a Registrar of the court, was introduced into 'Black Book of the Admiralty'. This manuscript came into the College of Advocates in 1685 but was lost. Re discovered much later, it was placed in archives of the Admiralty Court. Sea Laws of Oleron were translated into Castilian by order of King Alphonso VI. Its 15th century handwritten Gascon text is preserved in archives of Livorno.

Parent stock of Visby sea laws dated 1240 was apparently a code preserved in chancery of Lubeck, in the Old Saxon tongue. A manuscript of 1533 has been found in Guildhall of Lubeck. It contains a low German version of this collection, "the water law or sea law, which is the oldest and highest law of Visby." Word "belevinge" (judgment) appears in front of each article. Introductory clause to its thirty-seventh article says "This is the ordinance which community of skippers and merchants have resolved upon, amongst themselves as ship law, which the men of Zeeland, Holland, Flanders hold, with the law of Visby, which is the oldest ship law." After the seventy-second article is written, "Here ends the Gotland sea law, which community of merchants and mariners have ordained and made at Visby, that each may regulate himself by it". Thus it appears that the Visby sea laws, like the Oleron sea laws, have gathered bulk with increasing years. Earliest historical records of Rhodian Law include Law and customs of the Hanseatic League. Exhaustive criticism of Rhodian sea law dated 1909 is valuable material not only on the Rhodian sea law, but on various other sea laws in force in the Mediterranean.

Admiralty Courts originated in England in Saxon times. Admiralty law was introduced into England by Eleanor of Aquitaine while she was acting as regent for her son, King Richard the Lionhearted. She had earlier published admiralty law in Oleron Island in 1160. Article VI of 'Rolls of Oleron' contains the doctrine of maintenance and cure and requires a ship owner to provide free medical care to an injured seaman serving the ship. Obligation of "maintenance" also involves providing a seaman basic living expenses while convalescing. Authority of kings to administer justice in respect of piracy, or other offences on the high seas was well established in time of Edward III in mid-14th century. Islamic law also influenced international Maritime Law including derivations from civil Law but is not rooted in it.

Term Admiralty law is peculiar to UK and some countries of former British Empire where separate courts may exist to administer laws governing maritime activities. Admiralty courts in UK are civil law courts largely based on Law of Justinian. They handle all admiralty cases in England and try to steer away from British common law. This includes relations between entities which operate ships across oceans for transportation, commerce and trade. Though each legal jurisdiction is governed by its own legislation on maritime matters, some features exist in all countries pertaining to law governing sea and ships. Significant volume of International Maritime Law has been developed recently through many conventions and multilateral treaties. It covers Maritime and commercial activities but differs from country to country. Today, Admiralty law is a body of both domestic law governing maritime activities, and private international law governing relationships between private entities which operate ships on the oceans. It deals with transportation of passengers and goods by sea, shipping, maritime commerce, navigation and seafarers and covers commercial activities even if land based but maritime in character.

Admiralty law is characterized by inclusion of international law but is distinct from 'Law of the Sea', which is a body of public international law dealing with navigational rights, mineral rights, jurisdiction

over coastal waters and laws governing international relations. Each jurisdiction usually has its own enacted legislation governing maritime matters.

Islamic law departed from Roman and Byzantine maritime laws to make major contributions to admiralty law such as Muslim sailors being paid a fixed wage “in advance” with an understanding that they would owe money in the event of desertion or malfeasance, in keeping with Islamic conventions in which contracts should specify “a known fee for a known duration.” In contrast, Roman and Byzantine sailors were “stakeholders in a maritime venture, in as much as captain and crew, with few exceptions, were paid proportional divisions of a sea venture’s profit, with shares allotted by rank, only after a voyage’s successful conclusion.” Muslim jurists also distinguished between “coastal navigation, or cabotage”, and voyages on the “high seas”, and made shippers “liable for freight in most cases except for seizure of both the ship and her cargo”. Islamic law “departed from Justinian’s Digest and the Nomos Rhodion Nautikos in condemning slave jettison.” Islamic Qirad was a precursor to the European commenda, limited partnership. “Islamic influence on the development of an international law of the sea” can thus be discerned alongside that of the Roman influence.

High Court of Admiralty in UK, was an instrument of the Lord High Admiral to hear disputes and offences by a judge deputed by him. In due course it also started hearing civil disputes pertaining to sea thus usurping jurisdiction of Common Law Courts. In the 13th and 14th centuries, Lawyers of Common Law Courts objected to this encroachment. Admiralty Jurisdiction Act, 1389 catered to this objection and by 1391, pleas and quarrels, whether on land or sea became triable by Common Law Courts. During the time of William IV, wrecks at sea, collision, salvage, possession of ships, bottomry and seamen’s wages came under Admiralty Court. Most common law countries follow English statutes and case law. Other countries such as Panama, have also established their own maritime courts which regularly decide international cases. Malayasia has recently established its own Admiralty court.

After U.S. Constitution was adopted in 1789, admiralty law was gradually introduced into US Law through admiralty cases. American lawyers such as Alexander Hamilton in New York and John Adams in Massachusetts who were prominent in the American Revolution were practicing admiralty and maritime lawyers. Dr. Lushington became Judge of the High Court of Admiralty in 1838. Admiralty Courts act was passed in 1840. Its jurisdiction included cognizance of mortgage of ships, questions of legal title, division of proceeds of sale on suits of possession, claims for salvage services, provision of necessaries to a ship as well as claims for towage.

From 1840 to 1861, Laws were enacted for right of arrest of ships for claims of necessaries supplied and towage services rendered to foreign ships. Justice Oliver Wendell Holmes was an admiralty lawyer before ascending to the Supreme Court of USA. In Rem jurisdiction was expanded in 1873-75 by Supreme Court of Judicature Act, consolidated by a 1925 Act, replaced by Administration of Justice Act, 1956 and again by Supreme Court Act of 1981.

Article III, Section 2 of US Constitution, grants original jurisdiction to U.S. federal courts over admiralty and maritime matters. But this jurisdiction is not exclusive. Maritime cases can also be heard in state or federal courts. Some cases can only be heard in federal courts such as Limitation of Ship owner’s Liability, Arrests in Rem etc., because they basically require the court to exercise jurisdiction over maritime property.

2.3 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 ; 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.

2.4 IMMUNITY OF GOVERNMENT SHIPS

A government merchant ship may be defined as a merchant ship owned or operated by a state. Immunity of a ship here means the exemption of a government ship from the jurisdiction of any state other than the flag state. This term also connotes the immunity of the flag state from the jurisdiction of the tribunals of foreign states in respect of proceedings connected with such a ship. Immunity of persons means the exemption of persons in the service of a government ship, or other persons on board her, from the jurisdiction of any state other than the flag state.

The doctrine of sovereign immunity (also known as “jurisdictional immunity”) is an “amalgam of two quite different concepts, one applicable to suits in the sovereign’s own courts and the other suits in the courts of another sovereign”. In simplest terms, the doctrine provides an exemption from the exercise of court jurisdiction and enforcement against a sovereign entity. This immunity also extends to the property belonging to the sovereign.¹ A government ship is a special type of property that is afforded immunity under treaty, customary international law, and domestic statute.

Sovereign immunity is based upon principles that each nation possesses equal exclusive, absolute power, rights, and independence that cannot be restrained or restricted by any individual or another nation in the absence of an express waiver of immunity or voluntary submission. The exercise of authority by one nation-State over another nation-State implies hostility or superiority that might potentially impair foreign relations. While the origins of sovereign immunity are debatable, the modern doctrine represents the bedrock of international relations and is believed to trace back to 1648 with the signing of the Treaty of Westphalia thereby marking the end of the Thirty Years War between the Roman Empire, France, and their respective allies.² Sovereignty and the State Defined.

The Restatement (Third) of the Foreign Relations of the Law of the United States defines “sovereignty” as a State’s lawful control over a territory generally to the exclusion of other States. The term “State” is further defined as any “entity that has a defined territory and a permanent population, under the control of its own government, and that [has the capacity to conduct international foreign relations].

The Scope of Immunity Extended to a State Owned or Operated Ship

In admiralty, a ship is treated “as a juristic person whose acts and omissions, although brought by her personnel, are personal acts of the ship for which, as a juristic person, she is legally responsible³ (providing a detailed explanation of ship liability). This admiralty law fiction of convenience allows in rem action to be brought against the ship as the offending thing, under which the ship is arrested, seized, impleaded, and judgment is entered accordingly. A successful in rem action ultimately results in the creation of a lien against the ship. Unless a satisfactory bond is furnished, the ship is then sold -free of all claims. This admiralty practice is followed except where a State owned or operated ship is involved.

Under both international law and the domestic laws of the United States, there is no distinction between a lawsuit against a sovereign State and a lawsuit against any property owned or operated by the sovereign State⁴ (holding that a prize vessel captured by a warship of the United States which subsequently collided with a privately-owned vessel was exempt under the doctrine of sovereign immunity from a lawsuit seeking damages); The “Ara Libertad” Case (Argentina v. Ghana), Case No. 20, International Tribunal for the Law of the Sea, Order of 15 December 2012) (holding that the doctrine of sovereign immunity requires the Republic of Ghana to release an Argentinean navy frigate from detention that was being held by the High Court of Ghana to enforce a private judgment). Instead, the personality of the ship is merged into that of the sovereign.⁵

¹(Nevada v. Hall, 440 U.S. 410, 414 (1970))

²(Winston P. Nagan and Joshua L. Root, The Emerging Restrictions on Sovereign Immunity: Preemptory Norms of International Law, the U.N. Charter, and the Application of Modern Communications Theory, 38 N.C.

J. Int'l L. & Comm. Reg. 375, 405-406 (2013) [hereinafter, Nagan and Root, Restrictions on Sovereign Immunity).

³Canadian Aviator, Ltd. v. United States, 324 U.S. 215, 224 (1945); see also Oliver W. Holmes, Jr., The Common Law, at 26-38 (1881) (republished by The Project Gutenberg EBook Dec. 2000)

⁴The Siren, 74 U.S. (7 Wall.) 152, 154 (1868)

⁵(The Western Maid, 257 U.S. 419, 433 (1922))

The outcome of this merger is that a ship owned or operated by a sovereign State enjoys complete immunity from in rem action, and exemption from arrest, search, seizure, detention, attachment, or other legal process. In practical terms, the immunity protects the ship from being withdrawn from public service. In an analogous case involving a public vessel owned by a municipal corporation, an early Federal court explained, the exemption from legal process “arises not out of a want of power to sue the [sovereign entity], but out of a want of liability on the part of the ship (holding that “public property, devoted to public uses, and necessary for carrying on the operations of government, is not subject to seizure or sale on execution” to enforce lien taken against a steam-tug owned by a municipal corporation and devoted to public use).

The Evolution of Sovereign Immunity within the United States

Historically, sovereign States and their ships were afforded absolute immunity from the exercise of court jurisdiction and enforcement. This immunity was based on public policy, and applied even though an enforceable claim may have existed had the ship been privately owned. Chief Justice John Marshall’s 1812 United States Supreme Court opinion, *The Schooner Exchange v. McFaddon*, is recognized as the leading decision in American jurisprudence to articulate the rationale for providing sovereign immunity to other nation-States. In that case, the Supreme Court declined to exercise jurisdiction over a vessel that had been forcibly seized from the true owners by agents of the Emperor of France, Napoleon Bonaparte. The ship was then converted into a public armed warship.

Primarily relying on Emerich de Vattel’s *The Law of Nations*, Chief Justice Marshall held that a public

armed warship of a friendly foreign sovereign is immune from jurisdiction and process of the courts of the United States, and the sovereign power of the United States “is alone competent to avenge the wrongs committed by another sovereign”. In the Court’s view, the case engendered policy questions most appropriate for diplomatic channels instead of legal discussion.

Although the holding in *The Schooner Exchange* is quite narrow, the decision has become widely recognized as the source of foreign sovereign immunity jurisprudence in the United States⁶ and is relied upon by international tribunals adjudicating State-related disputes (see e.g., *The “Ara Libertad” Case (Argentina v. Ghana)*, Case No. 20, International Tribunal for the Law of the Sea, Order of 15 December 2012, Separate Opinions by Judge Chandrasekhara Rao, and Judges R. Wolfrum and J.-P. Cot (holding *The Schooner Exchange* is one of the earliest cases that captures respected principles of customary international law). However, as sovereign entities became increasingly engaged in trade and commercial activities in the late 19th and early 20th centuries, the theory of absolute immunity came severely under attack and eventually gave way to adoption of the restrictive theory of immunity. Under this later theory, a State enjoys immunity only with respect to sovereign or public acts (*acta jure imperii*), but not with regard to private or commercial acts (*acta jure gestionis*). Pursuant to this approach, the decision whether to extend immunity to a State is made by courts on a case-by-case basis. Commercial operation of a ship owned or operated by a State became a prime example of a private act that was not entitled to immunity under the restrictive theory of immunity. As many legal scholars have observed, the emergence of the restrictive theory of immunity was based on consideration of “other important international and national interests, such as fairness”.⁷

Today, the restrictive immunity approach is adopted by the United Nations, international treaties and conventions, and domestic legislation adopted by many sovereign States (including the United States)⁸,

International Court of Justice, Judgment of 3 February 2012.

⁶ *Republic Austria v. Altmann*, 541 U.S. 677, 688 (2004). ⁷ *Nagan and Root, Restrictions on Sovereign Immunity*, 38 N.C. J. Int’l L. & Comm. Reg., at 417 ⁸ *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening*

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Originally, the classical doctrine of absolute immunity reigned supreme and was applied by all states. Gradually, the practice of some states evolved away from this strict attitude which came to be criticized by both bench and bar. It was suggested that the conception of absolute immunity of states with all its implications was being outmoded by the developing activities of the states themselves. For a long time, however, no practical effect was given in the United States to this enlightened criticism. The old doctrine was upheld by the Supreme Court in all its rigidity in 1926 in the famous case of *Berizzi Bros. Co. v. S. S. Pesaro*.⁴ As of the time of writing’ this decision has never been specifically overruled. Nevertheless, the fundamental assumptions on which the judgment is based have become increasingly dubious, and the courts have felt able to maintain the doctrine only subject to a number of technical qualifications.

THE DOCTRINE OF ABSOLUTE IMMUNITY

The doctrine of absolute immunity, in its purest form stems from the maxim *par in parem non habet imperium*. It means simply that no state shall lay claim to exercise any jurisdiction whatsoever over any other state, including all the various persons, bodies, agents, corporations and instrumentalities which may purport to represent it on the international plane. It would be an overstatement, and incorrect in law, to suggest that the doctrine of absolute immunity could claim to form part of customary international law, and thus be an immutable principle which states would be obliged to follow. The very fact that many states have departed from the doctrine indicates an absence of overall consent on the international level. The doctrine is based upon international comity. Thus, if a state whose representative had been denied the benefit of the immunity in the courts of another state, attempted to bring suit before the International Court of Justice based upon such denial, as a violation of a rule of customary international

law, there is no doubt that the claim would be rejected. In the days when the relations between states were confined to political and diplomatic activities, there was good reason for the wholesale application of the doctrine. But since the time when states acting in the name of agents began to engage in various forms of commercial activity, albeit well concealed beneath the trappings of sovereignty, the basis of the doctrine that nothing must be allowed to be done to impair (or seem to impair) the three virtues of statehood, dignity, equality, and independence, has come to be questioned more closely. As states encroached into the spheres of national life hitherto reserved for the individual, or the individual in association with others, so did the doubts increase as to the practical validity of the doctrine. This century has witnessed the entry of the sovereign state into international trade and commerce in a manner which Chief Justice Marshall would hardly have believed possible. Sometimes this has happened by means of government-owned shipping, sometimes by bulk buying and selling of raw materials and manufactured goods, sometimes by other means. Generally speaking, all governments, to a varying degree, have taken a greater control over the economic life of their respective countries than was scarcely conceived of fifty years ago. The public corporations which have been formed as a result of the nationalization of industries have had effects not only on the domestic life of the states concerned, but also on their international relations. These relations have become increasingly diverse and today extend into every sphere of economic activity carried on over national boundaries. The representation of states abroad, by agencies, corporations and the like, has inevitably raised the question of the legal status of such bodies. It has been persuasively argued for well over a quarter of a century that no valid reason remains for continuing to grant full jurisdictional immunity to foreign states, when, acting or operating through agencies or instrumentalities created for this purpose, they engage in commercial or so-called non-sovereign activities. This argument has been applied to all branches of state activity which appear to transcend the boundary of traditionally sovereign functions. With the enormous expansion of governmental activities in almost all states of the world, it is no longer logical, reasonable or justifiable to place the private person or corporation in a position of disadvantage before national courts in suits concerning matters not related to the sovereignty of states. It is entirely inequitable that a citizen aggrieved by a foreign state, by virtue of transactions involving a government-owned corporation or ship, should have no remedy in the courts of his own country if the foreign state concerned decides to plead immunity from jurisdiction.

THE DOCTRINE OF RESTRICTIVE IMMUNITY

The fundamental basis of this doctrine, theory, or practice (whichever appellation be preferred), is the assumption that a legally significant distinction can properly be made between the sovereign (*jure imperii*), and non-sovereign (*jure gestionis*) activities of a state, or as they are allegedly distinguished in French, between “*actes de puissance publique*,” and “*actes de gestion private*.” Thus, the workability of the doctrine necessarily depends on the soundness of this assumption, for its essence is contained in the fact that full or absolute immunity should be granted to a state-or to an agency thereof-when what is involved in the case is the exercise of a sovereign function of the state; but that immunity should be denied whenever a non-sovereign function is concerned. It is generally agreed that another way of expressing this latter form of activity is to use the phrase “commercial activity”.

