

T H E A R R E S T O F S H I P S I N G E R M A N
A N D S O U T H A F R I C A N L A W

BY

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A thesis submitted to the UNIVERSITY OF NATAL, Faculty of Law (Department of Business Law) in partial fulfillment of the requirements for the degree of Master of Laws.

D U R B A N , 1988

TO

H E L L A C E C I L I A

I record that this thesis is substantially my own work, save in the respect I have acknowledged. I also declare that this thesis has not been submitted for a degree in any other university.

A B S T R A C T

This thesis compares the arrest-of-ship proceedings of the Republic of South Africa and the Federal Republic of Germany. In German law the more than a century old provisions of the Code of Civil Procedure (as amended) are applicable, in South Africa the major statute is the Admiralty Jurisdiction Regulation Act of 1 November 1983. South Africa has special Admiralty Courts having jurisdiction in arrest matters. When issuing the arrest in Germany, jurisdiction is vested in the court dealing with the principal matters, as well as in the Magistrate Court (Amtsgericht) in which district the property (such as the ship which is to be arrested) is located. Both German and South African law provide that a creditor who wishes to arrest a ship must have a "claim for an arrest." In South African law such a claim is called a "maritime claim." South African admiralty law contains some special and even unique provisions such as those regarding the arrest of an "associated ship." These provisions attempt to defeat the strategy against sister-ship-arrests and enable the courts to arrest ships owned by the person who was the owner of the ship concerned at the time the maritime claim arose. The court can also arrest a ship owned by a company in which the shares were controlled or owned by a person who then controlled or owned the shares in the company which owned the ship concerned. Ships will be deemed to be owned by the same persons if all the shares in the ship are owned by the same persons. A person furthermore will be deemed to control a company if he has the power to control the company directly or indirectly. Deviating from common law principles which require the physical presence of the property to be arrested, the South African courts can order anticipated arrests of a ship not yet within the area of jurisdiction of the court at the time of application. Such an order may be brought into effect when the property (in this case, the ship) comes within the area of jurisdiction of the court. The same principle is applicable in German law and does not contravene para 482 HGB because this provision only prohibits placing a ship

under distraint and not the order for an arrest. In German law an action in personam is only directed against a person whereas in South African law a res, eg a ship or her bunkers, is the object of the admiralty action in personam. The Admiralty Jurisdiction Regulation Act of 1983 attempts at uniformity with international law as it is based on several existing laws and international conventions, for example the International Convention for the Unification of Certain Rules Relating to Arrest of Seagoing Ships of 1952. Unlike Germany, South Africa is not, however, a signatory to the International Arrest Convention of 1952. When applying German law, it has to be noted that Germany has ratified the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 1968 (the EEC-Convention) - this is particularly so when trying to enforce the arrest of ships. Regulations Concerning the limitation of liability in South Africa can be found in ss 261 to 263 of the Merchant Shipping Act of 1951. In German law limitation of liability is codified in paras 486 to 487e of the Commercial Code (HGB) with reference to the International Convention on Limitation of Liability for Maritime Claims of 1976 (the 1976 Convention). This thesis shows that in certain fields South African and German provisions do not deviate or are at least substantially similar. This fact makes the application of both laws easier for litigants and lawyers, either for South Africans in Germany or Germans in South Africa.

F O R E W O R D

I wish to record my appreciation to all those who have assisted me with my research. In particular, I thank my girl friend Hella Cecilia, who lovingly gave me every motivation and support throughout this entire project. My supervisor, Professor Hilton Staniland, has given me inspiration, expert guidance, criticism, encouragement and support in my endeavours. I thank Dr Johannes Trappe, my co-supervisor from Hamburg (West-Germany), for his help and expert advice in connection with the German part of the thesis.

I am grateful to my friends and relatives for their encouragement and assistance: In particular Anja Luehrmann for spending so many hours in German libraries to locate and copy material not available in South Africa; Stephen Girvin for proof-reading the drafts and giving me every encouragement; Judy Parker for proof-reading the drafts; Advocate Chris Marnewick for proof-reading the drafts and for providing me with materials and information; Messrs Shepstone and Wylie (Attorneys) for providing me with materials and unreported cases; P&I Associates for permission to make use of a letter of undertaking in the Appendix of this thesis; Annette Ell and Jay Forder for advising me how to operate a Personal Computer; the members of the Department of Public Law of the University of Natal for allowing me to use their Personal Computers and my parents, Eleonore and Peter Schlichting and Arnold Amsinck for providing me with financial security.

I also wish to record my appreciation for all the assistance given by Heather Green, Librarian of the GMJ Sweeney Law Branch Library and her staff.

Mathias P Schlichting

Durban, December 1988

P R E F A C E

The aim of this thesis is to compare the legal systems of two different countries having different languages, namely South Africa and the Federal Republic of Germany. As the language of the thesis is English, all German literature and judgments which are applicable to the thesis, have had to be translated into English. The difficulties arising from translation are multiplied when translating statutory provisions, judgments, law books and articles. German expressions, terms and concepts more often than not have a specific meaning and cannot be translated into literal English. Thus, besides reading the translations of most of the German provisions it is necessary to read the original German provisions, which can be found in the Appendices and which are the foundation of the work.

The thesis is divided into four parts. PART A deals with the principles of the German law of arrest of ships and at the same time refers to South African law when the proceedings are equivalent or at least similar. Reference is here also made to the chapters in the second part of the thesis (PART B), where the reader will find the relevant provisions of South African law, and where the principles of the South African law of arrest of ships are described. Aside from the principles of the South African law of arrest of ships, PART B refers the reader to German law when the proceedings are equivalent or at least similar to South African law. The reader will find there the direct comparison described in PART A. PART C of this thesis is the CONCLUSION.

The fourth and final part of the thesis (PART D) contains the APPENDICES with a selection of paragraphs, sections, articles and forms referred to.

The classification of this thesis attempts to avoid repetitions which may arise from a legal comparison which tries not only to reproduce the similarities but also the whole of the law of arrest of ships in German and

South African law. Furthermore, this will enable the lawyer, whether familiar with German or South African law, to quickly recognize when the arrest proceedings are equivalent or similar or, alternatively, when he should pay attention to the peculiarities of arrest proceedings in the respective countries.

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cf Singh International Maritime Law Conventions vol 4 (1983) at 3101.

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cf Singh International Maritime Law Conventions vol 4 (1983) at 2976.

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cf Gazette of the Laws of the German Reich (Reichsgesetzblatt) II, p 484.

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cf Federal Law Gazette (Bundesgesetzblatt) 1975 II, p 301;
cf Singh International Maritime Law Conventions vol 3 (1983) at 2482 and at 2489.

- THE INTERNATIONAL CONVENTION FOR THE UNIFICATION OF CERTAIN RULES OF LAW RELATING TO MARITIME LIENS AND MORTGAGES, BRUSSELS, 10 April 1926 AND 27 May 1967
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- INTERPRETATION OF LAWS ACT 33 of 1957
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- MAGISTRATE'S COURTS ACT 32 of 1944
- Territorial Waters Act 87 of 1963
- Foreign States Immunities Act of 1981
- Law of Evidence Act 45 of 1988

SELECTED LIST OF ABBREVIATIONS

AC	-	Appeal Court
A	-	Appellate Division (South Africa)
AG	-	Magistrates Court (Amtsgericht)
All ER	-	All England Law Reports
Art	-	Article
B G B	-	Buergerliches Gesetzbuch (Civil Code)
BGH	-	Federal High Court of Justice (Bundesgerichtshof)
BGHZ	-	Reports of the Federal High Court of Justice
C	-	Cape Provincial Division
CPD		
CA	-	Court of Appeal
CLLMC	-	International Convention on Limitation of Liability for Maritime Claims of 1976
CLOPD	-	International Convention on Civil Liability for Oil Pollution Damage
D	-	Durban and Coastal Division
D B	-	Der Betrieb
E	-	Eastern Cape Division
ed	-	Edition
EEC	-	European Economic Community (The Common Market)
EEC-Convention	-	Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters of 1968
EuGH	-	European Court of Justice (Europaeischer Gerichtshof)
GG	-	Government Gazette

G V G	-	Gerichtsverfassungsgesetz (Constitution of Courts Act)
HANSA	-	Zeitschrift fuer Schifffahrt- Schiffbau - Hafen
H G B	-	Handelsgesetzbuch (Commercial Code)
H G Z	-	Hanseatische Gerichtszeitung
HL	-	House of Lords
ICRASS	-	International Convention Relating to the Arrest of Seagoing Ships of 1952
IPRax	-	Praxis des Internationalen Privat- und Verfahrensrechts
J	-	Mr Justice
KO	-	Konkursordnung (Bankruptcy Law)
KB	-	King's Bench Division
LG	-	Higher District Court (Landgericht)
Lloyd's Rep	-	Lloyd's Law Report
LJ	-	Lord Justice
LMCLQ	-	Lloyd's Maritime and Commercial Law Quarterly
LR	-	Law Reports
M D R	-	Monatsschrift des deutschen Rechts
MB	-	Modern Business Law
MLOPD	-	Maritime Law Order of Partition and Distribution (Seerechtliche Verteilungsordnung)
Moo PCC	-	Moore's Privy Council Cases
N J W	-	Neue Juristische Wochenschrift
No	-	Number
N	-	Natal Provincial Division

OJ	-	Official Journal of the European Communities
OLG	-	Higher Appeal Court (Oberlandesgericht)
P	-	Probate Division Page
Para	-	Paragraph
PC	-	Privy Council
PDA	-	Probate, Divorce and Admiralty Division
QB	-	Queen's Bench Division
RG	-	Supreme Court of the German Reich (Reichsgericht)
RGZ	-	Reports of the Supreme Court of the German Reich
RIW/ AWD	-	Recht der internationalen Wirtschaft / Aussenwirtschaftsdienst des Betriebs-Beraters
S	-	Section
SA	-	South African Law Reports
SALJ	-	South African Law Journal
THRHR	-	Tydskrif vir Hedendaagse Romeins-Hollandse Reg (Journal of Contemporary Roman-Dutch Law)
TranspR	-	Transportrecht
VersR	-	Versicherungsrecht
VglO	-	Vergleichsordnung (Composition Code of Procedure for Arrangements Between Debtor and Creditor to Avert Bankruptcy)
vol	-	Volume

W	-	Witwatersrand Local Division
Z P O	-	Zivilprozessordnung (Code of Civil Procedure)
Z V G	-	Zwangsversteigerungsgesetz (Compulsory Auction of Immovable Property Act)

PART A

CHAPTER I

HISTORICAL PERSPECTIVE AND THE LAW TO BE APPLIED

A historical consideration of the arrest of seagoing ships¹ can only be confined to some general remarks on maritime trade and arrest jurisdiction. This field, besides, remains the preserve of legal historians² and falls outside the ambit of this thesis.

There are no special provision relating to the arrest of ships in German maritime law.³ What is applicable however is the law relating to civil procedure and the Code of Civil Procedure (ZPO). The Code of Civil Procedure with its latest amendments dates back to the Code of Civil Procedure of 1877. In 1898 a supplementary law brought into use a special provision on the enforcement of a civil arrest against marine registered ships (cf para 931 ZPO⁴). The above-mentioned provision takes into account the particularities of ocean traffic and has, compared with common provisions on levy of execution (Pfaendungsvorschriften), certain specifics.⁵

Besides the common civil procedure provisions, there are numerous references in other statutes, both national and international. Thus one finds in the German Commercial Code (HGB) a provision, which prohibits the execution

1 The thesis only deals with the arrest of seagoing ships and not, for instance, with ships on inland waterways and the Inland Waterways (Civil Liabilities) Act or the law governing inland navigation matters.

2 Cf Benedict on Admiralty Jurisdiction and Principles 7ed (vol 1) (1983) Chapter I at 1 ff; G Hofmeyr 'Admiralty Jurisdiction in South Africa' 1982 Acta Juridica 30.

3 For an exception cf para 931 ZPO.

4 Cf Chapter VII (1) (a).

5 With regard to enforcement (Zwangsvollstreckung), compare the following provisions:
 -para 858 ZPO : Enforcement Into a Ship's Part. Cf also paras 489 ff HGB;
 -para 864 ZPO : Object of Enforcement of Immovable Property;
 -para 870a ZPO: Enforcement Against a Ship or a Ship Under Construction.

and arrest of ships (para 482 HGB).⁶

In the Compulsory Auction of Immovable Property Act of 20 May 1898 (ZVG) there are in the second section special regulations which deal with sales by public auction of ships and ships under construction.⁷

These national provisions have, because of the scope of international seaborne trade, been supplemented by international conventions. With regard to the arrest of seagoing ships, one has to take account of the International Convention for the Unification of Certain Rules Relating to the Arrest of Seagoing Ships of 10 May 1952⁸ (the Arrest Convention of 1952). The Federal Republic of Germany became a signatory to the Arrest Convention of 1952 in 1972, twenty years after it came into force. South Africa has not ratified the Arrest Convention of 1952.⁹

More than ten years passed before Germany ratified¹⁰ the International Convention on Limitation of Liability for Maritime Claims of 19 November 1976 (the 1976 Convention) which also contains rules relating to the arrest of ships for the enforcement of maritime claims.¹¹

Further, one has to note the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 27 September 1968

6 Cf International Convention for the Unification of Certain Rules Concerning the Immunity of State-owned Ships of 10 April 1926, Gazette of the German Reich (Reichsgesetzblatt) II, p 484.

7 Cf paras 162 - 171 ZVG, Appendix VII.

8 Federal Law Gazette (Bundesgesetzblatt) 1972 II, p 655. Cf Singh International Maritime Law Conventions vol 4 (1983) at 3101; Appendix III.

9 Cf Part B - Chapter XIV (5).

10 By a Statute of 23 July 1986, Federal Law Gazette (Bundesgesetzblatt) 1986 II, p 786.

11 Cf Art.13 of the 1976 Convention (Bar to Other Actions).

(EEC-Convention).¹²

In relation to the barter of goods and the exchange of goods and services, which is occurring more and more frequently and as loading-times become shorter owing to the use of containers and other modern loading techniques, it has become necessary to have uniform arrest provisions in special and uniform trade provisions in general. Also the ship mortgage banks are very much interested in having uniform arrest provisions in order to distribute the economic risks among them and the shipowners significant and just.¹³

In the case of Germany, it can be seen, that the legislature has been slow to make allowance for existing international circumstances. The reform of the Arrest Convention of 1952 is no exception.¹⁴

For the ease of seaborne trade it is to be hoped that for the arrest in seagoing ships common binding rules, like the International Arrest Convention of 1952, will be ratified by as many as possible of the seatrading nations.

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- 12 Federal Law Gazette (Bundesgesetzblatt) 1972 II, p 773, in the version of the joining treatment of 9 October 1978, Federal Law Gazette (Bundesgesetzblatt) 1983 II, p 802 and of 25 October 1982, Federal Printed Papers (Bundestagsdrucksache-BT) 10/537. The EEC-Convention came into force between Germany and the United Kingdom on 1 January 1987.
- 13 H-C Albrecht and V Looks 'Zum Entwurf des Comité International fuer die Revision des internationalen Uebereinkommens von 1952 ueber den Arrest in Seeschiffe' *TranspR* 1985, 321 at 323.
- 14 *Ibid* 321. Cf 'The Draft Revision of the Arrest Convention of 1952', *TranspR* 1985, 363.

C H A P T E R II

THE OPPOSING PARTIES AND THE OBJECT OF THE ARREST

In order to obtain an arrest successfully, a necessary precondition is (besides the legal requirements for an arrest¹⁵), that the petition for an arrest be directed against the correct debtor (opponent of the petition or respondent) and to arrest the right ship.¹⁶

(1) Principles of the German law of civil procedure

In German law, actions for arrest and of enforcement are only allowed against the debtor himself or over his own property or the part of property which he owns in common.

Accordingly, in principle it is only possible to arrest a ship which is the property of the debtor, ie the owner.

It is possible, because the whole property of the debtor is subject to the arrest, to take execution against every ship that the debtor owns.

The debtor can be a shipowner¹⁷ or a shipping company.¹⁸ A shipowner (within the meaning of para 484 HGB) can also be a trading association.

In principle it is not necessary to point out the object of the arrest itself, ie the ship to be arrested does not have to be pointed out by name.¹⁹

15 Cf Chapter III.

16 Cf H-C Albrecht 'Die Arrestbeschlagnahme von Seeschiffen nach deutschem Recht und nach dem internationalen Uebereinkommen ueber den Arrest von Seeschiffen, Bruessel, Mai 1952' HANSA 1954, 1142; Soehring Arrest of Ships ed C Hill, K Soehring, T Hosoi, C Helmer (1985) at 53.

17 Cf para 484 HGB.

18 Cf para 489 HGB.

19 Cf Stein and Jonas and Grunsky Zivilprozessordnung 20ed (1981) annotation 16 of para 920 ZPO and Chapter III (2) (a).

(2) Peculiarities of maritime law

Proceeding from the principle described,²⁰ in maritime law the following peculiarities in relation to exceptions exist:

(a) Para 510 HGB - the owner pro tempore

A shipowner is defined in para 484 HGB as a person who owns a ship and earns living from shipping.

In the case where a ship is used for shipping by a person who is not either the owner or the charterer, a shipowner in principle does not exist in terms of private law. This circumstance is taken into account by para 510 HGB.²¹ In accordance with para 510(1) HGB, someone who employs a ship (but not as owner) in order to live thereby and for his own account, and who either commands it by himself or who entrusts it to a master, is regarded as shipowner in relation to third persons. This so-called owner pro tempore becomes a shipowner, despite the fact that he is not its owner in the real sense (eg the registered shipowner), and he has all rights and duties of a shipowner. He, for instance, has the opportunity to assert by action in court all claims, which arise out of the use of a ship, eg as the result of a collision. If para 510 HGB is applicable, the real shipowner of the ship has no influence in such matters.

On the other hand, the owner pro tempore is the debtor in respect of all obligations arising out of the use of the ship. He owes the crew wages because he employs them. The master binds the owner pro tempore because of the authority he exercises.²²

20 Cf Chapter II (1).

21 G Schaps and H J Abraham Das Seerecht in der Bundesrepublik Deutschland (Erster Teil - Seehandelsrecht) 4ed (1978) introduction to para 510 HGB. Cf BGH, NJW 1957, 828.

22 H Pruessmann and D Rabe Seehandelsrecht 2ed (1983) annotation F(1) of para 510 HGB.

As a rule claims arising out of the use of a ship can only be brought against the owner pro tempore himself,²³ because the owner pro tempore in relation to a third party appears as a quasi-shipowner. He is therefore liable for the ship and the cargo.²⁴ It is thus possible to arrest a ship, which is deemed to belong to the owner pro tempore. An arrest is not only competent against the ship over which the owner is the owner pro tempore but also against other ships which he owns as owner. As far as maritime liens²⁵ are concerned, the shipowner himself can provide security against an arrest of his ship, or should the occasion arise, when there is a judicial sale of his ship. Claims by ship's creditors can however either be made against the owner pro tempore or against the owner himself and against the master,²⁶ as long as the owner pro tempore is in existence.

If a creditor wants to enforce a maritime lien against the owner pro tempore, which arose during the use of the ship by the owner pro tempore, the shipowner is²⁷ not permitted to intervene.²⁸

There will usually be an agreement between the owner pro tempore and the shipowner to the effect, that the former will defray the latter's expenses in relation to maritime liens and other claims, which result from use of the ship by the owner pro tempore. Both the maritime lien and other claims can be brought against the owner pro tempore and the shipowner himself.²⁹

23 Ibid.

24 Schaps & Abraham op cit annotation 8 of para 510 HGB; Albrecht op cit 1143.

25 Cf para 510(2) HGB.

26 Cf para 760(2) HGB.

27 In accordance with para 510(2) HGB.

28 The case would have to be decided in a different way if the shipowner was able to prove that the use of ships by the owner pro tempore was unlawful, or that the creditor was not bona fide. Cf para 510(2) HGB.

29 Cf para 760(2) HGB.

After the return of the ship, the shipowner is further liable for maritime liens, which have arisen when the owner pro tempore held the ship. Any subsequent legal action or application for an arrest therefore has to be directed against the person who is the new owner pro tempore or the shipowner.³⁰

A maritime lien which arises from the use of the ship during the holding of owner pro tempore follows the ship, and it is therefore of no consequence who possesses the ship, whether this be the owner pro tempore, the shipowner or the new owner pro tempore.³¹

In principle one can therefore say that the shipowner is liable for his own debt with his own ship, whilst the owner pro tempore is liable for his own debt with the strange ship.³²

(b) Charter

The law permits a further exception to the principle that it is only possible to enforce against the property of the debtor. This is the charter. One has to distinguish the case in which a charterer becomes an owner pro tempore within the meaning of para 510 HGB and the case, in which a charterer is neither the owner pro tempore nor the shipowner but only a third party, who uses the ship for a living.

In the cases of a time-charter (with a so-called employment clause) one should note that the time-charterer appears as a carrier by sea when he concludes the contract with a sub-charterer (the party contracting with the time-charterer as a sea-carrier in order to have his cargo transported). He

30 Pruessmann & Rabe op cit annotation F(2)(b) of para 510 HGB

31 For the relationship between an owner pro tempore in accordance with para 510 HGB and charterparties see Chapter II (2) (b).

32 Cf Albrecht op cit 1142.

does not become the owner of the ship through the charterparty, which he has, by means of the time-charterparty, hired from the shipowner.³³

The shipowner leases the charterer the ship with the crew (cf *Baltime* or *Deuzeit-Charter*). At this time he concedes that the charterer, within certain limits, has the legal competence to give directions to the master. The master and the crew remain in the employ of the shipowner, who is liable for them, and consequently maritime liens can be created in accordance with para 754(1)(No 1) HGB. The time-charterer does not become an owner pro tempore within the meaning of para 510 HGB, unless he makes it public (either by words or actions), that he is the owner pro tempore. In this case, he will be fully liable like a shipowner or an owner pro tempore.³⁴ Para 510 HGB therefore is not applicable to *Baltime*- or *Deuzeit Charter*.³⁵

Arising from the contract of carriage, which the time-charterer concludes with a third party, the time-charterer and not the shipowner will be under obligation as carrier. In this context, when determining the liability under a charterparty, one has to distinguish the relations under a charterparty and those under a Bill of Lading. Usually one is confronted with two contracts, the charter contract linking the owner and the time-charterer (or a charterparty either time or voyage linking the mentioned time-charterer as carrier and a sub-charterer) and the contract linking the consignee (often not the same person as the charterer) and the carrier (either eg the time-charterer or the owner as the case may be). Accordingly, with a Bill of Lading, the time-charterer as a carrier by sea is also liable in relation to the parties

33 R Liesecke 'Schiffsgläubigerrecht und Arrest' MDR 1967, 625 at 626.

34 Pruessmann & Rabe op cit annotation C(3) of para 510 HGB.

35 The High Court of Justice (Bundesgerichtshof) BGH, NJW 1957, 828 ruled as follows: A time-charterparty on basis of the *Baltime* (*Deuzeit*) does not establish an owner pro tempore in accordance with para 510 HGB. This provision cannot be applied correspondingly to *Deuzeit-Charterparty* with claims of third parties, which are attributable to the fault of the crew.

concerned with the cargo.³⁶

The shipowner is not liable for performance of the contract of carriage, especially in accordance with para 559 HGB³⁷ and for damage to cargo in terms of para 606 HGB.³⁸

One should notice, however, the exception to the rule contained in para 644 HGB, where the shipowner will be liable where the name of the carrier by sea is not specified in the Bill of Lading of the master or the agent of the shipowner. The shipowner is then the carrier by sea as the bills are issued by his agent on his behalf.

Claims against a time-charterer (with an employment-clause) have to be raised against the time-charterer as the carrier by sea.³⁹

It is questionable, whether a creditor can arrest a ship because of claims for which not the shipowner but the charterer is liable to a consignee or a third party. If it is possible to arrest a ship in this case, one would be departing from the principle that only the property of the creditor can be arrested.⁴⁰ Before answering the question it has to be mentioned that under German law a consignee, in view of loss of cargo, has two claims against the carrier, one contractual claim and one based on tort. A third party which has no contractual link with the carrier or the owner has a claim based on tort (eg collision, damage to quay). Departing from this, the time-charterer is not liable when the damage done to cargo is committed by the crew and as far as the nautical scope is concerned, provided the charterer has not given any

36 Cf Art.IV of the Hague-Visby Rules concerning the immunity from liability of the owner for loss or damage arising from unseaworthiness.

37 Liability of the carrier by sea for seaworthiness and cargoworthiness.

38 Liability of the carrier.

39 Cf Liesecke op cit 626.

40 Cf Albrecht op cit 1143.

directions neither to the crew or master⁴¹. In this case the owner become liable by means of his master and crew and, accordingly, a consignee can arrest the ship. As to performance of the contract of the charterer or compensation for damage arising out of a contractual obligation it is only competent to arrest the ship because of debts of the charterer when the damage or non-performance of the contract with the consignee was caused by joint tort of crew and charterer.⁴² Soehring⁴³ is therefore right when he states that it is especially with time-charterparties important to get sufficient evidence as to the responsibility of the shipowner. This is the surest way for an arrest to being successful. He gives the following example:⁴⁴

"Bunkers are very often ordered by the master or an agent on behalf of unknown charterers. In this case a creditor should produce a perfect bunker requisition, signed by the master in addition to the charterers order or other documentary evidence showing the joint and several liability of the owners. For cargo claims constituted by the charterers, the Hague Rules may assist the creditors view and hold available a guideline for the German judge. This is because the judge has to decide, whether the creditor's evidence is sufficient in accordance with para 916 ZPO and para 917 ZPO."

One has to distinguish between the time-charter and the (pure) 'Miet-Charter' (ie 'Bareboat Charterparty' or 'Charter by Demise'). These two charter-parties are correspondingly extensive.⁴⁵

The owner delivers his ship to the charterer so that the charterer can himself man and equip the unmanned and unequipped ship. The shipowner surrenders his ship to the charterer with full power of disposition over it.

41 Cf Art.IV(2)(a) of the Hague-Visby Rules.

42 Cf para 485 HGB.

43 Op cit 53.

44 Ibid. Cf Part B -.Chapter XIV (a) (ii).

45 Cf F M Ventris Tanker Voyage Charter Parties (1986) at 25.

The charterer, in the case of a 'Miet-Charter' (eg 'Bareboat Charterparty' or 'Demise Charterparty') becomes an owner pro tempore, if the remaining preconditions of para 510 HGB are met.⁴⁶ The charterer becomes a shipowner and the (real) owner loses his shipowner position and takes a legal position under the rules of civil law.⁴⁷ Since the charterer in this case becomes an owner pro tempore, the same principles bind him as described in Chapter II (2) (a).

In accordance with most charterparties, the charterer has a lien over the vessel for all moneys paid in advance and not earned, and the owners have a lien over all cargos and sub-freight belonging to the time-charterers and any Bill of Lading freight for all claims under the charter.⁴⁸ The liens of the charterer over the vessel can be secured by means of an arrest.

(c) Sale of vessel

Once the vessel has been sold and once the property has passed to the new owner, an arrest against this new owner under certain conditions is possible. This can be called an exception to the rule that only the property of the debtor can be arrested. As far as maritime liens are concerned the creditor does not lose his rights because of the sale of the ship. The maritime lien creates a real right (statutory lien) over the ship.⁴⁹ This follows the ship until it is discharged or until ceases to operate for other reasons. The fact, that it is possible to proceed against the new shipowner even after the vessel's sale is governed by para 755(1)(sentence 2) HGB. It is provided here that the lien over the ship can be enforced against each possessor of the ship. The new shipowner is the new possessor and is therefore the debtor for the

46 Schaps & Abraham op cit marginal note 5 of para 510 HGB.

47 Pruessmann & Rabe op cit annotation C (4) of para 510 HGB

48 Cf also para 623 HGB (Legal Right of Lien of the Carrier by Sea).

49 Cf para 755(1) HGB.

maritime lien.⁵⁰

(3) Possibilities of limitation of liability and exclusion of liability

In principle it is possible to take possession of all items of property of the debtor (ie shipowner, owner, charterer, owner pro tempore, salvor) to satisfy the claim.⁵¹

The shipowner is for instance liable⁵² for damages suffered by a third party and caused by a member of the crew or a pilot, who has been on board the ship. As far as the cargo owners are concerned, the shipowner is only liable insofar as the carrier by sea is responsible for the fault of the crew.

If one accepts this unrestricted liability as the basic principle, it is necessary to refer the exceptions to the rule.

In accordance with paras 486 to 487e HGB, in relation to the International Convention on Limitation of Liability for Maritime Claims of 1976 (the 1976 Convention)⁵³ for instance, shipowners (that is owner, charterer, manager and operator of a sea-going ship within the meaning of Art.1(2) of the 1976 Convention) and a salvor (Art.1(3) of the 1976 Convention) are able to limit their liability for maritime claims.⁵⁴ This is the meaning of Art.2 of the 1976 Convention.

A responsible person is, however, not allowed to limit his liability if

50 With regard to maritime liens see Chapter III (1) (a) (ii).

51 Cf exceptions above in Chapter II (2).

52 In accordance with para 485 HGB.

53 Germany acceded to the 1976 Convention on 23 July 1986, cf Federal Law Gazette (Bundesgesetzblatt) II, p 786 and p 787. Cf Singh *op cit* vol 4 at 2976. South Africa has not ratified the 1976 Convention; cf Part B-Chapter XIV (4).

54 One has to take note of the provisions dealing with the exception of liability of juristic persons and business partnerships in accordance with para 487d HGB.

the damage done by him has been on purpose or committed carelessly and with the knowledge that such damage will in all probability occur.⁵⁵

According to Art.11 of the 1976 Convention, where the person alleged to be liable has deposited money (a fund) with the court or some other authority in any State in which legal proceedings are instituted,⁵⁶ this will serve as satisfaction only for claims in which a limitation of liability is pleaded. After the fund has been constituted, any ship or other property belonging to the person on behalf of whom the fund has been constituted, which has been arrested and against which a claim is raised, may be released by order of the court or other competent authority of the State.⁵⁷

In accordance with Art.13(2)(sentence 2)(a)-(d) of the 1976 Convention, however, such a release will always be ordered if the limitation fund has been constituted:

- (a) at the port, where the occurrence took place, or, if it took place out of port, at the first port of call thereafter; or
- (b) at the port of disembarkation in respect of claims for loss of life or personal injury; or
- (c) at the port of discharge in respect of damage to cargo; or
- (d) in the State where the arrest is made.

Liability can also be limited where it is based on the International Convention on Civil Liability for Oil Pollution Damage⁵⁸ and the Protocol to

55 Cf Art.4 of the 1976 Convention.

56 Cf para 487e HGB in conjunction with Art.14 of the 1976 Convention.

57 Note para 305a ZPO (Judgment Reserving Maritime Law Liability), where possibly the right of limitation of liability can be disregarded with the legal decision. Likewise note para 786a ZPO (Limitation of Liability in the Scope of Maritime Law) in connection with para 305a ZPO.

58 Brussels, November 29, 1969. Cf Federal Law Gazette (Bundesgesetzblatt) 1975 II, p 301 and Singh op cit vol 3 at 2482.

that Convention.⁵⁹

Although the liability is subject to a limitation, both, in principle or in terms of the 1976 Convention, it is possible prior to the constitution of the liability deposit⁶⁰ to arrest a ship of a shipowner according to Art.1 of the 1976 Convention. This results from Art.13 of the 1976 Convention, where after constitution of the fund the court or other competent authority releases the ship or property from arrest. As long as the fund has not been constituted, an arrest to secure the claim (ie the maritime claim within the meaning of the 1976 Convention⁶¹) is competent. If the ship in respect of which the claim lies is seizable, than it is not permissible to arrest a sistership, for the reason that the sistership is not responsible for the claim as long as the ship which caused the damage is seizable.