RECENT DEVELOPMENTS

A. Conventions

Convention was signed at Brussels on April 10, 1926, for the unification of certain rules relating to the immunity of state-owned vessels. This Convention (hereafter referred to as the Brussels Convention of 1926) and an Additional Protocol of May 24, 1934,¹ lay down, inter alia, the principle that all government vessels, with the exception of military vessels and other vessels used exclusively on government noncommercial service, shall be subject in respect of claims arising out of their operation to the same rules of liabilities, obligations and enforcement measures as are applicable to private vessels. By November 1938, the Convention and the Additional Protocol had been ratified by thirteen states. A Conference convened by the General

Assembly of the United Nations 3 to examine the law of the sea was held at Geneva from February 24 to April 27, 1958. This Conference (hereafter called the Geneva Conference of 1958) was attended by representatives of eighty-six members of the United Nations Organization and “observers” sent by sixteen international agencies. Of the four Conventions prepared by this Conference, the Convention on the Territorial Sea and the Contiguous Zone 4 and the Convention on the High Seas 5 (hereafter referred to as the first and the second Geneva Conventions of 1958 respectively) deal with, inter alia, the question of the legal status of government ships. These two Conventions of 1958 have laid down the principle that government ships operated for commercial purposes shall on the high seas or in foreign waters enjoy exactly the same legal status as that enjoyed by private merchant ships. The first Convention was signed by forty-four states and the second Convention by forty-nine states. By July 1961,² the two Conventions had been ratified by only nine states. Both the Brussels Convention of 1926 and the Geneva Conventions of 1958 seem to have divided government ships into three categories; namely, (a) warships (b) non-military ships used only on government non-commercial service; (c) nonmilitary ships operated for commercial purposes. It is in respect of the third category of government ships that the Conventions have rejected the rule of immunity from jurisdiction or execution. In thus classifying non-military ships into two categories, the framers of the Conventions appear to have confirmed, unwittingly though, the already existing divergence in the practice of various municipal courts on the interpretation of the term “government commercial service”.

POSITION IN INDIA

The Government of India does not seem to support the principle of absolute immunity of government ships. The representative of India at the Geneva Conference of 1958 observed that prior to independence the legal status of ships which belonged to the East India Company or the ruling princes was controversial. However, he said that the problem had been solved on the basis of the activities of a ship, irrespective of her ownership.

It is significant that at the first session of the Asian Legal Consultative Committee, held in New Delhi in 1957, India’s representative advocated the abolition of the immunity of foreign states in respect of their commercial activities. The provisions of the Merchant Shipping Act, 1958, of India and the Indian Ports Act, 1908, seem to suggest that the principle of absolute immunity of government ships is not acceptable to India.

2.6 CONCLUSION

From the historical background, we can see that maritime business is one of the oldest in the world. Historically, it constitutes a major source of political power and territorial influence, because in times past, strength of a state was considered in its influence and control over its waters. Maritime is also all embracing as it covers matters relating to navigable waters, such as the sea, ocean or the navigation of commerce connected therewith.

The divergence and inconsistency seen in the judicial practice of several states in drawing a distinction between the commercial and non-commercial activities of foreign governments and their instrumentalities seem to suggest that the same difficulty is likely to arise if jurisdictional immunities of government ships were to be limited on the lines recommended by the Brussels Convention of 1926 and the Geneva Conventions of 1958. The difficulty of distinguishing government ships engaged in commercial activities from other government ships (apart from military ships) seems to lend support and force to the argument that the only logical alternative to absolute immunity is the complete abolition of the immunity of all non-military ships with certain exceptions and safeguards.

There is no rule of international law which compels the extension of the immunities of military ships to government merchant ships, and consequently the legal status of the latter is deemed to be the same as that of private merchant ships.

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UNIT -III

ADMIRALTY JURISDICTION AND THE MODE OF EXCERCISE

3. 1.0 INTRODUCTION

3. 2.0 MAIN CONTENT

3. 2.1 Admiralty and maritime jurisdiction (scope and extent)

3. 2.2 Enforcement of maritime claims by actions in rem and personam

3. 2.3 Jurisdiction in matters of collision

3. 2.4 Changing concept of maritime frontiers.

3. 2.5 Sea as a common heritage of mankind

3. 2.6 Conservation of marine living resources

3. 2.7 IMO and its role

3. 2.8 Piracy and Hot pursuits

3. 3.9 CONCLUSION

INTRODUCTION

India is a leading maritime nation and maritime transportation caters to about ninety-five percent of its merchandise trade volume. However, under the present statutory framework, the admiralty jurisdiction of Indian courts flow from laws enacted in the British era. Admiralty jurisdiction relates to powers of the High Courts in respect of claims associated with transport by sea and navigable waterways. The repealing of five admiralty statutes is in line with the Government's commitment to do away with archaic laws which are hindering efficient governance.

3.2.0 MAIN CONTENT

3.2.1 ADMIRALTY AND MARITIME JURISDICTION (SCOPE AND EXTENT)

The Indian Courts possessing Admiralty jurisdiction have jurisdiction over the following claims as set out herein under and to hear and determine any questions with regard thereto and or the claims as defined under Article 1 of the International Convention for the Unification of Certain Rules relating to the Arrest of Seagoing Ships, Brussels, May 10, 1952 'or' under Article 1 of the International Convention on the Arrest of Ships, Geneva, March 12, 1999.

(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 necessaries supplied to any ship

“(b) Any claim for necessaries 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. 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 ownership 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 Court 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”.

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”.

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 situated; 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

The Admiralty (Jurisdiction and Settlement of Maritime Claims) Bill 2016

The Admiralty (Jurisdiction and Settlement of Maritime Claims) Bill, 2016 consolidates the existing British era laws on civil matters of admiralty jurisdiction of courts, admiralty proceedings on maritime claims, arrest of vessels and related issues in line with modern trends in the maritime sector and in uniformity with prevalent international practices. The Bill also proposes to confer admiralty jurisdiction on High Courts of coastal States. This jurisdiction extends up to Indian territorial waters. The Central Government is empowered to further extend, by a notification, upto exclusive economic zone or any other maritime zone of India or islands constituting part of the territory of India. The Bill covers every vessel irrespective of place of residence or domicile of owner. However, warships and naval auxiliary or other vessels used for non-commercial purposes are beyond its purview. Though inland vessels and vessels under construction are excluded from its application, the Central Government is empowered to make it applicable to these vessels also, by a notification, if necessary. The Bill provides for adjudication of identified maritime claims and, to ensure security against maritime claims, arrest of vessels in certain circumstances. The Bill also provides for inter se priority on maritime lien. The liability in respect of selected maritime claims on a vessel passes on to its new owners by way of maritime liens subject to a stipulated time limit. The Civil Procedure Code, 1908 shall be applicable in respect of aspects on which provisions are not laid down in the Bill. The Bill also deals with admiralty jurisdiction in personam and the order of priority of maritime claims

On September 21, 2016, the Union Cabinet approved the enactment of the Admiralty (Jurisdiction and Settlement of Maritime Claims) Bill 2016. The Bill repeals five obsolete British statutes on admiralty jurisdiction in civil matters, namely, (a) Admiralty Court Act, 1840 (b) Admiralty Court Act, 1861, (c) Colonial Courts of Admiralty Act, 1890, (d) Colonial Courts of Admiralty (India) Act, 1891, and (e) the provisions of the Letters Patent, 1865, applicable to the admiralty jurisdiction of the Bombay, Calcutta and Madras High Courts. The process of drafting a suitable legislation to repeal the existing colonial statute was begun by the Director General of Shipping in 1986, and its urgent need was emphasised by the Supreme Court in its landmark judgement in the case of M.V. Elizabeth & others Vs Harwan Investment Trading Pvt. Ltd. JT in 1992. The maritime industry has been highlighting the need to update India’s Admiralty Laws so as to be responsive to the needs of the Industry and ensure that maritime disputes are disposed off expeditiously and effectively.

Salient Features of Admirability Bill, 2016

This legislative proposal will fulfil a long-standing demand of the maritime legal fraternity. The salient features are as follows:

- The Bill confers admiralty jurisdiction on High Courts located in coastal states of India and this jurisdiction extends upto territorial waters.
- The jurisdiction is extendable, by a Central Government notification, upto exclusive economic zone or any other maritime zone of India or islands constituting part of the territory of India.
- It applies to every vessel irrespective of place of residence or domicile of owner.
- Inland vessels and vessels under construction are excluded from its application but the Central Government is empowered to make it applicable to these vessels also by a notification if necessary.
- It does not apply to warships and naval auxiliary and vessels used for non-commercial purposes.
- The jurisdiction is for adjudicating on a set of maritime claims listed in the Bill.
- In order to ensure security against a maritime claim a vessel can be arrested in certain circumstances.
- The liability in respect of selected maritime claims on a vessel passes on to its new owners by way of maritime liens subject to a stipulated time limit.

In respect of aspects on which provisions are not laid down in the Bill, the Civil Procedure Code, 1908 is applicable.

3.2.2 Enforcement of maritime claims by actions in rem and in personam

For the claims under subparagraphs (a) (b) (c) (f) (k) (l) and (m) 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.

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.

¹ Read *Epoch Enterrepots –v-m.v. Wong Fu* 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*, the Hon'ble Supreme 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.

Thus, 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.

3.2.3 JURISDICTION IN MATTERS OF COLLISION

One of the concerns of international maritime community has been the setting of regulations to prevent collisions at sea and sailing regulations aimed at diminishing collision risks. To this end, a series of conventions were signed in this field: The International Convention for the Unification of Certain Rules of Law With Respect to Collision Between Vessels, Brussels, 23 September 1910, which entered into force on 1 March 1913, The International Convention on Certain Rules Concerning Civil Jurisdiction in Matters of Collision, 1952, which entered into force on 14 September 1955, The International Convention for the Unification of Certain Rules Relating to Penal Jurisdiction in Matters of Collision or Other Incidents of Navigation, 1952, Brussels, 10 May 1952 which entered into force on 20 November 1955 and Convention on the International Regulations for Preventing Collision at Sea (COLREG), London, 1972, which entered into force on 15 July 1977.

Also, two convention drafts were drawn up: The Draft International Convention for the Unification of Certain Rules Concerning Civil Jurisdiction, Choice of Law, and Recognition and Enforcement of Judgments in Matters of

Collision, Rio de Janeiro, September 1977 and The Draft Rules for the Assessment of damages in Maritime Collisions (“Lisbon Rules”), 29 February 1988. The Lisbon Rules 1987, are a set of rules on the assessment of damages in ship collision prepared by the Comité Maritime International and adopted at Lisbon in 1987. The Rules do not have the force of law, but are intended rather as guidelines for judges, arbitrators, insurers, average adjusters and other concerned with evaluating collision damages. They may also be chosen by the parties to a collision dispute, after it arises, to govern damage assessment.

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The International Convention for the Unification of Certain Rules of Law With Respect to Collision Between Vessels, Brussels, 23 September 1910

According to the Brussels Convention for the Unification of Certain Rules of Law with respect to Collisions, (Brussels, 1910), without consideration for the waters where a collision occurred, in case of collision between sea-going vessels or between sea-going vessels and vessels of inland navigation, the following provisions are applied: if the collision is accidental, if it is caused by force majeure, or if the cause of the collision is left in doubt, the damages are borne by those who have suffered them (Article 2); – if the collision is caused by the fault of one of the vessels, liability to make good the damages attaches to the one which has committed the fault (Article 3) -if two or more vessels are in fault the liability of each vessel is in proportion to the degree of the faults respectively committed. Provided that if, having regard to the circumstances, it is not possible to establish the degree of the respective faults, or if it appears that the faults are equal, the liability is apportioned equally. The right of action for the recovery of damages resulting from a collision is not conditional upon the entering of a protest or the fulfilment of any other special formality. All legal presumptions of fault in regard to liability for collision are abolished (Article 6).

Actions for the recovery of damages are barred after an interval of two years from the date of the casualty. The period within which an action must be instituted for enforcing the right to obtain contribution permitted by paragraph 3 of Article 4, is one year from the date of payment. The grounds upon which the said periods of limitation may be suspended or interrupted are determined by the law of the court where the case is tried (Article 7).

The main consequence of the 1910 Convention was the replacement of the “divided damages” principle (equal share of responsibility, irrespective of the extent of the contribution of each party to the collision) by the principle of “proportional fault”. The “divided damages” principle shall not be mistaken with the principle of “contributory negligence” based on which a plaintiff was deprived by his possibility to recover his damage from the defendant in tort if the plaintiff’s own fault or negligence led to the loss or the damage even to the smallest extent.

Another significant consequence was the application of the *lex fori* principle in terms of civil liability in case of vessels belonging to the contracting parties similar to the other cases stipulated by national laws.

Great Britain adopted the 1910 Convention, but transposed its provisions onto a domestic act, i.e. the 1911 Maritime Convention Act stipulating that the proportional fault principle applies to damages caused to the vessel and its cargo and in respect of personal injuries or death, the damages may be recovered from the party in fault. The 1995 Merchant Shipping Act which partly abrogated the 1911 Maritime Convention Act currently stipulates in the English legislation the proportional fault principle in case of collisions.

The United States did not adopt the 1910 Convention, but the proportional fault principle was introduced by the Supreme Court of the United States as a result of the process U.S.v.Reliable Transfer Co.421 U.S. 397, 1975, AMC 541(1975). The proportional fault principle only applies in case of damage to the vessels whereas damage to the cargo can be entirely recovered from the vessel in fault for the collision.

In practice, there is a differentiated establishing with respect to applying the provisions regarding civil competence in case of collision as provided by the 1952 International Convention or by Law 105/1992. The International Convention on Certain Rules Concerning Civil Jurisdiction in Matters of Collision shall be applied in the case of collision between two vessels under the flag of the contracting states, on the grounds of the specialia generalibus derogant principle. In case of vessels involved in the collision, which are not under the flag of any contracting parties, as well as in case that only one of them sails under the flag of a contracting state, Law 105/1992 is applied, according to the res inter alios acta principle.

The Convention on the International Regulations for Preventing Collisions at Sea (COLREG)

The 1972 Convention was designed to update and replace the Collision Regulations of 1960 which were adopted at the same time as the 1960 SOLAS Convention. One of the most important innovations in the 1972 COLREGs was the recognition given to traffic separation schemes-Rule 10 gives guidance in determining safe speed, the risk of collision and the conduct of vessels operating in or near traffic separation schemes. The first such traffic separation scheme was established in the Dover Strait in 1967. It was operated on a voluntary basis at first but in 1971 the IMO Assembly adopted a resolution stating that that observance of all traffic separation schemes be made mandatory and the COLREGs make this obligation clear.

The COLREG's include 38 rules divided into five sections: Part A-General; Part B-Steering and sailing; Part C-Lights and Shapes; Part D-Sound and Light signals; and Part E -Exemptions. There are also four Annexes containing technical requirements concerning lights and shapes and their positioning; sound signaling appliances; additional signals for fishing vessels when operating in close proximity and international distress signals. The COLREGs were amended on 19 November 1981, on 19 November 1987, on 19 October 1989, on 4 November 1993, on 29 November 2001.

COLREG is applied to all sea-going vessels at sea and on all neighbouring waters where they have access. One of the most important provisions on which may solutions of legal practice are based, is the one contained by Rule no. 2: "no provision of these regulations exempts any vessel or her owner, her master or her crew from the consequences of any negligence both with respect to failure to observe these regulations and to taking the necessary measures imposed by seafarers' experience or by special circumstances of the vessel".

Great Britain signed the Convention on the International Regulations for Preventing Collisions at Sea (COLREG), (London, 1972) and applied it domestically by means of Merchant Shipping (Distress signals and Prevention of Collisions) Regulations 1996.

The United States ratified the Convention on the International Regulations for Preventing Collisions at Sea on November 23, 1976. Removed from the Code of Federal Regulations on April 1, 1996, it remained applicable.

3.2.4 CHANGING CONCEPT OF MARITIME FRONTIERS

International sea

The international law of the sea is governed by three principles: the principle of freedom, the principle of sovereignty and the principle of the common heritage of mankind. Traditionally the law of the sea was dominated by the principle of freedom and the principle of sovereignty.

The principle of freedom: The principle of freedom aims to ensure the freedom of various uses of the oceans, such as navigation, overflight, laying submarine cables and pipelines, construction of artificial islands, fishing and marine scientific research. Historically the freedom of the seas was promoted by England. The policy of

Queen Elizabeth I of England may have been the starting point of the principle of the freedom of the seas. This principle may primarily be thought of as aiming to ensure the freedom of navigation in order to advance international trade and commerce across the oceans. In this regard, it is of particular interest to note that in the *Mare Liberum* published in 1609, Grotius upheld the freedom of the seas with a view to vindicating the right of the Dutch East India Company to trade in the Far East against the exclusive claim of Portugal upon the Bull of Pope Alexander IV. In the course of the negotiations for a conclusion of the Dutch war of independence, Spain – supporting Portugal’s position – persistently denied Dutch participation in commerce with India. However, this was unacceptable to the Dutch East India

Company. Grotius thus prepared the *Mare Liberum* for publication at the request of the Dutch East India Company. Indeed, the primary purpose of the book was to advocate the freedom of commerce on the basis of the freedom of the seas. This episode would seem to demonstrate that the freedom of the sea was essentially characterised by the economic and political interests of maritime States.

Principle of sovereignty

In contrast to the principle of freedom, the principle of sovereignty seeks to safeguard the interests of coastal States. This principle essentially promotes the extension of national jurisdiction into offshore spaces and supports the territorialisation of the oceans. It has been considered that the concept of the modern State was formulated by Vattel. Thus, Vattel clearly distinguished the sea under territorial sovereignty from the high seas. At the same time, Vattel accepted the right of innocent passage through the territorial sea and straits. On the other hand, Vattel denied that the high seas could be appropriated by States. In so doing, the territorial sea

is to be connected to the high seas for the purpose of navigation. Vattel’s conception represented a prototype of the law of the sea in a modern sense. Subsequently, a maritime belt adjacent to the coast became increasingly important for coastal States for purposes of neutrality, security, customs control, sanitary regulations, fisheries and economic policy on the basis of the doctrine of mercantilism. The claim over the maritime belt was thus consolidated as the territorial sea through State practice in the nineteenth century. At the international level, the dualism in the oceans which distinguishes the territorial sea from the high seas was clearly confirmed in the *Bering Sea Fur-Seals* case between Great Britain and the United States of America of 1893. In summary, on the basis of the principle of freedom and the principle of sovereignty, the ocean has been divided into two categories. The first category relates to marine space adjacent to coasts subject to the national jurisdiction of the coastal State. The second category concerns marine space beyond national jurisdiction where the principle of freedom applies.

Principle of the common heritage of mankind

The third principle of the law of the sea is the common heritage of mankind. This principle is enshrined in Part XI of the LOSC. First, while the principle of sovereignty and that of freedom aim to safeguard the interests of individual States, the principle of the common heritage of mankind seeks to promote the common interest of mankind as a whole. It may be argued that the term ‘mankind’ is a trans-spatial and trans-temporal concept. It is trans-spatial because ‘mankind’ includes all people on the planet. It is trans-temporal because ‘mankind’ includes both present and future generations. It would seem to follow that the common interest of mankind means the interest of all people in present and future generations

CONCEPTS

Baselines

In the international law of the sea, the scope of jurisdictional zones under national jurisdiction is to be determined on the basis of distance from the coast. Thus it is important to identify the line from which the outer limits of marine spaces under the national jurisdiction of the coastal State are measured. This line is called the baseline. At the same time, the baseline is the line distinguishing internal waters from the

territorial sea. The distinction is important because the legal regime of internal waters differs from that of the territorial sea

Under the LOSC, four types of baselines are at issue: normal baselines, straight baselines, closing lines across river mouths and bays, and archipelagic baselines.

- The normal baseline—the normal baseline is the low-water line drawn along the coast²
- Straight base lines—a system of straight lines joining specified or discrete points on the low-water line, usually known as straight baseline turning points, which may be used only in localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity³.
- Juridical bays —Bays are of particular importance for coastal States because of their intimate connection with land. Furthermore, where the low-water line rule applies to a bay whose mouth is less than twice of the breadth of the territorial sea, the high seas may be enclosed within the bay. The closing line of bays becomes the baseline for measuring the breadth of the territorial sea.
- Historic bays—The TSC and the LOSC contain no definition of historic bays. Historic bays are one of the categories of ‘historic waters’. Thus the legal regime of historic bays should be examined in the broad context of historic waters⁴.

Internal waters

Internal waters are ‘those waters which lie landward of the baseline from which the territorial sea is measured’. Specifically, internal waters in a legal sense embrace

- parts of the sea along the coast down to the low-water mark,
- ports and harbours,
- estuaries,
- landward waters from the closing line of bays,
- waters enclosed by straight baselines.

On the other hand, as noted earlier, internal waters in the law of the sea do not include waters within the land territory and land-locked waters or lakes.⁵

TERRITORIAL SEA

The territorial sea is a marine space under the territorial sovereignty of the coastal State up to a limit not exceeding twelve nautical miles measured from baselines

The sovereignty of India extends and has always extended to the territorial waters of India (hereinafter referred to as the territorial waters) and to the seabed and subsoil underlying, and the air space over, such waters. The limit of the territorial waters is the line every point of which is at a distance of twelve nautical miles from the nearest point of the appropriate baseline.⁶

²Article 5 of the Law of Sea Convention,1958, “ Except where otherwise provided in this Convention, the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts officially recognized by

the coastal State”

³Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice*, vol. I (Cambridge University Press, 1995), p. 218.

⁴According to the ICJ, 'historic waters' usually mean 'waters which are treated as internal waters but which would not have that character were it not for the existence of a historic title'. (The *Anglo-Norwegian Fisheries case*, ICJ Reports 1951, p. 130).

⁵Article 2(1) of the LOSC provides as follows: "The sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea. The sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea,

CONTIGUOUS ZONE

Each coastal State may claim a contiguous zone adjacent to and beyond its territorial sea that extends seaward up to 24 nm from its baselines. In its contiguous zone, a coastal State may exercise the control necessary to prevent the infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea, and punish infringement of those laws and regulations committed within its territory or territorial sea. Additionally, in order to control trafficking in archaeological and historical objects found at sea, a coastal State may presume that their removal from the seabed of the contiguous zone without its consent is unlawful.⁷

In the exclusive economic zone, India has, - (a) sovereign rights for the purpose of exploration, exploitation, conservation and management of the natural resources, both living and non-living as well as for producing energy from tides, winds and currents; (b) exclusive rights and jurisdiction for the construction, maintenance or operation of artificial islands, off-shore terminals, installations and other structures and devices necessary for the exploration and exploitation of the resources of the zone or for the convenience of shipping or for any other purpose. (c) Exclusive jurisdiction to authorize, regulate and control scientific research; (d) Exclusive jurisdiction to preserve and protect the marine environment and to prevent and control marine pollution; and (e) Such other rights as are recognized by International Law.⁸

EXCLUSIVE ECONOMIC ZONE (EEZ)

The UNCLOS (Part V) defines the EEZ as a zone beyond and adjacent to the territorial sea in which a coastal state has: sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents, and winds; jurisdiction with regard to the establishment and use of artificial islands, installations, and structures; marine scientific research; the protection and preservation of the marine environment; the outer limit of the exclusive economic zone shall not exceed 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.

CONTINENTAL SHELF

The UNCLOS (article 76) defines the continental shelf of a coastal state as comprising the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance; the continental margin comprises the submerged prolongation of the landmass of the coastal state, and consists of the seabed and subsoil of the shelf, the slope and the rise; wherever the continental margin extends beyond 200 nautical miles from the baseline, coastal states may extend their claim to a distance not to exceed 350 nautical miles from the baseline or

100 nautical miles from the 2500 meter isobaths; it does not include the deep ocean floor with its oceanic ridges or the subsoil thereof.

⁷ According to the UNCLOS (Article 33), this is a zone contiguous to a coastal state's territorial sea, over which it may exercise the control necessary to: prevent infringement of its customs, fiscal, immigration, or sanitary laws and regulations within its territory or territorial sea; punish infringement of the above laws and regulations committed within its territory or territorial sea; the contiguous zone may not extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured (e.g. the US has claimed a 12-nautical mile contiguous zone in addition to its 12-nautical mile territorial sea).

⁸ The Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act, 1976.

3.2.5 SEA AS A COMMON HERITAGE OF MANKIND

The third principle of the law of the sea is the common heritage of mankind. This principle is enshrined in Part XI of the LOSC. The principle of the common heritage of mankind emerged as an antithesis against the principle of sovereignty and the principle of freedom. This principle is distinct from the traditional principles in two respects. First, while the principle of sovereignty and that of freedom aim to safeguard the interests of individual States, the principle of the common heritage of mankind seeks to promote the common interest of mankind as a whole. It may be argued that the term 'mankind' is a transspatial and transtemporal concept. It is transspatial because 'mankind' includes all people on the planet. It is transtemporal because 'mankind' includes both present and future generations. It would seem to follow that the common interest of mankind means the interest of all people in present and future

generations. Second, the principle of the common heritage of mankind focuses on 'mankind' as a novel actor in the law of the sea. 'Mankind' is not a merely abstract concept. Under the LOSC 'mankind' has an operational organ, i.e. the International Seabed Authority, acting on behalf of mankind as a whole. To this extent, it can reasonably be argued that mankind is emerging as a new actor in the law of the sea. In this sense, the principle of the common heritage of mankind introduces a new perspective, which is beyond the State-to-State system, in the law of the sea⁹.

It is important to note that the principle of the common heritage of mankind came into existence in a situation where neither the principle of sovereignty nor that of freedom could provide a legal framework ensuring the equitable share of the benefit derived from natural resources of the Area. In fact, the application of the two traditional principles to the deep seabed was clearly negated in the 1970 Declaration.¹⁰

The sea-bed and ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction (hereafter referred to as the area), as well as the resources of the area, are the common heritage of mankind.

In 1970, the Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, Beyond the Limits of National Jurisdiction was adopted (hereafter the 1970 Declaration).

Principle 2 of the 1970 Declaration pronounced that: 'The area shall not be subject to appropriation by any means by States or persons, natural or judicial, and no State shall claim or exercise sovereignty or sovereign rights over any part thereof'. At the same time, the 1970 Declaration explicitly recognised that the existing legal regime of the high seas did not provide substantive rules for regulating the exploration of the seabed area beyond the limits of national jurisdiction and the exploitation of its resources.

⁹ The 'common interest of the international community as a whole' or 'community interests' is an elusive concept and it is difficult, a priori to define it in the abstract. As Simma pointedly observed, the identification of common interests does not derive from scientific abstraction but rather flows from the recognition of concrete problems: B. Simma, 'From Bilateralism to Community Interest in International Law' (1994-IV) 250 RCADI pp. 235-243. In the law of the sea, one can say that community interests include marine environmental protection, the conservation of marine living resources and biological diversity, the management of the common heritage of mankind, suppression of

piracy, and the maintenance of international peace and security at sea For an analysis of the protection of community interests in the law of the sea, see Y. Tanaka, 'Protection of Community Interests in International Law: The Case of the Law of the Sea' (2011) 15 Max Planck Yearbook of United Nations Law pp. 329–375. In this book, the term 'common interests of the international community' and 'community interests' will be used interchangeably.

¹⁰It is important to note that the principle of the common heritage of mankind came into existence in a situation where neither the principle of sovereignty nor that of freedom could provide a legal framework ensuring the equitable share of the benefit derived from natural resources of the Area. In fact, the application of the two traditional principles to the deep seabed was clearly negated in the 1970 Declaration. In 1970, the Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, Beyond the Limits of National Jurisdiction was adopted (hereafter the 1970 Declaration). Principle 2 of the 1970 Declaration pronounced that: 'The area shall not be subject to appropriation by any means by States or persons, natural or judicial, and no State shall claim or exercise sovereignty or sovereign rights over any part thereof. At the same time, the 1970 Declaration explicitly recognised that the

3.2.6 CONSERVATION OF MARINE LIVING RESOURCES

Marine living resources are of vital importance for mankind because these resources are an essential source of protein and many human communities depend on fishing. As marine living resources are renewable, there is certainly a need to pursue conservation policies in order to secure sustainable use of these resources. Nonetheless, the depletion of these resources is a matter of more pressing concern in the international community. Thus the conservation of marine living resources is a significant issue in the law of the sea. Considering that marine living resources are of vital importance for mankind because it could well be said that conservation of marine living resources can be considered as a common interest these resources constitute an increasingly important source of protein of the international community.

In this regard, it is relevant to note that the LOSC, in its Preamble, explicitly recognises its aim of promoting the conservation of marine living resources. At the same time, marine living resources are important for the international trade and industry of many countries. It may be said that conservation of marine living resources deeply involves not only community interests but also national interests at the same time. Thus the rules of international law on this subject rest on the tension between the protection of community interests and the promotion of national interests. Whilst there is no universal definition of conservation, one can take as an example Article 2 of the 1958 Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas (hereafter the High Seas Fishing Convention), which provides as follows: As employed in this Convention, the expression 'conservation of the living resources of the high seas' means the aggregate of the measures rendering possible the optimum sustainable yield from those resources so as to secure a maximum supply of food and other marine products. Conservation programmes should be formulated with a view to securing in the first place a supply of food for human consumption. As shown in this provision, conservation does not directly mean a moratorium or prohibition of exploitation of marine living resources.

Article II(2) of the 1980 Convention on the Conservation of Antarctic Marine Living Resources explicitly states that 'the term "conservation" includes rational use'. In practice, the 'supply of food for human consumption' will be determined on the basis of economic and social needs. Hence conservation is not a purely scientific or biological concept, but is qualified by economic, political and social elements. Presently there are growing concerns that marine living resources are at serious risk due to overcapacity, overfishing, illegal, unregulated and unreported fishing and marine pollution.

3.2.7 INTERNATIONAL MARITIME ORGANISATION

Because of the international nature of the shipping industry, it has long been recognized that action to improve safety in maritime operations is more effective if carried out at the international level rather than by individual countries acting unilaterally and without co-ordination.

History and Present Status

The International Maritime Organization (IMO), formerly known as the Inter-Governmental Maritime Consultative

Organization (IMCO), was established in Geneva in 1948 and came into force ten years later, meeting for the first time in 1959. The IMCO name was changed to IMO in 1982. With its headquarters in London, United Kingdom, the IMO is a specialized agency of the United Nations with 169 Member States and three Associate Members. The IMO's primary purpose is to develop and maintain a comprehensive regulatory framework for shipping and its remit today includes safety, environmental concerns, legal matters, technical co-operation, maritime security and the efficiency of shipping. IMO is governed by an Assembly of members and is financially administered by a Council of members elected from the Assembly. The work of IMO is conducted through five committees and these are supported by technical subcommittees.

Member organizations of the UN organizational family may observe the proceedings of the IMO. Observer status is granted to qualified non-governmental organizations.

The IMO is supported by a permanent secretariat of employees who are representative of its members. The secretariat is composed of a Secretary-General who is periodically elected by the Assembly, and various divisions such as those for marine safety, environmental protection, and a conference section.

The International Maritime Organization is the leading international organization in the field of maritime matters. The operations of the IMO are of a technical nature and seek to promote safety of shipping and the prevention of marine pollution.

Relevant Treatise/ Protocol

- 1 International Convention for the prevention of pollution from ships:
 - 2 Protocol to the International Convention for the prevention of pollution from ships;
 - 3 International Convention on Maritime Search and Rescue;
 - 4 International Convention for safe containers;
 - 5 London Dumping Convention;
 - 6 International Convention on Tonnage Measurement of ships
 - 7 International Convention on standards of training and watch keeping of seafarers;
 - 8 International Convention on Civil liability for oil pollution damage
 - 9 Convention on the International regulations for preventing collisions at sea;
 - 10 International Convention for the Safety of Life at Sea
 - 11 International Convention on Load Lines
 - 12 Convention on the International Maritime Satellite Organization (Torremolinos)
 - 13 International Convention for the Safety of Fishing Vessels
 - 14 International Convention on Standards of Training, Certification and Watch keeping for Fishing Vessel Personnel
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- 1 International Convention on Oil Pollution Preparedness, Response and Co-operation;
 - 2 International Convention on the Control of Harmful Antifouling Systems on ships.
 - 3 International Convention for the Control and Management of Ship's Ballast Water and Sediments
 - 4 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and its Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf

IMCO was formed to fulfill a desire to bring the regulation of the safety of shipping into an international framework, for which the creation of the United Nations provided an opportunity. When IMCO began its operations in 1958 certain other pre-existing instruments were brought under its aegis, most notable the International Convention for the Prevention of Pollution of the Sea by Oil (OILPOL) 1954. Throughout its

existence IMCO, renamed the IMO in 1982, has continued to produce new and updated instruments across a wide range of maritime issues covering not only safety of life and marine pollution but also encompassing safe navigation, search and rescue, wreck removal, tonnage measurement, liability and compensation, ship recycling, the training and certification of seafarers, and piracy.

In 1983 the IMO established the World Maritime University in Malmö, Sweden.

Contribution of IMO to Maritime Industry

IMO is the source of approximately 60 legal instruments that guide the regulatory development of its member states to improve safety at sea, facilitate trade among seafaring states and protect the maritime environment. The most well-known is the International Convention for the Safety of Life at Sea IMO regularly enacts regulations, which are broadly enforced by national and local maritime authorities in member countries, such as the (COLREG) International Regulations for Preventing Collisions at Sea. The IMO has also enacted a Port State Control authority, allowing domestic maritime authorities such as coast guards to inspect foreign-flag ships calling at ports of the many port states. Memoranda of Understanding (protocols) were signed by some countries unifying Port State Control procedures among the signatories.

Current Issues

Recent initiatives at the IMO have included amendments to SOLAS, which upgraded fire protection standards on passenger ships, the International Convention on Standards of Training, Certification and Watch keeping for Seafarers (STCW) which establishes basic requirements on training, certification and watch keeping for seafarers and to the Convention on the Prevention of Maritime Pollution MARPOL 73/78 which required double hulls on all tankers. In December 2002, new amendments to the 1974 SOLAS Convention were enacted. These amendments gave rise to the International Ship and Port Facility, which went into effect on 1 July 2004. The concept of the code is to provide layered and redundant defences against smuggling, terrorism, piracy, stowaways, etc. The ISPS Code required most ships and port facilities engaged in international trade to establish and maintain strict security procedures as specified in ship and port specific Ship Security Plans and Port Facility Security Plans. The IMO is also responsible for publishing the International Code of Signals for use between merchant and naval vessels.

The First Intercessional Meeting of IMO's Working Group on Greenhouse Gas Emissions from Ships took place in Oslo, Norway (23–27 June 2008), tasked with developing the technical basis for the reduction mechanisms that may form part of a future IMO regime to control green-house gas emissions from international shipping, and a draft of the actual reduction mechanisms themselves, for further consideration by IMO's Marine Environment Protection Committee (MEPC).

Governing Bodies

The governing body of the International Maritime Organization is the Assembly which meets every two years. In between Assembly sessions a Council, consisting of 40 Member States elected by the Assembly, acts as the governing body. The technical work of the International Maritime Organization is carried out by a series of Committees. The Secretariat consists of some 300 international civil servants headed by a Secretary-General.

Technical Committees

The technical work of the International Maritime Organization is carried out by a series of Committees. This includes The Marine Environment Protection Committee (MEPC)

- The Legal Committee
- The Technical Cooperation Committee for capacity building;
- The Facilitation Committee to simplify the documentation and formalities required in international shipping.

MARITIME SAFETY COMMITTEE

It is regulated in the Article 28(b) of the Convention on the IMO:.

“Article 28

(a)The Maritime Safety Committee shall consider any matter within the scope of the Organization concerned with aids to navigation, construction and equipment of vessels, manning from a safety standpoint, rules for the prevention of collisions, handling of dangerous cargoes, maritime safety procedures and requirements, hydrographic information, log-books and navigational records, marine casualty investigation, salvage and rescue, and any other matters directly affecting maritime safety.

(b) The Maritime Safety Committee shall provide machinery for performing any duties assigned to it by this Convention, the Assembly or the Council, or any duty within the scope of this Article which may be assigned to it by or under any other international instrument and accepted by the Organization.

(c) Having regard to the provisions of Article 25, the Maritime Safety Committee, upon request by the Assembly or the Council or, if it deems such action useful in the interests of its own work, shall

maintain such close relationship with other bodies as may further the purposes of the Organization”

The work of the nine sub-committees is described by their titles, as follows:

- Safety of navigation
- Radio communications and, search and rescue
- Standards of training and watch keeping
- Ship design and equipment
- Fire Protection
- Stability, load lines and fishing vessel safety
- Flag state implementation
- Dangerous goods,
- Solid cargoes and containers
- Bulk liquids and gases

The sub-committees work on numerous topics, including, for example, improvements in the design of passenger ships and the requirements for the stowage and packaging of the vast range of dangerous goods carried by sea.