In the case of carriage of goods by sea, limitations of liability are in existence,⁶² and in some cases the carrier by sea is allowed to appeal for a complete exclusion of liability (for instance in warlike events, strikes or actions/ omissions of the stevedore or owner of the commodities).⁶³ In these cases, there is no possibility of arresting a ship, because there can be no claim for an arrest within the meaning of para 916 ZPO.⁶⁴

In para 660 HGB the German law of carriage of goods by sea creates the opportunity for the carrier by sea to be liable for loss or damage up to a maximum amount, provided that the type and value of goods are not specified by the stevedore before their loading and the details have been drawn up in the

59 London, November 19, 1976. Cf Federal Law Gazette (Bundesgesetzblatt) 1975 II, p 301 and Singh op cit vol 3 at 2489.

60 Cf Art.11 of the 1976 Convention.

61 Cf Art.2 of the 1976 Convention.

62 Cf para 607a HGB.

63 Cf paras 608 and 609 HGB.

64 Cf Chapter III (1) (a).

Bill of Lading.

In the case of general average⁶⁵ the party entitled to compensation for instance has a maritime lien because of the contributions which have to be paid by the ship or the cargo.⁶⁶ This can be secured by means of an arrest against the owner or shipowner.⁶⁷

(4) Sisterships

Arising from the principle, that all property of the debtor can be executed against or arrested it is competent to arrest other ships of the shipowner, if the shipowner himself is the debtor of the claim.

In principle, only the ship which is let to the owner pro tempore, can be arrested.⁶⁸ In the case of a charter, the conditions described previously⁶⁹ arise. With maritime liens and charterparties which correspond to the owner pro tempore, it is only possible to arrest the ship from which the claim arises and one cannot arrest a sistership. This is because of the peculiarity of the maritime lien - it follows the ship and is not transferable.

65 Cf paras 700 ff HGB.

66 Cf para 726 HGB.

67 Cf Chapter III (1) (a) (iii).

68 Cf the peculiarities relating to the owner pro tempore referred to at Chapter II (2) (a).

69 In Chapter II (2) (b).

(5) International Convention for the Unification of Certain Rules Relating to the Arrest of Seagoing Ships of 1952

If the International Convention for the Unification of Certain Rules Relating to the Arrest of Seagoing Ships of 1952 (the Arrest Convention of 1952⁷⁰) is applicable, the creditor⁷¹ can (like in German law)⁷² arrest either the ship in respect of which the maritime claim⁷³ in accordance with Art.1(1) of the Arrest Convention of 1952 arose, or any other ship which is owned by the person who was, at the time when the maritime claim arose, the owner of the particular ship, even though the ship arrested is ready to sail.⁷⁴

A ship flying the flag of one of the contracting States may be arrested in the jurisdiction of any of the contracting States in respect of any maritime claim but in respect of no other claim.⁷⁵

The Arrest Convention of 1952 has the task of only limiting arrests and does not set grounds for obtaining arrests. In other words the Arrest Convention of 1952 does not give a claim for an arrest, but in accordance with Art.6 and Art.7 of the Arrest Convention of 1952, the preconditions relating to the substantive law have to be fulfilled.⁷⁶ The preconditions are determined by national law. In Germany therefore the preconditions of paras 916 and 917 ZPO have to be fulfilled.

The maritime claims enumerated in Art.1(1) of the Arrest Convention of

70 Germany joined the International Convention for the Unification of certain Rules relating to Arrest of Seagoing Ships (Brussels, May 10,1952) in 1972, Federal Law Gazette (Bundesgesetzblatt) 1972 II, p 655.

71 'Claimant' in terms of Art.1(4) of the Arrest Convention of 1952.

72 In accordance with Art.3(1) of the Arrest Convention of 1952.

73 The definition of maritime claim can be found in Art.1(1) of the Arrest Convention of 1952.

74 Cf Art.3(1) of the Arrest Convention of 1952 and para 482 HGB.

75 Art.2 of the Arrest Convention of 1952.

76 The Clydefirth OLG Hamburg, VersR 1987, 356.

1952 represent pecuniary claims and might become pecuniary claims in accordance with para 916(1) ZPO.⁷⁷

A number of the maritime claims set out in Art.1(1) of the Arrest Convention of 1952 correspond to para 754 HGB (maritime liens). One may emphasize that in accordance with Art.9 of the Arrest Convention of 1952 nothing will be construed as creating a right of action, which, apart from the provisions of the Arrest Convention of 1952, would not arise under the law applied by the court which had seisin of the case, nor as creating any maritime liens which do not exist under such law or under the Convention on Maritime Mortgages and Liens, if the latter is applicable. The lex loci therefore determines whether a maritime lien exists according to its own law. Accordingly, a maritime lien recognized in Germany does not necessarily mean that it will be recognized in England when a creditor wants to enforce his maritime lien by means of arresting a ship in one of the English ports. This can be a disadvantage for the German maritime lien holder because the principle of a maritime lien that it follows the ship will be undermined. Art.9 of the Arrest Convention and the English law contain the same axiom. English law does not recognize a foreign maritime lien which does not arise under its own law.⁷⁸ The draft revision of the Arrest Convention of 1952, elaborated by the Comité Maritime International takes this disadvantage into account. Art.9 of the draft revision reads as follows:⁷⁹

"A State may, when signing, ratifying, accepting or acceding to this Convention, reserve the right to refrain from applying the Convention to ships not flying the flag of a State party."

77 Cf Chapter III (1) (a) (i).

78 See Part B - Chapter XVI (1).

79 See the 'Draft Revision of the International Convention for the Unification of Certain Rules Relating to the Arrest of Sea-going Ships' TranspR 1985, 363 at 365. Cf Albrecht & Looks op cit 323.

Proceeding from the above the following maritime claims in Art 1(1) of the Arrest Convention of 1952 also give maritime liens in accordance with para 754 HGB and therefore 'give' a claim for an arrest in cases, where German law is applicable and a German court deals with the matter:

- Art.1(1)(a): damages suffered because of loss or damage to things;⁸⁰
- Art.1(1)(b): loss of life or personal injury;⁸¹
- Art.1(1)(c): salvage and provisions of aid when in distress at sea;⁸²
- Art.1(1)(g): general average;⁸³
- Art.1(1)(j): pilotage;⁸⁴
- Art.1(1)(l): harbour dues.⁸⁵

It should be mentioned that the Arrest Convention of 1952 is only binding the contracting States such as West Germany and the United Kingdom, but not South Africa having not ratified the Convention. The Arrest Convention of 1952 is only applicable between these and other contracting States.⁸⁶

Furthermore, Art.3(1) of the Arrest Convention of 1952 states that it is possible not only to arrest a ship because of the maritime claims in terms of Art.1(1) of the Arrest Convention of 1952, which the claim refers to, but also every other ship of the same shipowner. This is an exception to Art.2 of the Arrest Convention of 1952. A so-called sistership therefore can be arrested, if the owner is personally liable or if the sistership⁸⁷ itself is liable in rem

80 Para 754(1)(No 3) HGB.

81 Para 754(1)(No 3) HGB.

82 Para 754(1)(No 4) HGB.

83 Para 754(1)(No 4) HGB.

84 Para 754(1)(No 2) HGB.

85 Para 754(1)(No 2) HGB.

86 Cf Art.14 of the Arrest Convention of 1952.

87 'Sistership' is defined in Art.3(2) of the Arrest Convention of 1952. Accordingly, ships shall be deemed to be in the same ownership when all the shares therein are owned by the same person or persons.

for the maritime claim⁸⁸.

Art.3(4) of the Arrest Convention of 1952 is applicable to the owner pro tempore.⁸⁹ According to this a creditor/ claimant (where an owner pro tempore and not the registered ship is liable in respect of a maritime claim relating to the ship) may arrest such ship or any other ship in the ownership of the owner pro tempore, subject to the provisions of the Arrest Convention of 1952. No other ship in the ownership of the registered owner can be arrested to satisfy such a maritime claim.⁹⁰

The permissibility of a security attachment (arrest of a ship) presupposes, that there is in another contracting State sufficient security for the claim to be in existence.

Pursuant to Art.3(3) of the Arrest Convention of 1952, a ship will not be arrested, nor will bail or other security be given more than once in any one or more of the jurisdictions of any of the contracting States in respect of the same maritime claim by the same claimant. Art.3(3) of the Arrest Convention of 1952 reads further as follows:

"If a ship has been arrested in any one of the jurisdictions of the contracting States, or bail or other security has been given in such jurisdiction either to release the ship or to avoid a threatened arrest, any subsequent arrest of the ship or of any ship in the ownership of the same claimant for the same maritime claim will be set aside, and the ship released by the Court or other appropriate

88 Schaps & Abraham op cit Appendix para 482 HGB, marginal note 1 of Art.3 of the Arrest Convention of 1952; cf R Herber 'Zur Modernisierung des deutschen Seehandelsrechts' HANSA 1972, 510.

89 One should note that the English translation of Art.3(4) of the Arrest Convention of 1952 speaks of a charter by demise, whereas in the German translation, the idea of the owner pro tempore (fitter) is used and accordingly goes further than what corresponds with the English translation. The charter by demise is, in the meaning of the German law, an owner pro tempore pursuant to para 510 HGB (cf. Chapter II (2) (a). Compared to the charter by demise, the owner pro tempore is the generic term, whereas the charter by demise is the subterm.

90 This regulation corresponds to German law - cf Chapter II (2) (a).

judicial authority of that State. This is unless the claimant can satisfy the Court or other appropriate judicial authority that the bail or other security had been finally released before the subsequent arrest or that there is other good cause for maintaining that arrest."

Art.3(3) of the Arrest Convention of 1952 is also applicable to ships under the own flag of a contracting State which has stopped in the flag state. This will occur provided the other preconditions are complied with.⁹¹

91 Schaps & Abraham op cit Appendix para 482 HGB, marginal note 1 of Art.3 of the Arrest Convention of 1952.

CHAPTER III

LEGAL REQUIREMENTS OF AN ARREST (ACTION IN REM)(1) Particular preconditions

The arrest will be ordered, if (besides certain other preconditions, which will be discussed later) the two particular preconditions, namely "claim for an arrest"⁹² and "urgent reason for granting an order of civil arrest"⁹³ are before the court.⁹⁴

(a) Claim for an arrest - para 916 ZPO (types of claims)(i) The preconditions of para 916 ZPO

In accordance with para 916 ZPO the arrest will generally take place to secure the enforcement of a judgment in relation to movable or immovable property - in this case in relation to ships (and ships under construction). The arrest therefore has a safety function whereby the creditor can, by the enforcement, utilize his real right obtained by means of the enforcement of the arrest.⁹⁵ Para 916 sets out the requirements which must be furnished, in order for the application for an arrest to be successful.

The claim has to be a pecuniary claim or must be able to become a

92 Para 916 ZPO - see Chapter III (1) (a).

93 Para 917 ZPO - see Chapter III (1) (b).

94 Cf Zoeller and Vollkommer Zivilprozessordnung 15ed (1987) marginal note 1 of para 916 ZPO; H J Abraham Das Seerecht 2ed (1950) at 67; H Wuestendoerfer Neuzeitliches Seehandelsrecht 2ed (1950) at 109.

95 OLG Hamburg, MDR 1967, 677. Cf RG, RGZ 31, 370 at 374.

pecuniary claim.⁹⁶ The latter refers, for example, to cases of either "impossibility of performance" or the cases mentioned in paras 887 and 893 ZPO.

Para 887 ZPO relates to cases of so-called "surrogate performance", in which the creditor undertakes the performance of an obligation instead of the debtor. The costs of this performance rests on the debtor. If the debtor, for example, is to hand over a res which he has undertaken to provide or to produce, para 887 ZPO will come into use should he not meet his obligation to make available or produce the fungible thing. The costs arising out of the surrogate performance are costs, which⁹⁷ may become a pecuniary claim.⁹⁸

Contrary to this, para 893 ZPO gives the creditor the right to demand performance of the interest instead of the original performance. This would for example be applied if the debtor is not able to hand over the res, because he has alienated it. Alternatively, if the debtor is not able to hand over the res because he has not fulfilled the judgment and the action he had to perform cannot be enforced,⁹⁹ para 893 ZPO will also apply.

The claim for an arrest is regarded as the principal claim. The enforcement of this principal claim will be secured by the subsequent ratification of the court.¹⁰⁰

An arrest within the scope of the provisions relating to the sea trade¹⁰¹ ensures execution against a ship or a ship under construction.

The principal claim - for example through judicial sale - will be authorized by the arrest. Thus in the case of the denial of a right of

96 Cf L Hagberg and H-C Albrecht Maritime Law - Volume I: Arrest of Ships ed L Hagberg (1975) at 35.

97 Within the meaning of para 916(1) ZPO.

98 Cf Zoeller & Stoeber op cit marginal notes 1 and 2 of para 887 ZPO.

99 Ibid marginal note 1 of para 893 ZPO.

100 Pruessmann & Rabe op cit annotation D (2) of para 482 HGB; Zoeller & Vollkommer op cit marginal note 1 of para 916 ZPO.

101 Para 476 HGB ff.

execution on a Bill of Lading, an arrest may be possible, because a damage claim could arise from this.¹⁰²

In respect of future claims, an arrest is admissible. Thomas and Putzo¹⁰³ deny that there is the permissibility of securing future claims in terms of para 926 ZPO. This provision prescribes that if the principal claim is not pending, the competent court for arrest proceedings (assuming that an application is filed) will without oral hearing rule that the party who has obtained the arrest order, will be required to bring an action within designated time-limit. In the situation where the judicial order is not obeyed, the court will order the release of the ship from the arrest by means of judgment. Once again this depends on an application being filed. In support of their opinion, Thomas and Putzo argue that because the future claim is not yet actionable, it is no way to fulfil the requirements in terms of para 926 ZPO. This provides the mechanism of confirming the arrest contained in the interlocutory order by means of a judgment on the principal claim. Because of this, a future claim will only be actionable, if the claim to be secured has become due.

In my opinion this viewpoint cannot be accepted.¹⁰⁴ A conditional claim is frequently not actionable. On the other hand, a declaratory proceeding is competent for future legal relations. One has to weigh-up the interests and examine whether the debtor has an interest which should be protected. This is in order that he can already at this stage secure his claim. This weighing-up of interests has to be done with the consideration of a frictionless exchange of commodities as well as of a frictionless exchange of goods and services. It

102 Zoeller & Vollkommer op cit marginal note 5 of para 916 ZPO; dissenting opinion OLG Hamburg, VersR 1982, 341.

103 H Thomas and H Putzo Zivilprozessordnung 14ed (1986) annotation 2 of para 916; cf Stein & Jonas & Grunsky op cit marginal note 9 of para 916 ZPO with references to other authors arguing along the same lines.

104 Cf Stein & Jonas & Grunsky op cit marginal note 9 ff of para 916 ZPO.

also has to be done with the consideration that the creditor like the debtor should only be burdened in the least burdensome way. The extra demurrage, when arresting a ship, results in enormous charges, simply because a ship which does not sail does not earn money.

Therefore an arrest is competent to secure a claim for reimbursement of the costs and expenses of the action, if it is expected that the prospects of success favour the debtor.¹⁰⁵

In accordance with para 916(2) ZPO, an arrest in a conditional claim and in future claims is explicitly granted leave, with the restriction contained in the second part of the provision. This provides, inter alia, that conditional claims do not require the security of an arrest, unless the condition, because of the remote possibility of the occurrence of the event, has no present pecuniary value. Each case will depend upon its own facts and circumstances. The debtor will be responsible for this evidence.

(ii) Maritime lien as a claim for an arrest

A claim for an arrest within the meaning of para 916(1) ZPO is also available in respect of a maritime lien in accordance with para 754(1) HGB.¹⁰⁶

This does not appear directly from the Act, but is correctly recognized by the dominant opinion.¹⁰⁷ Rabe¹⁰⁸ observes that the holder of a maritime lien is able to establish a claim for an arrest as follows:

105 Cf Zoeller & Vollkommer op cit marginal note 8 of para 916 ZPO.

106 See International Convention for the Unification of Certain Rules of Law Relating to Maritime Liens and Mortgages (Brussels, April 10, 1926 and Brussels, May 27, 1967), which has never been accepted by any English-speaking country nor ratified by Germany.

107 For instance Pruessmann & Rabe op cit annotation D (2) (a) of para 482 HGB; Liesecke op cit 625; Albrecht op cit 1142. For a different opinion cf OLG Hamburg, MDR 1967, 50 and, confirming its legislation, cf MDR 1967, 677; cf also OLG Bremen, MDR 1955, 749.

108 Pruessmann & Rabe op cit annotation D (2) (a) of para 482 HGB.

"As the maritime lien as well as the mortgage of a vessel serves as a pecuniary claim, a claim for an arrest is also given with a maritime lien. Since the one year time-period of preclusion in terms of para 759(1) HGB only becomes evident by attachment through execution of judgment, it will follow that, if a maritime lien exists, this and not for example the personal claim against the shipowner serves as the claim for an arrest."

Maritime liens, which are pecuniary claims within the meaning of para 916(1) ZPO, also need to be secured by means of an arrest like every other pecuniary claim or a claim which might become a pecuniary claim. Indeed, maritime liens enjoy the privilege of being first in time over liens over the ship¹⁰⁹ and the creditor may for example enforce his rights by means of the judicial sale of the ship.¹¹⁰

The above-mentioned assumes that the ship is registered in the ships-register or can be registered in the ships-register.

The legal remedies are of no use, if the object of the judicial sale, viz the ship, is not available because it has sailed away. The maritime lien in this case does not offer real security, only the arrest does that.

Another opinion in respect of an arrest arising out of a maritime lien is provided by the OLG Hamburg.¹¹¹ This court is of the opinion that the maritime lien itself does not establish a claim for an arrest against the shipowner. If the creditor wants to prevent the removal of the ship, he has to put in a claim for an interim injunction and he has simultaneously to sequester the ship. In support of its opinion, the court argues that with the securing of maritime liens the petition for an interim injunction is only admissible under the

109 Para 761 HGB.

110 Cf para 760(1) HGB and para 870a(1) ZPO.

111 OLG Hamburg, MDR 1967, 50 and MDR 1967, 677 = HANSA 1967, 1805; Zoeller & Vollkommer op cit marginal note 10 ff of para 917 ZPO; cf OLG Bremen, MDR 1955, 749.

preconditions of para 935 ZPO with the regulation of sequestration¹¹². The reason is that the petition for a temporary injunction and attachment of a claim have no legitimate interest in the proceedings. As an obstacle, the court is of the opinion

"that an arrest and its enforcement by means of the levy of execution (cf para 930(1) and (2) ZPO, para 804(1) ZPO) will serve as security for future monetary execution in the scope of the already obtained attachment lien."

The application of the attaching creditor, said the court, is only for the purpose of preventing the departure of the ship. The applicant in the arrest has no interest in the attachment lien, because a maritime lien has preference (cf para 761 HGB). The court therefore is only allowed to grant an arrest if the creditor, when enforcing his future pecuniary claim, is able to utilize an in rem right obtained by the enforcement of a civil arrest. This opinion is not acceptable to many authorities for reasons already mentioned above.¹¹³

Liesecke¹¹⁴ correctly submitted, contrary to the OLG Hamburg, that para 917 ZPO determines the preconditions of an attachment order impounding the debtor's property in the following way:

"This will take place, if without the creditor's action the enforcement of the judgment will be defeated or rendered more difficult. The future judgment by obtaining the arrest because of a maritime lien is a judgment in which one suffers execution of the ship (cf para 760(2) ZPO). The enforcement will be rendered more difficult if the ship sails away. The law does not demand that the creditor generally first obtains an in rem right over the object (here the ship) through the enforcement of a civil arrest."

112 Cf para 938(2) ZPO.

113 Cf Pruessmann & Rabe op cit annotation D (1)(b) of para 482 HGB; Liesecke op cit 625; Stein & Jonas & Grunsky, op cit marginal note 21 of para 917 ZPO.

114 Liesecke op cit 625.

Furthermore, the maritime lien gives a so-called statutory lien in terms of para 755(1) HGB. It would be a disadvantage of a lienholder compared with any other creditor, if the latter can secure his right by means of an arrest provided that the right is a pecuniary claim or might become a pecuniary claim. Not only German maritime liens therefore are claims for an arrest. Also foreign maritime liens have to be recognized as a claim for an arrest. This follows from the principle that, general speaking, maritime liens are regarded as a claim for an arrest. It is of no consequence where (ie in which country) the maritime lien arose as long as this maritime lien is a pecuniary claim or might become a pecuniary claim in terms of para 916 ZPO.¹¹⁵

(iii) Maritime claims as a claim for an arrest in terms of the International Convention relating to the Arrest of Seagoing Ships of 1952

A claim for an arrest will also exist for almost all maritime claims according to Art.1(1) of the International Convention Relating to the Arrest of Seagoing Ships of 1952 (the Arrest Convention of 1952).¹¹⁶

(b) Urgent reason for granting an order of civil arrest - para 917 ZPO

In order for an arrest to be allowed, the elements of para 917 ZPO also have to be fulfilled. Para 917(1) ZPO states that an order for arrest will be granted if it is apprehended that without the order, the enforcement of the judgment will be defeated or rendered more difficult. Pursuant to para 917(2) ZPO, a sufficiently urgent reason for the granting an order of civil arrest will be that the judgment would have to be enforced abroad.

115 Cf Part B - Chapter (2) (b).

116 Cf Chapter II (5).

(i) Writ of attachment in terms of para 917(1) ZPO

The applicant has to give evidence if a concrete danger of enforcement of the judgement is given. Further, without the infliction of the arrest, the enforcement against a debtor, not against the ship, must be in danger. This means that the danger of enforcement of the judgment is not determined by the danger of the pledge of the ship, but by the danger of the enforcement of the pecuniary claim.¹¹⁷

It is not necessary that a judgment has been recorded or other title of execution already lies before the Court.¹¹⁸

The arrest relates to what will later be secured in respect of the title. If there is to be a writ of attachment, it has to be determined by an objective standard. Thus the personal opinion of the creditor is of no importance.¹¹⁹ The court has a limited scope in determining whether there should be writ of attachment and it is not a question of the unfettered discretion of the judge.

Unfortunately, the statute does not say,¹²⁰ in detail, what a "concrete danger" is, aside from the exception contained in para 917(2) ZPO.¹²¹

Differing opinions have been given on the effect of these indefinite general legal concepts.

Grunsky¹²² for instance states that the requirements of para 917(1) ZPO will be met, if the creditor is in danger of losing his basis for enforcing his claim owing to the rivalry of other creditors. By way of contrast Thomas and

117 The Pennoil OLG Hamburg, HGZ 1909, 107.

118 By missing: cf para 926 ZPO.

119 Cf Zoeller & Vollkommer op cit marginal note 4 of para 917 ZPO.

120 In accordance with para 917(1) ZPO.

121 See Chapter III (1) (b) (ii).

122 Stein & Jonas & Grunsky op cit marginal note 1 of para 917 ZPO and W Grunsky 'Konkurrenz anderer Gläubiger als Arrestgrund' NJW 1976, 553. Cf LG Augsburg, NJW 1975, 2350.

Putzo¹²³ are of the opinion that the arrest does not serve the purpose of improving the position of the creditor in respect of the property of the debtor. Rather, the purposes of the arrest should be to prevent a change for the worse. The rivalry of creditors is not a requirement for a writ of attachment when the property of the debtor is insufficient to all the creditors.

The OLG Hamburg¹²⁴ is of the opinion that in general the imminent rivalry of other creditors is not a reason for a writ of attachment. The decision was based on the following facts: The steamer Clara was towing the barge of the defendant, when the tow chain broke. The barge, because of this, ran into the shed of the plaintiff and caused damage. The application for the arrest in this case was based on the fact that the barge, which was used by the defendant for business purposes, sailed abroad from time to time. The court gave the following reasons for its decision:

"The business of shipping with the barge renders unavoidable the creation of new maritime liens, which are, by virtue of the law, ranked before the maritime lien of the plaintiff and consequently endanger his preferential right. The success of the attachment could be defeated by the future judgment, although the act of attachment itself will not be defeated or rendered more difficult. The poor financial position of the defendant is a sufficient reason for a writ of attachment, because it is uncertain, whether the other property of the defendant will be sufficient to satisfy the claim of the applicant. In general, the rivalry of other creditors does not form a requirement for a writ of attachment.¹²⁵ In this case, the matter deals with the problem of preventing the devaluation of an already existing right of the applicant against newly forming liens. It normally happens that because of the rivalry of other creditors

123 Thomas & Putzo op cit annotation 1 of para 917 ZPO; Zoeller & Vollkommer op cit marginal note 9 of para 917 ZPO are of the same opinion.

124 The Clara I OLG Hamburg, HGZ 1903, 216.

125 RG, RGZ 3, 416.

challenging him by the arrest, the applicant will have a preferential claim over these other creditors, which he does not normally have. The execution of the arrest gives rise to the execution lien."

Grunsky¹²⁶ argues, contrary to the above-mentioned opinions that the rivalry of other creditors will not be a writ of attachment. In my opinion, he correctly states:

"Whoever applies for an order of arrest wants to improve his position of preference against the property of the debtor. He aspires to obtain real security in the form of an execution lien, for which he normally only has a claim under the law of obligations."

The application for an arrest will, however, be successful, if the creditor already has real security to the extent offered by the execution lien.¹²⁷ It will therefore be of no consequence if one denies the existence of a writ of attachment or if one proves the result without a legitimate interest in taking legal action. Even the poor financial situation of the debtor will not be sufficient grounds for a writ of attachment.¹²⁸

In principle all facts from which the danger results have to be presented. Aside from this it must be shown that a change for the worse in the financial situation of the debtor is imminent. It is unimportant that the applicant has known from the first about the debtor's poor financial situation.¹²⁹ Knowledge of the debtor's poor financial situation does not mean that the applicant loses the security given in terms of para 916 ff of the ZPO.¹³⁰

126 Stein & Jonas & Grunsky op cit marginal note 1 of para 917 ZPO.

127 Cf para 804 ZPO.

128 Cf The Clydefirth OLG Hamburg, VersR 1987, 356; Zoeller & Vollkommer op cit marginal note 9 of para 917 ZPO; Stein & Jonas & Grunsky op cit marginal note 5 of para 917 ZPO; cf The Pennoil OLG Hamburg, HGZ 1909, 107.

129 P Schwerdtner 'Zur Dogmatik des Arrestprozesses' NJW 1970, 223.

130 Stein & Jonas & Grunsky op cit marginal note 6 of para 917 ZPO.

Generally one can say that the danger of a deterioration in the financial situation of the debtor will always occur when he, for instance, wastes or encumbers his assets by mortgaging or transferring them. The mere intention of doing so is sufficient, and it is not necessary for the debtor to have started to do so.

One has to distinguish the case of a breach of contract.¹³¹ A wilful and knowing breach of contract normally represents a writ of attachment, but not necessarily delay itself. The failure to fulfil an obligation itself will not form a writ of attachment. Likewise also not in cases when performance has occurred after conclusion of the contract.¹³² With other wilful breaches of contract however, a writ of attachment will normally be granted.

Procedural behaviour may also come into question when applying for an arrest and when determining the writ of attachment. An example would be if the debtor, in the main legal proceedings, defended himself with what are proved to be fraudulent (untrue) pleadings or if he denied the authenticity of documents.¹³³

Natural events or acts of a third party against the debtor may also constitute a writ of attachment, provided the financial collapse of the debtor is imminent. Here one can refer for example to the boycott, which in the case of South Africa has become some significance.

It is equally possible for the debtor to be struck and this may cause a deterioration of his financial situation.

The institution of composition proceedings to avert bankruptcy¹³⁴ does not in principle exclude the grant of a writ of attachment in favour of a

131 Cf Zoeller & Vollkommer op cit marginal note 6 of para 917 ZPO; Schwerdtner op cit 225.

132 Stein & Jonas & Grunsky op cit marginal note 8 of para 917(1) ZPO.

133 Ibid.

134 Vergleichsverfahren.

participating creditor. However, as long as the institution of composition proceedings to avert bankruptcy is pending, there cannot be the danger of an arrest. One has to note that during the institution of composition proceedings to avert bankruptcy the opportunity of enforcement of an arrest¹³⁵ and consequently the keeping of the time-limit referred to in para 929(2) ZPO will not exist.¹³⁶

Schwerdtner¹³⁷ is correct in his assertion that there will plainly be no writ of attachment in this situation. The reason for this is the system referred to in para 917(1) ZPO. The legislator has not appropriated the writ of attachment, but rather an indefinite legal conception has been preferred so as to include the multiplicity of possible situations. The circumstances of each particular case will have to be examined by the court.

No writ of attachment will be granted if the creditor has a title, which has become final and absolute (non-appealable) and which is without security provisionally enforceable. On the contrary, however, if the title is not enforceable without security, a writ of attachment is given if the debtor is unable to provide security.¹³⁸

(ii) Writ of attachment in terms of para 917(2) ZPO

In accordance with para 917(2) ZPO the fact that the judgment would have to be enforced abroad will be sufficient reason for the granting an order of civil arrest¹³⁹. Para 917(2) ZPO specifies a writ of attachment, and this therefore

135 Cf paras 47 and 124 Vg10.

136 Cf Schwerdtner op cit 226; Thomas & Putzo op cit annotation 1 of para 917 ZPO.

137 Ibid 225.

138 Cf Zoeller & Vollkommer op cit marginal note 12 ff of para 917 ZPO.

139 Cf The Clara I OLG Hamburg, HGZ 1903, 216; see also the appeal on points of law in that case, The Clara II RG, HGZ 1904, 168.

represents a relief of the enforcement. A sufficient reason for the granting an order of civil arrest in accordance with para 917(2) ZPO is an unconditional writ of attachment.

It is questionable whether an order in terms of para 917(2) ZPO will be issued only for domestic (German) judgments, or whether foreign judgments will be included where enforcement is to be secured in a German harbour.

Some writers are of the opinion, that the relief in para 917(2) ZPO is only valid for German decisions.¹⁴⁰

The OLG Koblenz¹⁴¹ is of the opinion, that para 917(2) ZPO means that the enforcement of a domestic judgement will be secured within the country, even when sovereign rights play come into consideration. The value of the German title should be kept in the enforcement. This court argues that the wording of para 917(2) ZPO already indicates, that this can only mean a German title because if one speaks of the enforcement of a judgement abroad, only a domestic judgment could be meant.

Some of the courts¹⁴² within the scope of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 1968 (ECC-Convention) make an exception to that principle. In their opinion, para 917(2) ZPO is limited to the enforcement of German judgments. Only after that can one deal with the case of the enforcement of a judgment in a third country.

140 OLG Stuttgart, NJW 1952, 831; OLG Frankfurt, NJW 1959, 1088; OLG Koblenz, NJW 1976, 2081, with the consenting opinion of Schlafen 'Anmerkung zum Urteil des OLG Koblenz vom 2.5.1975 (NJW 1976, 2081)' NJW 1976, 2082; OLG Hamburg, VersR 1972, 1114; OLG Frankfurt RIW 1983, 289 - cf LG Koeln, RIW/AWD 1979, 128; W Grunsky 'Zum Arrestgrund des Paragraphen 917 Abs.2 ZPO bei der Vollstreckung auslaendischer Urteile (zu OLG Frankfurt, Urteil vom 2.3.1983 IPRax 1983, 227)' IPRax 1983, 210; The Clydefirth OLG Hamburg, VersR 1987, 356; cf Soehring op cit 55.

141 OLG Koblenz, NJW 1976, 2081.

142 The MS X LG Bremen, RIW/AWD 1980, 366; OLG Duesseldorf, NJW 1977, 2034; OLG Muenchen, RIW 1983, 534 at 535 - and consenting with the court, presumably, Schlafen op cit 2083; cf R Dittmar 'Der Arrestgrund der Auslandsvollstreckung' NJW 1978, 1720; Grunsky, IPRax 1983, 210.

In this connection the OLG Bremen¹⁴³ decided the following case: The plaintiff in arrest proceedings, a French joint-Stock company (public limited company) with its seat of business in Paris, claimed damages against the defendant in arrest, a Dutch private limited company with its seat of business in Rotterdam. The cause was the considerable damage to cargo by the defendant in arrest proceedings as the carrier, who had been transporting the goods with The MS X. In terms of the judgment of the Tribunal de Commerce de Paris of 1.6.1977 the defendant in arrest proceedings was ordered to make payment. The defendant in arrest proceedings appealed against this judgment on questions of both fact and law. The case was taken on appeal before the Cour d'Appel Paris. Because of his claims the plaintiff in arrest proceedings obtained the order of arrest and an arrest order from the Magistrates Court (Amtsgericht) Bremen to arrest The MS X, which was owned by the defendant in arrest proceedings and which was in the dock of the 'Hapag Lloyd-Werft' (dockyard) Bremerhaven. On the objection of the defendant in arrest proceedings, the Magistrates' Court (Amtsgericht) Bremerhaven repealed the order of arrest, because it was of the opinion that the preponderance of evidence in favour of a writ of arrest was missing. The plaintiff in arrest proceedings lodged an appeal and asserted by action in Court that he had an urgent reason for the granting an order of civil arrest in accordance with para 917(2) ZPO. The LG Bremen argued, that it could not follow a restrictive interpretation of para 917(2) ZPO, which was only limited to German judgments. The court said that it could be left undecided, whether para 917(2) ZPO was in former times granted by a consideration of the sovereign right to retain the value of German title by means of security through the possibility of domestic attachment. When interpreting and applying para 917(2) ZPO, one has to concentrate on growing European co-operation in the field of judicial relief and in terms of the EEC-Convention. Thus, traditional and national State considerations have to be subordinated. The EEC-Convention aims

143 The MS X LG Bremen, RIW/ AWD 1980, 366.

at the harmonization of the judicial decisions of the contracting States and provides for their acknowledgment and enforceability by execution in the particular contracting States.¹⁴⁴ Thus, for instance arrests, where these can be obtained at the courts of one of the contracting States, even if the court of another contracting State has jurisdiction for the principal claim.¹⁴⁵ This is the reason why the LG Bremen, in its application of para 917(2) ZPO to a French principal-claim-judgment found that this did not have to be treated in a different way to German ones.¹⁴⁶

Even the OLG Duesseldorf¹⁴⁷ has placed first the European-Unity-Idea and refuses to accept the principle that para 917(2) ZPO only deals with German judgments at any event within the frame of the EEC-Convention. That principle is opposed to the spirit of the EEC-Convention, because the LG Bremen¹⁴⁸ has already ruled that Art.24 of the EEC-Convention presumes that the judgment of the principal claim is issued by another contracting State. The judgments of the contracting States have to be equated with domestic judgments to the extent envisaged by the Convention. On the other hand, the contracting States are also foreign countries according to para 917(2) ZPO, because the EEC-Convention leaves the state borders untouched.

The OLG Frankfurt¹⁴⁹ has stated that even the EEC-Convention has not changed the fact that, in accordance with para 917(2) ZPO, only the enforcement of a domestic judgment will be rendered. The case in question dealt with an

144 Cf Art.26 ff and Art.31 ff of the EEC-Convention.

145 Cf Art.24 of the EEC-Convention.

146 The MS X LG Bremen, RIW/ AWD 1980, 366.

147 OLG Duesseldorf, NJW 1977, 2034; cf AG Leverkusen, IPRax 1983, 45, which is of the opinion, that Art.24 of the EEC-Convention assumes that the judgment in the main issue is rendered in another contracting State as the judgment in the arrest application.

148 The MS X LG Bremen, RIW/ AWD 1980, 366.

149 RIW 1983, 289.

arrest in German-Italian litigation. In the main issue an Italian court had jurisdiction. The court ruled that a person who decides to sue abroad also has to provide for the enforcement of the judgment abroad. The prejudice to the Italian creditor, however, contradicts the sense of the EEC-Convention, in that he has to suffer an arrest of his German property.

Dittmar¹⁵⁰ considers that para 917(2) ZPO cannot be applied any longer to the contracting States of the EEC-Convention. If one follows the interpretation of the OLG Duesseldorf,¹⁵¹ every foreign creditor, who finds an item of property of his debtor in Germany,¹⁵² is able to obtain an order of arrest simply by establishing sufficient evidence of his claim. Thus, according to the EEC-Convention, the creditor is able by his own choice to arrest any property of the debtor. However from the point of view of the laws of the EEC, para 917(2) ZPO is out of date. This is because the Common Market has lead to increasing economic co-operation. The EEC-Convention is a reaction to the free market economy and its requirements, in which the alleviation of the enforcement of judgments has also found its place. It is untenable that a citizen of the European Community, who disposes of foreign property, has to realize, that his creditors, on the basis of simply establishing probable evidence of their claims, can freely arrest his property both domestic and abroad.

The above-mentioned opinions on para 917(2) ZPO cannot be followed. It is necessary to go a step further. It has nothing to do with the origin of title, because the reason for the provision is that the creditor should not be burdened with the duty of enforcement abroad, if he can produce seizable objects of enforcement (eg a ship or a ship under construction)

150 Op cit 1720.

151 NJW 1977, 2034.

152 For example a claim, cf para 23 ZPO.

domestically.¹⁵³ It is of no consequence whether the future judgment originated from a German or another foreign court.

Grunsky¹⁵⁴ is right when he states that the aim is not to relieve the enforcement of German sovereign acts. Rather, the aim is that creditor, who has found property of the debtor within the country should not be forced to seek redress abroad. Thus, for instance, the institution of principal proceedings against a foreign single-ship company only has relevance, if the enforcement of the decision can be secured by an arrest within the country.¹⁵⁵

One might mention that the above discussed problem does not only arise with a view to judgments but also with a view to arbitration awards. Very often, for instance an applicant (eg a time-charterer of a vessel) faces the problem that the charterparty provides for arbitration in London.

(iii) Further preconditions for the application of para 917(2) ZPO

If one assumes that the general purpose of para 917(2) ZPO is to save creditors from the difficulties which arise from enforcement abroad, it is implicit in this that the judgment in Germany is also recognized and enforceable in accordance with para 328(1)(No 5) ZPO and para 723(2) ZPO. In accordance with the EEC-Convention most judgments will be recognized of courts of contracting countries, without needing a special proceeding.¹⁵⁶

Besides this there exist in relation to Germany and many other states

153 Cf Grunsky op cit 210 who is of the same opinion; see Pruessmann & Rabe op cit annotation D (2) (a) of para 482 HGB; Soehring op cit 56.

154 Op cit 210; cf Stein & Jonas & Grunsky op cit marginal note 17 of para 917 ZPO.

155 Cf Pruessmann & Rabe op cit annotation D (2) (a) of para 482 HGB.

156 Cf Art.26 of the EEC-Convention. The members of the EEC-Convention are: Belgium, Denmark, Federal Republic of Germany, France, United Kingdom of Great Britain and Northern Ireland, Italy, Ireland, Luxembourg, Netherlands - cf Zoeller op cit Appendix II, annotation 1 of Art.1 of the EEC-Convention.

international treaties in which mutuality is guaranteed (reciprocity agreement).¹⁵⁷

Adjudication in many cases has recognized the guarantee of mutuality, eg between the Republic of South Africa and Germany.¹⁵⁸

The citizenship of the parties concerned does not play any role in the application of para 917(2) ZPO. Even if the debtor is a German owning property abroad, an arrest has to be granted. All the parties concerned can be foreigners.¹⁵⁹ However, where a foreigner has all his property in Germany, only para 917(1) ZPO is applicable.

Para 917(2) ZPO is applicable to all titles of execution, besides judgments eg on arbitration awards.

There is no need for the existence of security if the creditor has already obtained that security in rem, which he wishes to obtain by means of the enforcement of the arrest.

The result will be different if the already obtained security in rem is not sufficient to satisfy the claim.

Even with maritime liens in accordance with para 754 HGB¹⁶⁰ an arrest can be granted to prevent the ship from sailing out of the harbour, where this would lead to a danger of not being able to realize that right.

(iv) No writ of attachment within the meaning of para 917(2) ZPO

As already stated, the standard question in accordance with para 917(2) as well as para 917(1) ZPO is whether the future enforcement by reason of a domestic

157 Mutuality is guaranteed for instance between Germany and Australia, China, Japan, Mexico, Sweden, Switzerland and the United States of America: cf Zoeller-Geimer op cit Appendix I.

158 Cf BGH, NJW 1964, 2350.

159 OLG Muenchen, MDR 1960, 146.

160 Already discussed above in relation to para 916 ZPO.

monetary claim, directed personally against the debtor, will be in danger. This danger does not exist where the debtor owns permanent domestic property and when he gives a guarantee that he habitually brings property, which is sufficient to cover his obligations, to the country. An example would be a shipowner who has a scheduled service with his ships and which calls at a German harbour at regular intervals, and it is expected, that this will continue in the future.¹⁶¹

This principle is not restricted, as adjudication has justifiably extended it. The OLG Bremen¹⁶² had to decide a case, in which an insurance company and a Peruvian ship, The Paracas, were involved. The question was, whether the shipping trade maintained a regular scheduled service between Peru and Europe via Hamburg. The court ruled as follows:

"It is not decisive that a service qualifies as a regular scheduled service. What is decisive is the situation where, at different intervals, property of the debtor is made available which the creditor can enforce. There must always be a warrant therefore, that the regular scheduled service will be maintained in future. In the case of The Paracas this was dubious, because the economic existence of the shipping line depended on the company's mining output and the sale performance of a single product, that is fish-meal, which was produced by the enterprise of the principal shareholder of the shipping line. In such fish-meal enterprises, the binding arrangement on harbours is not as great as with the transport of small consignments, where well-established agencies are responsible for the cargo yield and the shipowner feels obliged, because of this, to call at the same ports."

This was not the case in The Paracas, because the insecurity was obvious, namely that it was uncertain whether the ship would call at a European harbour

161 OLG Bremen, MDR 1955, 749 - cf Zander 'Voraussetzungen fuer einen Arrest gegen eine auslaendische Reederei (zu OLG Bremen, MDR 1955, 749)' HANSA 1955, 1772; OLG Hamburg, HANSA 1966, 1261.

162 The Paracas OLG Bremen, VersR 1972, 250.

or not.

A further reason to make an exception to the rule contained in para 917(2) ZPO and not to arrest ships of shipowners supporting a regular scheduled service is, for instance, the age or the condition of the ship. If the case concerns a single-ship company, than an arrest will be ordered in terms of para 917(2) ZPO, if it is feared that this ship, because of profitability, will be withdrawn from circulation, and it is not certain that the ship will be replaced by a newly built ship or, at least a newer or chartered one.

A similar case occurred within the jurisdiction of the OLG Hamburg.¹⁶³ The court had to decide whether or not it could be guaranteed in future, that an Ethiopian State shipping line would discharge its cargo, namely coffee, at a German harbour (in this case Hamburg and Bremen). The court had to take into account the fact that the ships were totally out of date. The court ruled that in this special case, the Ethiopian State shipping line, being that of a Third World developing country, maintained a regular scheduled service, in which a ship called at a German port every four weeks and the agent collected freights of more than \$ 125.000 per ship. The creditor, on one side, could garnishee these freight claims after ordinary proceedings and was not dependant on the arrest of one of the foreign vessels because, in the courts opinion, the African government would not discontinue its business relations with the Hamburg agent in order to evade the creditor's claim of only DM 90.000. On the other hand, because of the low claim, one does not have to fear that the Ethiopian state shipping line would scrap their ships because of their age (built in 1961 and 1966) and that they would not be replaced. As Ethiopia is a developing country, it is unlikely to renounce its freight revenue in US-dollars. Therefore it is to be expected that either the running of the shipping line will be carried on with chartered ships or the old ships will be replaced

163 OLG Hamburg, VersR 1982, 341; cf Thomas & Putzo op cit annotation 2 (a) of para 917 ZPO.

by newly built ships (and in this case, the Ethiopian government had pleaded before the court that they planned to award a contract to build five new ships).¹⁶⁴

A further reason for the exception, namely to arrest ships from shipowners or shipping lines maintaining regular scheduled services, is the apprehension that a ship might be nationalized. The result would be that the shipowner no longer has disposal arrangements with his former ship, and from which the danger arises, that that ship (or the ships) will not call at a German port any longer or, if it is a foreign creditor (for instance a French one) that the ships will neither call at a French port nor a German harbour and consequently evade the enforcement of a claim in the future.

The OLG Hamburg, in an already mentioned decision,¹⁶⁵ refused to grant an order of arrest even when a ship sailed abroad for a certain time. The court, after considering the facts and circumstances of the case and the interests of the parties involved, did not fear that the ship would remain abroad. In this decision the special situation was mentioned, where a business enterprise was limited to ships sailing only on the River Elbe. The barge of the defendant ran into a shed of the plaintiff after the towing chain broke. The court ruled as follows:

"The possibility that the barge in the business enterprise of the defendant sails abroad for a certain time, does not establish the fear that the judgment has to be enforced abroad, because the Bohemian¹⁶⁶ stretch of the River Elbe is too short for the barge to be employed there with profit."

One has to decide each case individually and to weigh the interests involved.

164 Cf OLG Hamburg, VersR 1982, 341; see also Soehring op cit 55.

165 The Clara I OLG Hamburg, HGZ 1903, 216; cf also The Clara II RG, HGZ 1904, 168, appeal on points of law of the fore-mentioned judgment of the OLG Hamburg.

166 Part of Czechoslovakia.

No writ of attachment does exist in the case where the debtor gives the creditor sufficient security, and it is irrelevant whether the security is found domestically or abroad.¹⁶⁷

2. General preconditions

(a) Form for application - para 920(1) and (3) ZPO

The application for an arrest, known as a petition for an arrest, is what institutes the arrest proceeding. The application can either be before the Court office (para 919 ZPO) by means of a report of the proceedings, in which case there is no mandatory representation by lawyers before the Magistrates' Court (Amtsgericht).¹⁶⁸ Alternatively, more usually the application can be put in writing,¹⁶⁹ either by the applicant or his counsel.

In accordance with para 920(1) ZPO, certain minimum requirements have to be met with the arrest application. This will have to contain a description of the arrest claim together with a declaration of the amount, as well the setting out the urgent reason for granting an order of civil arrest.

In most cases the following minimum particulars are required on the application (form):

- (i) The applicant's full name and his registered (or principal) address in the heading of the case (Rubrum).
- (ii) Respondent's full name and address, and this must also appear in the heading of the case (Rubrum).

Note that where the applicant or the respondent is a body corporate, the full name of one of the directors who is authorized to represent it in litigation, should also be denoted. If the applicant is represented by counsel, the full name of the counsel (not only the name of the company or law firm to which he

167 Cf Zoeller & Vollkommer op cit marginal note 15 of para 917 ZPO; Thomas & Putzo op cit annotation 2 (a) of para 917 ZPO.

168 Cf para 78(2) ZPO.

169 Hagberg & Albrecht op cit 36.

belongs) has to be filled in on the application form.¹⁷⁰

- (iii) The claim for the arrest according to para 916 ZPO together with its establishing facts.
- (iv) Power of attorney.
- (v) The amount (monetary value) of the claim for arrest.
- (vi) The urgent reason for the granting of an order of civil arrest. This means the fact which signifies that the future enforcement is in danger.¹⁷¹
- (vii) Determined objects of arrest must be pointed out because of the principle that if the application for an arrest is submitted to the Magistrates' Court (Amtsgericht),¹⁷² the arrest will vest jurisdiction. The order of arrest can, nevertheless, be enforced against the whole property of the respondent and, as far as property outside the judicial district is concerned, even against that. It is sufficient for the attachment order impounding the debtor's property if the application for an arrest order merely mentions "against the property of the debtor", because it is for the creditor to indicate those things he wishes to be arrested.¹⁷³ In the case of the arrest of a ship, as a rule the petition for an order of arrest will¹⁷⁴ be put before the Magistrates' Court (Amtsgericht) in whose harbour the ship at time of the petition for an arrest is located. It is seldom that this is at the court of the principal claim.¹⁷⁵ Where the arrest order is pleaded before the Magistrates' Court (Amtsgericht),¹⁷⁶ the ship to be arrested has to be indicated by name, and the berth has to be named as well .

170 Cf para 253(2)(No 1) ZPO.

171 Cf paras 917 and 253(2)(No 2) ZPO.

172 Para 919 ZPO.

173 Paras 808, 828 and 930 ZPO. Cf Stein & Jonas & Grunsky op cit marginal note 16 of para 920 ZPO.

174 In accordance with para 917 ZPO.

175 See Chapter III (2) (c).

176 In accordance with para 919 ZPO.

The official language used in the court is German.¹⁷⁷ This is the reason, why, in principle, all written documents have to be submitted in German. The courts dealing with shipping matters will, however, especially with arrest proceedings, also accept documents supporting the claim if these are in English.¹⁷⁸

(b) Establishing a preponderance of evidence for the petition of arrest-
paras 920(2), 921(2)(sentence 1) and 751(2) ZPO

The arrest proceeding is a summary procedure and it is therefore sufficient, if the petitioner¹⁷⁹ shows by prima facie evidence the claim for the arrest as well as the urgent reason for granting an order of civil arrest.¹⁸⁰

An exception to this is para 921(2)(sentence 1) ZPO, where the arrest can be ordered even when the claim for the arrest and the urgent reason for granting an order of civil arrest have not been made credible by the petitioner providing security.

The proof by prima facie evidence does not of course exclude documentary evidence, such as a Bill of Lading, a witness or an expert, which can be produced at the court hearing.

The main means of proof by prima facie evidence is the affidavit of the petitioner or the assurance of his lawyer.¹⁸¹ It is, however, to be recommended that both assurances are recorded because of the resultant greater

177 Para 184 GVG.

178 Cf Soehring op cit 56 ff.

179 In accordance with para 919(2) ZPO.

180 Cf OLG Muenchen, RIW 1983, 534; The Kladderadatsch I LG Hamburg, HGZ 1910, 100; The Kladderadatsch II OLG Hamburg, HGZ 1910, 101.

181 Cf The MS X LG Bremen, RIW/ AWD 1980, 366.

credibility.¹⁸²

The respondent is allowed to submit a written statement as a precaution (caveat¹⁸³), if he fears an arrest proceeding. In the caveat he can file his observations to the arrest application, in order to render more difficult the petitioner's proof by prima facie evidence.¹⁸⁴

For the rest, there is no change in a summary proceeding with regard to the evidential burden of proof. The respondent has to substantiate his objections and defence pleas. If he fails to do so, the court has to grant the arrest petition.

There are cases in which the proof by prima facie evidence gives rise to difficulties. An example is when the real facts and circumstances of a collision usually become evident after a detailed hearing of the evidence.¹⁸⁵

In cases where the petitioner fails to prove by prima facie evidence, para 921(2)(sentence 1) ZPO and para 751(2) ZPO grants him the right to obtain the claim for an arrest (as well as the urgent reason for granting an order of civil arrest) by the lodging of security. The lodging of security, however, only substitutes the proof by prima facie evidence of the claim for the arrest and the urgent reason for the granting an order of civil arrest. The facts from which they result have to be submitted conclusively.¹⁸⁶

If it is certain from the beginning that there is no claim for an arrest nor an urgent reason for granting an order of civil arrest, then no warrant of arrest in accordance with para 921(2)(sentence 1) ZPO can be granted.

182 Zoeller & Vollkommer op cit marginal note 10 of para 920 ZPO.

183 Schutzschrift.

184 Cf Stein & Jonas & Grunsky op cit marginal note 9 of para 920 ZPO.

185 Cf The Pennoil OLG Hamburg, HGZ 1909,107.

186 Cf Thomas & Putzo op cit annotation 2 of para 921 ZPO.

(c) Competent court - para 919 ZPO(i) Principles

Para 919 ZPO states that the court of the principal claim is the competent Court for the order of an arrest.¹⁸⁷ On the other hand, the Magistrates' Court (Amtsgericht), in whose judicial district the object of the arrest is located, is also competent.¹⁸⁸ The second alternative is normally applicable to the arrest of ships.¹⁸⁹ According to para 35 ZPO and para 919 ZPO, the creditor thus has a choice between two legal venues.

Contrary to other courts, the ruling of competence in para 919 ZPO is an exclusive one.¹⁹⁰

The court of arrest is also competent to decide the protest proceeding¹⁹¹ and it may give the order stipulating the time-limit within which the petitioner has to bring his action for the principal claim.¹⁹² It also has the power to repeal the arrest where the petitioner has failed to meet the deadline¹⁹³ or because the circumstances have changed.¹⁹⁴

The court can order the return of security,¹⁹⁵ and it can also grant a court certificate of enforceability (Vollstreckungsklausel).¹⁹⁶

187 Para 919(alternative 1) ZPO.

188 Para 919(alternative 2) ZPO. Cf Pruessmann & Rabe op cit annotation D (2) (c) of para 482 HGB; Soehring op cit 56; Hagberg & Albrecht op cit 35.

189 Further than this, there are, in accordance with para 14 GVG, specially admitted courts for shipping for the matters described in statute, for instance, the Act which deals with the legal procedure relating to inland navigation matters.

190 Cf para 802 ZPO.

191 Widerspruch, cf para 925 ZPO.

192 Para 926(1) ZPO.

193 Para 926(2) ZPO.

194 Cf para 927 ZPO - exception: para 927(2) ZPO.

195 Para 109 ZPO.

196 Paras 929(1) and 731 ZPO.

Finally the court is competent to levy execution (Pfaendung) of pecuniary claims in execution of the arrest.¹⁹⁷

The court of the principal claim¹⁹⁸ is the court, which has local competence as well as jurisdiction over the matter over the principal claim. The principal claim is the proceeding in which the monetary claim will be secured and from which the claim for an arrest must arise. The parties participating in the proceedings of the principal claim must be the same as in the arrest proceeding. If the principal claim is pending before a court, that court is the court of the principal claim.¹⁹⁹ Likewise with a default summons, the Magistrates' Court at which the default summons has been issued, is the court of the principal claim.

The Magistrates' Court will be competent to hear the matter at the choice of the creditor, if it is within the circuit where the ship to be arrested is located, irrespective of the amount of the claim.²⁰⁰

Even though the arrest was applied for at the Magistrates' Court, it does not follow that the arrest has to be enforced only within the circuit of this court. If, for example, the ship sailed to Bremen during the time the application for the arrest was before the Magistrates Court Hamburg, it is possible to enforce a warrant of arrest, ordered by the Magistrates Court Hamburg, in Bremen.²⁰¹

In the situation where both alternatives are correct,²⁰² and the ship is

197 Paras 930(1)(sentence 3) and 934 ZPO. Cf Thomas & Putzo op cit annotation 1 of para 919 ZPO.

198 In accordance with para 919(alternative 1) ZPO. See the definition in para 943 ZPO.

199 Cf Stein & Jonas & Grunsky op cit marginal note 4 of para 919 ZPO; Thomas & Putzo op cit annotation 2 of para 919 ZPO; Zoeller & Vollkommer op cit marginal note 3 of para 919 ZPO.

200 Cf para 23 GVG.

201 Stein & Jonas & Grunsky op cit marginal note 12 of para 919 ZPO.

202 In accordance with para 919 ZPO.

in the circuit of the principal claim, the creditor can either apply for the arrest at the Magistrates' Court or, if the value of the claim exceeds the amount of DM 5000,²⁰³ at the District Court (Landgericht) competent for the principal claim.

An arrest in a German harbour does not imply that the creditor has to be resident in Germany.²⁰⁴ Albrecht²⁰⁵ gives the following hypothetical example:

"Imagine that a Swedish creditor arrests an Italian ship in the harbour of Hamburg because of a claim which he has made credible. The reverse is also imaginable, as the other legal systems correspond to the German legal system to the extent that for instance a German ship can be arrested in the harbour of Copenhagen (because of a Swedish creditor) or, as has turned out in practice, a German ship, which has been chartered to a Belgian, can be arrested in an Australian harbour because of a claim which originated in Aden."

As the regulation of competence is an exclusive one, an arbitration agreement cannot remove the competence of a court for an arrest application.²⁰⁶ An agreement which prescribes that an arrest cannot be applied for will not be permitted.

A claim for obtaining an arrest is also not renounceable.²⁰⁷ Stipulations as to venue for the action of the principal claim do not prevent the arrest by the Magistrates' Court of res, eg a ship.

By means of an arbitration agreement, the national jurisdiction of German courts is not simply excluded. This remains in existence for the summary arrest proceedings and the interim injunction. The competent court is the court which

203 Cf para 23 GVG.

204 If the creditor does not have his residence in Germany: cf para 23 ZPO.

205 Op cit 1145.

206 Para 919 ZPO.

207 RG, RGZ 31, 370; Pruessmann & Rabe op cit annotation D (2) (c) of para 482 HGB; Albrecht op cit 1145.

would be competent in the main proceedings if the arbitration agreement were not in existence.²⁰⁸ No court of arbitration can adjudicate an arrest application or issue an order of arrest.²⁰⁹

(ii) Particular international competence of German courts

The particular international competence of German courts derives from para 919 ZPO. German courts are therefore competent to order the arrest of a ship if it is in a German harbour.²¹⁰

(1) Scope of the application of the EEC-Convention

In terms of Art.24 of the EEC-Convention,²¹¹ the German court of the principal claim, which would be competent to hear the principal claim itself without the regulation contained in Art.2 of the EEC-Convention, is a competent court to order the arrest.²¹²

Art.24 of the EEC-Convention is an exceptional rule for temporary measures, which concern security of a claim.

In principle, the place of litigation stated in para 23 ZPO is excluded by Art.3 of the EEC-Convention, but this not so in the case of an arrest proceeding in accordance with Art.24 of the EEC-Convention.²¹³ The LG

208 OLG Frankfurt, NJW 1959, 1088.

209 RG, RGZ 31, 370 at 374 f.

210 Cf Chapter III (2) (i).

211 Cf R Geimar 'Eine internationale Zuständigkeitsordnung in Europa' NJW 1976, 441 and especially Art.5 (No 7) of the EEC-Convention in respect of orders already granted for arrest because of charges for salvage and provision of aid in distress at sea (para 740 HGB).

212 Stein & Jonas & Grunsky op cit marginal note 2 of para 919 ZPO; Thomas & Putzo op cit annotation 2 of para 919 ZPO.

213 AG Leverkusen, IPRax 1983, 45.

Bremen²¹⁴ stated as follows:

"The international and local competence (of the courts of Bremen) for arrest proceedings is governed by paras 23, 919 ZPO, for the reason that the ship to be arrested is presently in the harbour of Bremerhaven. The undisputed competence of the French courts to hear the principle claim does not impair a proceeding for arrest in Germany (in accordance with Art.24 of the EEC-Convention)."

An arrest can be applied for on the grounds of the location of the asset, if the German court in the judgment of the main issue is not competent in terms of the EEC-Convention.

The OLG Duesseldorf²¹⁵ stated the following in the case where a German plaintiff who had worked for an Italian company wished to secure his claim by means of an arrest against his former employer with the Higher District Court (Landgericht):

"The international competence of the LG Duesseldorf follows from Art.24 of the EEC-Convention. According to this, it is possible to apply for temporary measures which are assigned for in the law of the contracting State (including those measures which are directed towards the security of the claim), with the courts of these states even if for the decision in the principle claim, the court of another contracting State is competent. Consequently, the plaintiff was able to apply for an order of arrest before a German court, irrespective of the dispute between the parties as to whether an Italian court was competent to hear the principal claim in accordance with Art.2(1) and Art.53 of the EEC-Convention. Insofar the national rules of the state remain untouched and the arrest order can be applied for before the court²¹⁶, this can be done even where this comes into question after German law as the court of the principal claim. Considering the value

214 The MS X LG Bremen, RIW/ AWD 1980, 366; cf OLG Frankfurt, RIW 1983, 289.

215 NJW 1977, 2034; cf. Thomas & Putzo op cit annotation 2 of para 919 ZPO; cf the dissenting opinion of OLG Koblenz, NJW 1976, 2081 with the negative note of Schlafen op cit 2082.

216 In accordance with para 919 ZPO.

of the claim, this will be the Higher District Court (Landgericht)."

Besides the competence accorded in Art.24 of the EEC-Convention, it is possible to arrange a legal venue for the principal claim²¹⁷ by means of a stipulation as to venue in terms of Art.17 of the EEC-Convention.²¹⁸ This is binding even if only the arrest applicant has his residence or respective business seat in one of the contracting States. Thus it will be sufficient if one of the contracting parties at the conclusion of the contract has his residence within the area of one of the contracting States.²¹⁹

In accordance with Art.5(No 7) of the EEC-Convention, there is a particular arrest venue for litigation concerning salvage money and remuneration for assistance, when the case must deal with a pecuniary claim for maritime salvage done for the benefit of a cargo or a cargo claim (forum arresti²²⁰). What is competent is, according to English law, the court in whose sphere of responsibility the cargo or the corresponding cargo claim has been arrested to guarantee payment.²²¹ This provision complements Art.7(1)(e) of the Arrest Convention of 1952.²²²

The provision in Art.5(No 7) of the EEC-Convention is only applicable if it is asserted that the defendant has rights to the cargo or to the cargo claim or had these rights at the time of the salvage service.

217 Within the meaning of para 919 ZPO.

218 Cf BGH, RIW/ AWD 1978, 475; OLG Frankfurt, RIW/ AWD 1980, 799; OLG Muenchen, RIW 1983, 534; Zoeller & Geimer op cit Appendix II, Art.17 of the EEC-Convention; J Basedow 'Das forum conveniens der Reeder im EuGVUE' IPRax 1985, 133 at 134.

219 Cf E Jayme and H Haack 'Reziproke Gerichtsstandsklauseln - EuGVUE und Drittstaaten (zu OLG Muenchen, 8.8.1984, IPRax 1985, 323)' IPRax 1985, 323.

220 Cf G Brice 'Maritime Claims: The European Judgments Convention, 1987 (3) LMCLQ 281 at 287.

221 J Kroppholler 'Neues europaeisches Zivilrecht' RIW 1986, 929 at 931.

222 See Chapter III (2) (c) (ii) (No 2).

In the situation when the shipowner of a ship in distress has concluded a salvage agreement or a rescue contract, all the disputes arising in connection with this are not regulated by Art.5(No 7) of the EEC-Convention but by Art.5(No 1) of the EEC-Convention.²²³

Arbitration proceedings do not fall within the ambit of the EEC-Convention.²²⁴

(2) Scope of application of the Arrest Convention of 1952

There are no particularities resulting from the International Convention for the Unification of Certain Rules Relating to the Arrest of Seagoing Ships of 1952 (the Arrest Convention of 1952). This is because²²⁵ the proceedings relating to an arrest of a ship, the obtaining of an arrest order and all other proceedings, when an arrest is relevant, are determined by the law of the contracting State in which the arrest has been enforced or applied for.²²⁶

Accordingly, if a creditor wants to secure a maritime claim by means of an arrest under Art.1 of the Arrest Convention of 1952, and this is in Germany, the particular and general arrest provisions of German law have to be applied. Questions of competence are regulated by para 919 ZPO.

German courts are, according to Art.7 of the Arrest Convention of 1952, competent to decide the principal claim if the arrest has been enforced in Germany and if these courts are competent pursuant to para 919 ZPO. Thus, in accordance with this, the cases enumerated in Art.7(1) of the Arrest Convention of 1952 are:

223 Cf Kroppholler op cit 931.

224 Art.1(2)(No 4) of the EEC-Convention; cf Zoeller & Geimer op cit Appendix II, marginal note 9 of Art.1 of the EEC-Convention.

225 In accordance with Art.4 and Art.6(sentence 2) of the Arrest Convention of 1952.

226 Cf Albrecht op cit 1145.

- (a) if the claimant has his habitual residence or principal place of business in the country in which the arrest was made;
- (b) if the claim arose in the country in which the arrest was made;
- (c) if the claims concerns the voyage of the ship during which the arrest was made;
- (d) if the claim arose out of collision or circumstances covered by Art.13 of the International Convention for the Unification of Certain Rules of Law with Respect to Collision Between Vessels, Brussels, September23, 1910;²²⁷
- (e) if the claim is for salvage;
- (f) if the claim relates to mortgage or hypothecation of the ship arrested.

If the parties concerned have agreed to the competence of another court or concluded an arbitration agreement, it is possible that, pursuant to Art.7(3) of the Arrest Convention of 1952, the court of the circuit in which the arrest has been enforced, can set a time-limit for the applicant. The applicant then has to bring an action for the principle claim before the court agreed upon, or he must bring the matter before an arbitration tribunal. If the applicant does not bring the action before the court agreed upon in time or if he does not bring the matter before an arbitration tribunal in time, the debtor can cancel the arrest or he can demand to be released from suretyship or any other security he has provided.