Resolutions

Resolution MSC.255(84) (adopted on 16 May 2008) adopts the Code of the International Standards and Recommended Practices for a Safety Investigation into a Marine Casualty or Marine Incident (Casualty Investigation Code).

3.2.8.1 PIRACY

The concept of piracy has left room for confusion partly because the municipal laws punish as 'piracy' acts which do not constitute 'piracy' in international law. Currently a modern definition of piracy can be seen in Article 101 of the LOSC:

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Piracy consists of any of the following acts:

- (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
 - (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
 - (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;

(b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;

(c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b)

It may be said that this definition represents the existing customary law. This definition comprises five elements to identify piracy.

(i) There must be 'any illegal acts of violence or detention, or any act of depredation'.

Whilst the existence of violence constitutes an essential element, Article 101 does not provide further precision with regard to the types of violence which constitute piracy. Violence may be committed against persons or property on board. It may be argued that one murder alone would suffice to be regarded as a piratical act. However, attempts to commit illegal acts are not included in the definition of piracy.

(ii) Unlawful offences must be committed for 'private ends' (the private ends requirement).

It follows that piracy cannot be committed by vessels or aircrafts on military or government service or by insurgents. Yet the meaning of private ends is not wholly unambiguous. Two different views can be identified on this matter. According to the first view, any illegal acts of violence for political reasons are automatically excluded from the definition of piracy. According to this view, acts are tested on the basis of the motives of an offender. However, the interpretation of private ends will rely primarily on the subjective appreciation of the offender. In the second view, all acts of violence that lack State sanction or authority are acts undertaken for private ends.

(iii) Piracy is committed by the crew or the passengers of a private ship or a private aircraft against another ship or aircraft, or against persons or property on board such ships or aircraft (the private ship requirement).

Under Article 102 of the LOSC, the acts of piracy committed by a warship, government ship or government aircraft whose crew has mutinied and taken control of the ship or aircraft are also assimilated to acts committed by a private ship or aircraft. Under Article 103, a ship or aircraft is considered a pirate ship or aircraft if it is intended by the persons in dominant control to be used for the purpose of

committing one of the acts referred to in Article 101.

(iv) Piracy involves two ships or aircraft, that is to say, pirate and victim (the two vessels requirement).

In accordance with this requirement, hijacking a ship on the high seas by its own crew or passengers (internal hijacking) is not regarded as a piratical act. The case in point is the Achille Lauro affair. On 7 October 1985, four members of a Palestinian group, the PLF, aboard the Italian passenger ship, the Achille Lauro, hijacked the ship. They demanded the release of Palestinian prisoners. As the offenders had already boarded the ship, this affair involved hijacking of the ship, not piracy.

(v) Piracy must be directed on the high seas or in a place outside the jurisdiction of any State, such as Antarctica.

While Article 101 contains no reference to the EEZ, it seems that illegal acts of violence committed in the EEZ may also be qualified as piracy owing to a corresponding cross-reference under Article 58(2) of the LOSC. On the other hand, illegal acts of violence committed in the territorial sea or internal waters of a coastal State cannot be regarded as acts of piracy. Those acts are often called 'armed robbery'.

According to the IMO Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery against Ships adopted on 2 December 2009, 'armed robbery against ships' means any of the following acts:

1. any illegal act of violence or detention or any act of depredation, or threat thereof, other than an act of piracy, committed for private ends and directed against a ship or against persons or property on board such a ship, within a State's internal waters, archipelagic waters and territorial sea;
2. any act of inciting or of intentionally facilitating an act described above.

In reality, many illicit acts of violence occur in the territorial sea. This is particularly problematic if the coastal State concerned is unable to effectively prevent and suppress such acts in its territorial sea.

3.2.8.2 THE DOCTRINE OF HOT PURSUIT

The right of hot pursuit of a foreign ship is a principle designed to ensure that a vessel which has infringed the rules of a coastal state cannot escape punishment by fleeing to the high seas. In reality this means that in certain defined circumstances, a coastal state may extend its jurisdiction onto the high seas in order to pursue and seize a ship which is suspected of infringing its laws. This right was elaborated in Article 111 of the 1982 Convention, building upon article 23 of the High Seas Convention 1958.

The pursuit commences when the authorities of the coastal state have good reason to believe that the foreign ship has violated its laws. The pursuit must start while the ship, or one of its boats, is within the internal waters, territorial waters or contiguous zone of the coastal state and may only continue outside the territorial sea or contiguous zone if it is uninterrupted.

The right may also commence from the archipelagic waters; as well as to violations in the exclusive economic zone or on the continental shelf (including safety zones around continental shelf installation) of the relevant rules and regulations applicable to such areas.

It must be noted that hot pursuit begins when the pursuing ship has satisfied itself that the ship pursued or one of its boats is within the limits of the territorial sea or, as the case may be, in the contiguous zone or economic zone or on the continental shelf.

It is essential that prior to the chase a visual or auditory signal to stop has been given at a distance enabling

it to be seen or heard by the foreign ship and pursuit may only be exercised by warships or military aircraft or by specially authorized government ships or planes.

Cessation of the right of hot pursuit

The right of hot pursuit ceases as soon as the ship pursued has entered the territorial water of its own or a third state.

3.2.9 CONCLUSION

The 'common interest of the international community as a whole' or 'community interests' is an elusive concept and it is difficult, a priori to define it in the abstract. As Simma pointedly observed, the identification of common interests does not derive from scientific abstraction but rather flows from the recognition of concrete problems. In the law of the sea, one can say that community interests include marine environmental protection, the conservation of marine living resources and biological diversity, the management of the common heritage of mankind, suppression of piracy, and the maintenance of international peace and security at sea. The ocean as a subject of the law of the sea is one single unit and is essentially characterised by the continuity of marine spaces. In other words, as Gidel pointed out, the marine spaces governed by the law of the sea must communicate freely and naturally with each other all over the world.

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UNIT -IV

OWNERSHIP AND MANAGEMENT OF SHIPS

SYNOPSIS

4 . 1 THE SHIP AS PROPERTY

4.2 OWNERSHIP, REGISTRATION, ACQUISITION, TRANSFER OF SHIPS

4.3 FLAG OF CONVENIENCE AND SHIP CONSTRUCTION RULES

4.4 SHIPPING CONTRACT

4.5 SHIP MORTGAGES

4.6 ARREST OF SEA GOING SHIPS

4.7 ISM AND ISSUES OF SAFETY

4.1 THE SHIP AS PROPERTY

Ships must possess a national character to be allowed to use the high seas freely. They have the nationality of the State whose flag they are entitled to fly, which is the symbol of the ship's nationality. Individual States set the conditions for the entry of ships in their registries. Connecting factors between a ship and a State, such as the incorporation of the owning company of the ship in that State, or the registration of the ship in the particular State's registry, provide a test for the ship's nationality. Some States may not require the ship to be registered in the records of the State when the owning company is registered. The registration of a ship in the public records of a State attributes the national character of that State to the ship, and the documents issued to the ship by the competent authority of that State are evidence of the ship's nationality, which enables the ship to

engage in trade, enter ports and deal with authorities. The ship will be subject to the laws and regulations of the State under whose flag it is registered. Jurisdiction over vessels on the high seas, including for offences committed on the high seas, will reside with that State. Questions frequently arise with regard to which law should apply in the territorial waters of other States through which all ships will normally be entitled to have the right of innocent passage. In *Saldanha v Fulton Navigation Inc (The Omega King)*, it was held that the general rule in a situation where a tort was committed entirely on board a foreign vessel, while in the waters of another State, is that it is the law of that State that applies, not the law of the flag State. International law lays down rules regulating how the freedom to sail on the high seas should be used. The Geneva Convention on the High Seas 1958 and the United Nations Convention 1982 on the Law of the Sea require States to exercise effective control over ships flying their flag. When a ship enters the port of another State, it will be subject to the PSC of that State, and both the flag State and the PSC State should co-operate in matters of enforcement of the international treaties and regulations. With the opening of European Union membership, reflagging of ships from one European register to another for cheaper labour may attract industrial action by the International

Transport Workers' Federation and the national seamen's union in order to ensure payment to seamen at the higher rates. Threatened industrial action may be lawful in one Member State and unlawful in another. To determine whether or not an injunction to restrain threatened industrial action could be granted was a matter for the ECJ in *Viking Line ABP v ITF*. There are various factors that influence ship-owners to choose a flag of a particular State. The most important factors are economic considerations and operating costs.

4.2 OWNERSHIP

Evidence of ownership rests in the documents of registration of a ship, to be found in the relevant ship's registry. However, registration provides only prima facie evidence of the registered owner being the true owner and it is not conclusive evidence of ownership. The burden of proof shifts to the person alleging to be the owner. The court has jurisdiction to make a declaration as to which party would be entitled to be registered as the legal owner of a ship. In the absence of fraud, execution and registration of the bill of sale would give good title. The legal person registered to be the owner would be liable for the negligence of those employed in the ship, unless the ship has been chartered to a charterer by demise. Ownership can also be acquired involuntarily, either by inheritance or bankruptcy, which is known as transmission. It may be acquired by capture of an enemy ship in times of war, or by judicial sale.

Co-ownership

Co-ownership applies to ownership of ships. When two or more people own a ship jointly, they own it either as 'joint tenants' or as 'tenants in common'. These phrases bear the meaning attributed. Under English law, the principles applicable to ownership of chattels to them at common law.

Joint tenant

There can be joint owners of shares in the ship who have a single joint right to possession of the whole chattel. In the absence of any words to the contrary, when a chattel is transferred to two or more people, they will hold the chattel as 'joint tenants' with a unity of title. Joint tenants do not have an exclusive right to possession as against their co-owners. When one of them dies his interest in the ship will automatically accrue to the other. If a joint tenant disposes of his 'interest' in the ship by a lifetime gift or assignment, the effect of it will be the severance of the joint tenancy, and the third party will become a tenant in common with the other co-owners.

The ownership in the 'whole ship' owned jointly could only be transferred to a third person by the agreement of all co-owners. If one of them purports to sell the absolute interest in the ship without the authority of his co-owners, he cannot pass greater title than he actually has, *nemo dat quod non habet*. So the purchaser will acquire the seller's interest in the ship and become a tenant in common with the other joint owners.

Tenants in common

Tenants in common own separate shares in the ship, with an undivided interest in the whole of their shares and, therefore, they have several rights to possession in the ship, unless it is otherwise agreed between them. There must be an express intention of the co-owners, in such a case, that they should have separate shares in the ship for them to be tenants in common, otherwise they will be joint tenants. Indications of their being tenants in common will be inferred either from the words used in their agreement, for example, 'they are to have separate interests in the ship in equal shares', or when the joint owners have contributed to the purchase price in unequal proportions. When one of them dies his or her interest in the ship passes to his/her estate or pursuant to the terms of his/her will. A tenant in common can dispose of his 'interest' in the ship, and the assignee or buyer of it will step into his position becoming a tenant in common with the others.

REGISTRATION

Ship registration is the process of documenting a ship's given nationality. The nationality of a ship allows it to travel internationally wherever citizens of that nation are authorized to travel. The registration is almost like the passport for the ship, itself. Per international agreements, every merchant ship must be registered to a particular country. The country to which a ship is registered is called its "flag state." A ship is bound by the laws of its flag state, and one commonly says a ship sails "under the flag" of its country of registration.

Registration of ship in India

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 of in severalty, any share or interest therein.

4 3

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 second hand 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.
- 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.
- 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.

- On completion of the preliminaries to registry as described in the preceding paras, 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 above 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.

4.3 FLAGS OF CONVENIENCE

Maritime nations, historically, required a 'genuine link' between a vessel and the State in which the ship was registered. Market forces and attractions offered by 'open registries' known as 'ags of convenience' have brought a significant decline in the traditional ship registries since the 1950s. Subject to international law, States have had freedom to set their own regulations for ships carrying their ag. Some States have been very liberal in the regulations for entry of foreign ships in their ship registers, making it very convenient and opportune for ship-owners to register their ships with them. This gave rise to the proliferation of open registers or ag of convenience States, which provided attractive advantages. The most important of such advantages have been: the confidentiality of who is the actual beneficial owner of the ship, the allowance of ownership and control of the ship by non-citizens of that State, no income tax (only a registration fee and annual fees) and the

freedom of manning of those ships by non-nationals. The tax advantages and the freedom of manning have been the greatest stimuli for ship-owners to register under a flag of convenience. In addition, open registries enable the ship-owners to distance themselves from the political and economic situation of their country. The origin of the flag of convenience has its roots in the ingenuity of British merchants in the sixteenth century, who used the Spanish flag to avoid Spanish monopoly restrictions on trade with the West Indies, and later that of British shippers in the seventeenth to nineteenth centuries, who tried to avoid shipping restrictions.

Ship construction rules

A draft of the Merchant Shipping (Cargo Ship Construction and Survey) Rules, 1989 was published as required by section 299B of the Merchant Shipping Act, 1958 (44 of 1958), in the Gazette of India, Part II, Section 3. These rules are called the Merchant Shipping (Cargo Ship Construction and Survey) Rules, 1991. Except than as expressly provided in rule 67, they shall apply to all sea-going cargo ships of 500 tons gross or more, registered in India.¹

¹ http://www.dgshipping.gov.in/Content/PageUrl.aspx?page_name=MerchantShippingCargoshipRules1991

4.4 SHIPPING CONTRACT

Shipbuilding contracts provide for English law and jurisdiction. The contracts are on standard terms, for example: the contract of the Association of West Europe Shipbuilders, the contract of the Shipowners Association of Japan (SAJ), the contract of the Maritime Subsidy Board of the US Department of Maritime Administration and the contract of the Association of Norwegian Marine Yards. Recognising that existing standard form contracts are not serving the interests of both parties equally, BIMCO launched a new Standard Newbuilding Contract, NEWBUILDCON, in 2008, to be used across the industry and help in facilitating the business process by encouraging the use of standard wording. The objective of developing this contract was to provide builders and buyers with an alternative contract to those mainly in use. The BIMCO contract offers the parties a modern, clearly worded, balanced and comprehensive shipbuilding contract, so that the parties can easily identify their rights and obligations and reduce the risk of disputes on matters of interpretation of contractual terms. The contract is divided into six sections, set out conceptually and providing a solid structural basis for negotiations. The liabilities are equally apportioned between the parties. It also deals in detail with many difficult aspects of shipbuilding and fills the gaps in certain areas where there had been a lacuna or ambiguity in the terms of the old standard terms of contracts.

The Nature of the Contract

The answer to the question of whether the contract is one for sale of goods or a contract for construction and sale has significant implications on the determination of the parties' accrued rights. There are three issues of importance:

- (a) whether the buyer has a property right over the partly constructed hull (this would be relevant if a third party, that is, a claimant of the buyer, or a receiver appointed to arrange the affairs of the shipbuilder, arrested the semi-constructed ship);
- (b) whether a buyer could claim a property right on the materials (approved by him but not yet fixed to the hull), if the contract does not expressly provide about the time of the passing of property of the materials on to the buyer;
- (c) what is to happen to accrued rights of the parties upon cancellation of the contract? (Invariably, however, shipbuilding contracts provide for the parties' rights after cancellation of the contract.)

For a shipbuilding contract to be complete, it should contain the following essential terms:

- (a) ship's description and dimensions with dead weight capacity (DWC); the ship is given a hull number during construction, which is not, however, regarded as an essential part of her description; the class must also be specified; details of description and class may be inserted later;
- (b) speed and fuel consumption;
- (c) price and method of payment;
- (d) inspection of work in progress;
- (e) modification of agreed description;
- (f) nature and conditions of trials;
- (g) time and place of delivery;
- (h) transfer of title and risk with insurance arrangements; and
- (i) rectification of defects.

The parties agree that the details of other terms may be filled in later. If the parties need more time to consider their position, they can agree provisionally on a draft that is made 'subject to contract', which is understood to mean that there is no binding contract until a formal written contract is drawn up or this condition is withdrawn or waived. The contract will state that the vessel is to be built according to a specification, which is an integral part of the making of the contract. Invariably, the parties may alter the specification, and the question that arises is whether the alteration only affects the subsequent obligations of the parties or it creates a new contract.

INSPECTIONS BY THE BUYER

Clause 4 of the 1987, 1993 and 2012 sale forms² provides for two types of inspection: (a) inspection of the vessel's classification records (within a certain time agreed) and (b) physical inspection. The inspection of the records will reveal the history of the ship's maintenance and compliance with the requirements of class. It gives an unfettered discretion to the buyer whether or not to accept the ship. He has an opportunity to refuse the ship and recover the deposit, for example, if he realises that he made a bad bargain, or to renegotiate the price. As regards the physical inspection of the ship, the 1987 form provides for inspection afloat, whereas the 1993 form gives the option for inspection in dry dock; the 2012 form leaves it open, but all forms provide that such inspection should be undertaken by the buyers without undue delay and without cost to the seller. Should the buyers cause such delay, they shall compensate the sellers for the losses thereby incurred. During this inspection, the vessel's logbooks for engine and deck shall be made available for the buyers' examination. If the vessel is accepted after such inspection, the purchase shall become definite (and outright under the 2012 form), subject only to the terms and conditions of the agreement. Notice should be given to the seller within 48 hours under the 1987 form and up to 72 hours under the 1993 and 2012 forms, after completion of such inspection. Should notice of acceptance of the vessel's classification records and/or of the vessel not be received by the sellers as aforesaid, the deposit shall immediately be released, and the contract shall be considered null and void. Under the 1993 and 2012 forms, the deposit with interest is released to the seller. An additional clause, cl 4(a), is included in both the 1993 and 2012 forms, which is a confirmation that the ship has already been inspected, if she had been, before the contract was concluded. One clause or the other should be deleted, depending on whether or not the inspection had taken place. This optional clause reflects market practice. The effect of choosing this alternative cl 4(a) is an outright sale to the buyer, without the need to give notice of the vessel's acceptance to the seller.