For the rest, arrest proceedings are only available for those claims which can be brought as actions against someone in ordinary litigation procedures. If it is therefore impossible to bring the principal claim before the civil courts, one may not, according to para 916 ZPO, apply for an arrest before a civil court.²²⁸

227 Signed on 23 September 1910.

228 Cf. Stein & Jonas & Grunsky op cit marginal note 24, preliminary remark of para 916 ZPO.

CHAPTER IV

VALUE OF CLAIM AND PRESENT VALUE

When dealing with arrest proceedings, the value of the claim²²⁹ and its present value²³⁰ have to be kept separate, and not merely for the purpose of determining court's and counselor's fees. According to para 919 ZPO,²³¹ the present value of the claim will determine which court has jurisdiction over the principal claim.²³² The value of the claim is measured in money. Further, the value of the claim determines the professional charge of the counselor (eg the attorney or advocate) who was representing either the creditor or the debtor in the arrest proceedings or the principal claim.²³³ The value of the claim can be lower than the present value.

In order to assess the value of a claim, one must distinguish between the main proceedings and arrest proceedings.²³⁴ The main proceedings often concern the enforcement of a monetary claim, whereas arrest proceedings frequently concern the attempt to secure the (asserted) claim.

In the main proceedings, title will be effected over the claim, and execution takes place on the basis of this when the occasion arises.

The arrest proceedings are, by way of contrast with the main proceedings, merely a summary proceeding. The effect of this is that only substantiation by

229 Streitwert.

230 Gegenstandswert.

231 In connection with para 1 ZPO and para 23(No 1) GVG.

232 According to para 23(No 1) GVG, if the present value is over DM 5000, the court of the main proceedings will be the Higher District Court (Landgericht), otherwise the Magistrates' Court (Amtsgericht).

233 Main proceedings.

234 The value of the claim and the present value can correspond.

prima facie evidence is required.²³⁵ The procedural requirements are also not as strict as those in the main proceedings.

It is possible for the arrest court to adjudicate the arrest application without an oral hearing,²³⁶ whereas in the main proceeding only the explicit consent of the parties concerned can waive the court hearing.²³⁷ The arrest proceedings can, however, prepare for the main proceeding if it is not yet pending. This has to be taken into consideration when determining the value of the claim.

When dealing with the arrest of a ship, the property assets which are temporarily in the native country will be utilized for the purpose of enforcement. If this is successful, the arrest claim will be fulfilled most of the time without a main proceeding. If the creditor renounces his rights arising from the arrest, it is justifiable if the value of the claim for arrest proceedings corresponds to the arrest claim (present value) to its greatest extent.²³⁸

Even if the respondent guarantees or deposits the settlement first, the applicant will be satisfied relatively quickly without the need of instituting the main proceeding. Thus in these cases, the value of the claim should amount to 25 percent of the present value of the main proceeding.²³⁹

The court normally determines the value of the claim, and here the provisions of the German Federal Attorneys Act (Bundesgebuehrenordnung fuer Rechtsanwaelte) will have to be observed as well.

235 Cf para 920 ZPO.

236 Cf para 921 ZPO.

237 Cf para 128 ZPO.

238 Pruessmann & Rabe op cit annotation D (2) (d) of para 482 HGB.

239 Pruessmann & Rabe op cit annotation D (2) (d) of para 482 HGB which contains additional sources.

C H A P T E R V

ADJUDICATION OF THE COURT OF THE ARREST PETITION(1) Court order or judgment - paras 921(1), 922 ZPO

The decision on the petition for arrest will occur either by means of a court order (Beschluss) or a judgment (Urteil).²⁴⁰

The court orders an arrest without having had an oral hearing beforehand on application of the creditor. Then the order is published in the form of an order (Beschluss). The defendant (debtor) may ask the court to have an oral hearing. Then the court (same instance) will issue a judgment either confirming the first arrest order or rejecting the application. This judgment may be appealed. If the court holds an oral hearing (ie because the debtor had filed a caveat²⁴¹), then the court will decide by a judgment either ordering an arrest or rejecting the application. Again, an appeal against this judgment is possible as above.

One has to have regard to the fact that arrests by means of a court order, pursuant to Art.25 of the EEC-Convention, are not recognized.²⁴² Therefore if an arrest applicant is a member of a state which has ratified the EEC-Convention, the applicant in his own interest has to see to it that the decision on the arrest is a judgment. He cannot otherwise have the advantages of the EEC-Convention. Whether the decision on the arrest is made with or without an oral hearing is the decision of the court and this has to be decided according to its best judgment.

The party who has obtained the arrest, has to serve the court order in

240 Para 922 ZPO.

241 Schutzschrift.

242 EuGH, NJW 1980, 2016; cf Zoeller & Vollkommer op cit annotation 1 of para 921 ZPO.

which the arrest is directed upon the respondent.²⁴³

(2) Security deposit by the applicant - para 921(2) ZPO

The court can, according to para 921(2)(sentence 1) ZPO, even if the claim for the arrest or the urgent reason for granting an order of civil arrest is not credible, order the arrest so long as security is provided by the applicant. This is because of the disadvantages for the respondent which arise out of the arrest. The ship, when the occasion arises, will be "put in irons" ("in die Kette legen") and will not be able to sail away.²⁴⁴

The court is allowed to make the order of arrest contingent upon a security deposit, even if the claim for the arrest and the urgent reason for granting an order of civil arrest are made credible.²⁴⁵

The security deposit provided for by para 921(2) ZPO is not full compensation for the substantiation by prima facie evidence. The court can, if the danger resulting from an order of arrest is equalized by the securing of an eventual indemnification, content with a lower grade of conviction.²⁴⁶

The court is not allowed, even if the applicant himself has not offered to provide security, to refuse the arrest petition without having proved, that it is possible to correspond to the arrest petition by means of a security deposit.

Para 921(2)(sentence 2) ZPO contains a special provision to protect the respondent. The court can take into consideration the dangers resulting from the enforcement of the arrest by demanding security from the applicant, despite preliminary proof of a claim for arrest and an urgent reason for granting an

243 Para 922(1) ZPO.

244 Cf Chapter III (2) (a) and para 920(2) ZPO.

245 Cf para 921(2)(sentence 2) ZPO.

246 Stein & Jonas & Grunsky op cit marginal note 6 of para 921 ZPO.

order of civil arrest. It may, for instance, be questionable, whether the applicant, if the arrest is cancelled and the respondent has a damage claim²⁴⁷, be able to pay compensation for damage or not.²⁴⁸ In this case, the court issues two court orders. Firstly, it will issue one in which the applicant has to provide security and, secondly, it will issue the order of (civil) arrest, provided that the applicant has provided security.

The value of the security is fixed according to what the court thinks fit and can consist of money which has to be paid into court. On the other hand, security can be provided by the deposit of a pledged item or a suretyship agreement.

The value of security will be set sufficiently high so as to include all damage pursuant to para 945 ZPO.

The applicant can, if he has applied for an order of arrest without lodging security or if he has not given a statement about the security in his arrest application, file a simple appeal against the court order, should it order him to provide security.

The respondent can lodge a protest, if the court orders the arrest without a security deposit by the applicant.

- (3) Competence of the respondent to avoid the restraint of his ship by lodging of security (P & I-Club) - para 923 ZPO.

The competent court for arrest proceedings²⁴⁹ will, in the order of arrest, determine an amount which the respondent has to provide as security. If the respondent pays the money into court, the enforcement of the arrest will be

247 According to para 945 ZPO.

248 Zoeller & Vollkommer op cit marginal note 3 of para 921 ZPO; Stein & Jonas & Grunsky op cit marginal note 7 of para 921 ZPO.

249 Pursuant to para 923 ZPO.

stopped and the respondent can legitimately apply for cancellation of the enforcement of the arrest.

The respondent accordingly has the right to provide security after the arrest has been ordered and thereby to prevent his ship from being held for a (long) time in a harbour.

The value of the security will correspond to the claim together with all subsidiary claims and interest as well as the fees and expenses of the arrest proceeding. The respondent can, by means of proving a security deposit, prevent the enforcement of the order of arrest²⁵⁰ and he is also entitled to apply for the repeal of the enforcement measures at the court which is competent to hear enforcement matters²⁵¹.

The order of arrest, despite this, will remain effective, so long as the court has not overruled it.

After the repeal of the arrest, the security provided by the respondent will be refunded.²⁵²

As a rule, in shipping matters, the respondent will bring as security money,²⁵³ a pawn,²⁵⁴ or the registration of a ship's mortgage in a German register of ships.²⁵⁵ The value of the security is determined by the court.²⁵⁶ The respondent of a ship to be arrested can, provided that he is a member of the P & I-Club, offer the creditor a letter of undertaking from the Club in

250 In accordance with para 923 ZPO and in conjunction with paras 712 and 775 (No 3) ZPO.

251 Para 934 ZPO. Cf para 776 ZPO.

252 Cf Thomas & Putzo op cit annotation 2 of para 923 ZPO.

253 Cf as well para 232 BGB.

254 Cf Stein & Jonas & Grunsky op cit marginal note 4 of para 923 ZPO with regard to lodging of security by a third party in favour of the debtor; cf Stahl 'Sicherung von Anspruechen gegen auslaendische Reeder im Inland' DB 1959, 589.

255 Ibid.

256 Para 108 ZPO.

exchange for the arrest.²⁵⁷ "Although the applicant is not bound to accept the security not approved by the court, he will usually do so, provided the wording of the club letter enables him to collect his money without further difficulties as soon as the judgment on the merits has been issued in his favour."²⁵⁸

The security by payment into court is regulated by the Court Deposit Regulations (Hinterlegungsordnung). This sets out the grounds by which the applicant²⁵⁹ can obtain a lien over the sum paid into court.

The repeal of the executed arrest is done by the court competent to enforce the arrest.

Finally, the amount in accordance with para 923 ZPO forms the maximum amount of the liability of the ship in case of sale of execution by public auction in terms of paras 931(6) and 932(1) ZPO.

257 Cf Appendix XIV.

258 Soehring op cit 58 f. Cf T G Coghlin 'Protection and Indemnity Clubs' (1984) LMCLQ 403; S Braekhus and A Rein Handbook of P & I Insurance 2ed (1979) at 189, 255, 258, 330 and 331.

259 According to para 233 BGB.

C H A P T E R VI

JUDICIAL REMEDIES OF THE RESPONDENT AGAINST THE ORDER OF ARREST(1) Particular legal remedies - paras 924, 925 and 926 ZPO

The respondent can lodge an appeal if the arrest has been ordered by judgment.²⁶⁰ Where the arrest is directed by means of a court order (Beschluss), the respondent has possibilities offered him by para 924 ZPO. Thereafter, protest (Widerspruch) against the order of arrest is possible. The remedy can be sought either by the respondent himself, his counselor or by a legal successor or a trustee in bankruptcy.²⁶¹

The respondent's protest is not restricted by any time-limit. This is possible, as long as the order of arrest is in existence. Furthermore, the protest is admissible against an order of arrest which has not yet been served or which has not yet been enforced, even if the time-limit for execution has expired.²⁶²

The court which has authority to the arrest is that court which has jurisdiction over the subject of the matter and is locally competent.²⁶³ The protest can be lodged at the Magistrates Court' (Amtsgericht) in writing or it can be recorded in the court office of the Higher District Court (Landgericht) by a counselor of the debtor. The protest can be withdrawn at any time.

The protest does not stop the enforcement of the arrest.²⁶⁴ The court

260 Cf Chapter V (1).

261 BGH, NJW 1962, 591.

262 Cf para 929 ZPO.

263 Para 919 ZPO. Cf Zoeller & Vollkommer op cit marginal note 6 of para 924 ZPO.

264 This is in accordance with para 924(3) ZPO.

can, however, grant a provisional order²⁶⁵ when, on application of the respondent, the execution (against or without lodging of security) will be temporarily suspended. Alternatively, this will only take place with the lodging of security and the enforcement measures will only be suspended once security is lodged.

If the protest concerns the lawfulness of the arrest order, this will be the first time that a decision will be made after an oral hearing.²⁶⁶ The court, ex officio, will without delay fix a date for the hearing following the debtor's protest.²⁶⁷

When a protest is lodged, the court which granted the order of arrest has to decide whether the arrest was lawful, and will then make a final judgment.²⁶⁸

The subject-matter of the decision will only be the claim for the arrest and not the principal claim itself.

It is not permissible to raise objections against the enforcement of the arrest or to raise the question of compensation for damage in the protest proceedings.²⁶⁹ The court has to decide whether the arrest could be granted, if it has not already done so. In accordance with para 925(2) ZPO, the court can confirm the arrest totally or partially, it can amend the arrest, or it can even repeal it. Confirmation, amendment or repeal can be made dependant on the lodging of security by the respondent to the court.

Where the arrest is repealed by means of judgment, the respondent can on this grounds have the enforcement measures²⁷⁰ repealed by the bailiff.

265 Pursuant to para 707 ZPO.

266 Para 925 ZPO. Cf Hagberg & Albrecht op cit 36.

267 Para 925(2)(sentence 2) ZPO.

268 Para 925(1) ZPO.

269 Cf Stein & Jonas & Grunsky op cit marginal note 3 of para 925 ZPO.

270 Pursuant to paras 775(No 1) - (No 3), 776 ZPO.

Alternatively,²⁷¹ this can be done at the court competent to enforce matters by lodging memory (Erinnerung) with it. If the applicant wishes to prevent this, he can apply²⁷² for enforcement to take place only on the lodging of security together with an appeal on questions of fact and law.

An appeal of facts and law against the judgment resulting from the protest (Widerspruch) is possible.²⁷³

The respondent, however, has a further opportunity to revoke the arrest. Where the principal claim is not yet pending,²⁷⁴ he can apply to the competent court in arrest proceedings to make an order (without oral hearing) that the applicant should be given a time-limit in which to file his suit.²⁷⁵ If the applicant who has obtained the arrest does not file suit within the time-limit, the respondent can apply to cancel the arrest by means of a final judgment.

The respondent is in fact not bound to wait until the applicant files suit within the time-limit. He himself can become active and apply for a negative declaratory action²⁷⁶ in terms of which he can enforce the decision of the principal claim.

Para 926 ZPO corresponds fundamentally to Art.7(2) and (4) of the International Convention for the Unification of Certain Rules Relating to the Arrest of Seagoing Ships of 1952 (the Arrest Convention of 1952). This states that the court or other appropriate judicial authority of the country in which

271 According to paras 766, 764 ZPO.

272 Pursuant to paras 707, 719 ZPO.

273 Cf Chapter V (1) and para 511 ff ZPO. See para 545(2) ZPO (Revision).

274 Para 926 ZPO.

275 The court of the principal claim at which the applicant has to file suit is either a court within the meaning of the ZPO, or a foreign court or an arbitration tribunal if between the parties in arrest proceedings an arbitration agreement is in existence. Cf RG, RGZ 31, 370 at 375; OLG Frankfurt, NJW 1959, 1088; Hagberg & Albrecht op cit 36. With regard to South African law see Part B - Chapter XXVI.

276 Negative Feststellungsklage.

the arrest is made, will fix a time within which the claimant must bring an action before a court having such jurisdiction.²⁷⁷ If the parties have agreed to submit the dispute to the jurisdiction of a particular court (other than that within whose jurisdiction the arrest was made) or to arbitration, the court or other appropriate judicial authority within whose jurisdiction the arrest was made may fix a time within which the claimant must bring proceedings.²⁷⁸ If, in any of the cases mentioned in Art.7(2) and (3) Arrest Convention of 1952, the action or proceedings are not brought within the time so fixed, the respondent may apply for release of the ship or of the bail or other security which he has been given.²⁷⁹

(2) Repealing proceeding of para 927 ZPO

In accordance with para 927(1) ZPO the respondent can, even after the arrest has been confirmed, legally review the continuance of the arrest. He can apply to cancel the arrest owing to changed circumstances such as the arrest claim having been waived or the provision of security by himself. The competent court for this is the court which has ordered the arrest. If the principal claim is pending, the competent court is the court of the principal claim.²⁸⁰ Adjudication on the matter is sealed by a final judgment²⁸¹.

If the order of arrest is not yet a res judicata, the reasons for a repeal can be pleaded even in the protest (Widerspruch) or appellate (Berufung) proceedings.

277 Art.7(2) of the Arrest Convention of 1952.

278 Art.7(3) of the Arrest Convention of 1952.

279 Art.7(4) of the Arrest Convention of 1952.

280 The court of the principal claim which eventually repeals the arrest by means of a final judgment in accordance with para 927(2) ZPO is not an arbitration tribunal, cf RG, RGZ 31, 370 at 375.

281 Para 927(2) ZPO.

Various preconditions and reasons for cancelling an arrest or suspending an enforcement of an arrest are as follows:

- Changed circumstances

Changed circumstances²⁸² can concern either the urgent reason for granting an order of civil arrest (for instance an unappealable successive judgment in the principal claim), or the claim for an arrest (for instance if it is extinguished, the principal claim is rejected as unfounded and if it is not reckoned that an appeal will be successful).²⁸³

- Lodging of security

The respondent can offer to provide security. The repeal takes place when the security has actually been provided.

- Further reasons

If for instance the enforceability of the arrest is stopped because the time-limit in para 929(2) ZPO has lapsed, the respondent can apply to cancel the arrest. Likewise, the institution of bankruptcy proceedings stops an arrest²⁸⁴ as does the institution of composition proceedings to avert bankruptcy.²⁸⁵

The court must always cancel not only the order for an arrest, but also its enforcement.²⁸⁶

282 In accordance with para 927(1) ZPO.

283 Cf Zoeller & Vollkommer op cit marginal note 5 of para 927 ZPO; Thomas & Putzo op cit annotation 2 of para 927 ZPO - these respectively contain additional sources of literature and jurisdiction.

284 Para 14 KO. Cf Chapter IX.

285 Cf paras 47 and 124 Vglo and Stein & Jonas & Grunsky op cit marginal note 8 of para 927 ZPO.

286 Thomas & Putzo op cit annotation 2 of para 927 ZPO.

CHAPTER VII

THE ENFORCEMENT OF CIVIL ARREST IN SHIPS - PARA 928 ff ZPO

German arrest provisions, which are general and provide for a multiplicity of particular cases, contain special provisions for the enforcement of an arrest of a ship in para 931 ZPO and para 482 HGB.²⁸⁷

One has to distinguish between ships registered in a ships register²⁸⁸ and ships which are not registered in a ships register.²⁸⁹ It should be noted that there are peculiarities relating to the enforcement of arrests in foreign ships.

(1) Principles(a) Enforcement of arrest in registered ships - para 931 ZPO

Registered seagoing ships²⁹⁰ are regarded as immovable property for the purpose of the enforcement of an arrest.²⁹¹ For practical reasons, seagoing ships fall within the terms of the provisions relating to the levy of execution

287 Cf The International Convention for the Unification of Certain Rules Concerning the Immunity of State-owned Ships of 1926, Appendix V.

288 Para 931 ZPO. Cf Marine Registry Regulations (Schiffsregisterordnung) of 20.5.1951, Federal Law Gazette (Bundesgesetzblatt) I, p 360 and Marine Register Implementing Order (Verordnung zur Durchfuehrung der Schiffsregisterordnung) of 24 November 1980, Federal Law Gazette (Bundesgesetzblatt) I, p 2169.

289 Para 930 ZPO.

290 In accordance with para 3(2) of the Marine Registry Regulations all merchant ships and ships determined as seagoing ships have to be registered, and have, according to paras 1 and 2 of the Law Concerning the Right of Flag (Flaggenrechtsgesetz) 8 February 1951, Federal Law Gazette (Bundesgesetzblatt) I, p 79, to fly the federal flag; cf. Wuestendoerfer op cit para 12 I at 109.

291 In accordance with para 864 ZPO.

(Pfaendung) of movable property together with the law relating to chattels.²⁹² The enforcement of the arrest therefore takes place in accordance with the provisions of paras 808 ff ZPO.²⁹³

The following particulars are, however, worth noting:²⁹⁴ Levy of execution (Pfaendung) will be ordered by the court competent to hear arrest proceedings on the application of the applicant.²⁹⁵ The order which is then granted to the applicant is an official document. The applicant has to submit the official document to the bailiff.²⁹⁶ The writ of fieri facias (Pfaendungsanordnung) can be included in the order of arrest and will then be ordered by the court competent to hear arrest proceedings; if this is not the case, the judicial officer (Rechtspfleger) is competent to grant the writ of fieri facias (Pfaendungsanordnung).²⁹⁷

The levy of execution (Pfaendung) establishes a (statutory) lien over the arrested ship (or ship under construction);²⁹⁸ this lien gives the creditor

292 Cf para 931(1) ZPO.

293 Enforcement in physical res.

294 Cf Thomas & Putzo op cit para 931 ZPO.

295 Para 931(3) ZPO.

296 Cf Stein & Jonas & Grunsky op cit marginal note 2 of para 931 ZPO.

297 Para 20(No 16) of the Act concerning the Judicial Officer (Rechtspflegergesetz) which provides, inter alia, as follows:

Folgende Geschaeefte im Verfahren nach der ZPO werden dem Rechtspfleger uebertragen:

"die Pfaendung von Forderungen sowie die Anordnung der Pfaendung von eingetragenen Schiffen oder Schiffsbauwerken aus einem Arrestbeschluss, soweit der Arrestbefehl nicht zugleich den Pfaendungsbeschluss oder die Anordnung der Pfaendung enthaelt."

Cf Zoeller & Vollkommer op cit annotation 1 of para 931 ZPO.

298 The priority of the attachment lien is determined by para 804 and para 10 (3) of the Act on Rights of registered Ships and Ships under Construction of 15 November 1940 (Gesetz ueber Rechte an eingetragenen Schiffen und Schiffsbauwerken vom 15 November 1940, Gazette of the Laws of the German Reich (Reichsgesetzblatt) I, p 1499); Pruessmann & Rabe op cit annotation 3 of para 482 HGB; Wuestendoerfer op cit para 12 I at 109; Albrecht op cit 1145; Soehring op cit 58.

the same rights as a ships mortgagee in proportion to other rights.²⁹⁹

At the same time, the court competent to hear arrest proceedings has to request the Registry Court³⁰⁰ to enter a priority caution (Vormerkung)³⁰¹ on the ships register (or ship under construction register). This priority caution expires if the enforcement of the arrest becomes inadmissible.³⁰²

The attachment lien takes effect (departing from the principle of para 8(2) Act on Rights of Registered Ships of 1940 in connection with para 3 Act on Rights of Registered Ships of 1940) before registration. The attachment lien would therefore be ineffective against bona fide third parties because of public reliance (oeffentlicher Glaube) in the register.³⁰³ The applicant can therefore demand the rectification of the ships register by the registration of his attachment lien in accordance with para 931(6) ZPO. The procedure for alteration of the register is governed by paras 23 ff of the Marine Registry Regulations. Para 931(6) ZPO refers to para 867 ZPO³⁰⁴ concerning the registry of the attachment lien. The procedure for the repeal of an arrest is set out in para 870a ZPO (execution against a ship takes place by entry on a ships mortgage).³⁰⁵

After the court competent to hear arrest proceedings has given the order for enforcement the bailiff can proceed with the arrest. He serves the order of

299 Cf para 931(2) ZPO.

300 Pursuant to para 1 of the Marine Registry Regulations it is the Magistrates' Court (Amtsgericht).

301 To secure the attachment lien.

302 Cf para 931(3) ZPO.

303 Para 16 of the Act on Rights of Registered Ships 1940. Cf Stein & Jonas & Grunsky op cit marginal note 5 of para 931 ZPO; Zoeller & Vollkommer op cit marginal note 2 of para 931 ZPO.

304 Mortgage registered to enforce judgment debt.

305 Stein & Jonas & Grunsky op cit marginal note 5 of para 931 ZPO.

arrest on the master of the vessel³⁰⁶ and takes the ship under guard into his official custody.³⁰⁷ Traditionally, for this purpose the ship will be symbolically "put into irons" ("in die Kette legen"). This means that a small chain (which can be locked) with an official seal will be put around the mast or fixed somewhere (for instance on the helm³⁰⁸) as an exterior symbol of occupation.³⁰⁹ The applicant has to pay the costs of guarding in advance.³¹⁰ The bailiff has to take suitable measures with regard to the guarding and safekeeping of the ship in accordance with para 808 ZPO, para 928 ZPO and para 931(4) ZPO.³¹¹ The port authorities should also be informed in order that they can prevent the ship from sailing from the harbour.³¹²

At this stage, the respondent has the option of giving security to free his ship. If he provides security at the amount prescribed as ransom money by the arrest order, he obstructs the enforcement of the arrest and can demand the repeal of the arrest.³¹³

If, at the time of the enforcement of the arrest, sale in execution by public auction of the ship (or ship under construction) has been initiated, the attachment of the ship in these proceedings is considered as "first levy of execution" (Erste Pfaendung);³¹⁴ an attested copy of the bailiff's return

306 Hagberg & Albrecht op cit 37.

307 Cf paras 931(1) and (4), 808 ZPO.

308 Cf Pruessmann & Rabe op cit annotation D (3) of para 482 HGB; Wuestendoerfer op cit para 12 I (2) at 109.

309 Cf Part B - Chapter XXII (1).

310 Stein & Jonas & Grunsky op cit marginal note 4 of para 931 ZPO. Cf para 934(2) ZPO.

311 Zoeller & Vollkommer op cit marginal note 1 of para 931 ZPO.

312 Cf Pruessmann & Rabe op cit annotation D (3) of para 482 HGB; Soehring op cit 58; Hagberg & Albrecht op cit 36.

313 Para 923 ZPO.

314 In the meaning of para 826 ZPO.

(Pfaendungsprotokoll) has to be submitted to the court competent to hear enforcement matters.³¹⁵

(b) Enforcement of arrest in non-registered and foreign ships - para 930 ZPO

According to para 930 ZPO, levy of execution (Pfaendung) against a ship not registered in a ships register follows the principles of levy of execution against movables.³¹⁶ Levy of execution establishes a lien with the effect as set out in para 804 ZPO.

The applicant has no right to the satisfaction of his claim from the ship after he has arrested it. He is not permitted to initiate a (judicial) sale of the arrested ship, as the sole object of the arrest is to secure the principal claim.

In conjunction with this however, the court competent to hear enforcement matters can order the sale of the ship by public auction (on application of either the applicant or the respondent),³¹⁷ if the ship is in danger of considerable loss of value, or if the "safe deposit" of the ship will cause disproportionate costs. After the public sale of the ship,³¹⁸ the proceeds of the auction are paid into court (fund).³¹⁹ The same proceedings apply to ships registered in a foreign country.³²⁰

Where a foreign ship which is registered in a ships register of its own

315 Para 931(5) ZPO.

316 Pruessmann & Rabe op cit annotation D (3) of para 482 HGB; cf para 930(1) ZPO.

317 Para 930(3) ZPO.

318 The judicial sale by public auction is regulated by para 162 ff ZVG. Cf Appendix VII. See Part B - Chapter XXIV (1).

319 Cf Part B - Chapter XXI(3).

320 Cf LG Hamburg, MDR 1978, 764. For the proceedings of the judicial sale look at para 870a ZPO and para 171 ff of the ZVG; cf F Zeller and K Stoeber Zwangsversteigerungsgesetz 12ed (1987) para 171.

state shall be arrested, the bailiff can enforce the arrest without the normal writ of fieri facias (Pfaendungsanordnung) in terms of para 931(3) ZPO.³²¹ This matter however is not totally beyond dispute. In practice, such writs of fieri facias are often issued with the argument that such an order is innocuous and at worst redundant. Judges familiar with the practice of arrests of ships will not issue an extra writ of fieri facias, because they object, it is submitted that para 931 ZPO only refers to ships which are registered in a German ships register. It follows that no writ of fieri facias is necessary.³²² The OLG Bremen³²³ has given the following view on the problem:

"A writ of fieri facias according to para 931(3) ZPO is not required for foreign ships which are not registered in a German ships register. This is because levy of execution (Pfaendung) against foreign ships when arrested is governed by para 930 ZPO (without the restrictions of para 931 ZPO) which contains the principles applicable to the levy of execution against movables. Para 870a ZPO and para 171 ZVG do not oppose this opinion."

In the same way, the LG Hamburg³²⁴ adjudicated on the matter as follows:

"Just as the special provision of para 870a ZPO is applicable to native registered ships (this refers to the proceedings of execution against real estate), para 930 ZPO is pertinent to seagoing ships as with movable property. This fact is not changed by the possibility stated in para 171 ZVG, which provides that foreign ships (if one applies German law, these have to be registered in a German ships register) have to be sold by auction in special proceedings. The reason is that the legislator has not enacted the restriction contained in para 930 ZPO. Neither did it do so with the insertion of

321 Cf Albrecht op cit 1145; Pruessmann & Rabe op cit annotation 3 of para 482 HGB; LG Hamburg, MDR 1978, 764; The Ventuari OLG Bremen, HANSA 1981, 1294.

322 Strube 'Arrestpfaendung auslaendischer Schiffe' HANSA 1981, 1294.

323 The Ventuari OLG Bremen, HANSA 1981, 1294.

324 LG Hamburg, MDR 1978, 764.

para 870a ZPO in 1940, nor in the modifications of para 171 ZVG."³²⁵

Accordingly, foreign ships are regarded as movable property and are, in that sense, treated the same as non-registered German ships.³²⁶

(c) Enforcement of an arrest against a registered ship owned in individual shares

The enforcement of an arrest of the share of a joint owner of a registered German ship is the same as enforcement against the whole ship.³²⁷

This rule is however not applicable to the enforcement against the share owned by a shipowning partnership³²⁸ where the law of movable property³²⁹ is applicable, and in the cases (situations) where the law of immovable property applies.³³⁰

(2) Exemption clauses and restrictions on arrest

In principle, every ship of a shipowner can be arrested.³³¹ There are however two exceptions:

(a) Inadmissibility of enforcement of the arrest - para 482 HGB

In terms of para 482 HGB the enforcement of an arrest of a ship is not

325 Cf Appendix VII.

326 Cf Albrecht op cit 1145.

327 Para 864(2) ZPO.

328 Para 489 HGB.

329 Para 930 ff ZPO.

330 Paras 858, 857 ZPO. Cf Abraham op cit para 11 (III) at 68.

331 Cf Chapter II.

admissible if the ship is on a voyage and is not in a harbour. This paragraph thus regulates the exemption from arrest and seizure of a ship. South African law goes much further than German law. The Admiralty Jurisdiction Regulation Act of 1983 allows the arrest of a ship which is "in the territorial waters" but not in port, even if the ship only travels through the territorial waters without visiting any South African port.³³²

Previously the exemption from arrest and seizure began from the moment the ship was ready to sail.³³³ The present position is that the exemption is effective from the beginning of the voyage. The change to para 482 HGB was effected by the Maritime Law Amending Act of 21 June 1972.³³⁴ The comparable provision in international law is Art.3(1) of the International Convention for the Unification of Certain Rules Relating to the Arrest of Seagoing Ships of 1952 (the Arrest Convention of 1952). This provides that a ship which is ready to sail can be arrested.³³⁵

With the latest amendment, a ship (according to para 482 HGB), has to be on a voyage and must not lie in a harbour,³³⁶ if it wishes to benefit from the advantages of exemption from arrest and seizure. Para 482 HGB in its latest form does not prevent the order of an arrest, only its enforcement.³³⁷

332 Section 2(2) of the Admiralty Jurisdiction Regulation Act of 1983. Cf Part B - Chapter XIV (1).

333 The term "ready to sail" in the former version of para 482 HGB was interpreted to mean if the ship had started to sail, the condition "ready to sail" (and with that the privilege of exemption from arrest and seizure) continued to persist until the termination of the freight contracts entered into, even when the ship had called at a harbour in distress or at an intermediate harbour; cf Abraham op cit para 11 (V) (2a) at 68; F Schlegelberger and R Liesecke Seehandelsrecht (1959) marginal note 2 of para 482 HGB.

334 Federal Law Gazette (Bundesgesetzblatt) I, p 966.

335 Dissenting opinion, presumably Pruessmann & Rabe op cit annotation B (1) of para 482 HGB, whereas Art.3(1) of the Arrest Convention of 1952 and para 482 HGB correspond.

336 To "lie in a harbour" means to lie on the quay or to ride at anchor.

337 Cf Part B - Chapter XIX (2) - "anticipated attachment".

The actual determination of the beginning and the end of a voyage has caused some debate. Pruessmann and Rabe³³⁸ are of the opinion that a voyage starts if one has commenced to untie the connection with the berth, for instance to haul home the first hawser, or to weigh the anchor in order to leave the harbour. So long as the ship lies moored at the quay, it can be arrested and as long as the ship is moored it is of no consequence if the master has taken precautions to leave the harbour, for example if a tug is alongside. Pruessmann and Rabe thus give priority to the beginning of the manoeuvre to leave. Schaps and Abraham³³⁹ are of the view that the arrival in the harbour and putting to sea of the ship fall under the term "voyage". They do not say exactly when a voyage starts. The end of a voyage will be when the ship lies in harbour is moored or anchored. They determine the conditions when it is permitted to arrest a ship as "arrived ship". It is not clear if the concept "arrived ship" shall be the same as that used in charterparties. Proceeding from English and South African law an "arrived ship" in conjunction with charterparties means a ship which has reached the port or the berth, as the case may be specified in a charterparty. In the case of a port-charterparty, 'before a ship can be said to have "arrived" at a port she must, if she cannot proceed immediately to a berth, have reached a position within the port where she is at the immediate and effective disposition of the charterer.'³⁴⁰ It is difficult to follow Schaps and Abraham because they do not determine exactly what the concept "arrived ship" means.

With Pruessmann and Rabe one has to accept the following principle in respect of the beginning of the voyage. A ship is docked if all lines

338 Op cit annotation B (1) of para 482 HGB.

339 Op cit marginal notes 4 and 5 of para 482 HGB.

340 The Johanna Oldendorff (1973) 2 Lloyd's Rep 285 at 291 (HL) per Lord Reid. Cf The Leonis (1908) 1 KB 499; Stag Linie Ltd v Board of Trade (1950) 1 All ER 1105 (CA); The Timna (1970) 2 Lloyd's Rep 409 QB; The Atlantic Sunbeam (1973) 1 Lloyd's Rep 482 QB at 488 per Kerr J; The Maratha Envoy (1977) 2 Lloyd's Rep 301 (HL).

(Festmacher) which hold the ship to the berth are fastened, ie fore-line, stern-line and spring. A ship has left the quay (or the anchor berth) and is on its voyage when all lines are hauled home (eingeholt), that means, when the last line (the last connection between ship and land) is hauled home or when the anchor is out of the water. As long as that has not happened, a ship can be arrested, even if is ready to leave the harbour and has started to haul home the lines and a connection with land is still maintained. Accordingly, a ship cannot be arrested when all lines are hauled home. Information as to whether these conditions have been fulfilled or not can be obtained from the port captain.³⁴¹

Interruptions of the voyage (for example fastening in a dock of a canal, bunkering oil or taking supplies) do not cancel the exemption from arrest and seizure of the ship. Para 482 HGB is applicable to registered ships, non-registered ships and foreign ships.³⁴²

(b) Immunity of State Ships - International Convention of 1926

Claims against sea-going ships owned or operated by German or foreign States, cargos owned by them, and cargos carried on State-owned ships, as well as States which own or operate such ships and own such cargos, can be secured by means of an arrest. The International Convention for the Unification of Certain Rules Concerning the Immunity of State-owned Ships (the Immunity Convention of 1926)³⁴³ must be considered here.³⁴⁴

341 Cf Schlegelberger & Liesecke op cit marginal note 2 of para 482 HGB.

342 Cf Pruessmann & Rabe op cit annotation C (3) of para 482 HGB; Abraham op cit para 11 (IV) (1) at 68.

343 Law of July 9, 1927, Gazette of the German Reich (Reichsgesetzblatt) II, p 484, and Supplementary Protocol of April 25, 1934, Gazette of the German Reich 1936 (Reichsgesetzblatt) II, p 303; cf Singh op cit vol 4 at 3096. South Africa is not a signatory of the Immunity Convention of 1926, cf Part B - Chapter XXII (3).

In principle, one has to apply the rules for merchant ships, cargos and merchant-enterprises owned by private persons to State-owned ships.³⁴⁵ These common law provisions however are not applicable to ships of war, State-owned yachts, patrol vessels, hospital ships, fleet auxiliaries, supply ships and other vessels owned or operated by a State and employed exclusively on Government and non-commercial services at the time when the cause of action arises. Such ships will not be subject to seizure, arrest or detention by any legal process, nor indeed any proceedings in rem.³⁴⁶ The same rule will apply to State-owned cargos carried on board any of the above-mentioned ships, or State-owned cargos carried on board merchant ships for Government and non-commercial purposes.

Nevertheless, claimants will have the right to proceed before the appropriate courts of the State which owns or operates the ship in the following cases:³⁴⁷

- (i) claims in respect of collisions or other accidents of navigation;
- (ii) claims in respect of salvage or in the nature of salvage and in respect of general average;
- (iii) claims in respect of repairs, supplies or other contracts relating to the ship.

The state, in such cases, is not entitled to rely upon any immunity as a defence.³⁴⁸

The provisions of the Immunity Convention of 1926 will be applied³⁴⁹ in each contracting State, but without any obligation to extend the benefit

344 Brussels, April 10, 1926; Appendix V. Cf Hagberg & Albrecht op cit 37.

345 Cf Art.1 and Art.2 of the Immunity Convention of 1926.

346 Art.3(1) of the Immunity Convention of 1926.

347 Ibid. Cf RG, RGZ 157, 389.

348 Cf Art.3(1) of the Immunity Convention of 1926.

349 Pursuant to Art.6 of the Immunity Convention of 1926.

thereof to non-contracting States. The Immunity Convention of 1926, Art.6 has the effect that neither ships owned or operated by that state, nor cargos owned by it, will be subject to an arrest, seizure or detention by a foreign court of law. The claimant however has the right to take proceedings before the appropriate court in accordance with Art.2 and Art.3 of the Immunity Convention of 1926.³⁵⁰

(C) International Convention Relating to Penal Jurisdiction in Matters of Collision or Other Incidents of Navigation of 1952

Unlike South Africa Germany has ratified the International Convention Relating to Penal Jurisdiction in Matters of Collision or Other Incidents of Navigation of 1952.³⁵¹ What the arrest of ships concerns one has to note Articles 1 and 2. Article 1 provides that in the event of a collision or any other incident of navigation concerning a sea-going ship and involving the penal or disciplinary responsibility of the master or of any other person in the service of the ship, criminal or disciplinary proceedings may be instituted only before the judicial or administrative authorities of the state of which the ship was flying the flag at the time of the collision or other incidents of navigation. In terms of Article 2 no arrest or detention of the vessel shall be ordered in the case provided for in Article 1, even as a measure of investigation, by any authorities other than those whose flag the ship was flying.

(3) Enforcement of foreign arrests in Germany and German arrests abroad

An arrest granted in a foreign state can, in principle, only be enforced in

350 For further details see the Immunity Convention of 1926.

351 Federal Law Gazette (Bundesgesetzblatt) 1972 II, p 668. Cf Singh op cit vol 4 at 3111.

Germany in the meaning of paras 328 and 722 ZPO.³⁵² Para 722 provides, amongst other things, that enforcement of a foreign judgment will only take place, if its admissibility is given by a judicially enforceable judgment.

Paras 328 and 722 ZPO presume a foreign judgment (Urteil).³⁵³ Following the wording of this provisions foreign orders of arrest (Arrestbefehle) do not fall within the terms of these provisions and therefore cannot be enforced. The term "judgment" has to be interpreted widely however. One has to expedite international enforcement possibilities and accordingly, foreign orders of arrest can be enforced in Germany.³⁵⁴ This result is also in accordance with the EEC-Convention.³⁵⁵ Pursuant to Art.25 of the EEC-Convention "judgment" means any judgment given by a court or tribunal of a contracting State, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as the determination of costs or expenses by an officer of the court. A "judgment" (for example an order of arrest) given in a contracting State (eg Germany) will be recognized in the other contracting State (eg England) without any special procedure being required.³⁵⁶ A "judgment" given in a contracting State and enforceable in that State will be enforced in another contracting State when, on application of any interested party, the order for its enforcement has been issued there.³⁵⁷ Thus an order

352 Para 328 ZPO concerns provisions dealing with the recognition of foreign judgments. Compare the reciprocity agreements on the enforcement of judgments. Cf Zoeller op cit Appendix I; see also the decision of the LG Hamburg, RIW/AWD 1980, 287 (enforcement of a South African judgment) and the judgments of the BGH, BGHZ 42, 194 and BGHZ 52, 251, dealing with the question of guaranteeing reciprocity between Germany and South Africa.

353 Cf OLG Hamburg, OLGE 15, 21.

354 Stein & Jonas & Grunsky op cit preliminary remark, marginal note 34 of para 916 (2) ZPO. OLG Hamburg, VersR 72, 1114 at 1116 f.

355 The EEC-Convention and its regulatory statute are for example applicable between Germany and England.

356 Art.26 of the EEC-Convention. Cf R Geimar 'Eine neue internationale Zustaendigungsordnung in Europa' NJW 1976, 441.

357 Art.31(1) of the EEC-Convention.

of arrest issued in England is enforceable in Germany if it is provided with a writ of execution (Vollstreckungsklausel). An order of arrest which will be enforced in England and Wales, in Scotland, or in Northern Ireland, when, on the application of any interested party, it has been registered for enforcement in that part of the United Kingdom. This interpretation of Art. 25 of the EEC-Convention was not beyond dispute. In 1980 the EuGH³⁵⁸ decided that "judgments" which order temporary measures or measures directed to secure and passed ex parte, and which will be enforced without prior service, cannot be recognized in terms of Art.25 of the EEC-Convention. The EuGH however revised its decision and explicitly states now that a foreign order of arrest (Arrestbefehl) is recognizable and enforceable within the country (eg Germany).³⁵⁹ This is in accordance with Art.25 of the EEC-Convention and it is not clear why the EuGH in its former decision distinguished between orders issued ex parte and other orders.

According to Art.32 of the EEC-Convention, an application for granting a writ of execution (Vollstreckungsklausel) in Germany has to be filed with the presiding judge of a chamber of the Higher District Court (Landgericht). In England and Wales this would be the High Court of Justice, and in Scotland the Court of Session.

The respondent can lodge an appeal within a month against the decision to allow the execution.³⁶⁰ In Germany the application has to be directed to the Higher Appeal Court (Oberlandesgericht). In England and Wales this would be to the High Court of Justice, and in Scotland to the Court of Session.³⁶¹

When an application for granting a writ of execution

358 NJW 1980, 2016.

359 EuGH, IPRax 1985, 339; cf P Schlosser 'Grenzueberschreitende Vollstreckung von Massnahmen des einstweiligen Rechtsschutzes im EuGVUE-Bereich (zu EuGH, 27.11.1985)' IPRax 1985, 321.

360 Cf Art.36 of the EEC-Convention.

361 Cf Art.37 of the EEC-Convention.

(Vollstreckungsklausel) is refused, the applicant can seek a judicial remedy at the Higher Appeal Court (Oberlandesgericht) in Germany and at the High Court of Justice in England.³⁶²

South African law provides for the enforcement of foreign titles as follows: In August 1978 the Protection of Business Act³⁶³ came into force. It makes the enforcement of foreign titles dependant on the approval of the Minister.³⁶⁴ The comprehensive clause in s 1 is extended by amendments³⁶⁵ and appears to include every title,³⁶⁶ as far as it originates from an action or legal act, which (at any time before or after the coming into force of the law) is connected with the production, import trade, export, improvement, possession, use, sale, purchase or ownership of objects (no matter what their nature, and whether brought or dealt within or outside of the Republic of South Africa).

362 Art.40 of the EEC-Convention.

363 Act 99 of 1978. Cf Appendix IX. Cf D J Shaw Admiralty Jurisdiction and Practice in South Africa (1987) at 57.

364 Minister of Economic Affairs.

365 Protection of Business Amendment Acts No 114 of 1979, No 71 of 1984 and No 87 of 1987.

366 Cf A Thomashausen 'Vollstreckung auslaendischer Titel in Suedafrika' IPRax 1983, 309.

C H A P T E R VIII

RANKING OF THE CLAIM(S) - PARAS 804 ZPO, 761 HGB

Paras 804(1) ZPO, 930(1)(sentence 2) ZPO and 931(1) and (2) ZPO state that the creditor will by means of the arrest gain an attachment lien over the ship. The creditor's ranking will be determined by para 804(2) and (3) ZPO.

In the case of registered ships, the attachment lien gives the creditor, in proportion to other rights, the same rights as a ship's mortgage.³⁶⁷ A priority caution (Vormerkung) therefore has to be entered in the ships register to secure the attachment lien. This happens on the motion of the arrest court. In this case, the content and position of the attachment lien is determined by the principles applicable to the ship's mortgage. These are codified by the Act on Rights of Registered Ships and Ships Under Construction of 1940.³⁶⁸ This law in para 25 determines the ranking, which in turn depends on the sequence of the entry in the register.³⁶⁹ Accordingly, in relation to non-registered ships, the attachment lien offers additional security given to the creditor by a ships mortgage by ranking the remaining creditors according to priority.

367 Cf para 931(2) ZPO.

368 Gesetz ueber Rechte an eingetragenen Schiffen und Schiffsbauwerken, Gazette of the Laws of the German Reich (Reichsgesetzblatt) I, p 1499.

369 Para 25 Act on Rights of registered Ships and Ships under Construction reads as follows:

(Rangverhaeltnis)

(1) Ist ein Schiff mit mehreren Schiffshypotheken belastet, so bestimmt sich ihr Rangverhaeltnis nach der Reihenfolge der Eintragungen. Die Eintragung ist fuer das Rangverhaeltnis auch dann massgebend, wenn die nach Paragraph 8 Abs.2, Paragraph 3 zur Bestellung der Schiffshypothek erforderliche Einigung erst nach der Eintragung zustande gekommen ist.

(2) Eine abweichende Bestimmung des Rangverhaeltnisses muss in das Schiffsregister eingetragen werden.

For the ranking between a lien by attachment and a lien by agreement,³⁷⁰ only the time priority of the accrual of the lien is of consequence (the so-called priority-principle (Prioritaetsprinzip)).³⁷¹

It follows that an earlier levy of execution (Pfaendung) precedes a later one. Levies of execution simultaneously undertaken have the same ranking. It is of no importance in which sequence the instructions to the bailiff arrive on his desk.

In the case of priority, the creditor of the earlier right will be fully satisfied before the creditor who has a later right. The profit (from a sale or venture) will be distributed in proportion to each single claim.³⁷² The earlier attachment lien has³⁷³ priority over later bona fide liens by agreement.

Priority over all other liens is enjoyed by maritime liens.³⁷⁴ The ranking of maritime liens is determined by the sequence of the number by which the claims are enumerated in para 754 HGB. The liens enumerated in para 754 (1)(No 4)HGB³⁷⁵ have priority over all other liens of a ships creditor, whose

370 For example a 'simple' ships mortgage to secure a claim in accordance with para 8 of the Act on Rights of Registered Ships and Ships Under Construction which reads as follows:

(Schiffshypothek)

(1) Ein Schiff kann zur Sicherung einer Forderung in der Weise belastet werden, dass der Glaebiger berechtigt ist, wegen einer bestimmten Geldsumme Befriedigung aus dem Schiff zu suchen (Schiffshypothek). Eine Schiffshypothek kann auch fuer eine zukuenftige oder eine bedingte Forderung bestellt werden. Das Recht des Glaebigers aus der Schiffshypothek bestimmt sich nur nach der Forderung.

(2) Fuer die Bestellung der Schiffshypothek gilt Paragraph 3 sinngemaess.

(3) Der Bruchteil eines Schiffes kann mit einer Schiffshypothek nur belastet werden, wenn er in dem Anteil eines Miteigentuemers besteht.

371 Cf para 804(3) ZPO.

372 Cf Zoeller & Vollkommer op cit marginal note 5 of para 804 ZPO.

373 In accordance with para 1208 BGB.

374 Cf para 761 HGB in conjunction with para 754 HGB.

375 Costs of salvage and provision of aid in distress at sea, costs of general average and costs arising out of the removal of a wreck.

claims arose previously in time.³⁷⁶ The ranking of the other maritime liens enumerated in para 754 HGB one with another are determined by paras 763 and 764 HGB.

³⁷⁶ Cf para 762(2) HGB.

C H A P T E R IX

ARREST AND INSOLVENCY

Where the shipowner becomes bankrupt, the creditor will have no opportunity to levy successful execution against the ship.

In accordance with para 14 KO, arrests and enforcements in favour of individual creditors in bankruptcy do not take place either in relation to property belonging to the bankrupt's estate (the ship), nor in relation to the other property of the common debtor (Gemeinschuldner).

According to para 14(2) KO, it is not possible to have a caution entered³⁷⁷ during the duration of bankruptcy proceedings on behalf of an interim injunction in favour of individual creditors in bankruptcy.

The trustee in bankruptcy is the only person who is entitled to the right of disposal and of administration over the ship, because with the adjudication of bankruptcy, the common debtor loses the power to administer his property belonging to the bankrupt estate or to dispose of the property.³⁷⁸ Accordingly, a trustee in bankruptcy is entitled to prevent a ship from leaving the harbour, irrespective of para 482 HGB, and he is even competent to initiate the sale in execution by public auction³⁷⁹ in order to provide for the liquidation of the insolvent's estate and secure an even distribution of his assets amongst the creditors in accordance with the order of preference provided for by the Bankruptcy Law.

Bankruptcy proceedings as well as composition proceedings to avert

377 This is with regard to registered ships and ships under construction belonging to the bankrupt's estate, or with regard to the registered rights of the common debtor (Gemeinschuldner) registered against ships and ships under construction, or pursuant to such registered rights.

378 Para 6 KO.

379 Paras 117, 126 KO. Cf Pruessmann & Rabe op cit annotation F of para 482 HGB; Schlegelberger & Liesecke op cit marginal note 1 of para 482 HGB.

bankruptcy do not fall within the field of application of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 1968 (the EEC-Convention).³⁸⁰

The European Court of Justice (Europaeischer Gerichtshof)³⁸¹ has stated that bankruptcy and composition proceedings with creditors and similar proceedings are proceedings which are based on³⁸² cessation of payments, inability to pay debt's (insolvency) or the upsetting of the creditworthiness of the debtor. These include judicial intervention, which leads to compulsory and collective liquidation of the assets of the debtor, or at least leads to judicial control. Decisions referring to insolvency proceedings only fall under Art.1(2)(No 2) of the EEC-Convention if they result directly from the proceedings, and if they are closely connected with bankruptcy proceedings and composition proceedings. The International Convention for the Unification of Certain Rules Relating to Arrest of Seagoing Ships of 1952 does not contain any restrictions.

380 Art.1(2)(No 2) of the EEC-Convention. Cf EuGH, NJW 1979, 1772; OLG Frankfurt, NJW 1978, 501; Zoeller & Geimer op cit Appendix II, marginal note 17 of Art.1 of the EEC-Convention.

381 EuGH, NJW 1979, 1772.

382 In the laws of each contracting State.

C H A P T E R X

ARREST OF FOREIGN SHIPS - ARREST CONVENTION OF 1952 AND EEC-CONVENTION

In the previously mentioned chapters, the particulars relating to the arrest of foreign ships have already been explained. If a foreign ship is arrested in Germany, one has to apply the German provisions already described together with a consideration of the international rules, as far as Germany is bound by them. In particular, one has to mention the International Convention for the Unification of Certain Rules Relating to Arrest of Seagoing Ships of 1952 (the Arrest Convention of 1952) and Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 1968 (the EEC-Convention).

The Arrest Convention of 1952 restricts the possibilities of an arrest with regard to seagoing ships flying the flag of a contracting State. The arrest will only be granted for a maritime claim³⁸³ against the ship or against a sistership belonging to the same owner. Other claims can only be secured, if the ship's home port is situated in a non-contracting State.³⁸⁴

383 Cf Art.1 of the Arrest Convention of 1952.

384 Soehring op cit 52.

C H A P T E R X I

ACTION IN PERSONAM - PARAS 918 AND 933 ZPO

Apart from the action in rem, German law offers a further possibility of securing a claim, and this is the action in personam (persoenlicher Sicherheitsarrest) against the debtor.³⁸⁵ This form of arrest, however, is subordinate to the action in rem, eg the arrest of ships.³⁸⁶ The purpose of an action in personam - like the action in rem - is to secure enforcement over the property of the debtor.³⁸⁷

Like the action in rem a claim for an arrest³⁸⁸ and an urgent reason for granting an order of civil arrest³⁸⁹ must be established. With the latter one must be sure on the one hand that enforcement against the property of the debtor is in danger, and on the other, that the necessity of the arrest to prevent this danger, is in existence.

The main reason for an action in personam would be that the debtor will secretly try to remove his assets (property) abroad. In the maritime field, this will occur if the debtor/ shipowner tries to take his ship abroad and thus tries to escape jurisdiction. An arrest in an action in personam is not possible if it is to urge a shipowner to bring one of his ships to the country and therefore to bring it within the jurisdiction of a German court. The scope of an arrest in an action in personam is limited not only in maritime law. In order to obtain an arrest in an action in personam successfully, the creditor

385 Para 918 ZPO.

386 Subsidiaritaetsgrundsatz, cf Zoeller & Vollkommer op cit marginal note 1 of para 918 ZPO. See Part B - Chapter XVII.

387 Stein & Jonas & Grunsky op cit marginal note 1 of para 918 ZPO.

388 Para 916 ZPO. See Chapter III (1) (a).

389 Para 917 ZPO. See Chapter III (1) (b).

has to prove that the debtor has domestic property and he at least has to make it credible.

An arrest in an action in rem and an arrest in an action in personam can be applied for simultaneously in the situation where the whereabouts of a ship in German territorial waters is not clear³⁹⁰ and where the applicant fears that the debtor will sail abroad with his ship. The difficulty for the applicant lies in proving that a ship of the debtor/ shipowner is actually in German territorial waters.

The procedure for an arrest in an action in personam is the same as for an arrest in an action in rem. The fact that the debtor is an incola (eg a German) or a peregrinus (eg a South African) is of no consequence.³⁹¹

The Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 1968 (the EEC-Convention) states that an arrest in an action in personam like an arrest in an action in rem can be issued independently of the jurisdiction of the principal claim.³⁹²

The enforcement of an arrest in an action in personam is regulated by para 933 ZPO. The forms of arrest in action in personam are: detention, compulsory registration with the police within a certain time (eg daily or weekly), and the attachment of non-negotiable documents (eg a passport) or house arrest.³⁹³ With detention, paras 904 to 913 ZPO are applicable, as these contain provisions as to how to accomplish detention.

The enforcement of an arrest in an action in personam will be by the bailiff (sheriff's officer) and this is in accordance with paras 753(1), 904ff and 928 ZPO.³⁹⁴

390 And the ship does not fall under para 482 HGB. See Chapter VII (2) (a).

391 Cf Stein & Jonas & Grunsky op cit marginal notes 8 and 9 of para 918 ZPO.

392 Art.24 of the EEC-Convention.

393 Stein & Jonas & Grunsky op cit marginal note 1 of para 933 ZPO.

394 Ibid marginal note 2 of para 933 ZPO.

If the plaintiff wishes to obtain an arrest in an action in personam, he has to make it clear in the arrest application, and the court granting the arrest has equally to make it clear in the order of arrest. The type of enforcement of an arrest in an action in personam is stipulated either in the order of arrest or (later) in a separate court order by the court competent to hear arrest proceedings.³⁹⁵

395 Ibid.

C H A P T E R X I I

LIABILITY FOR DAMAGES OF THE CREDITOR BECAUSE OF UNDUE ARREST - PARA 945 ZPO
AND ART.6 OF THE ARREST CONVENTION OF 1952

Where the arrest proves to be unjustified from the outset, or if the regulation ordered in terms of para 926(2) ZPO is to be cancelled (owing to the order of institution of an action not being followed by the party who obtained the arrest), the party who obtained the order (the creditor/ applicant) is obliged to indemnify the respondent for damage which originates from the enforcement of the arrest or because of having provided security to prevent the arrest or to effect to repeal the arrest (cf para 945 ZPO). The creditor of the damage claim is normally the respondent of the arrest against whom the arrest was originally directed.

(1) The right (relating to substantive law) to get indemnification

Precondition for a damage claim is that the arrest order was unjustified from the beginning. The important point is the moment of the issuing of the arrest. If the principal claim has existed at this time, the creditor (applicant) is not liable for damages, even if the (principal) claim has retroactively fallen away.³⁹⁶

The arrest can be unjustified if the claim for an arrest was missing or because the urgent reason for granting an order of civil arrest was not given or because the establishing preponderant evidence for the petition of arrest

396 Stein & Jonas & Grunsky op cit marginal note 19 of para 945 ZPO; Zoeller & Vollkommer op cit marginal note 8 of para 945 ZPO; Albrecht op cit 1185; Soehring op cit 62.

was not sufficient.³⁹⁷

(2) Indemnification because of the repeal of the arrest according to paras 926(2) and 929(2), (3) ZPO

A damage claim is awarded independently of the substantive justification of the arrest if the arrest has been cancelled because the creditor has not³⁹⁸ filed suit for the principal claim. The judge who decides on the damage claim is bound by that.³⁹⁹ He is himself not allowed to examine whether the claim for an arrest was in existence.

What is not regulated is the case where the enforcement of the arrest⁴⁰⁰ has become invalid or will become invalid. Grunsky⁴⁰¹ considers that this situation is comparable with para 926(2) ZPO which deals with the failure to observe the requisite time-limit. What is at stake is to keep the applicant to comply with time-limits by means of the menace of sanctions.⁴⁰² Therefore the creditor has to recover damage even in the case of para 929(2) and (3) ZPO.

(3) Compensation for damage

The nature and extent of the indemnification act is provided for in paras 249 ff of the BGB, irrespective of the fault of the applicant. After this, the person who is liable has to restore the condition which would be in existence

397 Stein & Jonas & Grunsky op cit marginal note 18 of para 945 ZPO; Albrecht op cit 1185.

398 Pursuant to para 926(2) ZPO.

399 Zoeller & Vollkommer op cit marginal note 12 of para 945 ZPO; Stein & Jonas & Grunsky op cit marginal note 33 of para 945 ZPO.

400 With regard to the time-limits in para 929(2) and (3) ZPO.

401 Stein & Jonas & Grunsky op cit marginal note 34 of para 945 ZPO.

402 In the interest of the debtor.

if the circumstance leading to indemnification had not occurred. The indemnification covers lost profits as well.⁴⁰³ Where both parties are equally at fault, the claim is reduced according to para 254 BGB. Thus, the obligation to indemnify as well as the extent of the compensation depends on the circumstances, especially to what extent the preponderant damage has been caused by the applicant or by the respondent. Contributory negligence of the respondent will, for instance, include the following situations: where he negligently makes believe that there is an urgent reason for granting the order of civil arrest; if he has not specifically pointed out to the applicant the fact, that the execution of that specific ship will cause costs which exceed the normal arrest expenses; if he keeps back legal evidence; if he makes incorrect allegations.⁴⁰⁴

The damage claim is dealt with by the Statute of Limitations (gesetzliche Verjaehrungsvorschriften) and by applying para 852 BGB mutatis mutandis.

(4) Competent court

The decision on the damage claim is incumbent on the court in whose circuit the arrest has been enforced. It has jurisdiction at the place set out in para 32 ZPO. Para 945 ZPO gives it its international competence.⁴⁰⁵

(5) Binding of the judge deciding upon the compensation for damage on other decisions (stare decisis)

The court deciding on the damage proceedings is fundamentally free in its critical examination of the initial vindication of the arrest or interim

403 Cf para 252 BGB.

404 Albrecht op cit 1185.

405 Cf BGH, VersR 1985, 335; see Chapter X (6).

injunction. The court is not bound by the decision in arrest proceedings whether this is issued in a judgment or an order.

The reason is that arrest proceedings are a totally different subject of litigation in comparison with the main proceedings, and these therefore cannot have the effect of a res judicata. Zoeller and Vollkommer⁴⁰⁶ correctly state that the court is not bound because in summary proceedings there is no guarantee of the correctness of the decision. The admissible abridgment of procedural rights (in an inadmissible manner) would otherwise continue. The Federal High Court (Bundesgerichtshof) is of a different opinion. It assumes that the judge who decides on the damage is bound, for example, in the case where an urgent reason for granting an order of civil arrest is missing.⁴⁰⁷

When a legally binding judgment is given, the case is different. The judge deciding the damage is bound by this.

(6) Art.6 and 7 of the Arrest Convention of 1952

In accordance with Art.6 of the International Convention for the Unification of Certain Rules Relating to the Arrest of Seagoing Ships of 1952 (the Arrest Convention of 1952), all questions relating to whether the claimant is liable in damages for the arrest of a ship (or for the costs of the bail or other security furnished to release or prevent the arrest of a ship), are determined by the law of the contracting State in whose jurisdiction the arrest was made or applied for. If the arrest proceedings took place in Germany, one thus has to apply para 945 ZPO.

The international competence of German courts in actions relating to disputes for compensation for damage because of an arrest which has been

406 Op cit marginal note 9 of para 945 ZPO.

407 VersR 1985, 335. Cf The Clydefirth OLG Hamburg, VersR 1987, 356. See in detail O Teplitzky 'Zur Bindungswirkung gerichtlicher Entscheidungen im Schadensersatzprozess nach Paragraph 945 ZPO' NJW 1984, 850.

enforced in Germany, is provided for by para 32 ZPO. The provisions contained in Art.6 and 7 of the Arrest Convention of 1952 do not differ from this regulation.

The Federal High Court of Justice (Bundesgerichtshof) has correctly stated that the contracting States do not have to come to an agreement about the question as to how the liability for damages of the creditor will be regulated in the case where an arrest is cancelled.⁴⁰⁸

408 Cf Schaps & Abraham op cit Appendix of para 482 HGB, marginal note 1 of Art.6 of the Arrest Convention of 1952.

P A R T B

HISTORICAL PERSPECTIVE AND THE LAW TO BE APPLIED

As pointed out in Chapter I of Part A, a historical consideration of the arrest of seagoing ships can only be confined to some general remarks, because this field remains the preserve of legal historians and hence falls outside the ambit of this thesis. Some remarks on the historical development of admiralty jurisdiction must however be made.⁴⁰⁹ By way of contrast with German arrest proceedings whose origins go back to the end of the 19th century,⁴¹⁰ South African admiralty law has, especially in the last few years, undergone some epoch-making changes.

On 1 November 1983 the Admiralty Jurisdiction Regulation Act (the 1983 Act)⁴¹¹ came into force. The 1983 Act contains the relevant provisions dealing with the arrest of ships, and is complemented by the Admiralty Proceedings Rules (the Rules)⁴¹² which regulates the conduct of the admiralty proceedings of the provincial and local divisions of the Supreme Court of South Africa. Unlike German law, South African law has special provisions dealing with the arrest of ships, whereas in German law the common law relating to civil procedure and the Code of Civil Procedure (ZPO) regulate such arrests.

Before the 1983 Act came into operation, the courts had to apply (depending on the nature of the claim) either English maritime law as it was in

409 Cf South African Law Commission Project 32 on the Review of the Law of Admiralty at 1 ff with an overview of the origins of maritime law in general.

410 The German arrest provisions, codified in the Code of Civil Procedure as amended, go back to the Code of Civil Procedure of 1877.

411 Act 105 of 1983. Cf Appendix X.

412 1 December 1986. Cf Appendix XI.