4.5 SHIP MORTGAGES

Ship mortgages are today distinctive contractual transactions with voluminous documentation. The sophistication of their development has reached a level that requires special expertise in financial markets. Unlike the security of lenders for the purchase of land, the inherent risks involved in ships, being floating objects of security, have given rise

over the years to the development of additional forms of security, apart from the mortgage, to protect mortgagees who finance the purchase of ships. The loan agreement contains covenants regulating the conduct of the borrower; the mortgage creates a preferential security interest of the lender on the ship; insurance to protect the interest of the mortgagee on the ship is obtained, in addition to the borrower's insurance against perils of the sea; assignment of the insurance proceeds of the ship, in the event of loss, is provided, as well as assignment of the earnings of the ship. Mortgagees are also protected by law in the enforcement of their security on the ship and are given priority over other maritime creditors, save for those who claim maritime liens. Given this limitation to their security, mortgagees seek to obtain personal and corporate guarantees, a general charge over the company's assets, or a pledge

² There have been various NSF contracts: 1966, 1983, 1987, 1993 and now 2012. In recent years, the 1993 form has been most commonly used. The parties must specify at the outset which form is going to be used. Another sale contract of second-hand ships is the Nipponsale 1993, which is used by Japanese sellers. These types of form concern an absolute sale, which comprises transfer of possession and of property at the same time in exchange for payment of the contract price

on the company's shares. The *ag* State in which the ship is registered is very important to the mortgagee. Most *nanciers* will insist on a *ag* that has a good reputation in the enforcement of international regulations of safety. They will also consider the law of the *ag* State, which will govern the validity of the mortgage. The development of ship mortgages, therefore, is based on the unique characteristics of the nature of the subject matter and the business in which it is used.

The nature of ship mortgage

There have been two theories about the nature of a ship mortgage, which are worth mentioning briefly.

The Property Transfer Theory – Origin and Deconstruction

Prior to the Merchant Shipping Act (MSA) 1854, which introduced the form of a statutory charge on a ship for the protection of the mortgagee, the law of land mortgages applied also to mortgages of chattels, as the ship is a chattel.³ This means that a mortgage on a chattel involved a transfer of its legal title to the mortgagee effected by delivery. Thus, traditionally, at common law, the chattel mortgage was regarded as a property transfer by way of security, ⁴ whereby legal ownership was transferred to the mortgagee and, upon payment of the loan amount with interest, was re-transferred to the mortgagor. The British ship mortgage originated as a property transfer security and was executed by a bill of sale, which was registered and was subject to a covenant for re-transfer of the ship back to the mortgagor upon the payment of the loan. The mortgagee took steps to register his ownership interest in the ship under the statutes for the Registration of British Vessels 1823–5. According to this traditional property transfer analysis, derived from the *obiter dicta* of Lindley J in *Keith v Burrows*,⁵ the first ship mortgagee acquired legal title regardless of whether or not the mortgage was registered. The registered owner of the ship retained an equitable right of redemption during the duration of the mortgage. All other subsequent mortgages were necessarily equitable, because the ship-owner did not have legal ownership to pass to another lender. Once the first mortgage was discharged, the second in line of creation would become legal.

The Statutory Nature of a Ship Mortgage – Prevailing Theory

The modern and prevailing view of the nature of a ship mortgage is that registration under the MSAs has created a *sui generis* statutory security perfectible by registration. There are authorities supporting this view. The point made by these authorities was that registration of a mortgage according to statutory provisions created a legal mortgage as opposed to an unregistered one, which is regarded as an equitable mortgage under English law. This should not be confused with the unregistered mortgage of an unregistered ship. A ship mortgage, therefore, is a form of security created by a contract that confers a property interest, not a property transfer, to the mortgagee and it comes to an end upon the performance of agreed obligations by the mortgagor. Ownership still remains with the mortgagor. The

purpose of the registered mortgage is to give the mortgagee an interest in, or a right against, the property of the debtor, so he is not left only with a personal remedy against him. The effect of the mortgage is that the mortgagee, when he needs to enforce his security, can exercise owner-type rights on the mortgaged property, subject to rights of previous

¹ *Reeves v Capper* (1838) 132 ER 1057

² *Santley v Wilde* [1899] 2 Ch 474 (CA)

³ 1876) 1 CPD 722, pp 731–733; the decision was heavily criticised and overruled on other grounds: (1887) 2 App Cas 636 (HL): no comment was made on this issue by the House of Lords, which decided the rights of a mortgagee in possession of the ship. However, what Lord Cairns said on the rights of a mortgagee before possession (pp 645, 646) seems to impinge upon the very foundation of the judge's view of the nature of a mortgage.

registered mortgages, or maritime liens, to meet the debt, and such rights are given by statute and contract. Owner-type rights of a ship-registered mortgagee stay dormant until it becomes necessary for him to take possession and exercise his powers given under statute and contract. These rights are not exercised if the debt is paid as agreed.

The Property Subject to the Mortgage

The ship and all articles necessary for the navigation are included. The word 'appurtenances' is used in the mortgage documents and the prescribed form. The word means, broadly, a thing belonging to another and, in the case of mortgages, it indicates that anything on board the ship, being necessary for the voyage and the adventure, is included as belonging to the owner and is, thus, part of the security. Whether or not particular equipment has become an appurtenance to the ship is a question of fact. For example, containers are not part of the ship, as they are not necessary for its operation. Bunkers on board the ship are not always part of the security. Fuel is not part of the ship, but it could be included in the mortgage by a collateral agreement if fuel is the property of the owner. Normally, charter parties provide for the charterer to pay for all bunkers on board the ship, and it is common practice for the fuel to be the property of the time charterers. The cargo on board the ship is not part of the security, unless the mortgagor has an interest in it, and the mortgage provides that it attaches to that interest. With regard to freight earned by the ship, the mortgagee does not have a right to earn freight until he enters into possession to realise his security. The freight is not part of the security, unless there is a special assignment of earnings to the mortgagee by a separate agreement.

PRIORITIES BETWEEN MORTGAGES

A mortgage is valid from the date of its creation and not from the date of registration, but priorities of mortgages are determined by the date of registration. A registered mortgage takes priority over an earlier unregistered interest, even if the registered mortgage had notice of the unregistered interest. Registration is essential to priority. As a general rule, known as the *Hopkinson v Rolt* rule⁶, advances made by the first mortgagee, whose mortgage is taken to secure future advances, cannot take priority over a second mortgage, when such advances were made after he had notice of the second mortgage.

SHIP'S MORTGAGE IN INDIA

A registered ship or a share therein may be made a security for a loan or other valuable consideration, and the instrument creating the security (in this Act called a mortgage) shall be in the prescribed form or as near thereto as circumstances permit, and on the production of such instrument the registrar of the ship's port of registry shall record it in the register book.

(d)Cross Default : if any other indebtedness of the Borrower and/or of the Guarantor for borrowed money (to whomsoever owing) or part thereof is not paid at its stated maturity or on its due date (as may be extended by any grace period) or by reason of any default or the occurrence of any event becomes due or is declared due prior to its stated maturity or original due date or if the Borrower and/or the Guarantor fails to discharge any guarantee or indemnity given by it with respect to any indebtedness; or

(e)Adverse Effect of Other Agreements : if an event has occurred which constitutes a default on the part of the Borrower or the Guarantor with respect to its payment obligations under or in respect of any other agreement or document to which the Borrower or the Guarantor as the case may be is a party or by which it may be bound or an event has occurred which, with the giving of notice, lapse of time, determination of materiality or other condition might constitute a default on the part of the Borrower or the Guarantor as the case may be with respect to its payment obligations under or in respect of any such agreement or document; or

(f)Insolvency: if the Borrower or the Guarantor becomes insolvent, is unable to pay its debts as they fall due, stops, suspends, or threatens to stop or suspend payment of all or a material part of its debts, or proposes or makes a general assignment or an arrangement or composition with or for the benefit of its creditors for any money whatsoever; or

(g) Judicial Management and Dissolution: if any competent order is made or step or petition is taken by any person for the dissolution or winding-up of the Borrower or of the Guarantor or for the appointment of a liquidator, receiver, administrator, trustee, judicial manager or other similar officer of the Borrower or of the shall cease or threaten to cease to carry on its business whether voluntarily or involuntarily; or over their respective assets and undertakings or part thereof; or

(h)Cessation of Business: if the Borrower, or the Guarantor shall cease or threaten to cease to carry on its business whether voluntarily or involuntarily; or

(i)Enforcement Proceedings against Borrower: if a distress, an execution or writ of seizure and sale or attachment is levied upon or issued against any of the property or assets of the Borrower or of the Guarantor;

(j) Nationalisation: if any agency of any state seizes, compulsorily acquires, expropriates or nationalises all or a material part of the assets, properties or shares of the Borrower or of the Guarantor; or

(k)Unlawful Performance: if it is or will become unlawful for the Borrower and/or the Guarantor to perform or comply with any one or more of its obligations under this Agreement and/or the Securities,

PROVIDED THAT it shall not be an Event of Default hereunder if the Borrower immediately pays the Indebtedness to the Lender; o(l) Authorisation and Consent: if any action, condition or thing at any time required to be taken, fulfilled or done for any of the purposes of this Agreement and/or the Securities is not taken, fulfilled or done or any such consent ceases to be in full force and effect without modification or any condition in or relating to any such consent is not complied with; or

(m)Material Adverse Change: if there shall occur a material adverse change in the financial position of the Borrower or if any situation shall have arisen which in the reasonable opinion of the Lender shall make it improbable that the Borrower or the Guarantor will be able to perform its obligations under this Agreement and/or the Securities as to case may be; or

(n)Securities: if any of the Securities is terminated or extinguished or otherwise ceases to remain in full force and effect; or

(o)Business in Jeopardy: if in the reasonable opinion of the Lender the business of the Borrower or of the Guarantor is in jeopardy and notice thereof has been given by the Lender to the Borrower; or

(p)Arrest of Vessel: if the Vessel is arrested or otherwise detained; or

(q)Breach under the Charter: if there shall be a breach of any Charter by either the Borrower or the charterer or if either party shall terminate or repudiate the Charter or declare it to be frustrated; or

(r)Breach of obligations: if in the opinion of the Lender the Borrower and/or the Guarantor is or may be unable to perform their respective obligations hereunder or under any of the Securities, and notice thereof has been given to the Borrower and/or the Guarantor (as the case may be)

Upon the happening of any of the following events (herein called "Events of Default") the Outstanding Indebtedness and all amounts secured by this security shall, immediately become due and payable to the Lender on demand:

(a)subject as provided below, if the Company defaults or threatens to default in the due performance and/or observance of any term or condition hereof;

(b)if the Security Ship becomes a Total Loss : PROVIDED THAT it shall not be an Event of Default hereunder if the Security Ship has been insured in accordance with the provisions of Clause 7 hereof and the proceeds of the Insurances shall have been recovered by the Lender and applied in accordance with Clause 12 in complete satisfaction of the Outstanding Indebtedness within one hundred and twenty (120) days of the occurrence of the event giving rise to the Total Loss;

(c)if the Security Ship be arrested or otherwise detained for a period exceeding thirty (30) days;

(d)if anything is done or knowingly suffered or omitted to be done by the Company or the Master (if any) or any charterer or any subcharterer (if any) or Manager for the time being of the Security Ship which in the opinion of the Lender has imperilled or is likely to imperil the security hereby created; or

(e)if an Event of Default (as defined therein) under the Loan Agreement shall occur.

4.6 ARREST OF SEA-GOING SHIPS

Arrest of seagoing ships is an issue of considerable importance to the international shipping and trading community. While the interests of owners of ships and cargo lie in ensuring that legitimate trading is not interrupted by the unjustified arrest of a ship, the interest of claimants lies in being able to obtain security for their claims. 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. The main objective of the arrest is that the creditor who arrested the ship secures his claims. The final possibility, which stems from the seizure effected, consists of the right to sell the ship in the enforcement procedure. So far, in the matter of arrest of seagoing ships two international conventions have been adopted. International Convention Relating to the Arrest of Sea-Going Ships of 1952 that came into force on 24 February 1956 and International Convention on Arrest of Ships of 1999 that came into force on 14 September 2011. So far, only 10 states have chosen to ratify this convention and these are Albania, Algeria, Benin, Bulgaria, Ecuador, Estonia, Latvia, Liberia, Spain and the Syrian Arab Republic. However, Denmark and Norway have signed up to the new Arrest Convention and so may choose to ratify it in the future. The 1999 Arrest Convention was designed to update and address the identified deficiencies of the 1952 Arrest Convention and aims to strike a fairer balance between the interests of the ship owner and claimant.

INTERNATIONAL CONVENTION FOR THE UNIFICATION OF CERTAIN RULES RELATING TO THE

ARREST OF SEA-GOING SHIPS OF 1952

The basic starting principle is that ships may be only arrested in respect of securing maritime claims. The Convention explicitly lists in its first Article which claims are considered maritime claims. Further, the Convention emphasizes that maritime claims are considered those ones arising out of one of the following causes:

- (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 connexion with the operation of any ship;
- (c) salvage;
- (d) agreement relating to the use or hire of any ship whether by charter party 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 agent 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.

Even before the Convention came into force there was no dispute in legislation and court practice of certain maritime countries that the ships may only be arrested for maritime claims.

However, when it is needed to determine what is considered a maritime claim, there are basically two approaches. One is that such claims are explicitly enumerated and that out of that enumeration there are no other claims, it is so-called closed list of maritime claims. Another approach is not to enumerate the claims, that is, in addition to possibly enumerated claims; courts can also recognize other claims as maritime ones. This approach is known as open-ended list of maritime claims. Convention of 1952 provides a closed list and in respect of outstanding practice it should be concluded that it is about maritime claims that were, as such, undisputed and acceptable to most countries.

Definition of arrest under the convention

Definition of the arrest of the ship, as stipulated in Article 1 of the Convention, is that “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. This type of arrest of the ship in the theory of the Continental Maritime Law is known as the conservative ship arrest, while arrest of the ship on the basis of an enforceable court decision is known as the court arrest. Temporarily arrest of the ship is solely related to maritime claims and can only be pronounced by the court. This does not affect any rights or powers vested in any government, that is any public authority, or in any dock or harbor authority, under any international convention or under any domestic laws or regulations, to detain or otherwise prevent from sailing any ship within their jurisdiction.

INTERNATIONAL CONVENTION OF 1999

When the IMO, UNCTAD and the CMI initiated proceeding for adoption of the new International Convention on Maritime Liens and Mortgages, the work on preparation of the Convention on the Arrest of Ships was also initiated. This resulted in the adoption of new Convention of 1999. The 1999 Arrest Convention came into force on 2011, having finally been ratified by the requisite ten countries. That this process took over 12 years reflects the lukewarm reception that the Convention has received from the international shipping community. The new Convention from 1999 also does not greatly alter the existing international regime as established by previous Convention, but seeks to codify the whole matter, leaving less space to Contracting States for “their own solutions.” However, as regards enforcement of the arrest procedure, it is still left to national legislation by application of the principle *lex fori*. The basic approach to the principle of temporary arrest of

ships remained unchanged according to the Convention of 1999 compared to the 1952 Convention. Still, temporary arrest of ships can only be effected for maritime claims. Having in mind that the 1999 Convention increases the number of maritime claims in relation to the Convention of 1952, and in a way that certain maritime claims that were previously considered claims for purely business relationship, for which creditors had not been able to enjoy the protection relating to arrest of the ship, are deemed to be maritime claims. Namely, while in the 1952 Convention all claims, which are considered maritime, are classified in 17 groups from a to q, maritime claims in the 1999 Convention are contained in 22 groups starting from a and ending with v.⁷

SHIP ARREST IN INDIA

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

7Berlingieri, F., (2000), Arrest of ships, A commentary on the 1952 and 1999 Arrest Conventions, third edition, London, Hong Kong.
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.

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.

4.7 ISM AND ISSUES OF SAFETY

The ISM Code

The IMO Assembly unanimously accepted Resolution A.596(15), which called upon the MSC to develop guidelines concerning shipboard and shore-based management to ensure the safe operation of ro-ro passenger ferries. It was pointed in the resolution that a great majority of accidents are due to human error and fallibility, and that the safety of ships will be greatly enhanced by the establishment of improved operating practices. The ISM Code evolved through the development of the guidelines on management of the safe operation of ships (not only ro-ro vessels) and for pollution prevention.

The IMO Assembly adopted Resolution A.647(16) in 1989 to apply to all ships, and the revised Guidelines were adopted two years later as Resolution A.680(17) . The review process continued, and, in 1993, Resolution A.741(18), which included the ISM Code in Annex, was adopted by the Assembly. The ISM was originally intended as a recommendation, but it soon became apparent that it should become mandatory. The rst stage of implementation was on 1 July 1998, and the Code applied to passenger ships, high-speed craft, oil tankers, chemical tankers, gas carriers and bulk carriers. The Code was amended in 2000 to apply to other cargo ships and offshore drilling units, and these amendments (the second stage) entered into force on 1 July 2002. It was further amended in 2004 by Resolution MSC.179(79), and these amendments entered into force on 1 July 2006. Further amendments in 2005 entered into force in 2009, and the most recent amendment of 2008 (Resolution MSC.273(85) was adopted on 1 January 2010 and entered into force on 1 July 2010.

The Role of the ISM Code in the Safety

The preamble of the Code sets out its purpose, which is to provide an international standard for the safe management and operation of ships and for pollution prevention. Regulation 3 makes the safety management requirements mandatory. The Code superimposed a safety case regime by which risk analysis by owners has, unwittingly, become compulsory. Although the requirement of risk analysis was implicit in the original Code, it became an express requirement by the amendment of the Code in 2010. A new approach to ship operations and management, which is a radical change from the traditional approaches, is enshrined in the Code by requiring the ship-owners and managers to establish an SMS

through which the company's philosophy on safety is supposed to become transparent. However, the Code is not prescriptive but only provides the framework for owners and managers to ensure compliance with its provisions. In that sense there is exibility in determining compliance. It obliges both ag and port States to enforce the Code and has had a significant effect on reducing the number of substandard ships.

It is further stated in the preamble of the Code that the cornerstone of good safety management is commitment from the top. In matters of safety and pollution prevention, it is the commitment, competence, attitudes and motivation of

individuals at all levels that determine the end result. Its philosophy, in effect, is to cultivate a culture of self-regulation, and its goal is to minimise or prevent human error in the whole spectrum of ship operations through training, communication and accountability. The Code is based on general principles and objectives and is expressed in broad terms so that it can have a widespread application. Its stated purpose is to establish minimum standards for safety management and operation of ships and for pollution prevention. Clearly, different levels of management, whether shore-based or at sea, will require varying levels of knowledge and awareness of the items outlined.

The objectives of the code

They are set out in paragraph 1.2, in the following sub-paragraphs:

- 1 To ensure safety at sea, prevention of human injury or loss of life, and avoidance of damage to the environment, in particular to the marine environment and to property.
- 2. The safety management objectives of the company should, inter alia:
 - (i) provide for safe practices in ship operation and a safe working environment;
 - (ii) assess all identified risks to its ships, personnel and the environment and establish appropriate safeguards; and
 - (iii) continuously improve safety management skills of personnel ashore and aboard ships, including preparing for emergencies related both to safety and environmental protection.
- 3. The SMS should ensure:
 - (i) compliance with mandatory rules and regulations; and
 - (ii) that applicable codes, guidelines and standards recommended by the organisation, administrations, classification societies and maritime industry organisations are taken into account.

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UNIT – V

SAFETY AND SECURITY AT SEA

- 5 . 1 INTRODUCTION
- 5 . 2 DEFINING MARITIME SECURITY

5.3 COLLISION AND OTHER ACCIDENTS

5.4 TOWAGE

5.5 SALVAGE AND PILOTAGE

5.6 THE INDIAN LAW ON WRECK

5.7 CONCLUSION

5.1 INTRODUCTION

Since the earliest times, there has been a tendency to make time spent at sea safer and to reduce as much as possible risks related to maritime navigation. The need for safety at sea came gradually to the fore in the wake of major maritime accidents and disasters, which each time provoked taking numerous actions and measures. Many maritime

accidents had a significant impact on legal regulations in the field of maritime security. Accidents of Titanic, Torrey Canyon and Achille Lauro, which were the incentive for the adoption of numerous regulations, are particular. It has been known that the Titanic catastrophe¹ was the reason for convening the international conference in 1913 at which the first Convention for the Safety of Life at Sea was adopted (The International Convention for the Safety of Life at Sea), i.e. the SOLAS Convention. Then, the tanker Torrey Canyon disaster², IMO established a Legal Committee and adopted a number of international conventions relating to the protection of the sea against pollution, liability and compensation for damage caused by pollution of the sea by oil. Therefore, in 1969 the International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties was adopted, INTERVENTION, in 1969 International Convention on Civil Liability for Oil Pollution Damage, CLC Convention, in 1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage FUND Convention and in 1973 the International Convention for the Prevention of Pollution from Ships) MARPOL Convention. The event that marked suffering of the ship Achille Lauro happened in Egypt in 1985 and was the reason for the adoption of the Convention for the suppression of unlawful acts against the safety of maritime

¹ On 10 April 1912, the passenger ship Titanic sailed from Southampton. It was its maiden voyage to New York. At that time, the Titanic was the largest and most luxurious ship ever built. On 14 April, at 23:40, the Titanic struck an iceberg about 400 miles off Newfoundland, Canada. Less than three hours later, the Titanic sank to the bottom of the sea, with more than 1502 passengers, while, unfortunately, only 705 passengers were rescued.

² Liberian tanker, on 18 March 1967, owing to a navigational error by its Master, stranded in the open sea, near the southwest coast of England. The ship was carrying 119,328 tons of oil. Storms broke up the tanker after grounding spilling 60,000 tons of oil into the sea. Different techniques have been used to remove spilled oil from the sea but did not give the expected results. In order to reduce harmful effects, different detergents are used for cleaning the surface of the sea and the cost of that project was 1.6 million English pounds. As a final measure, which was partially successful, the British Government gave orders for the tanker to be destroyed by aerial bombardment. However, the oil slick still continued to expand to the southwest of England, which resulted in additional problems (bad summer tourist season, the deaths of seabirds).

navigation concluded in 1988, i.e. SUA Convention. Historically, all major maritime accidents had a positive effect on maritime security, since they significantly contributed the improvement of maritime transport safety through the adoption of legal regulations. However, despite the positive effect it is much better to act preventively, i.e. prevent maritime accidents through adoption of certain strategies and prevention regulations. But, if we have a situation that, despite preventative measures undertaken, maritime accident happened, it would be useful to undertake activities aimed at detection and identification of reasons that led to the accident (to establish the failures, omissions, irregularities in work), in order to avoid such situations in the future.

5.2 DEFINING MARITIME SECURITY

Although in the literature of the Maritime Law, as a rule, the authors do not address a problem of defining the maritime security, it could be said that the term maritime security implies a certain material condition arising from a lack of, i.e. non-existence of exposure to danger, as well as the organization of all the factors whose aim is to create or to extend such a situation. In an attempt to analyze the above mentioned definition, two elements for the existence of the state of maritime security may be noticed. First, it is necessary that there is such a condition in which there is no danger. This primarily refers to absence of dangers emerging from the sea, and dangers in connection with the sea. The second element presumes proper organization and compliance of numerous factors which are indispensable links in the creation of such a state, starting from owners of naval vessels, operators, administration, i.e. Maritime Administration, employees of the ports, as well as many other maritime state and non-state organizations and institution.

It is necessary to distinguish the term maritime security from other similar terms like safety of navigation, safe trade

and maritime safety. The term safety of navigation implies preservation of human lives at sea, property (ship and cargo) and marine environment from all perils of the sea including also natural disasters, maritime accidents like collisions, grounding and other accidents that are inevitable companion of maritime navigation. This definition also contains the aim of maritime security. Unlike the previous one, safe trade, among other things, implies protection of the ship from dangers caused by illegal actions, such as piracy, maritime frauds, mutiny aboard, etc. The distinction between the terms maritime safety and maritime security is quite debatable, especially because some languages do not distinguish between these terms. There is no universal or universally accepted definition of maritime security. Especially for this reason, there have been attempts to define the term maritime security through identifying specific activities that pose a peril, i.e. threat to maritime security. In this regard, we would emphasize the 2008 Report of the UN Secretary General, known as the Oceans and the Law of the Sea,¹⁰ which identifies seven specific threats for maritime security, such as: piracy and armed robbery; terrorist acts against shipping, offshore installations, and other maritime interests; illicit trafficking in arms and weapons of mass destruction; illicit trafficking in narcotic drugs and psychotropic substances; smuggling and trafficking of persons at sea; illegal, unreported, unregulated fishing and international and unlawful damage to the marine environment. In the shipping industry maritime security is defined as a set of measures taken by all persons involved in realization of maritime transport. In addition, these persons mean owners of sea-going vessels, operators, administration, i.e. maritime administration, employees of the ports, as well as other naval and state organizations and institutions that contribute to protection of various dangers at sea, such as piracy, kidnapping and armed robbery against ships, pilferage and theft, stowaways, smuggling and trafficking in human beings, drug trafficking, arms trafficking and terrorism. On the other hand, maritime security creates conditions to establish and maintain certain protection measures against intentional and illicit acts directed towards the ship. The task of maritime security is to make access to target more difficult in order to discourage perpetrators of the attempted attack. In order to achieve this, it is necessary on the one hand to have a good knowledge of all threats to maritime security (e.g. piracy, terrorism), and on the other hand to react in the right manner. In the context of interpretation of the terms safety and security, IMO emphasizes that "...the term safety has to be interpreted as safe movement and integrity of ships and security provided protection from threats."³ From the above mentioned and in order to establish a clear boundary between maritime safety and maritime security we can conclude that the term maritime safety includes providing protection from perils of the sea, i.e. marine risks while maritime security implies protection of intentional and unlawful acts oriented against the ship. However, what must be borne in mind is that maritime safety and maritime security have the same goal, which is to protect human life at sea (of passengers and crew), marine property (of the ship and cargo) and the sea and the marine environment against pollution.

Safety of ships as one of the aspects of maritime safety

From the perspective of law, safety of navigation is a condition without which the ship is not permitted to navigate. The existence of safety at sea is imperative of maritime navigation. However, securing the existence of safety at sea is not an easy task. In order to be able to talk about safety of navigation it is necessary to cumulatively fulfil certain conditions, i.e. requirements. Actually there are requirements relating to different aspects of maritime safety. First of all it is necessary to comply with the requirements relating to the safety of ships, then requirements relating to safe transport in terms of different types of cargo, requirements relating to human factor, i.e. crew on board, as well as with the requirements relating to safety of navigation (the existence of aids to navigation). Cargo on board can seriously damage the ship and the crew, as well as the marine environment. Therefore, it is necessary to provide safe carriage of cargoes on board. Safe transportation of cargo implies strict compliance with the rules, as well as the adoption of necessary measures when handling certain types of cargo. ⁴Taking precautionary measures or safety precautions on all cargo ships is also of great importance, in order to prevent or reduce as much as possible the occurrence of certain maritime risks, realization of which may lead to damage of the ship and or cargo and endangering the crew. Human factors significantly affect safety of navigation. When we talk about human personnel in maritime affairs, we primarily refer to sailors who represent a specific category of employees. In order for navigation to be safe, it is necessary

to fulfill certain requirements in terms of the ship's crew. On the one hand, it is necessary that the ship is no a minimum number of crew members is present on the ship, or that manning is adequate, while, on the other hand it is required that the crew is skilled, i.e. qualified to perform corresponding activities on the ship. The existence of these two elements is inevitable and it is imperative stipulated by the international instruments.

³IMO, Maritime Safety Committee, Report of the Maritime Safety Committee on its Eighty-Fifth Session, MSC 85/26, 19 December 2008, p. 29

⁴Legal regulations relating to the safe transport of cargo can be divided into general regulations, special regulations and dangerous goods regulations. General regulations include Chapter VI of the SOLAS Convention, which contains provisions on carriage of cargoes. Especially important is Regulation 5, titled Stowage and securing of cargo, which generally regulates the safety of cargo. Various regulations (codes, codexes) adopted by then IMO make also a part of general regulations. Ordinances regulate in detail many issues relating to safe carriage of cargo. Particularly important are the Code of Safe Practice for Cargo Stowage and Securing – CSS Code and the International Maritime Solid Bulk Cargoes Code – IMSBC Code. Regulations relating to the safe transport of certain types of cargo by the sea make special regulations, first of all: grain cargoes, timber deck cargoes and containers. In this part the following have been adopted: International Code for The Safe Carriage of Grain In Bulk– International Grain Code; Code of Safe Practice for Ships Carrying Timber Deck Cargoes; CSC Convention – International Convention for Safe Containers. Dangerous goods are also regulated by Chapter VII of the SOLAS Convention titled Carriage of dangerous goods. In addition, the SOLAS Convention also MARPOL Convention regulates certain types of dangerous goods. The provisions on dangerous goods are mostly of general nature and are further elaborated by individual codes. The most important codes that have been adopted, concerning the dangerous goods are: International Code for the Construction and Equipment of Ships carrying Dangerous Chemicals in Bulk– IBC Code; International Code for the Construction and Equipment of Ships Carrying Liquefied Gases in Bulk – IGC Code; The International Code for the Safe Carriage of Packaged Irradiated Nuclear Fuel, Plutonium and High Level Radioactive Wastes on Board Ships – INF Code.

It is necessary to distinguish the term maritime security from other similar terms like safety of navigation, safe trade and maritime safety. The term safety of navigation implies preservation of human lives at sea, property (ship and cargo) and marine environment from all perils of the sea including also natural disasters, maritime accidents like collisions, grounding and other accidents that are inevitable companion of maritime navigation. This definition also contains the aim of maritime security. Unlike the previous one, safe trade, among other things, implies protection of the ship from dangers caused by illegal actions, such as piracy, maritime frauds, mutiny aboard, etc. The distinction between the terms maritime safety and maritime security is quite debatable, especially because some languages do not distinguish between these terms.⁵ There is no universal or universally accepted definition of maritime security. Especially for this reason, there have been attempts to define the term maritime security through identifying specific activities that pose a peril, i.e. threat to maritime security. In this regard, we would emphasize the 2008 Report of the UN Secretary General, known as the Oceans and the Law of the Sea,⁶ which identifies seven specific threats for maritime security, such as: piracy and armed robbery; terrorist acts against shipping, offshore installations, and other maritime interests; illicit trafficking in arms and weapons of mass destruction; illicit trafficking in narcotic drugs and psychotropic substances; smuggling and trafficking of persons at sea; illegal, unreported, unregulated fishing and international and unlawful damage to the marine environment. In the shipping industry maritime security is defined as a set of measures taken by all persons involved in realization of maritime transport. In addition, these persons mean owners of seagoing vessels, operators, administration, i.e. maritime administration, employees of the ports, as well as other naval and state organizations and institutions that contribute to protection of various dangers at sea, such as piracy, kidnapping and armed robbery against ships, pilferage and theft, stowaways, smuggling and trafficking in human beings, drug trafficking, arms trafficking and terrorism. On the other hand, maritime security creates conditions to establish and maintain certain protection measures against intentional and illicit acts directed towards the ship. The task of maritime security is to make access to

target more difficult in order to discourage perpetrators of the attempted attack. In order to achieve this, it is necessary on the one hand to have a good knowledge of all threats to maritime security (e.g. piracy, terrorism), and on the other hand to react in the right manner. In the context of interpretation of the terms safety and security, IMO emphasizes that "...the term safety has to be interpreted as safe movement and integrity of ships and security provided protection from threats."⁷ From the above mentioned and in order to establish a clear boundary between maritime safety and maritime security we can conclude that the term maritime safety includes providing protection from perils of the sea, i.e. marine risks while maritime security implies protection of intentional and unlawful acts oriented against the ship.

⁵In the Croatian language, as well as in Russian (bezopasnost) and German (sicherheit) there are no different terms where aspects of security are separated from aspects of the lack of security. In English and French there is a clear difference between the term safety that is *safety* and the term security, that is *secure*.

⁶United Nation, Secretary – General, Report of the Secretary– General on Oceans and the Law of the sea, UN Doc. A 63/63 (March 10, 2008).

⁷IMO, Maritime Safety Committee, Report of the Maritime Safety Committee on its Eighty-Fifth Session, MSC 85/26, 19 December 2008, p. 29.

Human factors significantly affect safety of navigation. When we talk about human personnel in maritime affairs, we primarily refer to sailors who represent a specific category of employees. In order for navigation to be safe, it is necessary to fulfil certain requirements in terms of the ship's crew. On the one hand, it is necessary that the ship is no a minimum number of crew members is present on the ship, or that manning is adequate, while, on the other hand it is required that the crew is skilled, i.e. qualified to perform corresponding activities on the ship. The existence of these two elements is inevitable and it is imperative stipulated by the international instruments. ⁸In order to provide safe and efficient navigation and to avoid dangers, aids to navigation play very important role.

The SOLAS Convention is the basic legal act that, among other things, contains regulations and requirements that each ship must comply. These are mainly regulations relating to construction of ships, which, according to the above mentioned Convention must be constructed in a certain manner in order to be strong and watertight. Furthermore, the Convention contains provisions which stipulate that ships must be properly supplied with the necessary equipment that provides safe transportation of passengers, cargo and ship's crew. er equipment for rescue of passengers and crew, and the like. If the ship fails to comply with safety requirements it can lead to stopping of the ship and give rise to criminal responsibility of a commander, i.e. the shipping company, or to loss of insurance. However, what might be characterized as the most dangerous is that these ships represent a serious risk to the ship itself, the crew, passengers and the marine environment.

Seaworthiness is determined in the course of ship's construction, as well as during the examination of used boats and this is confirmed by certain documents, i.e. certificates. The boat must be safe for navigation at all times, i.e. until she is withdrawn from navigation. There are three different stages in which safety of the ship for navigation is provided. First, during the construction of the ship and installation of the equipment, then during its operation – from the time when the ship was commissioned, until her withdrawal and the third stage is the stage that refers to time during navigation.

International organizations, states and classification societies put enormous efforts into prevention of these risks. Their efforts are reflected in undertaking various measures and actions, inter alia, in the adoption of technical regulations on the construction and equipment of merchant ships. All of these regulations make a whole and represent the general regime of ship safety. Technical inventories are largely contained in international conventions, but also in regulations of classification societies. The most important conventions adopted by the IMO relating to the safety of ships are: –

- International Convention for the Safety of Life at Sea (SOLAS Convention), 1974 with amendments;
- International Convention on Load Lines, 1966, (LL Convention) and the 1988 Protocol and
- The International Convention for the Prevention of Pollution from Ships 1973/78 (MARPOL Convention).

In addition to these conventions, a significant one for safety of ships is also the International Convention on Tonnage Measurement of Ships, 1969, and as regards fishing vessels the 1977 Torremolinos International Convention for the Safety of Fishing Vessels occupies a special place.

§ The most significant international instruments adopted in this part are the International Management Code for the Safe Operation of Ships and for Pollution Prevention, ISM Code; the International Convention on Standards of Training, Certification and Watch-keeping for Seafarers, STCW Convention of 1978 which governs the requirements regulating the conditions for obtaining authorizations of the staff. The provisions of the SOLAS Convention and Maritime Labour Convention, MLC Convention, as well as numerous resolutions relating to manning of ships are also important.

5.3 COLLISION AND OTHER ACCIDENTS

The Basic Collision Regulations (COLREGS), or International Rules, were developed by the Intergovernmental Maritime Commission (originally IMCO, now IMO) and agreed on in the 1972 Convention on the International Regulations for Preventing Collisions at Sea. In 1977, these rules were adopted by statute in the United States and became part of the law of the United States. These rules essentially deal with the safe navigation of vessels; they are analogous to “rules of the road.” It should be noted, however, that in the internal waters of the United States a separate set of navigational rules, referred to as the Inland Navigational Rules, apply. Although there are many similarities between the two, they are by no means identical. The basic international law applicable to collision liability is embodied in the 1910 Brussels Collision Convention.⁹ The United States has not ratified this convention. Under the convention, liability for damage or injury caused by a collision is based on fault. Despite the fact that collision law in the United States is also based on fault, including the proportional fault rule,¹⁰ important differences exist between U.S. and international law relating to collisions. Collision law applies in two situations. The first is the traditional collision situation where two moving vessels come in physical contact with each other. The second situation, referred to as an “allision,” occurs where a moving vessel strikes a stationary object, such as a docked vessel, a bridge, or a wharf.