1890⁴¹³ or the Roman-Dutch law of South Africa. Whilst the English admiralty law had developed steadily since 1890, the South African Admiralty Courts had the jurisdiction of the English Admiralty Courts as it was on 1 July 1891 (the commencement of the 1890 Act) and which was therefore out of date.⁴¹⁴

There was also another unsatisfactory condition which made a new act more than necessary. Despite the fact that there was legally only one court dealing with admiralty jurisdiction (the Supreme Court), there were in fact two courts exercising jurisdiction over maritime matters.⁴¹⁵ Firstly, there was the Supreme Court sitting as an Admiralty Court, meaning as a Colonial Court of Admiralty exercising jurisdiction by the High Court of Admiralty in England as it existed in 1890 and applying English admiralty law at that date.⁴¹⁶ Secondly, there was the Supreme Court sitting as an ordinary civil court administering the ordinary common law, ie Roman-Dutch law.⁴¹⁷ The effect was that the result of a case could differ depending on the court before which the

413 53 & 54 Vict c 27. The enactment of the Colonial Courts of Admiralty Act of 1890 made every court of law in a British possession with unlimited civil jurisdiction, a Court of Admiralty with the same jurisdiction as the admiralty jurisdiction of the High Court in England. Cf The Golden Togo 1986 (1) SA 505 (N); The Houda Pearl I 1986 (2) SA 714 (A); The Houda Pearl II 1986 (3) SA 960 (A).

414 Cf H Staniland 'Developments in South African Admiralty Jurisdiction and Maritime Law' 1984 Acta Juridica 271, 'The Implementation of the Admiralty Jurisdiction Regulation Act in South Africa' (1985) 4 LMCLQ 462; C Dillon and J P van Niekerk South African Maritime Law and Marine Insurance: Selected Topics (1983) at 27.

415 Cf Dillon & van Niekerk op cit 17; see Crooks & Co v Agricultural Operative Union Ltd 1922 AD 423 at 428; South African Law Commission op cit 10.

416 Cf G Hofmeyr 'Admiralty Jurisdiction in South Africa' 1982 Acta Juridica 30; H Booysen 'South Africa's new Admiralty Act: A maritime disaster?' (1984) 6 MB 75; D J Shaw Admiralty Jurisdiction in South Africa (1987) at 2.

417 Booysen op cit 75; Shaw op cit 3.

action was instituted.⁴¹⁸

Another reason for reform was the fact that most of the international conventions which came into force since 1890 were not incorporated into the South African legislation.

The 1983 Act takes into consideration many of the above mentioned unsatisfactory conditions. It is based on several existing laws and international conventions.⁴¹⁹ The International Convention for the Unification of Rules Relating to the Arrest of Seagoing ships of 1952 (the Arrest Convention of 1952)⁴²⁰ served as the basis of the definition of a maritime claim⁴²¹ and English, Scottish and American laws were selectively applied.⁴²² Conflict between the Admiralty Court and the Supreme Court has been abolished because the 1983 Act gives the Admiralty Court exclusive jurisdiction over the defined maritime claims.⁴²³

In some areas the 1983 Act is ahead of international law. An example is the provision relating to the arrest of associated ships, which is, so far, unprecedented in the world,⁴²⁴ and which tries to eliminate the escape of shipowners from responsibility in companies which purport to have as their asset only a single ship.

However, the 1983 Act can also be criticized. If, for instance, there is

418 The classic case which shows the clash between the two legal systems was The Waikiwi Pioneer II 1977 (1) SA 76 (N); see also Crooks & Company v Agricultural Operative Union Ltd 1922 AD 423 at 428. Cf Staniland 1984 Acta Juridica 271; C Forsyth 'The Conflict Between Modern Roman-Dutch Law and the Law of Admiralty as Administered by South African Courts' (1982) 99 SALJ 255 at 265; Hofmeyr op cit 45.

419 See Dillon & van Niekerk op cit 28.

420 South Africa has not ratified the Arrest Convention of 1952.

421 Cf Staniland 1984 Acta Juridica 271 at 273.

422 Ibid.

423 Dillon & van Niekerk op cit 28.

424 Cf ss 3(6) and (7) of the 1983 Act.

no agreement between the parties to the dispute concerning the law which they contend is applicable,⁴²⁵ the judge has to apply s 6 of the 1983 Act. Section 6 of the 1983 Act provides that "notwithstanding anything to the contrary in any law ..." English law, ie English admiralty law as it is at the commencement of the Admiralty Jurisdiction Regulation Act (1 November 1983), is applicable, or Roman-Dutch law⁴²⁶, as the case may be, will apply in certain matters. If the matter therefore is one in which a Court of Admiralty in South Africa (referred to in the Colonial Courts of Admiralty Act 1890 of the United Kingdom) had jurisdiction before the commencement of the 1983 Act, the law which has to be applied is that which the High Court of Justice of the United Kingdom in the exercise of its admiralty jurisdiction would have applied on 1 November 1983 insofar as that law can be applied.⁴²⁷ The major head of admiralty jurisdiction, to which the English law⁴²⁸ will apply, has its origin in the English Admiralty Courts Act of 1840⁴²⁹ and the English Admiralty Courts Act of 1861.⁴³⁰ These heads of jurisdiction are: booty of war, damage done by a ship, damages for loss of life or personal injury, master's wages and disbursements, mortgages, necessities, ownership of ships, building, equipping, or repairing of ships, salvage, seamen's wages, towage, damage to cargo imported and damage to ships.⁴³¹ The heads of jurisdiction to which Roman-Dutch law will apply

425 Cf s 6(5) of the 1983 Act.

426 Cf The Kalantiao 1987 (4) SA 250 (D) at 253.

427 The Andrico Unity 1987 (3) SA 794 (C) at 801; Cf The Kalantiao 1987 (4) SA 250 (D).

428 In accordance with s 6(1)(a) of the 1983 Act.

429 3 & 4 Vict c 65.

430 24 & 25 Vict c 10. Cf for instance The Antigoni Tsiris 1981 (3) SA 950 (N); H Staniland 'Can an Indemnity Issued in Consideration for a Misinterpretation in a Bill of Lading Be Enforced in the Admiralty Court?' (1988) 105 SALJ 322.

431 B R Bamford The Law of Shipping and Carriage in South Africa 3ed (1983) at 180 ff; see Dillon & van Niekerk op cit 29 f; Staniland (1985) 4 LMCLQ 462 at 466.

are⁴³² for instance claims relating to charterparties and marine insurance. Hare⁴³³ considers "that s 6(1) of the 1983 Act is an attempt by the draftsmen to placate the traditional common law jurists of South Africa who are intent on keeping the Roman-Dutch maritime law intact". This law is outdated and, as Dillon and van Niekerk have pointed out, "not easily accessible".⁴³⁴ The ineptitude of s 6 of the 1983 Act becomes evident especially in the case of marine insurance, as England is more or less the home of marine insurance,⁴³⁵ and Roman-Dutch law has not contributed much to this part of law in the last few decades. Another reason for criticizing s 6(1) of the 1983 Act is the fact that English maritime law is linked to international law whereas the South African Roman-Dutch law has, as far as maritime law is concerned, a more national rather than an international basis. On the other hand, one should not overinterpret s 6(1) of the 1983 Act, because its scope is limited.⁴³⁶ Section 6 of the 1983 Act should be amended as regards the application of English law to give the court a discretion or wider power to apply English maritime law.

Aside from the 1983 Act and the Admiralty Proceedings Rules, in principle, no other provisions relating to the arrest of ships have to be noted. South Africa has not, unlike Germany, ratified the Arrest Convention of 1952 but it is desirable that it does so to extend its international standard. The first step in the right direction was, however, made with the implementation of the 1983 Act, because, as far as arrest is concerned, it is, to a certain extent, based on the Arrest Convention of 1952. However, as will be shown in the following chapters, the 1983 Act offers further opportunities for criticism.

432 In accordance with s 6(1)(b) of the 1983 Act.

433 Op cit 78; see also Bamford op cit 195, n 1; Booysen op cit 82 ff.

434 Op cit 28. See South African Law Commission op cit 10.

435 For instance Lloyd's of London. See Dillon & van Niekerk op cit 115 ff; D B Friedman 'Maritime Law in the Courts after 1 November 1983' (1986) 103 SALJ 678 at 684.

436 Cf Shaw op cit 75.

These criticism will hopefully be included in amendments of the 1983 Act.

THE OPPOSING PARTIES AND THE OBJECT OF THE ARREST

The essential question for a maritime claimant (aside from the legal requirements for an arrest, which will be discussed in the forthcoming chapters) is whether he is permitted to arrest a ship⁴³⁷ of his debtor in South Africa or not. This becomes especially evident if a foreign creditor wants to arrest a ship in South Africa. It is also important to know whether only the ship over which the claim arose rather than other ships can be arrested. This is because the debtor may not be the shipowner himself but a time-charterer or a charterer by demise.

(1) Principles

The Admiralty Jurisdiction Regulation Act 105 of 1983 (the 1983 Act) allows a person, whether an incola or a peregrinus, to bring actions before the Admiralty Courts and therefore allows every creditor to arrest a ship, subject of course to the general requirements for such arrests. Section 2(1) of the 1983 Act provides that each provincial and local division (including a circuit local division of the Supreme Court of South Africa) has admiralty jurisdiction to hear and determine any maritime claim⁴³⁸ irrespective of the place where it

437 According to s 1(1)(v) of the 1983 Act ship means: "Any vessel used or capable of being used on the sea or internal waters, and includes any hovercraft, power boat, yacht, fishing boat, submarine vessel, barge, crane barge, floating crane, floating dock, oil or other floating rig, floating mooring installation or similar floating installation, whether self-propelled or not". South African law does not (unlike German law) include ships under construction. These are therefore excluded from any arrest.

438 Including in the case of salvage, claims in respect of ships, cargo or goods found on land. Cf Chapter XV (2) and ss 1(1)(ii)(a)-(z) of the 1983 Act.

arose, of the place of registration of the ship concerned, or of the residence, domicile or nationality of its owner. According to s 2 of the 1983 Act, it is possible for a German creditor to arrest a ship in South Africa on account of a maritime claim which arose in Australia even though the ship is registered in Liberia. It is not a precondition that a South African is involved either as debtor or as creditor. The only connection South Africa may have with the case is that the ship is in South African territorial waters and this means that it is not necessary for the ship to be berthed in a South African harbour.⁴³⁹ This follows from s 2(2) of the 1983 Act, as it provides that the area of jurisdiction of an Admiralty Court referred to in s 2(1) of the 1983 Act shall be deemed to include that portion of the territorial waters of South Africa adjacent to the coastline of its area of jurisdiction. In this respect, the 1983 Act goes much further than the German law which in para 482 HGB prohibits the arrest of a ship when she is on a voyage and is not berthed in a harbour.⁴⁴⁰

As pointed out by Hare⁴⁴¹ any juristic person may ask the court for relief, whether a local or private individual, or a corporate body registered according to the laws of the state, an association with juristic personality recognised by the laws of the state in which it is resident, and the government of another state⁴⁴² or a liquidator of a company.⁴⁴³

The Admiralty Proceedings Rules (the Rules) provide in Rule 2(3)(a) that the owner of a ship, cargo or other property in respect of which a maritime claim is made may sue or can be sued as such. The opposing parties (creditor or debtor) are exactly described in this rule and can be anyone already stated

439 Cf Booyesen op cit 80; The Fabian 1912 CPD 148 at 149.

440 Cf Part A - Chapter VII (2) (a).

441 Op cit 68.

442 Ibid.

443 Cf The Alkar 1986 (2) SA 138 (C).

above so long as the defendant against whom the claim is made is the owner of the ship to be arrested. Likewise, the owner of a ship or cargo may sue.

The Rules indicate that the importance of the origin and name of the parties involved is, to a certain extent, subordinate and that the claim for an arrest and the object of the arrest are of greater importance. Rule 2(3)(b) in conjunction with Rule 20(4)(a), for instance, provide that parties may sue or be sued jointly and may (in that event) be described as the owner of a named ship or of the cargo in or formerly in a named ship, or otherwise in like manner. In any such case, the parties need not be further named or described in the pleadings. The plaintiff or defendant can to a certain extent remain anonymous. Rule 2(4) provides that in the case of an action in rem the property in respect of which the claim lies, as set forth in s 3(5) of the 1983 Act, shall be described as the defendant. That is for instance the ship 'XYZ'. This rule is especially a relief for the plaintiff who does not have to find out the opponent's exact name and address as in German law, where it often becomes problematic to find out who the owner is. This problem becomes more complicated when a company is part of a number of interrelated companies.

In principle an admiralty action can accordingly be brought against the owner of a ship or the ship itself.⁴⁴⁴

Both the 1983 Act and the Rules continually refer to the "owner", but do not define the word. The word "owner" has different meanings in different other acts. For instance in s 2 of the Merchant Shipping Act,⁴⁴⁵ owner means "any person to whom a ship or a share in a ship belongs". In s 263 of the Merchant Shipping Act, which deals with the limitation of liability, the word "owner" in relation to a ship "includes any charterer, any person interested in or in possession of such ship, and a manager of such ship". A further definition is

444 Cf s 3 of the 1983 Act.

445 Act 57 of 1951 as amended.

given in s 1 of the Insurance Act,⁴⁴⁶ where "owner", in relation to a policy, "means the person who is entitled to enforce any benefit for in the policy". However, the definitions of s 263 of the Merchant Shipping Act and s 1 of the Insurance Act are used in a special context, namely limitation of liability and insurance policies. It follows from this that they cannot be applied analogously. Contrary to this the definition of the word "owner" given by s 2 of the Merchant Shipping Act can be applied mutatis mutandis, because it is in accordance with the general meaning of ownership, ie that a res belongs (in the sense of dominium) to a person.

(2) Peculiarities

Proceeding from the principles described in the previous section, one should note the following:

(a) Charter

(i) Charter by demise - beneficial ownership

On the basis of the definition of "owner" given in s 2 of the Merchant Shipping Act it is questionable whether South African law recognizes "beneficial ownership", for instance in the case of the demise charterparty. A ship is "beneficially owned" by a person who is not the legal (registered) owner in the meaning of s 2 of the Merchant Shipping Act but who has lawful possession and control over the ship with the use and economic benefit which are derived from her which a legal (registered) owner would ordinarily have.⁴⁴⁷ This is the case with a charter by demise, which has to be distinguished from a normal

⁴⁴⁶ Act 27 of 1943 as amended.

⁴⁴⁷ The Andrea Ursula (1971) 1 All ER 821 (PDA) at 824e. A beneficial owner has to be treated like a (registered) owner.

charter in both South African and German law.⁴⁴⁸

As pointed out above, a demise charterer is one who hires a ship, normally for a long term, on a "bare boat" basis and is usually responsible inter alia for the insurance, manning, maintenance, repair and operation of the ship.⁴⁴⁹ The demise charter is a contract for the hire of a ship, as all other charterparties are merely contracts of carriage by sea.⁴⁵⁰ Despite the fact that he is not the "real" owner,⁴⁵¹ the charterer by demise has all the responsibilities and duties of a "real" owner and is treated as such.

The 1983 Act and other South African Acts as well as the existing judgments give no concrete answer to the question whether beneficial ownership is recognized,⁴⁵² especially with a demise charterparty. The answer to this question is important for the attachment and arrest of ships because, on the one hand, ownership is a prerequisite for the attachment in an admiralty action in personam. On the other hand ownership is a precondition in an action in rem. Section 3(4)(b) of the 1983 Act provides that a maritime claim can be enforced by an action in rem "if the owner of the property to be arrested would be liable to the claimant in an action in personam in respect of the cause of action concerned". Furthermore, as will be discussed later, it is important for an arrest applicant to know whether a ship is beneficially owned in relation to the associated ship provisions in ss 3(6) and (7) of the 1983 Act.

In order to answer the question whether beneficial ownership is recognized

448 Cf Part A - Chapter VI (2) (b). For the South African law see Bamford op cit 17.

449 Ibid. Cf F M Ventris Tanker Voyage Charter Parties (1986) at 25; The Phillippine Commander 1988 (1) SA 457 (D) at 460.

450 Ventris op cit 25; Dillon & van Niekerk op cit 47.

451 He is not, for instance, registered as the owner of the ship in the vessel's ship register in terms of Chapter II of the Merchant Shipping Act.

452 German law recognizes beneficial ownership, cf para 510 HGB, Part A-Chapter II (2) (a) and Chapter II (2) (b).

or not one has to look, firstly, at s 3(4) of the 1983 Act where, as already stated, the 1983 Act provides that a maritime claim can either be enforced "if the claimant has a maritime lien over the property to be arrested",⁴⁵³ or alternatively, that the owner of the property to be arrested is liable in an action in personam.⁴⁵⁴

In accordance with s 3(4)(a) of the 1983 Act it is of no consequence whether the ship is in possession of the "real" owner or in possession of the demise charterer. Once it has attached, in order to arise the maritime lien is independent of ownership and possession in the sense that it travels with the ship into whosoever possession or ownership the vessel may come. For that reason s 3(4)(a) of the 1983 Act does not help answering the question concerning beneficial ownership.

Does the word "the owner" in s 3(4)(b) of the 1983 Act include a demise charterer? If one looks at s 3(7)(c) of the 1983 Act, the law seems to distinguish between owner and charterer (sub-charterer) by demise. Section 3(7)(c) of the 1983 Act reads as follows:

"If a charterer or sub-charterer of a ship by demise and not the owner thereof, is alleged to be liable in respect of a maritime claim, the charterer or sub-charterer, as the case may be, shall for the purposes of subsection 6⁴⁵⁵ and this subsection be deemed to be the owner."

As stated by Shaw⁴⁵⁶ this is a 'clear' distinction between a charterer by demise and the owner. This is true in law, because there is a difference between the registered owner of a ship and the charterer by demise, but only in one main respect, namely, the distinction between ownership and possession. The

453 The 1983 Act, s 3(4)(a).

454 The 1983 Act, s 3(4)(b).

455 Subsection 6 refers to the arrest of associated ships.

456 Op cit 33.

registered shipowner has ownership, whereas possession is obtained and kept by the charterer by demise.⁴⁵⁷ There is in fact no difference between a registered owner and a charterer by demise, not only metaphorically but even in reality:

"The charterer becomes for the time being the owner of the ship; the master and crew are, or become to all intents and purposes, his servants, and through them the possession of the ship is in him. The owner, on the other hand, has divested himself of all control either over the ship or over the master and crew. His sole right is to receive the stipulated hire, and to take back the ship when the charterparty comes to an end."⁴⁵⁸

Ownership does not pass, but in almost all other respects the charterer by demise will be considered to be in the position of an owner.⁴⁵⁹ The 1983 Act draws this distinction exactly when s 3(7)(c) states that the charterer by demise 'shall be deemed to be the owner'. This means that he will be treated like an owner.

In the case of the demise charter, the demise charterer, as pointed out by Lord Herschell LC,

"has become, pro hac vice and during the term of the charter, the owner of the vessel, when one is considering the rights and liabilities which arise from the acts of the master, and the crew of the vessel, who during that time are the servants of the charterer,

457 Mc Kinnon L J is therefore wrong when he states that "the ship has at all times been in the possession of the shipowners...", because with a charter by demise the registered shipowner "only" keeps ownership but not possession of the ship, see The Alresford (1942) 1 All ER 503 (CA) at 504. With a charter by demise, the shipowner has to hand over possession to the demise charterer by giving him the ship. See also The Phillipine Commander 1988 (1) SA 457 (D) at 460.

458 Nel v Santam Insurance Co Ltd 1981 (2) SA 230 (T) at 248.

459 Dillon & van Niekerk op cit 47 f.

appointed and paid by him."⁴⁶⁰

The demise charterer therefore has to be treated like an owner. He is, after all, included in the word 'owner' in s 3(4)(b) of the 1983 Act and he would be liable to the claimant in an action in personam in respect of the cause of action concerned. It is possible to arrest the ship which is under a demise charter and the registered owner has no remedy by which he can avoid the arrest or otherwise intervene.

This result is the same as in German law, where a demise charterer is regarded as an 'owner pro tempore', meaning that he is a beneficial owner or an 'owner pro hac vice'. In accordance with para 510 HGB he will be treated as the owner of the ship.⁴⁶¹

Proceeding from the above the question arises, how beneficial ownership does relate to the associated ship provisions.⁴⁶² As already stated, in terms of s 3(7)(c) of the 1983 Act a charterer by demise is explicitly "deemed to be the owner for the purpose of the associated ship provisions". A creditor therefore can arrest either the ship which the demise charterer owns beneficially and in which the maritime claim arose, or any other ship which he owns as a "real" owner in accordance with s 2 of the Merchant Shipping Act and the associated ship provisions.

The South African Law Commission, responsible for the Admiralty Jurisdiction Regulation Act, has missed the opportunity to prevent the problems

460 The Baumwoll Manufactur von Carl Scheibler v Christopher Furness (1893) AC 8 (HL) at 16. Cf The Andrea Ursula (1971) 1 All ER 821 (PDA); The Aventicum (1978) 1 Lloyd's Rep 184 QB; Bamford op cit 17; Dillon & van Niekerk op cit 47. The demise charterer is not regarded as owner by the following authorities: The I Congreso Del Partido (1977) 1 Lloyd's Rep 536 QB at 563; The Father Thames (1979) 2 Lloyd's Rep 364 QB. See Shaw op cit 33, where he is of the opinion "that there is therefore certainly room for the argument that the owner in s 3(4) does include the demise charterer". He however does not state whether he follows this statement or not.

461 Cf Part A - Chapter II (2) (b).

462 The 1983 Act, ss 3(6) and (7).

arising from a charter by demise as the difficulties of characterization as to whether a demise time charterer should be regarded as owner or not were known to English law.⁴⁶³ The Law Commission should have taken into consideration the provisions of the International Arrest Convention of 1952,⁴⁶⁴ as the convention served as a basis for the Admiralty Jurisdiction Regulation Act. Future amendments should therefore include a clear definition stating that the word "owner" in the 1983 Act includes the charterer by demise.

(ii) Time charter

Another question arising from a charter concerns the possibilities of an arrest or attachment of a ship, her stores or bunkers for debts for which the time charterer and not the shipowner is liable to a third party. For example, can a creditor who has a claim which has nothing to do with a charterparty but where the debtor happens to be a charterer under an (ordinary) timecharter agreement, arrest or attach the bunkers paid for by the charterer ?

Before answering this question, the following remarks have to be made in order to give an short overview of the principles of time charters. Their nature is international and the principles do not differ whether the law is German, English or South African.

Berman AJ⁴⁶⁵ opined that the statement of Mc Kinnon LJ (with the concurrence of Goddard and Du Parry LLJ⁴⁶⁶), pointing out that the position with regard to time charterparties 'is of application to all time

463 Cf The Baumwoll Manufactur von Carl Scheibler v Christopher Furness (1893) AC 8 (HL) at 16; The Andrea Ursula (1971) 1 All ER 821 (PDA); I Congreso Del Partido (1977) 1 Lloyd's Rep 536 QB at 563; The Father Thames (1979) 2 Lloyd's Rep 364 QB.

464 Art.3(4) of the Arrest Convention of 1952 concerns the possibilities of an arrest with a charter by demise.

465 The Maria K 1985 (2) SA 476 (C) at 480.

466 Cf The Alresford (1942) 1 All ER 503 (CA).

charterparties (concluded in the standard form) amongst all maritime nations, not excluding this country' (ie South Africa). Mc Kinnon LJ had stated following:⁴⁶⁷

"The respective rights and obligations of the two parties to this time charterparty must depend upon its written terms, for there is no special law applicable to the particular form of contract known as a time charterparty. A time charterparty is, in fact, a document which is of a very misleading nature, because the real nature of what is undertaken by the shipowner is disguised by the use of language dating from a century or more ago - language which was then appropriate to a contract of a totally different character. A century ago a time charterparty, then known as a demise charterparty, was an agreement under which the charterer was handed over the possession of the ship of the shipowner to put his servants and crew upon her and to sail her for his own benefit. That form of charterparty, which, as I say, was called a demise charterparty, has long since been obsolete. The modern form of time charterparty is, in essence, one under which the shipowner agrees with the time charterer that, during a certain named period, the shipowner will render service as a carrier by his servants and crew to carry the goods which are put on board his ship by the time charterer."⁴⁶⁸

Berman AJ and Mc Kinnon LJ are to a certain extent correct as to what the time charter concerns. But one cannot agree with the opinion that the demise charter is obsolete. That might have been the case in 1942, when Mc Kinnon LJ gave his judgment, but not in 1988, where there is still a need for the demise charterparty.⁴⁶⁹

As pointed out in Part A,⁴⁷⁰ one of the common forms of the time charter

467 Op cit at 503 f.

468 Cf The Maria K 1985 (2) SA 476 (C) per Berman AJ at 479; The Scaptrade (1983) 2 All ER 763 (HL) per Lord Diplock at 766E ff; The London Explorer (1971) 1 Lloyd's Rep 523 (HL) per Lord Reid at 526; see Shaw op cit 50.

469 Cf Bamford op cit 101; Dillon & van Niekerk op cit 45 ff.

470 Cf Part A - Chapter II (2) (b).

nowadays is the Baltimere-charter. The shipowner leases the charterer the ship with crew, at which time he concedes that the charterer, within certain limits, has the legal competence to give directions to the master.⁴⁷¹

With a charter the charterer can appear as a carrier by sea. This follows from the South African Carriage of Goods by Sea Act (the 1986 Act),⁴⁷² which provides in s 1 for the application of the Hague-Visby Rules.⁴⁷³ The Hague-Visby Rules regard either the owner or the charterer as the carrier who enters into a contract of carriage with the shipper.⁴⁷⁴ Therefore the charterer - as carrier by sea - will be under obligation to the freighter⁴⁷⁵ as a consignor. The shipowner is not liable for performance of the contract of carriage if a charterer is acting as a carrier by sea.⁴⁷⁶

As far as the liability of a shipowner for claims caused by the charterer is concerned, one has to distinguish between the liability of the charterer, the registered owner and the liability of the ship. The 1986 Act applying the Hague-Visby Rules in Art.IV(2) provides that neither the carrier (ie the owner or charterer) nor the ship⁴⁷⁷ shall be responsible for loss and damage arising and resulting from, for instance, act, neglect, or default of the master,

471 See 'Beeptime 2' form; The Sagona (1984) 1 Lloyd's Rep 194 QB and (1984) LMCLQ 347 QB.

472 Act 1 of 1986; see H Staniland 'The new Carriage of Goods by Sea Act in South Africa' (1987) 2 LMCLQ 305.

473 The Hague-Visby Rules consist of the original Hague Rules amended by what are called the Visby Amendments but are referred to as 'The Protocol to amend the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading signed at Brussels on 25th August 1924-Brussels 23rd February 1968.

474 The Hague-Visby Rules, Art.I.

475 The party contracting with the sea-carrier to transport the cargo.

476 In accordance with s 1(a)-(d) of the 1986 Act South African law recognizes 'as contract of carriage' not only contracts covered by a Bill of Lading or any similar document (of the Hague-Visby Rules in Art.I(b)) but also several other forms of contracts, cf s 1 of the 1986 Act.

477 This means that no maritime lien comes into existence.

mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship⁴⁷⁸ or any (other) cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier.⁴⁷⁹ But if there is, for instance, simultaneous tortious liability of the master or crew of the ship and the time charterer himself the registered owner (and, of course, the charterer) cannot appeal that he is not liable, because he himself participates by means of his crew or his master, whom he employs. In such a case, the registered owner has to suffer an arrest of his ship for loss or damage to cargo.⁴⁸⁰

A further problem with a time charterparty arises in relation to the attachment of bunkers, that is the question as to who the owner of the bunkers is, and this can be either the registered owner or the time charterer. An example demonstrating the problem is The Areti L:⁴⁸¹ The applicant was the owner of the mv Areti L which had been employed on a time charter entered into at Singapore with a Singapore-based company which subsequently became insolvent. When the ship was delivered for the use of the charterer, it had a certain amount of bunkers aboard which were supplemented by the charterer at Port Kelang and again at Singapore prior to the ship's arrival at Cape Town. The counter-applicant had a claim against the charterer for an amount of R 16000 and sought and obtained an order for the attachment of the bunkers aboard the vessel while it was in Cape Town in order to found jurisdiction in an

478 Cf Art.IV(2)(b) of the Hague-Visby Rules.

479 Cf Art.IV(2)(q) of the Hague-Visby Rules. The burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage. See also the exceptions from liability in Art.IV(2)(b)-(q) of the Hague-Visby Rules.

480 In cases of loss or damage, Art.IV(5)(a) of the Hague-Visby Rules offers a limitation of liability 'exceeding the equivalent of 10000 francs per package or unit or 30 francs per kilo of gross weight of the goods lost or damaged'; cf ss 261 - 263 of the South African Merchant Shipping Act.

481 The Areti L 1986 (2) SA 446 (C).

action in personam which it intended to institute against the charterer. In order to release the vessel, the applicant lodged a bail bond with the Registrar in the amount of the counter-applicant's claim with the express condition that it reserved the right to seek an order declaring that the bunkers aboard the vessel were at all times wholly or partly its property.⁴⁸²

To help decide the question whether the owner or the charterer becomes owner of the bunker one has to look at the respective judgments of English and South African courts.

In the English case of The Saint Anna,⁴⁸³ it was held that with a time-charter under a Shelltime 3-form⁴⁸⁴ the fuel and diesel oil on board the Saint Anna (when she was arrested) was the property of the charterers. The reasons set out by Sheen J were:⁴⁸⁵

"... at the moment of delivering of the vessel to the charterers when, under cl 14, the charterer must 'accept and pay for' all bunker oil on board ... If the parties merely intended a financial transaction under which the charterers paid in advance for fuel, it would have been sufficient to provide that the charterers must pay for all bunker oil on board. The obligation to accept the bunkers connotes a preexisting contract of sale.

The second stage is covered by cl 6, under which the charterers 'shall provide and pay for all fuel (except galley fuel)'. It seems to me that if the charterers purchase fuel, that fuel is their property unless the parties clearly and unequivocally agree that the property shall vest in the owners. This approach is reinforced by the words of cl 22 (quoted above), under which the owners agree to pay for all fuel consumed and all other expenses incurred in the course

482 Aside from this case see The Maria K 1985 (2) SA 476 (C) and The Atlantic Victory 1986 (4) SA 329 (D). See also The Saint Anna (1980) 1 Lloyd's Rep 180 QB and The Span Terza 1984 (1) Lloyd's Rep 119 (HL); Shaw op cit 50 and Hare Arrest of Ships (Volume 5) ed C Hill (1987) at 70.

483 (1980) 1 Lloyd's Rep 180 QB.

484 On an analysis of the clauses by Sheen J.

485 Op cit 182 f.

of going to a special port of periodical docking. The owners are not required to 'provide and pay for such fuel'. It is provided by the charterers and paid for by the owners. Such a provision in the charterparty would be unnecessary if the fuel was the property of the owners ...

The final stage occurs at the moment of redelivery. This is dealt with in cl 14, under which the owners shall pay for all bunkers oil remaining on board at prices therein set out Such an agreement is consistent only with the bunkers being the property of the charterers until the owners purchase it."

In a further English case, The Span Terza,⁴⁸⁶ it was held that a time charter under the New York Produce Exchange (NYPE)-form although not identical were similar to the corresponding clauses in the Shelltime 3 time charter in The Saint Anna⁴⁸⁷ and that the bunkers were the property of the charterers. The clauses provided inter alia:

"(cl 2) That the charterers shall provide whilst on hire and pay for all the fuel except galley and lubricating oil ...

(cl 3) That the charterers at the port of delivery and the owners at the port of redelivery shall take over and pay for all fuel remaining on board the vessel"

The reasons set out by Lord Diplock LJ were as follows:

"In cl 2 the words 'provide ... and pay for'; in cl 3 the words: 'take over and pay for' and the references to 'price', seem to me to be wholly inconsistent with the property in the bunkers being vested

486 (1984) 1 Lloyd's Rep 119 (HL). This was an appeal by the interveners/ sub-charterers from the judgment of the Court of Appeal, (1983) 1 Lloyd's Rep 441, dismissing their appeal from the judgment of Mr Justice Sheen, (1982) 2 Lloyd's Rep 72, given in favour of the owners of The Span Terza and holding inter alia that the risk in the bunkers passed to the owners on the cancellation of the charter. The bunkers on The Span Terza (at the time of her arrest and at the time of cancellation of the charterparty) had all been paid for by the charterers.

487 (1980) 1 Lloyd's Rep 180 QB.

in anyone other than the charterers. The words I have underlined would otherwise be meaningless. Possession of all bunkers once they are on board the vessel is no doubt vested in the shipowners as bailees who are under a duty to procure that they are used by the master in carrying out the orders which the charterers are authorized by the charterparty to give him as to the employment of the vessel⁴⁸⁸. For this uncomplicated reason, involving as it does no more than the application of basic principles of the common law of bailment, I would allow this appeal (by the sub-charterers)."⁴⁸⁹

As these two judgments show, in English law, the charterer is in principle regarded as the owner of the fuel which he has bought and with which he has filled the tanks of the ship.