Liability

Fault in a collision case may arise because of (1) negligence or lack of proper care or skill on the part of the navigators; (2) a violation of the rules of the road (i.e., the applicable rules of navigation laid down by or under the authority of statute or regulation); (3) failure to comply with local navigational customs or usage; or (4) an unseaworthy condition or malfunction of equipment. Liability is imposed where the

negligence of the navigator of a vessel is found to have caused a collision. The test is whether the collision could have been avoided by the exercise of ordinary care, caution, and maritime skill. Collision cases tend to be fact-specific, and the circumstances of each case will be controlling. Also, a vessel may be held at fault for violation of a local navigational custom. A party seeking to rely on a custom to establish fault has the burden of establishing that such custom, in fact, exists. Custom may be relied on only if it does not conflict with statutory rules of navigation.

Causation

No liability will be imposed even where negligent navigation is shown unless it is proved that the negligence was the proximate cause of the collision. A proximate cause must, however, be a substantial factor in bringing about the collision. There may be more than one proximate cause to a collision. Before the adoption of the “proportionate fault” rule that allocates the aggregate loss according to the degree of fault of the parties, a series of “causation” rules had been created to ameliorate the unfairness of the “divided damages” rule that apportions the loss equally among tortfeasors regardless of the degree of fault.

Damages

The measure of damages in a collision or allision case depends on whether the vessel is deemed a total loss or a partial loss capable of being repaired. In a total loss, the damages include the market value of the vessel at the time of the loss plus pending freight and pollution cleanup, wreck removal, and other incidental costs proximately resulting from the casualty. Loss of earnings and detention are not recoverable. In a partial loss capable of being repaired, damages include the cost of repairs (or diminution in value if no

⁹International Convention for the Unification of Certain Rules of Law with respect to Collision between Vessels, Brussels, Sept. 23, 1910. ¹⁰United States v. Reliable Transfer Co., 421 U.S. 397 (1975)

repairs are made), the loss of earnings for the period the vessel is out of service, and incidental costs such as wharfage, pilotage, and salvage. Repairs for damage that was not caused by the collision will not be included in a damage recovery. In order to recover lost earnings, the vessel owner must prove the loss. A vessel owner may prove lost earnings by showing that because of the damage to the vessel the owner has been unable to fulfil contractual commitments and has lost charter hire or freight.

5.4 TOWAGE

A Towage service may be described as the employment of one vessel to expedite the voyage of another, when nothing more is required than accelerating her progress.

The High Court has admiralty jurisdiction to hear and determine any claim in the nature of towage, whether the services were rendered within Indian waters or on the high seas. In order that the owner of the tug may recover the amount of remuneration, if disputed, from the owner of the tow, the claim must, whether specified at the outset or not, be reasonable, and, if the sum was agreed, it must be certain, nothing extra being payable, beyond the fixed amount, for an alleged subsidiary service, such as delay in the transit and the tug must have fulfilled her obligations.

Although the contract between the owner or master of the tug and the owner of the ship requires the tug to obey the directions of the ship-owner and act as his servant, and though the tug and tow are, for the purposes of rendering the ship in the tow subject to the rules of navigation applicable to steamers, regarded as one vessel, it has been laid down that, as the employment of the tug is a voluntary act on the part of the ship-owner, and not, like the employment of a pilot, forced upon the ship-owner by compulsion of law,

the contract between tug and tow does not affect third parties. Therefore, if a steam tug towing a vessel under a towage contract comes into collision with a third vessel, it is no defence to an action by the owners of the third vessel against the tug that the tow was in charge of a pilot by compulsion of law whose default solely occasioned the collision.

Ordinary towage is confined to vessels that have received no injury or damage, and mere towage reward only is payable in those cases where the vessel receiving the services is in the same condition she would ordinarily be in without having encountered any damage or accident.

In ordinary towage all that is stipulated for on behalf of the vessel towing is, that she shall receive the ordinary reward which is paid in compensation for that towage services but there are two species of agreement which may be entered into by a vessel, whose usual occupation it is to tow vessels from one place to another. One is, where she meets with a vessel disabled, and where she undertakes, for any sum agreed upon between the parties, to perform the services of bringing the vessel from one port to another, or a place of safety. This may be called extra-ordinary towage, because it is not in the ordinary occupation of the vessel, and not to be considered ordinary towage.

Though an action in rem lies, ordinary towage services do not give rise to a maritime lien.

Ships may need towage assistance in various circumstances. However, the most common circumstances are the following:

i) Deep sea towage: Ships are often towed long distances to repair yards and large structures such as floating docks, power plants and oil rigs are often towed from one part of the world to the other. Such services are provided by large oceangoing tugs which are capable of spending long periods at sea, with a significant fuel range and a very large towing power. These vessels are also sometimes used in providing salvage services and are often stationed near important navigational routes. A number of these vessels provide multi-purpose services such as towage, salvage, oil-rig supply and services.

ii) Coastal and river towage: The tugs that are involved in this activity are generally smaller versions of ocean-going tugs and are primarily used to tow or push barges loaded with cargo and other materials along coastlines, major navigable rivers, and across short ocean passages. Such tugs are occasionally also used in order to provide salvage services.

iii) Harbour towage: Ships will often require tug assistance in berthing, docking or undocking in confined port areas and, in many instances, such assistance will be mandatory as a condition of port entry. This operation may require the use of more than one tug but may not involve actual attachment to the towed vessel since in many cases, pushing will be sufficient. The tugs that are involved in this form of activity are often highly manoeuvrable, with very sophisticated steering and/or propulsion systems.

Towage is normally provided by specialist towage companies pursuant to a formal towage contract that has been negotiated well in advance between shipowners and towing companies. In some instances (particularly in the case of coastal, river or harbour towage) such contracts are period contracts which relate to the provision of towage as and when needed at particular locations within a specified period.

However, even if no formal agreement is negotiated, completed or signed, a towage contract may be deemed to exist by implication especially where the shipowner or the master has consistently accepted such terms on previous and similar occasions. Furthermore, should the need for towage arise at short notice, the master of a vessel has implied authority to engage towage services that are reasonably necessary for the safe and proper performance of the voyage.

The Distinction between Towage and Salvage

However, an important distinction should be drawn between a towage contract and a salvage contract. A towage contract was described as long ago as 1848 as:

“... the employment of one vessel to expedite the voyage of another when nothing more is required than the accelerating of her progress.”

Therefore, a towage contract is normally negotiated at a time when the ship that is to be towed is not facing imminent peril and remuneration is negotiated and agreed in advance, usually on a fixed fee basis. However, a salvage contract (normally a standard form of salvage contract such as the Lloyd's Open Form of Salvage Agreement (LOF)) is agreed when the ship that is to be assisted is facing imminent peril and remuneration is assessed after the completion of the salvage services by a specialist system of arbitration based on a number of factors including the degree of danger to the salvaged property, the value of the property at risk, the degree of skill demonstrated by the salvor and the cost to the salvor of performing the services.

Furthermore, the remuneration that is normally payable under a towage contract is payable regardless of the success of the operation whereas a salvage contract is based on the principle of 'no cure-no pay' which means that the salvor is rewarded only if he succeeds in saving the ship and/or cargo and receives no reward if he fails to do so. Therefore, since the public policy of most countries is to encourage salvage for the common good, a salvage claim normally qualifies as a maritime lien whereas a claim under a towage contract does not do so.

However, the demarcation between towage and salvage may become blurred. For example, a ship which may be proceeding perfectly normally without tug assistance may suffer a problem such as an engine breakdown which does not place the ship in imminent peril but which nevertheless, requires the attendance of a tug to tow the vessel to a port where she can be repaired. Disputes can then arise as to whether the services provided by the tug should be considered to be salvage and remunerable on the usual 'no cure no pay' basis, or towage services for which remuneration should be in the form of a lump sum. Therefore, it is important whenever time allows that the owners of the ship which requires assistance should involve those other parties who may have to contribute to such remuneration in due course (e.g. his hull and machinery and P&I insurers, and cargo insurers) in such discussions to avoid future disagreements between the interested parties.

Alternatively, if it is known that the ship will need tug assistance to perform a voyage and the shipowners enter into a towage contract in advance for that purpose they will normally envisage that the tow may encounter some difficulties en route and conclude terms that will govern their relationship in circumstances which are reasonably foreseeable and anticipated. In particular, the tug will normally be obliged to use its best endeavours to protect the tow in such circumstances.

Therefore, if an event that was anticipated occurs during the towage and the tug is obliged to take steps to preserve the safety of the tow such services will normally be considered to be an integral part of the towage contract and the tug is not entitled to any additional remuneration. However, if the safety of the tow is imperiled by an event or danger that was not within the reasonable contemplation of the parties, such services may be considered to be salvage services, notwithstanding the existence of the towage contract, and the tug may be entitled to claim additional salvage remuneration if it succeeds in saving the towed ship.

Article 17 of the Salvage Convention states that a salvage reward is payable only where “... the services rendered exceed what can be reasonably considered as due performance of a contract entered into before

the danger arose.” Therefore, to convert a towage contract into a salvage it has been held that the tug must prove (a) that the services that it performed were of such an extraordinary nature that they could not have been within the reasonable contemplation of the parties to the original towage contract, and that (b) the services that had in fact been performed and the risks in fact run would not have been reasonably remunerated by the contractual remuneration that had been agreed in the towage contract.

Each case will depend on its particular facts. However, it is possible for a towage contract to expressly exclude the right to salvage if a clause to that effect is included in the towage contract.

5.5 SALVAGE

The legal concept of an entitlement to reward for saving imperilled marine property can be traced back into antiquity for some 3,000 years. Beginning with the Edicts of Rhodes, through the laws of the Romans and into modern legal systems, it has been recognised throughout the ages that an individual who risks himself and his own property voluntarily to successfully rescue the property of another from peril at sea should be rewarded by the owner of the property saved. The modern law of salvage rewards the voluntary salvor for a successful rescue of property in peril at sea. The purpose of the policy is not only the obvious humanitarian benefits of maritime rescues but to advance marine commerce. To this end, the measure of reward has never been adjusted by a mere estimate of the time and labour provided by the salvors. Looking to the safety and interest of seafarers and sea commerce, the courts have allowed liberal rewards for useful and successful salvage operations even when these involve little effort or trouble to the salvors particularly where human life is at risk.

When does a right to a salvage reward arise?

The modern law of salvage is found in the International Convention on Salvage (1989) which has force of law in Australia pursuant to the Commonwealth Navigation Act as amended. A right to salvage can only arise where a “vessel” or other property as defined is in peril at sea or in navigable waters. Vessel is defined to include any ship or craft or any structure capable of navigation. Rights of salvage do not apply to aircraft, or oil and gas platforms. In addition to vessels, rights of salvage also attach to any property not permanently or intentionally attached to the shoreline and include freight adrift or at risk.

Modern salvage rewards are not based as they once were on any fixed percentage of a vessel’s value. As noted earlier, historically a salvor of a derelict vessel was entitled to half the value of the property saved. The International Convention in force in Australia and many other countries sets out a number of factors which a court is required to have regard to in fixing a salvage reward. These include:

- (a) The salvaged value of the vessel and other property;
- (b) The skill and efforts of the salvors in preventing or minimising damage to the environment;
- (c) The measure of success obtained by the salvor;
- (d) The nature and degree of the danger;
- (e) The skill and efforts of the salvor in salvaging the vessel, other property and life;
- (f) The risk of liability and other risks run by the salvors or their equipment;
- (g) The time used and expenses and losses incurred by the salvors;
- (h) The promptness of the services rendered;
- (i) The availability and use of vessels or other equipment intended for salvage operations and the state of readiness and efficiency of the salvor’s equipment and the value of that equipment

PILOTAGE

Marine Pilots are a critical manpower requirement for the effective functioning of any port. The very nature of work of a marine pilot solely depends on his/her training and an understanding of the local navigational knowledge, such as substantial understanding of the local safety and environment issues of the port and the waters in its proximity. At the same time, marine pilots need to have basic understanding of the way a ship behaves in particular environment. Such behaviour or the manoeuvring characteristics would have several varying features depending on the type and the size of the vessel, her draft and displacement, beam width and air draft, propulsion power and availability of bow thrusters, prevailing wind and current / tides etc. The training, therefore, would ideally constitute two essential components, namely, basic understanding of safe navigation and the specific needs of the port for implementing a safe passage/ operation/movement within the port. At present, in Indian ports, the subject of training of pilots has been dealt, generally, by the concerned ports, driven through their specific requirements. Therefore, there is a need to harmonise this training requirement to bring about standardization which could then be the USP of our ports and such institutionalized skill development would also generate better opportunities for Indian marine pilots. To achieve such a harmonization the Maritime States Development Council in their 15th and 16th meeting desired that the National Shipping Board should do this work.

The term “pilot” may be broadly used to describe any person directing the navigation of a vessel. A compulsory pilot is not an agent or servant of the vessel owner; hence the owner of a vessel cannot be held liable in personam for damages caused by a compulsory pilot.

It is recognized that pilotage requires specialized knowledge and experience in the specific area, and that in India, as in the rest of the world, with diverse waterways and ports, it has been found appropriate to administer pilotage, on a regional or local basis. The maritime pilots referred to in this recommendation do not include shipmasters or crew who are certified or licensed to carry out pilotage duties in particular areas. Organizations are encouraged to establish and maintain competent pilotage authorities, for administering safe and efficient pilotage systems. The provisions are required to be implemented by concerned ports, by realigning their respective rules/regulations. The recommendatory provisions (wherever specified) may be considered for implementation at the discretion of the port. These

Regulations shall be titled the “Indian Maritime Pilots Regulations”. It shall come into force from the date of its publication in the official Gazette by the Central Government. It shall apply to all Indian Major and Non-major Ports to which the provisions of Section 31 of Indian Ports Act 1908 have been extended.

The Major Port Trusts Act, 1963 makes 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.

5.6 THE INDIAN LAW ON WRECK

As per the provisions of the Merchant Shipping Act 1958, a wreck may happen not only in territorial waters or areas beyond that but also in the tidal waters or on the shores or the coasts.¹¹ Yet, a harbour or port is exempted from the place of occurrence of wreck under the Act.¹² Hence, if the wreck, stranding or sinking of the ship happens in the port, the provisions of the Indian Port Act, 1908 and the powers of the deputy conservator in preventing pollution will apply. Under the Indian law, the abandonment of the vessel beyond any hope or intention is the criteria for treating it as a wreck.¹³ Hence, the vessel about to be stranded included under the Convention and OPA Scheme does not find application in India. The potentially polluting wreck is not a wreck as per the Indian law. Hence, if a vessel sinks or capsizes in the port area, unless the owner abandons it, the laws on wreck may not be applicable to it.

Wrecks include goods and vessels. It may happen in sea, tidal waters, shores or in the coast. Under the Indian Ports Act, 1908, if a ship is wrecked, stranded or sunk within the port limits, the Conservator of the Ports or in the absence of such an office, the Harbour master may give notice to the owner of the vessel, to raise, remove or destroy

the vessel within such period as may be specified in the notice and to furnish such adequate security to the satisfaction of the conservator to ensure that the vessel shall be raised, removed or destroyed within the said period. If the owner does not comply and act upon the notice, the conservator may raise, remove or destroy the property and claim the compensation from the owner. Mostly, the salvage activity will be done by private salvors in agreement with the Port Trust. Within the port limits, the capacity of the party to carry out salvage, the methods used to raise or remove or destroy the vessel is subjected to the expert opinion of the deputy conservator of the port. Normally, the court will not interfere with these technical decisions. For example, on 16th June 2013, M.T.Pratibha Tapi, which was anchored along the Mumbai coast drifted towards the Maldha Island and capsized, thereby raising considerable public outrage against the authority delay in initiating the response proceedings. The vessel was under financial distress and was allowed to operate with lesser number of required crew during the pre-monsoon season. The D.G. Shipping requested the shipping corporation of India to send emergency towage vessel to tow the tanker off the port area. The ship had 2000 tonnes of fuel oil on board.

¹¹ The Merchant Shipping Act, 1958, s. 391

¹² Id., s. 2(49) reads, "Tidal waters has been defined in the Act to mean any part of the sea and any part of a river within ebb and flow of the tide at ordinary spring tides and not being a harbour".

¹³ The Merchant Shipping Act, 1958, s. 2(55)

5.7 SHIP OWNER'S LIABILITY UNDER TORT

The common law doctrines of public nuisance,¹⁴ trespass¹⁵, negligence,¹⁶ rule of strict liability ¹⁷and absolute liability¹⁸ and the riparian owners rights are incorporated into Indian law but invoked very rarely in air and water pollution cases. Those doctrines created by the common law is meant to fix liability for the escape of the noxious objects, careless use of noxious articles and pollutants and the infringement of property rights in water. The liability for pollution damage is strict on ship owners, irrespective of their nationality. As per the law, "...the owner is a person registered as owner of the ship; in the absence of registration the person owning the ship; or in the case of a ship registered in foreign state, the person registered in that state as the operator of the ship". He may be exempted from the liability in cases of war, hostilities, civil war, insurrection and such other unforeseen emergencies. He is also exempted in cases where the pollution damage is caused entirely by a third party intervention or negligence by the government authority in providing proper navigational aids. Exemptions are also granted to war ships and other government ships used for non-commercial purposes based on the doctrine of sovereign immunity. When two or more ships are involved in the tort, all the owners are jointly and severally liable for the loss incurred. The ship owner is also exempted from liability if the plaintiff himself had contributed to the pollution damage or loss.

Under the provisions of the MSA, only the ship owners can be held liable for the pollution damage. The liability cannot be imposed on the master and crew, operators and salvors unless there is proven negligence or recklessness by these persons who have contributed to the pollution damage. The Act excludes certain persons from the strict liability regime. In cases of oil pollution damage the ship owner cannot limit his liability.