In South African law, in two judgments of Berman AJ,⁴⁹⁰ the learned judge pointed out that he could not follow the above two cited English decisions and bunkers brought on board by the charterers become the property of the shipowner or are jointly owned property of both of them (ie the shipowner and the charterer). In The Maria K⁴⁹¹ Berman AJ held that:

"The contract between the applicant⁴⁹² and I⁴⁹³ was a time charterparty ... a contract sui generis ... and whereby the possession and the control of the vessel is exercised through the master and crew employed by the owner and remains with the latter, the fuel required for the vessel's engine would in the normal course of events be, and would remain, the property of the owner ... that delivery of the fuel had never been effected to the charterer and that to constitute such delivery there would have had to be a parting with the whole possession and control of the vessel ... merely

488 The Span Terza (1984) 1 Lloyd's Rep 119 (HL) at 122.

489 Ibid.

490 The Maria K 1985 (2) SA 476 (C) and The Areti L 1986 (2) SA 446 (C).

491 1985 (2) SA 476 (C).

492 Owner of the ship.

493 Charterer.

providing that the charterer was to pay for the fuel oil to be consumed on the voyage, indicated that the parties contemplated no more than a financial transaction (and not a purchase) under which the charterer paid for the fuel oil. Accordingly, as the onus rested on the respondent to prove delivery or sale of the fuel oil to the charterer, that it had not discharged it."

In the Areti L,⁴⁹⁴ which served as an example in the above case, Berman AJ held that:

"Where the charterers have provided and paid for fuel put aboard the vessel chartered by them, such fuel was and remained their property unless there was a clear and unequivocal agreement to the contrary or the evidence showed that the fuel was otherwise obtained That the bunkers that had been attached were what was left of the inseparable mixture of those bunkers which were on the vessel when it was delivered to the charterers and those supplied by the charterers, and the bunkers were accordingly owned jointly by the applicant⁴⁹⁵ and the charterer: The counter-applicant was entitled as a creditor of the charterer to attach such jointly-owned property."

The English decisions are in principle right.⁴⁹⁶ If the charter-clauses provide that 'charterers provide and pay for the bunkers', the charterers become the owners of the fuel. It is of no consequence that the fuel is stored in the tanks of the ship. One cannot support Berman AJ in The Maria K when he speaks of a 'mere financial transaction'. The meaning of the words 'provide' and 'pay' are clear, otherwise that clause in charterparties would have no meaning and would be useless. It is true that in the case where the tanks are already filled to a certain extent and where the charterer (only) supplements the fuel, a mixture of both can come into being. But technical data can determine how much fuel has been in the tanks and how much the charterer has

494 1986 (2) SA 446 (C) at 447.

495 Shipowner.

496 Hare op cit 72 is of the same opinion.

refueled. If there is anything left of the charterers part (fuel), than a third party to whom the charterer is a debtor is allowed to attach only that part of the fuel which belongs to him. It does not matter that the fuel which the owner has left has already been used up. The part belonging to the owner remains in a figurative sense even if the charterer refuels the tanks several times during existence of the charterparty. The quantity of the shipowner's fuel will normally have been stated at the beginning of the charterparty and that remains in his ownership as a unit of account. If there is a maritime claim against the owner pursuant to s 3(4) of the 1983 Act, the remaining part belonging to the owner can be enforced by either an action in rem or in personam, even during the time when the ship is under a charterparty. The part of the charterer in this case however cannot be arrested. This was, in principle, the correct result in the English judgments and the South African cases should have been the same, because the question whether the fuel is mixed does not result in the answer of 'joined property'; rather, it leads to the answer that the parts of bunkers can be clearly named. The part of the fuel in a figurative sense (either the one of the owner or the one of the charterer) is the object of the decision as to how much bunker (for instance of the owner) can be attached. On the other hand, the part of the fuel belonging to the charterer can be attached by every creditor of the charterer. The attachment of the bunkers in The Maria K was therefore lawful and the decision on this point is therefore wrong. But Berman AJ is right when he states that the onus lies on a creditor to prove delivery or sale of the fuel oil either to the owner or the charterer.

(b) Sale of the vessel

The sale of a vessel does not affect the rights of holder of a maritime lien and he can thus arrest a ship which gave rise to a maritime lien, even if it has been sold. A maritime lien, which has its origin in the common law and

which will be discussed later on in more detail,⁴⁹⁷ follows the ship.⁴⁹⁸ The maritime lien is inchoate from the moment the claim attaches, "and when carried into effect by legal process, by a proceeding in rem, relates back to the period when it first attached."⁴⁹⁹

Dillon and van Niekerk⁵⁰⁰ correctly describe the nature of a maritime lien as follows:

"The maritime lien arises automatically, by operation of law and without any agreement or formality, and comes into existence from the moment when the circumstances giving rise to the maritime lien occurs. It attaches to the res secretly and without any record or registration, is not dependent upon possession of the res⁵⁰¹ by the lienholder, and remains so attached if the res is thereafter alienated for value to a bona fide alienee without notice of the lien."

Further, Dillon and van Niekerk consider the maritime lien as a real right. The contrary view was held in The Kalantiao⁵⁰² and the Andrico Unity,⁵⁰³ viz that the maritime lien is a mere procedural remedy. These differing opinions as to the nature of a maritime lien will be discussed more fully later.⁵⁰⁴ At this stage one can, however, already say that the concept of a maritime lien as a procedural remedy cannot be accepted. It contravenes the above principle that

497 See Chapter XVI (1).

498 The Bold Buccleugh II (1851) 7 Moo PCC 267 at 284 f; Shaw op cit 87. See also The Fidias 1986 (1) SA 714 (C); The Andrico Unity 1987 (3) SA 794 (C); The Halcyon Isle (1981) AC 221 (PC) at 250; The Colorado (1923) P 102 at 110.

499 The Bold Buccleugh II (1851) 7 Moo PCC 267 at 285.

500 Op cit 13.

501 For example the ship.

502 1987 (4) SA 250 (D).

503 1987 (3) SA 794 (C).

504 Cf Chapter XVI (1).

the maritime lien travels with the ship and is inchoate from the moment it attaches to her, regardless of in whose possession or ownership she may be. The decisions are contradictory. On the one hand they recognize the principles of a maritime lien as stated above. On the other hand they do not recognize a foreign maritime lien because the lien is regarded as a (mere) procedural remedy. It follows from the above judgments that a foreign maritime lien becomes invalid when the ship to which it is attached sails into South African territorial waters. Presumed, a South African creditor has a maritime lien on a German ship because of a claim for loss of or damage to things in accordance with para 754(1)(No 3) HGB insofar, as these claims arose from the use of the ship. According to the decisions of The Kalantiao and The Andrico Unity the South African creditor would not, if the ship were attached by him and a South African mortgagee in a South African port, enjoy a better ranking in the distribution of the proceeds of the vessel sold by order of court than the South African creditor. He would, however, have a better ranking if, for example he had a maritime lien because of a salvage claim. Furthermore, the South African maritime lien holder could not enforce the maritime lien in terms of s 3(4)(a) of the 1983 Act by an arrest of the German ship. This result is in conflict with not only the principles of a maritime lien recognized by the above quoted decisions but also the common law principles of a real right. The peculiarity of a real right, distinguished for example from a personal or procedural right, "is that it adheres or is attached to the property which is its object so closely that it may be enforced by the person who is entitled to it against any person who infringes it, and not merely against a particular person who is under a special obligation to recognize it. This is achieved by an action in rem. So closely indeed is a ius in rem bound up with the property to which it is attached that it ceases ipso facto with its destruction."⁵⁰⁵

505 C G Hall Maasdorp's Institutes of South African Law - Volume II (The Law of Property) 10ed (1976) at 10.

Both, in South African and German law, real rights run, for example in the case of a hypothec or a lien, with the land.⁵⁰⁶ These rules become ineffective when regarding the maritime lien as a procedural remedy.

The position in German law is as adopted by Dillon and van Niekerk, viz that the maritime lien is a real right. The maritime lien gives a so-called statutory lien in terms of para 755(1) HGB. Furthermore, in terms of para 916(1) ZPO a foreign maritime lien is recognized as a claim for an arrest. A precondition of an arrest in German law is that the claim is a pecuniary claim or a claim which can become a pecuniary claim. For this purpose it is of no consequence where (ie in which country) the maritime lien arose. What is important is the fact that the maritime lien is a claim in terms of para 916 ZPO, viz a claim which can become a pecuniary claim.⁵⁰⁷

Accordingly, the purchaser has to ensure that he obtains certainty from the vendor as to the freedom of the ship from maritime liens and other debts (for example mortgages). This he must do because of the nature of the maritime lien as stated above. He otherwise, as the new owner of the vessel, may have to endure the arrest of his ship because of a maritime lien which attached to her before the purchase.

These principles are referred to by Dr Lushington in his judgment in The Bold Buccleugh I,⁵⁰⁸ although he is not speaking directly about a maritime lien:

"... It is quite manifest that a mere change of property does not exonerate a ship from liability of being sued; neither can a sale of a vessel after a collision produce any such effect; if it were so, the owners of a vessel doing a damage would have nothing to do but to sell her, and would thereby deprive the party aggrieved of his best security for compensation ... As regards the subsequent purchase of

506 Ibid. Cf Silberberg & Schoeman The Law of Property 2ed (1983) at 49.

507 Cf Part A - Chapter II (2) (b).

508 (1847-1850) 3 Rob 220 at 229.

the vessel, there is no evidence even to the effect that the present owner knew anything as to the action or bail at the time he made the purchase ... What he did know is left, I am sorry to say, very much in the dark. If he knew that there has been a collision, he certainly might have protected himself, either by not making the purchase, or by some other protection."

The principle that a maritime lien follows a ship even after she has been sold⁵⁰⁹ is, as pointed out above, the same as in German law, where para 755(1) HGB gives a so-called statutory right over the ship and this right follows the ship until it is, for example, discharged.

A bona fide purchaser also has, after all, to endure an arrest because of a claim which gave rise to a maritime lien notwithstanding the fact that he had no notice of the lien and that he has no personal liability on the claim from which the lien arose.⁵¹⁰ In the South African context this English and German principle accords, like mentioned above, with that of a real right.⁵¹¹ The only way to get compensation for damage resulting from the arrest out of a maritime lien which arose before the purchase of the ship without knowledge of the purchaser is to claim against the vendor.

These rules are effective not only for maritime liens but also for any other claim which came into existence before the purchase of the vessel.

(3) Sisterships and associated ships - ss 3(6) and (7) of the 1983 Act

In German law one can arrest other ships of the shipowner even though these are not referred to in the claim and this is known as the arrest of a so-called

509 See Booyesen op cit 81 in respect of the purchase of associated ships and South African Law Commission op cit 8.

510 Cf The Halcyon Isle (1981) AC 221 (PC) at 234; The Khalij Sky 1986 (1) SA 485 (C) at 489B. See Part A - Chapter III (1) (a) (ii).

511 The Khalij Sky 1986 (1) SA 485 (C) at 489B.

sistership.⁵¹²

In terms of Art.3(3) of the Arrest Convention of 1952, a claimant can arrest either the particular ship in respect of which the claim arose or any other ship which is owned by the person who was, at the time when the maritime claim arose, the owner of the particular ship. This means that the arrest of a sistership is also possible.⁵¹³

Because of the principles pointed out supra 'a stratagem was adopted' in order to defeat the arrest of sisterships.⁵¹⁴ A proliferation of 'single-ship' companies - variously described as 'asset-poor' or 'brass-plate' concerns- occurred.⁵¹⁵ These had the advantage that their vessel could not be subject to arrest for claims against ships owned, not by the same company, but by 'sister companies'. In these 'sister companies' the shares were either immediately or ultimately controlled by the same person who owned the shares in the company owning the ship in question.⁵¹⁶

An action in rem in South African law can in principle be brought about by the arrest of a so-called 'associated ship' instead of the ship in respect of which the maritime claim arose. A definition of what has to be understood as an associated ship is given by the 1983 Act in s 3(7)(a):

An associated ship shall be a ship -

- (i) owned by the person who was the owner of the ship concerned at the time when the maritime claim arose; or
- (ii) owned by a company in which the shares, when the maritime claim arose, were controlled or owned by a person who then controlled or owned the shares in the company which owned

512 Cf Part A - Chapter II (4).

513 Cf Part A - Chapter II (5).

514 H Staniland and J S Mc Lennan 'The Arrest of an Associated Ship' (1985) 102 SALJ 148.

515 Ibid.

516 Shaw op cit 36.

the ship concerned.

Ships will be deemed to be owned by the same persons if all the shares in the ship owing companies owned by the same persons.⁵¹⁷ A person will be deemed to control a company if he has power to control the company directly or indirectly.⁵¹⁸

The provisions of the arrest of associated ships are unique to South Africa and have resulted in many judgments and comments since coming into force in 1983.⁵¹⁹

There are exceptions such as claims relating to the ownership of a share in a ship, and claims in respect of a mortgage, hypothec, right of retention or pledge of, or charge on, a ship when the attachment of an associated ship will not be allowed⁵²⁰. Another exception is referred to by s 3(9) of the 1983 Act, where the Minister of Justice can exclude (by notice in the South African Government Gazette and subject to such conditions as he may prescribe), any ship owned by a company named in the notice from being arrested as an associated ship.⁵²¹ This provision can be criticized. Firstly, no hint is given why some companies should be excluded and secondly, what class of company

517 The 1983 Act, s 3(7)(b)(i).

518 The 1983 Act, s 3(7)(b)(ii).

519 The Nefeli 1984 (3) SA 325 (C); The Kyoju Maru 1984 (4) SA 210 (D); The Zygus I 1984 (4) SA 444 (C); The Berg I 1984 (4) SA 647 (N); The Zygus II 1985 (2) SA 486 (C); The Emerald Transporter I 1985 (4) SA 133 (N); The Berg II 1986 (2) SA 700 (A); The Stavroula 1987 (1) SA 74 (C); The Jade Transporter II 1987 (2) SA 583 (A); Shaw op cit 37 ff; Hare op cit 72; Dillon & van Niekerk op cit 32; A Rycroft 'Changes in South African Admiralty Jurisdiction' (1984) LMCLQ 417 at 419; Booyesen op cit 81; Staniland 1984 Acta Juridica 271 at 276, (1986) 3 LMCLQ 279, (1985) 4 LMCLQ 462 at 467; Staniland & Mc Lennan op cit 148; D B Friedman 'Maritime Law in Practice and in the Courts' (1985) 102 SALJ 45 at 55 ff, (1986) 103 SALJ 678 at 685.

520 The 1983 Act, s 3(6). Cf Booyesen op cit 81.

521 See for instance: South African Marine Corporation Ltd and Unicorn Lines (Pty) Ltd R 267 in GG 9582 of 8 February 1985, corrected by R 482 in GG 9609 of 1 March 1985; Mobil Refiner owned by Petroleum Transport International (Pty) Ltd in GG 10414, Notice 1825 of 5 September 1986.

shall be excluded (perhaps only state-owned companies?). Finally, as Booyesen⁵²² has correctly pointed out, such a provision may lead to discrimination. The work of the administration of justice is complete at that moment when an act comes into force. Thereafter there is only the application and interpretation of the law by the courts who have to determine what is right or wrong and who can be sued and sentenced or not. One fears that the application of s 3(9) of the 1983 Act may produce high-handed decisions.

Another area of criticism of the associate-provisions is expounded by Friedman⁵²³ and concerns the question of 'association', which has to be determined at the time when the maritime claim arises.⁵²⁴ If therefore, says Friedman, there is a bona fide sale of an associated ship subsequent to the claim arising, the purchaser is in no way protected against a possible arrest of the vessel, and this, in turn, can conceivably give rise to hardship. Consideration should perhaps be given to some form of protection of a bona fide purchaser of a ship liable to be arrested as an associated ship. As stated earlier,⁵²⁵ the nature of the maritime lien does not provide for exceptions to the rule that it follows the ship, even if sold to a bona fide purchaser. The fact that the purchaser is bona fide may not lead to discrimination against the lienholder.

A further lack of clarity pertains to s 3(7)(a) of the 1983 Act. As Staniland and Mc Lennan⁵²⁶ have correctly stated, a loophole in the law occurs if the owner of the 'ship concerned' is an individual while, the owner of an alleged associated ship is a company. They give the following example:

522 Op cit 82.

523 (1986) 103 SALJ 678 at 686 f.

524 The 1983 Act, s 3(7)(a).

525 Chapter XIV (2) (b).

526 Op cit 150.

"Ship A is owned by Mr X, who owns all the shares in X Co, and this company owns ship B. Clearly the two ships are associated, but the wording of para (a)(ii) does not actually cover this situation. The reason is that shares in X Co are owned and controlled not by any 'company which owned the ship concerned': the owner of that ship (A) is Mr X himself. If B is the ship concerned, the loophole is the more apparent. When one considers that anything from a yacht to a submarine is a 'ship' as defined on s 1, it is apparent that this lacuna is not merely of academic importance."

Section 3(a) of the 1983 Act does not deal with ships owned by partnerships or other unincorporated associations.⁵²⁷ The Legislature's attention is demanded by these considerations and should include these aspects in an amendment.

Another problem arising from the associated ship provisions concerns the question of evidence. More often than not the construction of companies is non-transparent and it will therefore be difficult to prove the requirements of s 3(7)(b)(ii) of the 1983 Act, which provides that 'the companies are controlled and owned by the same person(s)'. Control means the power, either direct or indirect, of controlling the company.⁵²⁸ It is common cause that the onus of proof rests upon the plaintiff/ applicant to justify the arrest.⁵²⁹ He has to show that the person(s) against whom it is sought to invoke admiralty jurisdiction by arresting 'his' ship is the person who 'owns and controls' in terms of s 3(7)(b)(ii) of the 1983 Act. The difficulties which can arise are shown by The Nefeli,⁵³⁰ the first reported case to deal with the arrest of an

527 Friedman (1986) 103 SALJ 678.

528 The 1983 Act, s 3(7)(b)(ii).

529 See American Cotton Products Corporation v Felt and Tweeds Ltd 1953 (2) SA 753 (N) at 755B-E; Lendalease Finance (Pty) Ltd v Corporation De Merca-Deo Agricola and others 1976 (4) SA 464 (A) at 489B; The Aventicum (1978) 1 Lloyd's Rep 184 QB at 186; The Maritime Trader (1981) 2 Lloyd's Rep 153 QB at 157; The Kyoju Maru 1984 (4) SA 210 (D) at 214I.

530 1984 (3) SA 316 (C).

associated ship.⁵³¹ In order to satisfy the requirements of s 3(7)(b)(ii) of the 1983 Act, it was not possible for the applicants to prove the necessary common ownership. Reliance had thus been placed on the fact of common control. King AJ⁵³² pointed out that it was not sufficient that the ships had the same managing agents because this does not necessarily lead to overall control. The applicants could prove 'that each of the companies which owned one of the alleged sisterships had as its president/ director the same individual, who could sign and act on behalf of the corporation and with his signature bind the corporation.'⁵³³ A further factor common to all companies could be found in the person of the director/ secretary. King AJ was satisfied that the power to directly control the several companies had been shown and that the ships were associated ships.

One must note that the associated ship provisions are not retrospective in their operation. One cannot thus follow Leon J in The Kyoju Maru⁵³⁴ where he held that the 'provisions are procedural and retrospective in the absence of express provisions to the contrary'. A contrary decision, which one should follow, was given in The Berg I,⁵³⁵ where Milne JP delivering the majority judgment held that ss 3(6) and (7) of the 1983 Act 'did not merely create a new remedy but imposed an obligation upon persons who had no obligations in law before, the section referred to a matter of substantive rights and not merely procedure.' The application of s 3(6) of the 1983 Act retrospectively 'would

531 Staniland & Mc Lennan op cit 149; Staniland 1984 Acta Juridica 271 at 276.

532 The Nefeli 1984 (3) SA 325 (C) at 326; The Stavroula 1987 (1) SA 74 (C) at 78.

533 Ibid.

534 1984 (4) SA 210 (D) at 214G.

535 1984 (4) 647 (N) at 648F; Milne JP's judgment was confirmed in the Appellate Division in The Berg II 1986 (2) SA 700 (A). Cf Staniland 'Arrest of Associated Ship Not Retrospective in Operation' (1986) 3 LMCLQ 279, (1985) 4 LMCLQ 462 at 476. Cf The Atlantic Victory 1986 (4) SA 329 (D).

interfere with vested rights with a vengeance.⁵³⁶ This result corresponds with the principles of German law in which new acts or statutes are not retrospective in their operation. However, after the commencement of a new or amended act there is a "transitional time" in which a claim brought into court before the commencement of the new act or its amendment is governed by the old law, whilst actions instituted after the coming into force of the new act or its amendment are adjudicated upon the law of the new act. So it might happen that in the "transitional time" cases with the same facts are decided under different laws. This is however not an unjustified condition because every case will be held under the law which was or is applicable under the accrual of the actionable claim.

For the purposes of legal security, in South Africa the law which was applicable at the accrual of the actionable claim should be taken as the basis for the judgment.

The provisions of associated ships do apply to a demise charterer who, for the purposes of an associated ship arrest, is deemed to be the owner of the chartered ship. Thus, a ship owned by a demise charterer can be arrested as an associated ship to enforce claims against the demise charterer which arose in connection with the demise chartered ship.

Lastly, the associated ship provisions do not apply with regard to attachments in personam.

(4) Limitation of liability

The principle of the limitation of the shipowner's liability is limited in both South African and German law. The possibility of limiting the liability will probably lead to the arrest not fulfilling its aim, either because the damage is not fully covered or because a complete limitation which excludes any

536 The Berg I 1984 (4) SA 647 (N) at 662.

compensation for a damage applies.

South Africa, unlike Germany,⁵³⁷ has not ratified the International Convention on Limitation of Liability for Maritime Claims of 1976.⁵³⁸

The principles of limitation of liability are contained in ss 261 to 263 of the Merchant Shipping Act.⁵³⁹ Section 261 of the Merchant Shipping Act gives the owner of a ship the right to limit his liability in accordance with the rule which is generally accepted, namely, that the damage should be caused without his actual fault or privity. The Merchant Shipping Act, s 263(2) provides 'for the purpose of s 261 Merchant Shipping Act to extend the word owner to include any charterer, any person interested in or in possession of such a ship and a manager or operator of such ship'. The Merchant Shipping Act does not cover the master, the crew or other servants of the owner.⁵⁴⁰ Section 261 of the Merchant Shipping Act limits liability to an amount equivalent to 2635 gold francs for each ton of ship's tonnage in respect of loss of or personal injury.⁵⁴¹ In respect of loss of or damage to property, liability is limited to an amount equivalent to 850 gold francs for each ton of ship's tonnage.⁵⁴² Finally where both types of damage are claimed⁵⁴³ liability is limited to an amount equivalent to 2635 gold francs for each ton of the ship's tonnage with a prescribed preference in favor of the former.⁵⁴⁴

If one compares the South African provisions with the International

537 Cf Part A - Chapter II (3).

538 Appendix VI.

539 Act 57 of 1951 as amended, Appendix XII. Cf Rule 21(2) of the Admiralty Proceedings Rules.

540 Dillon & van Niekerk op cit 94.

541 The Merchant Shipping Act, s 261(1)(a).

542 The Merchant Shipping Act, s 261(1)(b).

543 The Merchant Shipping Act, s 261(1)(c).

544 Cf Bamford op cit 68; Dillon & van Niekerk op cit 89; Shaw op cit 121 f.

Convention on Limitation of Liability of 1976 one notices that there are certain similarities.

The amounts set out in s 261 of the Merchant Shipping Act will be specified pursuant to s 261(5) of the Merchant Shipping Act by the Director-General: Transport Affairs. He will from time to time give notice in the Government Gazette as to what amounts in Rand will be equivalent to 2635 and 850 gold francs respectively.⁵⁴⁵

The 1983 Act contains a provision in s 1(1)(ii) relating to the limitation of liability. Under s 1(1)(ii)(t) of the enumerated maritime claims one finds that a maritime claim includes:

"any claim relating to the limitation of the liability of the owner of a ship or of any other person entitled to any similar limitation of liability."

This maritime claim can be enforced⁵⁴⁶ by means of an action in rem, ie an arrest.

When the question of limitation of liability arises it is up to the defendant owner to raise the issue in his plea, 'the onus than being on him to establish the absence of his actual fault or privity and the tonnage of the vessel, when he wants to seek to limit his liability.'⁵⁴⁷

As s 261 of the Merchant Shipping Act is based on s 503 of the British Merchant Shipping Act⁵⁴⁸ the South African courts will have regard to the English law and judgments dealing with the question as to the meaning of

545 Cf Dillon & van Niekerk op cit 93.

546 In accordance with s 3(4) of the 1983 Act.

547 Bamford op cit 69. Cf The Luneplate 1986 (4) SA 865 (C); The England (1973) 1 Lloyd's Rep 373 (CA); The Edward Dawson (1914) 1 KB 419.

548 57 & 58 Vict c 60; cf Dillon & van Niekerk op cit 87.

'caused without actual fault or privity'. Van Heerden J⁵⁴⁹ in the first reported case concerning s 261 Merchant Shipping Act reasoned as follows:

"There does not appear to be any reported South African case in which the question has been considered as to whether the claimant's loss was 'caused without the actual fault or privity' of the owner of the ship within the meaning of s 261 of Act 57 of 1951, but the question has been extensively dealt with by the English courts in relation to s 503 of the English Merchant Shipping Act of 1894. The reason for introducing a provision for such limitation in our legislation would appear to be the same as in the case of English law, namely to enable our ships to trade on equal terms with those of other nations, and there seems to be no valid reason why the similar provision should not be construed in accordance with the English authorities⁵⁵⁰ on the subject."

Thus if one looks at the English judgments, Buckley LJ⁵⁵¹ has, for instance, defined the words 'actual fault and privity' as follows:

"The words 'actual fault or privity' in my judgment infer something personal to the owner, something blameworthy in him, as distinguished from constructive fault or privity such as the privity of his servants or agents. But the words 'actual fault' are not confined to affirmative or positive acts by way of fault. If the owner be guilty of an act of omission to do an 'actual fault' than if the act had been one of commission. To avail himself of the statutory defence, he must show that he himself is not blameworthy for having either done or omitted to do something or been privy to something. It is not necessary to shew knowledge. If he has means of knowledge which he ought to have used and does not avail himself of them, his omission

549 The Luneplate 1986 (4) SA 865 (C) at 875H-I. The facts were as follows: In terms of an oral agreement between the parties, the defendant undertook to tow an unmanned vessel owned by the plaintiff from Ijmuiden to Bremerhaven on the terms and conditions embodied in the Unterweser towage agreement. The plaintiff's vessel ran aground during the journey when both the towline and emergency line utilized by the defendant's tug for the tow parted.

550 The England (1973) 1 Lloyd's Rep 373 (CA).

551 The Edward Dawson (1914) 1 KB 419 at 432.

so to do may be a fault, and, if so, it is an actual fault and he cannot claim the protection of the section."

Another case, The England,⁵⁵² dealt with the 'actual fault or privity' of managers/ directors of a shipping company. The relevant facts of the case were that a collision took place on the River Thames during the hours of darkness in the early morning of December 20, 1963 between The England and The Aletta. The Aletta navigated without a pilot. Her master failed to give a single whistle signal required by the Port of London river by-laws. These by-laws were totally unknown to the master of The Aletta. The questions was whether the director of The Aletta was not negligent in not providing the ship with the by-laws and, if so, it must be regarded as having been relevantly causative for the collision. In trying to give an answer as to the 'fault' may have been, Sir Gordon Willner, giving one of the judgments in The England,⁵⁵³ quoted a sentence in a case called The Radiant⁵⁵⁴ which he thought appropriate to The England:

"The fundamental fault in respect of which I am disposed to blame Mr B (the manager) is that he never had any proper comprehension of what his duty as managing director of a fleet of this sort was."

Finally in The Luneplate, the actual fault or privity of the managing director was described as follows:⁵⁵⁵

"... actual fault or privity on the part of the defendant⁵⁵⁶ has been shown in regard to his lack of instruction and supervision concerning

- (i) the inspection of towing stretchers;
- (ii) the fitness for use of towing stretchers; and
- (iii) the use of a polypropylene line as a towing line;

552 (1973) 1 Lloyd's Rep 373 (CA).

553 Op cit 383.

554 (1958) 2 Lloyd's Rep 596 QB at 615.

555 1986 (4) SA 865 (C) at 881D per van Heerden J.

556 Towage contractor.

its lack of instruction to its masters to report on and comply with any qualification attached to a seaworthiness certificate of the object being towed and its failure in appropriate circumstances to enquire as to the existence of any such qualification; its failure to prevent the commencement of the towage notwithstanding that the master had failed to comply with his obligation to report on the prevailing weather conditions; and its failure in appropriate circumstances to enquire as to weather conditions and the towing equipment being used in the circumstances."

The cases thus show that it will depend on the individual case as to what 'actual fault and privity' will mean. The cases thus merely give guidelines.

(5) International Convention relating to the arrest of seagoing ships 1952
(ICRASS)

Despite the fact that the Admiralty Jurisdiction Regulation Act (aside from other sources) is based on the principles set out in the Arrest Convention of 1952(ICRASS), South Africa has, up to now, not ratified the Arrest Convention of 1952. As the trend is more and more towards international uniformity, it is to be hoped that South Africa will not hesitate too long before ratifying the Arrest Convention of 1952.

ESSENTIAL CHARACTERISTICS FOR THE ENFORCEMENT OF A CLAIM IN ADMIRALTY
PROCEEDINGS

(1) General remarks

Before the particularities of the action in rem, ie the arrest of a ship, are discussed in detail, some general remarks with regard to the principles of South African admiralty jurisdiction and procedure have to be made.

The essentials which are discussed more fully in the following chapters may be summarized as follows: If a creditor wants to bring a claim in admiralty proceedings he must, firstly, have a claim which is a 'maritime claim' as defined in s 1(1)(ii) of the Admiralty Jurisdiction Regulation Act 105 of 1983 (the 1983 Act) and, secondly, the court must have or be conferred with jurisdiction which, in an action against a foreigner, is generally effected by an arrest or attachment of the vessel or other property in South Africa or within its territorial waters.⁵⁵⁷ Pursuant to s 2 of the 1983 Act, neither the place where the claim arose nor the place of registration of the ship (her flag), nor the residence, domicile or nationality of its owner or of the claimant is relevant to the question whether or not the South African courts, ie each provincial and local division of the Supreme Court (including a circuit local division) has jurisdiction.

The divisions mainly dealing with admiralty matters in South Africa are:⁵⁵⁸

- The Cape Provincial Division : Cape Town, Walvis Bay, Saldanha Bay
- The South Eastern Cape Local Division: Mosselbay, Port Elizabeth
- The Eastern Cape Division : East London

⁵⁵⁷ Cf Territorial Waters Act 1963 (Act 87 of 1963).

⁵⁵⁸ Cf Hare op cit 58.

- The Durban and Coast Local Division : Durban, Richards Bay
- The Natal Provincial Division : Durban, Richards Bay

The 1983 Act offers a claimant two different forms of proceedings, namely, the action in personam (s 3(1) of the 1983 Act) and the action in rem (s 3(4) of the 1983 Act).

In an action in personam, the person of the debtor or wrongdoer is cited as the defendant and in actions in rem the ship, cargo, bunker (each of them separately or together) are the object of the arrest and cited as defendant. Proceeding from the wording 'action in rem' and 'action in personam' one might think that with an action in rem only a res (for instance ship, cargo or freight) is the object of the arrest whereas with an action in personam a person (for instance the shipowner) is to be arrested. This is in fact the case in German law⁵⁵⁹ and seems, by reading the 1983 Act verbatim, the same for South Africa. The 1983 Act, s 3 reads as follows:

- s 3(2) : An action in personam may only be instituted against a person.
- s 3(5) : An action in rem shall be instituted by the arrest ... concerned of property of one or more of the following categories against or in respect of which the claim lies:
 - (a) The ship, with or without its equipment, furniture, stores or bunkers;
 - (b) the whole or any part of the equipment, furniture, stores or bunkers;
 - (c) the whole or any part of the cargo;
 - (d) the freight.