Compulsory Insurance as a Requirement for Port Entry

Compulsory insurance scheme is prescribed under the Merchant Shipping (Regulation of Entry of Ships into Ports, Anchorages and Offshore Facilities), 2012.¹⁹ "Any vessel of 300 GRT or more, other than Indian Ship, entering into or sailing out of ports, terminals, anchorages or seeking port facilities or Indian offshore facilities in Indian territorial waters shall be in possession of insurance coverage against maritime

claims and established policies and procedures for their supervision”. The oil or chemical tankers which are more than twenty years old; general cargo and passenger vessels of more than 25 years old; and LNG tankers of more than 30 years old should have a class certification by a classification society which is a member of the International Association of Classification Societies duly authorized by Indian maritime administration. The operators of all foreign vessels in Indian waters should have a valid P & I insurance coverage against all maritime claims as mentioned under the LLMC. No ship shall be permitted to enter respective port without having P & I insurance to cover a maritime adventure.²⁰

¹⁴The Indian Penal Code, 1860, ss.268-294 A ¹⁵Esso Petroleum v. Southport Corporation, (1956) A.C. 218 ¹⁶Mukesh Textiles Mills (P) Ltd. v. H.R. Subramania Shastri, A.I.R 1987 Kart. 87; Naresh Dutt Tyagi v. State of U.P., 1995 Supp. (3)

S.C.C 144; B. Venkatappa v. B. Lovis, A.I.R 1986 A.P. 239 ¹⁷Becharam Choudhury v Pububrath, (1869) 2 Beng. L.R. 53; M.Madappa v K.Kariapa, A.I.R (1964) Mys. 80 ¹⁸M.C. Mehta v. Union of India, A.I.R 1987 SC 1086; Union Carbide Corporation v Union of India, Civil Revision No. 26 of 1988 ¹⁹G.S.E 311(E) on 20th April 2012, the Merchant Shipping (Regulation of Entry of Ships into Ports, Anchorages and Offshore

Facilities), 2012 ²⁰M.V. Sea Success I v. L. & L.S.P & Indemnity Assn. Ltd., A.I.R 2002 Bom. 151

Pollution Damages under General Environmental Laws

The liability and damages relating to pollution from hazardous substances is dealt primarily under the Manufacture, Storage and Import of Hazardous Chemicals Rules, 1989 made under the EPA, 1986 scheme and also under the Public Liability Insurance Act, 1991 and the National Environmental Tribunal Act, 1995. The Public Liability Insurance Act, 1991 gives immediate relief to persons affected by an accident occurring while handling of hazardous substances and matters related thereto. The handling of hazardous substances includes “transportation by vehicle other than railways” and thus maritime transport and incidents in connection thereto are coming under the purview of the Act.²¹ The ship owner’s strict liability includes providing immediate relief under the Environmental Relief Fund and from the insurance coverage. The central government can exempt any public or state corporations from taking out insurance policies. This is the greatest deficiency of the Act as it may dilute the adjudication proceedings.

Any excess quantum of damages and as above those prescribed under the Public Insurance Scheme is enforceable under the National Environmental Tribunal Act, 1995. In case of environmental damage re-sulting during the handling of hazardous substances and also for destruction of bio diversity, compensation may be claimed under this Act and the liability of the ship owner is strict. Even though the provisions of LLMC, 69 are incorporated under the MSA scheme, India has not ratified the HNS Protocol. Strict en-forcement of the provisions of general environmental law is possible only if the HNS is ratified and MSA is amended thereby adopting its provisions.

Ship Detentions and Release

If the ship owner violates any of the provisions mentioned under the Merchant Shipping (Amendment) Act, 2002, regarding strict liability, the ship may be detained. It has to be released after sufficient security is provided. In *Videsh Sanchar Nigam Ltd., (VSNL) v. Kapitan Kud*,²² the Supreme Court pointed out that the arrest of the vessel effected under provisions of the MSA and the admiralty rules can be lifted only on deposit of security in the Court by the vessel owner.

Civil Jurisdiction in Maritime Claims

In India, Admiralty jurisdiction was originally vested only with the Recorders Court at Bombay, which was established by the Charter dated 20th February, 1778. Later on, the Recorders court was superseded by the Supreme Court of Judicature by means of the Letters Patent issued by the Charter of 1823 and admiralty powers were retained on it. In 1862, the High Court of Bombay was established by the Letters Patent. Thereafter, by virtue of the powers under the Colonial Courts of Admiralty Act, 1891, the High Courts at Calcutta and Madras were also vested with Admiralty jurisdiction. There was a view that only the High Courts of Bombay, Calcutta and Madras were having admiralty jurisdiction. In *M.V.Elizabeth v. Harwan Investment and Trading Company*,²³ the issue was “whether any court in the State of Andhra Pradesh or in any other State in India (including the High Courts and Supreme Court) had admiralty jurisdiction to proceed in rem against an arrested ship on a cause of action concerning carriage of goods from an Indian port to a foreign port”. The Supreme Court held that even though the Indian high courts are established like their British counterparts, the high courts in India never acquired the supreme civil jurisdiction on all matters including admiralty for being a court of record. Unlike, the English statute, the Colonial Courts of Admiralty Acts, 1890 and 1891 never conferred on Indian high courts separate and distinctive admiralty jurisdiction.

²¹ The Public Liability Insurance Act, 1991, s. 2(c) and 2 (j) ²² A.I.R 1996 SC 516 ²³ A.I.R 1993 SC 1014

But this jurisdiction of High Courts is strictly confined to its territorial limits only. The main issue in *World Tanker Carrier Corporation v SNP Shipping Services Pvt. Ltd.*²⁴ was that when a collision happens in international waters, whether the foreign owners of a foreign vessel could apply to an Indian High Court to set up a limitation fund.

In *Mayar (H.K.) Ltd. and Others v. Owners & Parties*,²⁵ *Vessel M.V Fortune Express and Others*, the Supreme Court held that unless the bill of lading has an exclusion clause suggesting proper forum for litigation, the High Court of Calcutta had jurisdiction to decide the case. In this case, a recovery suit for damages was filed before the Calcutta High Court for short landing of certain wooden logs for which the appellants had chartered a vessel from Malaysia to Calcutta. The appellants had demanded arrest of the vessel when it was in Calcutta port. One step forward, the High Court of Kerala in *MV Free Neptune V. D.L.F. Southern Towns Pvt. Ltd.*,²⁶ had issued an arrest warrant for the ship which was anchored in Chennai port. It was held that the High Court of Kerala has inherent powers to adjudicate admiralty cases under its civil jurisdiction.

Since the High Court had not framed admiralty rules, it imported the admiralty rules of the Madras High Court for adjudicating admiralty cases in the state. Now, as a result of this judgment, any civil suit may be filed before the High Court of Kerala by invoking its admiralty jurisdiction.

In India, under the Admiralty Jurisdiction Act, 1860,²⁷ an action for claim can be brought “in personam or in rem”. In this way, the claimant can proceed either against the ship involved in cause or against the owner. On this aspect, literally, the Indian law is in tune with the law in other major maritime countries. The major deficiency is the absence of clear statutory provisions supporting such claims. In India, the usual practice in maritime claims is to obtain an order for the arrest of ship. The owners will provide bank guarantee and the ship sails into the next port of call. Under the existing law, in personam proceedings against the owner are very difficult and impractical. As per the prevailing circumstances, the owner of the foreign ship is most unlikely to be available for prosecution, within the Indian jurisdiction. Hence, the master can be prosecuted for his physical presence and for the reason that a personal prosecution is more likely to bring home to the master his

individual responsibility and thus to make him more careful in future. An issue when prosecuting the master rather than the owner is that, “the fine on the master must be relevant and proportional to his personal responsibility”, while the fine on the owner can relate to the nature and extent of pollution. In order to impose monetary penalties upon the captain, crew or agents of the ship owner, there should be a proven act or omission committed with an intention to cause such damage, or recklessly with full knowledge that such a damage is the probable result of such acts or omission. The law gives an option to proceed either against the ship or the owner or master. But at the same time, to proceed against the master, it insists on strong evidentiary requirement to prove the willful negligence of the master or crew, causing pollution. In effect, the claimant can proceed only against the ship involved in cause. Hence, during in personam proceedings, the power of the court is limited, only to hold the master and thereafter imposing fine on him proportionate to his responsibility, thus not placing the owner under direct liability. Unless the owner cannot be made responsible, the entire purpose of compensation regime will be futile. The law does not address this.

²⁴ A.I.R 1998 SC 2330 ²⁵ [2006] 3 SCC 100 ²⁶ 2011 (1) KLT 904 ²⁷ The Admiralty Jurisdiction Act, 1861

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The British law has undergone radical changes but in India the provisions are the same, in spite of the dynamic changes in shipping operations. A committee appointed by the Central government had opined that admiralty jurisdiction in India is out dated and requires a comprehensive legislation, defining the scope of admiralty jurisdiction of the courts is an immediate requirement.²⁸ Because of the inadequate provisions in law that has actually weakened the civil liability regime, there is increase in criminal prosecutions against seafarers worldwide.

Criminal Liability of Seafarers for Maritime Accidents

On 24th March 1989, the Exxon Valdez had grounded on the Bligh reef causing the greatest crude oil spill that the world had ever witnessed. The spill had caused massive environmental pollution of the Alaskan waters. Consequently, Captain Joseph Hazelwood was prosecuted along with the Exxon shipping company and the Exxon Corporation. For the first time in the history, the captain, ship owner and ship operator were criminally prosecuted for accidental pollution. This trend slowly spread into other legal systems. For example, when the Prestige disaster occurred, the Captain Apostolos Mangouras of the tanker was arrested by the Spanish authorities on grounds of not cooperating with salvage crews and for harming the environment. His release was allowed on a bail of 3 million Euros by the European Court of Human Rights. In April 2004, eight crew members of the tanker Tasman Spirit were arrested and detained for eight months an oil spill near the Karachi port resulting from a collision. They were released upon discussions between the Pakistan authorities, Greek government and the IMO.²⁹

International Laws on Coastal State's Right to Investigate on Marine Casualties

The SOLAS Convention 1974 prescribes duty upon the flag states to conduct investigations into any casualty suffered by a ship of its flag, if the investigation is to assist in identifying legal issues as a contributing factor. This provision is incorporated in many other conventions such as the Load Line Convention, 1966. The duty sprouts out from the UNCLOS.³⁰ Coastal States can adopt any measure to prevent pollution in the territorial waters. In the EEZ, the coastal states can adopt such laws in conformity with the international rules and standards. Under the MARPOL, coastal states can impose sanctions severe enough to dissuade its noncompliance. The MARPOL does not empower imposition of criminal liability in accidental pollution except when the incident had happened intentionally or

recklessly. The UNCLOS further restricts criminal prosecutions against seafarers. Accordingly, if the incident happens beyond the territorial waters, or if inside the territorial waters but without any intention to cause it, only monetary penalty can be imposed. The coastal states sovereignty within the territorial waters and its jurisdiction or sovereign rights up to the EEZ empowers it with an inherent right to investigate into marine casualties affecting its coasts. All major countries have incorporated these provisions and the MSA also recognizes India's right to investigate into marine casualties affecting its territory. The International Labour Organizations Maritime Labour Convention, 2006 provides a provision for investigation of serious marine casualties as well as setting out working conditions for seafarers. India has not ratified this convention.

²⁸ The Parveen Singh Committee Report, 1986

²⁹ Jeanne Grasso and Allison Fennell, "Criminal Prosecutions and the Maritime Industry—A World-wide Trend, 2005", International Oil Spill Conference, <http://www.iosc.org/papers/IOSC%202005%20a159.pdf>, last visited in December 2013

³⁰ The UNCLOS 1982, art. 94(7) reads, "Each State shall cause an inquiry to be held by or before a suitably qualified person or persons into every marine casualty or incident of navigation on the high seas involving a ship flying its flag and causing loss of life or serious injury to nationals of another State or serious damage to ships or installations of another State or to the marine environment. The flag State and the other State shall cooperate in the conduct of any inquiry held by that other State into any such marine casualty or incident of navigation."

International Instruments for the Protection of Seafarer's Right

The IMO Guidelines on the Fair Treatment of Seafarers in the event of a Maritime Accident are frequently violated by many countries and there is widespread concern among seafarers upon this crucial issue. These concerns are detrimental to the existence of the industry itself and it was promptly addressed by the IMO by means of a Resolution in 2011. These guidelines were aimed to ensure fair treatment to seafarers, who are facing criminal prosecutions in a coastal or port state following a maritime accident. It addresses the coastal states to protect the basic human rights of the seafarer and to give them fair trial without any discrimination and in due process. The flag states are asked to co-operate with the coastal state and take necessary steps in ensuring fair treatment to mariners. The state to which the crew is a national is also recommended to conduct necessary interactions with the coastal state and co-operate with the investigations. The mariner is directed to reveal all necessary information and to co-operate with the coastal state authorities in finding out the root cause of the incident. In 2008, the Casualty Investigation Code³¹ was adopted as a result of the disparity in national laws about fair treatment to seafarers and to promote co-operation among nations in this regard. This Code is meant to establish the best practices in marine casualty and marine incident investigation. It incorporates the recommendations of the IMO Resolution.³² The code specifically states that "Marine safety investigations do not seek to apportion blame or determine liability. Instead a marine safety investigation, as defined in this Code, is an investigation conducted with the objective of preventing marine casualties and marine incidents in the future".³³ The code describes pollution damage or potential damage to the environment as a marine casualty. Marine incident include any incident or chain of events which may harm the environment or the safety of the ship. In the event of any casualty, the coastal states are obligated to notify the incident immediately to all interested states. It should ensure due process, unbiased and independent investigation, mainly focusing on safety and not on liability. It obligates states to facilitate co-operation and give priority to marine casualty investigation in the same way as being done in criminal prosecutions.

Indian Position

In India, the captain or crew of the ship cannot be held liable for pollution damage unless "...the incident causing such damage occurred as a result of their personal act or omission committed or made with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result". Hence, to impose monetary penalties upon the captain, crew or agents of the ship owner, there should be a

proven act or omission committed with an intention to cause such damage, or recklessly with full knowledge that such a damage is the probable result of such acts or omission.

In India, when pollution damage occurs as a result of some marine casualty within the port area, the master of the ship should first inform the port authorities and side by side activate the ship board oil pollution emergency plan or the ship board marine pollution emergency plan to mitigate its effect. The port authority should handle the pollution as per the crisis management plan for the port, considering the gravity of the pollution. The ports, maritime boards and concerned agencies should send the report to the

D.G. Shipping. The deputy conservator for port is the preliminary investigating agency to conduct investigation about the marine casualty. He submits the report to the judicial first class magistrate before whom will follow the criminal prosecutions. The preliminary investigating agency should be an independent agency. This will make the enquiry speedy and reports accurate. In this manner the trial could be made more expeditious. If it is proved that the incident was because of reckless act or wilful violations, criminal penalties may be imposed under the Indian Ports Act, 1908.³⁴

³¹ The Code of the International Standards and Recommended Practices for a Safety Investigation into a Marine Casualty or Marine Incident, 2008

³² The IMO res. A.849 (20)

³³ The Code of the International Standards and Recommended Practices for a Safety Investigation into a Marine Casualty or Marine Incident, 2008, ch.1.

³⁴ The Indian Ports Act, 1908, s.21

Prosecutions are also possible under the Water (Prevention and Control of Pollution Act), 1974 and the Environmental Protection Act, 1986. The person who is found to be responsible for pollution of coastal waters may be given imprisonment for a maximum period of 6 years with additional fine. For repeating offences, the imprisonment can extend up to 7 years along with additional fine. For rash and negligent navigation of the vessel, the captain may be imprisoned for a period of 6 months and with a fine of Rupees 1000 under the Indian Penal Code. If the marine casualty results in hurt or grievous hurt to the person or personal safety of others, criminal prosecutions could be initiated under the Penal Code.

Hence, the Indian law permits criminal prosecution of seafarers under the provisions of the Merchant Shipping Act, the Indian Ports Act and the general environmental laws and the Indian Penal Code³⁵. One of the deficiencies identified is that, the sea farer involved in the marine casualty should face double trial-one under the shipping legislations and the other under the Penal code. This has created delay in closing the investigation proceedings on time and there are instances when mariners had to undergo trial for several years. For example, the mariners of M.T.Dadabhai Naoroji and MT Bhagat Singh had to face criminal trial for over 15 years, following the death of 5 persons from two separate fire incidents on board of the vessels while it was anchored in Cochin port. Finally they were acquitted of all charges. This incident throws light upon the inadequacy of national laws in adjudicating cases relating to marine casualties.³⁶ The major difficulty is that the enquiry under the MSA, 1958 and the Indian Ports Act, 1908 are administrative enquiries. It is not final as such, Therefore, marine casualties in India face huge investigative delays. To overcome this difficulty, the Government of India had constituted a Marine Casualty Investigation Cell in 2010. The Cell was constituted to undertake investigation into marine casualties, such as groundings, sinking, or collision of vessels or death or grievous injury or missing reports of seafarers. It has not started functioning. At least, a dozen marine casualties are reported to have occurred along the Indian coastal line during the monsoon season every year. Yet, no one knows about the status of investigations made into them. If any Oil spill happens in USA, decisions are quick and investigations are conducted and closed at the earliest. Litigations can follow later. It is hoped that once the new agency starts functioning, time bound investigations will be conducted in an efficacious manner.

5.8 CONCLUSION

The Indian law permits criminal prosecution of seafarers under the provisions of the Merchant Shipping Act, 1958, the Indian Ports Act, 1908 and general environmental laws and the Indian Penal Code, 1860. One of the deficiencies identified is that, the sea farer involved in the marine casualty should face double trial-one under the shipping legislations and the other under the Penal code. This has created delay in closing the investigation proceedings on time and there are instances when mariners had to undergo trial for several years. The enquiry under MSA and Indian Ports Act are administrative enquiries. Therefore, marine casualties in India face huge investigative delays and nothing is put to the ordeal of the court finally.

India lacks a consolidated law for dealing with marine pollution from collisions at sea. The existing law is too inadequate to deal with marine casualty incidents. The MSA is not enough to fix the quantum and liability in marine casualty cases. Vessel detentions are temporary solutions since, the ship owner may abandon the vessel and the government will be left with the job of cleaning up the shores.

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³⁵ The Indian Penal Code, 1860, s. 280 ³⁶ Such incidents are beyond the scope of Part XB, Part XC and Part XIA of the MSA, 1958