However legal authorities in South Africa do not follow this wording and, consequently the foreign litigant, familiar with statutory law and used to be the wording of an Act or Statute as being the basis for legal findings, is easily confused. Legal practice in South Africa concerning the action in personam and the action in rem is as follows: The action in rem is instituted

559 Paras 916 and 918 ZPO.

by an arrest for instance of a ship⁵⁶⁰ and is directed against a res, as in German law.⁵⁶¹ With an action in personam, however, the aim of the applicant is not really directed at a person (for instance a shipowner) but at the whole property of that person and, again, a res like in an action in rem is the object of an admiralty action. This interpretation differs from the wording of the German provisions because with an action in personam in German law a person is not only called the defendant, he is in fact the defendant. This means that he can for instance be arrested and put in jail.⁵⁶² An action in rem in German law is (as in South African law) directed at the res of the owner of the ship or company and in fact his whole property, not only the ship, cargo or freight can be sued by an action in rem or an action in personam. The main difference in South African law between an action in rem and an action in personam seems to be the characterization of the defendant:

- With an action in rem it is the ship and
- with an action in personam, it is a "person" as set out in s 3(2) of the 1983 Act.

Accordingly one has to distinguish between an action in personam and an action in rem, the first enforced by attachment⁵⁶³ the latter by an arrest.

As it will be shown later,⁵⁶⁴ the legal procedure to 'found and confirm jurisdiction' is called an attachment as well and is ruled by the provisions of the action in personam.

The question whether to proceed in an action in rem or in an action in

560 The 1983 Act, s 3(5).

561 See however The Commodore 1943 NPD 27 and The Fabian 1921 CPD 148.

562 Cf Part A - Chapter XI.

563 See however The Answald 1912 AD 546.

564 See Chapter XIX (3).

personam or in both⁵⁶⁵ depends on the individual case. One must bear in mind that with the arrest of a ship one only arrests the 'value of a ship after a judicial sale'. This value is the basis for compensation of the claim. If the ship is an old small one, it might happen that the money from the sale of the ship is not sufficient enough to discharge the claim, especially when there are other claimants with maritime liens of a better ranking. On the other hand, the action in rem gives the plaintiff the advantage of claiming against the ship as defendant and then he does not have the burden of proving the ownership as required in an action in personam. The action in personam has the advantage that the attachment over the whole property of the owner (defendant) is possible and the full claim can be sued, this not being dependent on the value of the ship. However, as already stated above, the claimant has the onus of proving ownership of the res at the time of the attachment. If therefore the proceeds of a (fictitious) judicial sale will be sufficient enough, an action in rem is the most efficient and recommended admiralty procedure. If there is, however only the slightest doubt that the proceeds could be not enough, either an action in personam or both an action in personam and an action in rem are the recommended admiralty procedures.

(2) The claims for an arrest/ attachment - s 1(1)(ii) of the 1983 Act

As mentioned earlier, an essential for the enforcement of a maritime claim in South Africa, either by an action in personam or an action in rem, is that the claim must be a 'maritime claim' as defined in s 1(1)(ii) of the 1983 Act. However, even if a claim is not a maritime claim as defined, an action under the common law would lie in favour of an incola plaintiff, who can attach property to found or confirm jurisdiction in proceedings similar to an application for attachment prior to an action in personam. Such an action

565 Rule 20(5) of the Admiralty Proceedings Rules (the Rules).

would, of course, not be brought in the Admiralty Court, but in one of the parochial courts.

The maritime claims listed in ss 1(1)(ii)(a) to (z) of the 1983 Act which are subject to the admiralty jurisdiction of the Supreme Court, include all the maritime claims enumerated in the International Convention of Arrest of Sea-going Ships of 1952⁵⁶⁶ and the heads of admiralty jurisdiction as set out in s 20(2) of the United Kingdom Supreme Court Act of 1981.⁵⁶⁷ They can be described briefly⁵⁶⁸ as follows:⁵⁶⁹

- (a) and (b) : ownership and possession
- (c) : mortgages
- (d) : damage caused by a ship
- (e) : damage to a ship
- (f) : loss of life and personal injury
- (g) : loss or damage to goods
- (h) and (i) : carriage of goods and charterparties⁵⁷⁰
- (j) : salvage⁵⁷¹
- (k) : towage or pilotage⁵⁷²
- (l) : materials and services
- (m) : construction and equipment
- (n) : wages⁵⁷³
- (o) : disbursements
- (p) : general average
- (q) : bottomry and respondentia
- (r) : marine insurance
- (s) : forfeiture
- (t) : limitation of liability
- (u) : distribution of fund in Court
- (v) : maritime lien
- (w) : oil pollution

566 Appendix III. Cf Shaw op cit 10 ff.

567 C 54. Cf The Public General Acts and General Synod Measures (1981) Part II at 1138.

568 Cf Shaw op cit 10 ff.

569 In detail see ss 1(1)(ii)(a)-(z) of the 1983 Act.

570 Cf The Zygos I 1984 (4) SA 444 (C).

571 Cf The Brazilia II 1988 (1) SA 103 (C); The Manchester 1981 (2) SA 798 (C); H Staniland 'Towage or salvage? The Manchester - case and comment' (1988) 1 LMCLQ 16.

572 Ibid.

573 The Antigoni Tsisiris 1981 (3) SA 950 (N).

- (x) : arbitration awards
 (y) : indemnity and contribution.⁵⁷⁴

Although the Colonial Courts of Admiralty Act 1890 has been repealed as regards its application in South Africa,⁵⁷⁵ the 1983 Act keeps the heritage of colonial jurisdiction. In accordance with s 1(1)(ii)(z) of the 1983 Act all claims which could have been heard under the Colonial Courts of Admiralty Act 1890 prior to 1983 are defined as maritime claims. Booyesen⁵⁷⁶ levels the criticism that this article, having been enacted as a catch-all provision to cover every possible contingency, 'reflects an extremely cautious and unsure legislature or draughtsman. Even after 1983 the English Admiralty Court Acts of 1840 and 1861 and the inherent common law jurisdiction of the Colonial Courts of Admiralty therefore remains relevant to a determination of South African admiralty court jurisdiction in so far as they bestow a wider jurisdiction than the Admiralty Jurisdiction Regulation Act'. Booyesen's criticism is correct as to the application of the colonial jurisdiction, but one cannot agree that the catch-all provision reflects an 'extremely cautious and unsure legislature or draftsman'. Perhaps it is a little bit unfortunate to create a catch-all provision (which principally is necessary to ensure that shipping matters not listed in s 1(1)(ii) of the 1983 Act will be heard by an admiralty court) which refers to what can be called the old jurisdiction. It might have been better to create a catch-all provision which gives the Admiralty Courts jurisdiction to hear any maritime claim, whether or not specifically defined as such in the 1983 Act.

With regard to German law, the 1983 Act gives a much wider description of claims which can be heard before the courts. However, one must remember that the German law does not offer special Admiralty Courts. In shipping matters

574 The Zygus I 1984 (4) SA 444 (C).

575 See s 16 of the 1983 Act (repeal of laws, schedule).

576 Op cit 76.

there are special chambers of the Higher District Court (Kammer fuer Handelssachen am Landgericht) and for arrest proceedings,⁵⁷⁷ usually the Magistrates' Courts (Amtsgerichte) are the competent courts.

⁵⁷⁷ Cf Part A - Chapter III (2) (c).

C H A P T E R XVI

LEGAL REQUIREMENTS OF AN ACTION IN REM (ARREST) - SS 3(4) AND (5) OF THE 1983 ACT

An arrest will be allowed, if (besides other preconditions which will be discussed later) the preconditions of s 3(4) of the Admiralty Jurisdiction Regulation Act 105 of 1983 (the 1983 Act) are fulfilled. Section 3(4) of the 1983 Act provides that, without prejudice to any other remedy that may be available to a claimant or to the rules relating to the joinder of cause of action, a maritime claim⁵⁷⁸ may be enforced by an action in rem:

- (a) if the claimant has a maritime lien over the property to be arrested; or
- (b) if the owner of the property to be arrested would be liable to the claimant in an action in personam in respect of the cause of action concerned.

Furthermore s 3(5) of the 1983 Act provides that an action in rem shall be instituted by an arrest within the area of the jurisdiction of the court concerned of property of one or more of the following categories against or in respect of which the claim lies:

- (a) The ship, with or without its equipment, furniture, stores or bunkers;
- (b) the whole or any part of the equipment, furniture, stores or bunkers;
- (c) the whole or any part of the cargo;
- (d) the freight.

(1) The preconditions of s 3(4)(a) of the 1983 Act - maritime lien

In terms of s 3(4)(a), the 1983 Act provides that a maritime claim can be enforced by an action in rem (an arrest) if the claimant has a maritime lien

⁵⁷⁸ As set out in the previous chapter.

over the property (eg the ship), even though the owner of the vessel is not liable for the debt which gives rise to the claim. The 1983 Act does not however define a maritime lien.⁵⁷⁹ The only references to a maritime lien are to be found in ss 3(4)(a), 1(1)(ii)(v) and 11(1)(e) of the 1983 Act. In order to find the meaning of a maritime lien one therefore has to look at English law. This follows from s 6(1) of the 1983 Act where English law as it stood on 1 November 1983 is applicable.⁵⁸⁰

The English admiralty law recognizes six categories of maritime liens, namely:⁵⁸¹

- | | | | |
|-------|-------------------------|---|---|
| (i) | Salvage | - | cf s 11(1)(c)(vi) of the 1983 Act |
| (ii) | Collision damage | - | cf s 11(1)(c)(iii) and/ or (iv) of the 1983 Act |
| (iii) | Seaman's wages | - | cf s 11(1)(c)(ii) of the 1983 Act |
| (iv) | Bottomry ⁵⁸² | - | |
| (v) | Master's wages | - | cf s 11(1)(c)(i) of the 1983 Act |
| (vi) | Master's disbursements | - | cf s 11(1)(c)(i) and/ or (v) of the 1983 Act. |

This numerus clausus is restricted to debts incurred in respect of or occasioned by the vessel and which may arise, as stated by Nienaber J,⁵⁸³ ex contractu (for instance seaman's and master's wages), ex delicto (collision

579 See the definition of Dillon & van Niekerk op cit 13. Cf Chapter XIV (2) (b) with regard to the recognition of a foreign maritime lien and the position thereto in German law.

580 Cf H Staniland 'The Recognition of an American Maritime Claim for Services and Disbursements' (1986) 103 SALJ 542 at 543; Hare op cit 61; The Fidias 1986 (1) SA 714 (C) at 716B; The Kalantiao 1987 (4) SA 250 (D) at 253D-F. "Roman-Dutch law does not know the maritime lien. It recognizes certain tacit hypothecs over ships but these are greatly diminished by the rule that they are extinguishable on alienation because Roman-Dutch law, differing from civil law holds to the maxim mobiles non habent sequelam," Shaw op cit 88. See Bamford op cit 21 ff.

581 Cf Hare op cit 61; H Staniland 'The Admiralty Jurisdiction Regulation Act and the Maritime Claim of a Saudi Arabian Necessaries Man' (1986) 103 SALJ 350 at 352; The Fidias 1986 (1) SA 714 (C) at 717B.

582 This is (now) an obsolete lien in English law as well as in German law. Cf The Halcyon Isle (1981) AC 221 (PC) at 232H. See Federal Law Gazette (Bundesgesetzblatt) 1972 I, at 966.

583 The Fidias 1986 (1) SA 714 (C) at 715F.

damage) or quasi ex contractu (for instance master's disbursements).

The discussion with regard to maritime liens goes back to the 19th century and Jervis CJ⁵⁸⁴ tried to give the first definition of a maritime lien, when he said that this was meant to be

"... the foundation of the proceeding in rem, a process to make perfect a right inchoate from the moment a lien attaches; and whilst it must be admitted that where such a lien exists, a proceeding in rem may be had, it will be found to be equally true, that in all cases where a proceeding in rem is the proper course, there a maritime lien exists, which gives a privilege or claim upon the thing, to be carried into effect by legal process. This claim or privilege travels with the thing, into whosoever possession it may come. It is inchoate from the moment the claim or privilege attaches, and when carried into effect by legal process, by a proceeding in rem, relates back to the period when it first attached."

The last sentence of Jervis' definition has been the cause of a controversy which continues to this days. The word 'inchoate' according to one opinion,⁵⁸⁵ leads to the conclusion that the maritime lien is a procedural remedy. A contrary opinion states that the reference of Jervis CJ to the maritime lien as an 'inchoate' right has mistakenly been interpreted to mean that a maritime

584 The Bold Buccleugh II (1851) 7 Moo PCC 267 at 284. The facts of the case were as follows: The steamship Bold Buccleugh ran down and sank the barque William in the Humber in 1848, was seized under process in Leith in an action against her owners upon that cause in the Court of Session in Scotland in January 1849, was bailed, released and sold to a bona-fide purchaser without notice of the cause or claim pending, was sent to Hull by her new owner in August, 1849, and was arrested by warrant of the High Court of Admiralty. The new owner appeared under protest, alleging a lis pendens in Scotland; the Scottish action was subsequently abandoned, and Dr Lushington overruled the protest and found for the owners of the William. The cause was taken on appeal to the Privy Council, which held that the Scottish action - being in personam with collateral seizure - could not bar a suit in rem in the Admiralty Court, and, in regard to a second defence asserted below but not considered by Dr Lushington, that the collision lien survived even a bona-fide sale without notice, cf F L Wiswall The Development of Admiralty Jurisdiction and Practice since 1800 (1970) at 155 f.

585 See for instance The Halcyon Isle (1981) AC 221 (PC).

lien is procedural, and that a maritime lien has to be regarded as a substantive right.⁵⁸⁶

The question is accordingly whether the maritime lien is a substantive right or merely a procedural remedy. This question became a real problem with regard to the recognition of a foreign maritime lien, for instance in the cases The Two Ellens,⁵⁸⁷ The Colorado,⁵⁸⁸ The Halcyon Isle,⁵⁸⁹ The Khaliij Sky,⁵⁹⁰ The Fidias,⁵⁹¹ The Andrico Unity⁵⁹² and The Kalantiao.⁵⁹³ According to English law the issue of whether a maritime claim attracts a maritime lien will be resolved by the lex fori on the basis of a general choice-of-law rule that matters of procedure are decided according to the law of the forum.⁵⁹⁴ In South African law, because there is no clear existing definition, it has to be determined, firstly, which classification a maritime lien has and, secondly, whether or not South African courts will recognize a maritime lien created by the law of a foreign state in circumstances in which the South African law would not confer such a lien.⁵⁹⁵

As pointed out above, s 6 of the 1983 Act provides that South African Admiralty Courts must apply the law which the High Court of Justice of the United Kingdom in the exercise of its admiralty jurisdiction would have

586 See for example Staniland (1986) 103 SALJ 542 at 547.

587 (1872) 4 LR (PC) 161.

588 (1923) P 102.

589 (1981) AC 221 (PC).

590 1986 (1) SA 485 (C).

591 1986 (1) SA 714 (D).

592 1987 (3) SA 794 (C).

593 1987 (4) SA 250 (D).

594 Staniland (1986) 103 SALJ 542 at 543. Cf The Halcyon Isle (1981) AC 221 (PC).

595 The Kalantiao 1987 (4) SA 250 (D) at 253B.

applied⁵⁹⁶. But the question then arises: What law would a (notional) court in England (including the highest court) apply? The House of Lords has not yet spoken on the point in question. Only the Privy Council, the final court of appeal for the colonies, has decided on this point in The Halcyon Isle.⁵⁹⁷ However, the Privy Council is not part of the appellate hierarchy of the Supreme Court. Its decisions do not bind either the High Court of Appeal or the House of Lords⁵⁹⁸. Its decisions are of 'great persuasive value',⁵⁹⁹ but no more. It follows from this that the decision of the Privy Council in The Halcyon Isle does not bind the Admiralty Courts in South Africa. Accordingly, having relinquished the burden of having to follow the decision of the Privy Council in The Halcyon Isle, one has to look at the House of Lords, which is part of the appellate hierarchy of the Supreme Court.⁶⁰⁰ As already stated one will find that the House of Lords has not yet decided on the matter. Therefore, one has to look at the Court of Appeal for the decision of The Colorado⁶⁰¹ and to consider the meaning of that judgment. Having done that, one has to look at the Privy Council decision Halcyon Isle if one is not sure whether to follow The Colorado or not. This in principle was the path followed by Leon J in The Kalantiao, where the facts were as follows: The Registrar of the court issued a warrant of arrest on behalf of the plaintiffs, directing the Sheriff to arrest the ship Kalantiao and keep it under arrest until further order. Subsequent to

596 The Fidias 1986 (1) 714 (D) at 718H; The Kalantiao 1987 (4) SA 250 (D) at 253B.

597 (1981) AC 221 (PC). The judgment will be discussed later.

598 References for the fact that the decisions of the Privy Council are not binding can be found in The Kalantiao 1987 (4) SA 250 (D) at 255F; cf Hare op cit 62.

599 Leon J in The Kalantiao 1987 (4) SA 250 (D) at 255F. Cf Staniland (1986) 103 SALJ 542 at 543.

600 Appellate Jurisdiction Act. See Halsbury's Laws of England 4ed (1982) (vol 37) para 710 at 545.

601 (1923) P 102.

the arrest, security was filed by the defendants and the ship was allowed to sail. The plaintiffs had a valid claim against the time charterers of the Kalantiao, in respect of stevedoring services rendered to the vessel in ports of the United States of America in pursuance of an agreement concluded in the USA. The proper law of the contract was the federal law of the United States of America. In terms of that law the plaintiffs enjoyed a maritime lien.

Leon J looked at the judgment in The Colorado,⁶⁰² a ship which was registered in France. The appellants were ship repairers in Cardiff who had effected repairs to the ship, and, failing to obtain payment of their claim, had arrested the vessel in an action in rem and obtained judgment and an order for sale in November 1921. The vessel was sold by the Marshal and the proceeds paid into court. The question which fell to be decided by the court was whether the holders of a French mortgage which was in the nature of a hypothec, should rank above or below a necessaries man in respect of the proceeds of the sale of the ship. Under French law a hypothec ranked below a claim by a necessaries man. In English law a mortgage does not enjoy a maritime lien at all but only has a statutory right in rem. The Court of Appeal held that the holder of the French registered mortgage had priority over the necessaries man. The quintessence of The Colorado was the lex loci should determine the nature of the claim and thereafter the lex fori should govern the priorities.⁶⁰³ Bearing this result in mind, one looks at The Halcyon Isle⁶⁰⁴ and notes that this case has a minority and a majority judgment. The minority referred to The Colorado as support and held that the maritime lien created by the lex loci had to be recognised as such, and that the maritime lien was a substantive property right

602 Ibid.

603 The Colorado (1923) P 102 at 110 f. Cf Staniland (1986) 103 SALJ 542 at 547.

604 (1981) AC 221 (PC). Cf M M Cohen 'In defence of the Halcyon Isle' (1987) 2 LMCLQ 152.

attaching to the claim as soon as the cause of action arose.⁶⁰⁵

The judgment in The Halcyon Isle concerned two claims competing for priority ranking against the proceeds of the sale of the ship the Halcyon Isle. One claim was that of a mortgagee and the other was the claim of a US repairman asserting that he had acquired a maritime lien under US law in circumstances which English law would not have recognised as giving rise to a lien.

The Halcyon Isle has, as already stated, produced two controversial opinions. One is the minority judgment of Lord Salmon and Lord Scarman⁶⁰⁶ who were of the opinion that:

"... the English Court of Appeal in The Colorado adopted the approach which is correct in principle. A maritime lien is a right of property given by way of security for a maritime claim. If the Admiralty Court has, as in the present case, jurisdiction to entertain the claim, it will not disregard the lien. A maritime lien validly conferred by the lex loci is as much part of the claim as is a mortgage similarly valid by the lex loci. Each is a limited right of property securing the claim. The lien travels with the claim, as does the mortgage: and the claim travels with the ship. It would be a denial of history and principle, in the present chaos of the law of the sea governing the recognition and priority of maritime liens and mortgages, to refuse the aid of private international law."

The minority, hence, classified the maritime lien as a substantive right. It considered the applicability of the decision of The Colorado and came to the

605 Cf Staniland (1986) 103 SALJ 542 at 547; Shaw op cit 86.

606 The Halcyon Isle (1981) AC 221 (PC) at 250C-E. The facts of the case were as follows: Mortgagee held a mortgage on a British ship dated April 27, 1973. In March 1974 American ship-repairers carried out repairs to the ship in New York. Under USA law they were entitled to a maritime lien for the price of the repairs. The ship sailed from New York. In August 1974 both the ship-repairers and the mortgagees started admiralty actions in rem against the ship in the High Court of Singapore. In September the ship was arrested in Singapore in the mortgagees action and in March 1975 she was sold by order of the Court. The proceeds of sale were insufficient to satisfy all the claims made by the owner's creditors. The ship-repairers applied to the High Court for a declaration that they were entitled to a maritime lien for the price of the repairs. The mortgagees applied for a determination of priority of payments from proceeds of the sale.

conclusion

"(that) the case is a neat illustration of the application of two principles of the law. The court looks to the lex loci to determine the nature of the claim. Having established its nature, the court applies the priorities of its own law, the lex fori."⁶⁰⁷

In accordance with the minority judgment, Munnik JP in The Khalij Sky⁶⁰⁸ came to the same conclusion.⁶⁰⁹

Contrary to the minority judgment the majority held (per Lord Diplock⁶¹⁰) that a maritime lien arose in circumstances which, had they occurred in England, would not have given rise to a maritime lien in English maritime law, and would not be recognised and applied in considering questions of priorities among claimants to proceeds of the sale of the ship.⁶¹¹ The majority thus regards the maritime lien as a procedural remedy and not as a substantive right. The court looks at the lex fori to determine the nature of the claim. The ship-repairers lien was therefore not enforceable and the mortgagees claim

607 The Halcyon Isle (1981) AC 221 (PC) at 248G-H.

608 1986 (1) SA 485 (C) at 493G. The facts of the case were as follows: Both applicants individually entered into contracts with the head charterer and for the sub-charterer of the respondent vessel whilst it was in the port of New Orleans in the State of Louisiana in the USA, a port other than its home port, the contracts being respectively for agency services and disbursements for necessities in the case of first applicant and stevedoring in the case of second applicant. First applicant performed the services contracted for and in the result the head charterer and/ or sub-charterer became liable for the payment of certain sums of money specified in the papers but not admitted by respondent. It is common cause that according to United States law, both applicants have a maritime lien on the vessel in respect of the services and disbursements in question enforceable by an action in rem and this is so irrespective of whether credit was given to the vessel or to the charterer.

609 The minority judgment has been approved by certain writers, such as Staniland (1986) 103 SALJ 542 and Shaw op cit 86 ff. In support of the minority judgment see also the Canadian case The Strandhill (1926) 1 Ex CR 226.

610 The Halcyon Isle (1981) AC 221 (PC) at 229D ff.

611 The Andrico Unity 1987 (3) SA 794 (C) at 802D-G.

was entitled to priority.⁶¹²

The majority judgment in The Halcyon Isle has been approved in South Africa in the cases of The Andrico Unity⁶¹³ (per Marais J) and The Kalantiao⁶¹⁴ (per Leon J). Marais J⁶¹⁵ pointed out that in his respectful opinion the view of the majority in The Halcyon Isle "was not in conflict with prior English authority and rested upon readily understandable considerations of policy". He opined further as follows:

"As far as I am aware, the majority's discussion has not been repudiated or criticized in any subsequent case in England. Whatever the position may be in other jurisdictions, the law of England at the relevant date appears to me to be that which is reflected in the decision of the majority in The Halcyon Isle. A notional High Court of Justice exercising admiralty jurisdiction on 1 November 1983 would therefore have declined to recognize the Argentine lien and would have refused to arrest the vessel in rem. If the vessel had already been arrested, it would have ordered that the arrest be discharged."⁶¹⁶

Leon J⁶¹⁷ explained his decision to follow the majority judgment in The Halcyon Isle as follows:

1. The House of Lords has not yet spoken on the point.
2. The Privy Council, which has highly persuasive force, has and has decided by a majority in favor of the lex fori.
3. The Colorado, which is the relevant decision in the Court of Appeal, does not in my judgment support the minority in The

612 The Halcyon Isle (1981) AC 221 (PC) at 235D, 238H - 239A, 241F-G and 242 A-G.

613 1987 (3) SA 794 (C).

614 1987 (4) SA 250 (D). Cf Cohen op cit 152.

615 The Andrico Unity 1987 (3) SA 794 (C) at 821I-J.

616 Ibid.

617 The Kalantiao 1987 (4) SA 250 (D) at 264A-D.

Halcyon Isle case.

4. There are no decisions subsequent to The Halcyon Isle in England which have in any way called into question the majority view in The Halcyon Isle.
5. As Marais J has shown, the majority view in The Halcyon Isle is clearly defensible and would therefore continue to be of persuasive force in England.
6. The English cases spanning more than 100 years before The Halcyon Isle all support the conclusion of the majority in that case.
7. An English court faced with 1-6 above would therefore in all probability follow the majority in The Halcyon Isle.

Conclusion:

It is submitted that the minority decision in The Halcyon Isle should be favored but for different reasons to those mentioned. One is the assumption that the maritime lien is a substantive right and not simply a procedural remedy. Jervis CJ's definition or prescription of the maritime lien in The Bold Buccleugh II⁶¹⁸ has been interpreted from the starting-point of the word 'inchoate'. But reading the whole definition, one finds that Jervis CJ states that when a maritime lien exists, it gives a privilege or claim upon the thing, to be carried into effect by legal process. In other words, the maritime lien gives a claim (a substantive right) which can be enforced by legal process, ie in an action in rem (arrest). This conclusion is in accordance with German law⁶¹⁹ where a maritime lien is recognised as a claim for an arrest. This means as a substantive right, which is in principle enforceable by an incola and a peregrinus. The classification of a maritime lien by the majority of The Halcyon Isle as a procedural remedy and not as a substantive right would have the effect, as Munnik JP ⁶²⁰ correctly pointed out

618 (1851) 7 Moo PCC 267 at 284 f.

619 See Part A - Chapter III (1) (a) (ii).

620 The Khalij Sky 1986 (1) SA 485 (C) at 488.

"that no action in rem against the vessel could ever succeed where the forum in which it is brought is governed by English admiralty law and where the action is based upon facts which, although giving rise to a maritime lien under the lex loci, do not give rise to a maritime lien under the lex fori."⁶²¹

One has to agree with Staniland⁶²² that this,

"in turn, would have had the effect of encouraging so-called forum shopping, since the ship, as she navigates through various jurisdictions of the world, would either attract or discard maritime liens in terms of the lex fori."

Another reason for following the minority is that it is contradictory for the majority to accept in principle that 'this claim (the maritime lien) or privilege travels with the thing (the ship), into whosoever possession she may come' and on the other hand to deny a maritime lien not recognised by English law. That means that the principle is not a 'real' principle because it is only applicable to maritime liens recognised by English law. As far as foreign maritime liens are concerned the principle stops at British territorial waters,⁶²³ ie English jurisdiction.

The majority furthermore refuses to apply the established rule of private international law that a substantive right will be recognised under its lex causa.⁶²⁴ But this result followed only because the majority regarded the maritime lien as a procedural remedy and not as a substantive right.

A further reason for following the minority in The Halcyon Isle is that the majority decision would effect an injustice. The ship-repairers would be deprived of their maritime lien, valid as it appeared to be throughout the

621 Op cit 488D-E.

622 (1986) 103 SALJ 542 at 548.

623 Or the territorial waters of the countries (Colonies) which are connected with English admiralty law.

624 The Kalantiao 1987 (4) SA 250 (D) at 263 per Leon J.

world. Without this, they would obviously never have allowed the ship to sail when a dollar had not been paid for the important repairs⁶²⁵ on which the ship-repairers had spent a great deal of time and money and from which the mortgagees obtained substantial advantages.

It follows from the above that a foreign maritime lien, being a substantive right, should be recognised by South African Admiralty Courts, which are free to decide and follow the minority in The Halcyon Isle. As pointed out above, the decision of the Privy Council has only 'persuasive value' and is not binding.

(2) The preconditions of s 3(4)(b) of the 1983 Act - liability in action in personam

Another way that a maritime claim can be enforced by an action in rem is if the owner of the property to be arrested (for example a ship) 'would be liable' to the claimant in an action in personam in respect of the cause of the action concerned.

'Would be liable' refers to being sued in an action in personam.⁶²⁶ The liability originates either ex contractu, ex delicto or quasi ex contractu.

Owner does not mean only the registered shipowner but also the beneficial owner.⁶²⁷

625 The Halcyon Isle (1981) AC 221 (PC) at 246. Cf Staniland (1986) 103 SALJ 542 at 549.

626 Shaw op cit 32. The requirements of an action in personam will be discussed in the following chapter.

627 See Chapter XIV (2) (a) (i).

LEGAL REQUIREMENTS OF AN ACTION IN PERSONAM (ATTACHMENT) - SS 3(1), (2) AND (3)
OF THE 1983 ACT

(1) General preconditions

In terms of s 3(1) of the Admiralty Jurisdiction Regulation Act 105 of 1983 (the 1983 Act) any maritime claim, subject to the provisions of the 1983 Act, may be enforced by an action in personam.⁶²⁸ As pointed out in the previous chapter, an action in personam will, in the first place, be directed against all or any of the property of the debtor or wrongdoer (defendant) and includes all the items set out in s 3(5) of the 1983 Act ie the ship, her cargo, freight or bunkers. Any property can be attached, whatever its nature and value,⁶²⁹ including incorporeal property (such as the right to claim payment of debts, provided that the Deputy Sheriff can make an effective attachment) or pledged goods.⁶³⁰ As noticed earlier⁶³¹ the defendant's liability originates either from contract, quasi contract or tort.

Pursuant to s 3(2) of the 1983 Act, an action in personam may only be instituted against a person:

- (a) resident or carrying on business at any place in South Africa;⁶³²
- (b) whose property within the court's area of jurisdiction has been attached to found or confirm jurisdiction;⁶³³

628 Cf The Andrico Unity 1987 (3) SA 794 (D) at 795A.

629 Even of 'trivial value', see Thermo Radiant Oven Sales (Pty) Ltd v Nelspruit Bakeries (Pty) Ltd 1969 (2) SA 295 (A).

630 Shaw op cit 50. Cf Mercantile Bank of India Limited v Davis 1947 (2) SA 723 (C).

631 Cf Chapter XVI (1).

632 The 1983 Act, s 3(2)(a).

633 The 1983 Act, s 3(2)(b).

- (c) who has consented or submitted to the jurisdiction of the court;⁶³⁴
- (d) in respect of whom any court in South Africa has jurisdiction in terms of Chapter IV of the Insurance Act (Act No 27 of 1943);⁶³⁵
- (e) in the case of a company, if the company has a registered office in South Africa.⁶³⁶

A 'person' against whom the action in personam may be instituted includes any juristic person, whether a local or private individual, or a corporate body.⁶³⁷

In ss 3(2)(a) and (e) the 1983 Act refers to 'companies' either carrying on business at any place in South Africa or if the company has a registered office in South Africa. The word 'company' refers to the Companies Act,⁶³⁸ which in s 1(1) defines a company as

"a company incorporated under Chapter IV Companies Act⁶³⁹ and includes any body which immediately prior to the commencement of the Companies Act was a company in terms of any law repealed by the Companies Act 1973."

The words 'carrying on business at any place in South Africa' refer to s 1(1)

634 The 1983 Act, s 3(2)(c). Cf The Atlantic Victory 1986 (4) SA 329 (D) at 333E ff.

635 The 1983 Act, s 3(2)(d).

636 The 1983 Act, s 3(2)(e).

637 A person is defined in s 2 of the Interpretation Act 33 of 1957 (as amended) as

(a) any divisional council, municipal council, village management board, or like authority;

(b) any company incorporated or registered as such under any law;

(c) any body of persons corporate or unincorporated.

Cf Chapter XIV (1) and Rule 14 of the Uniform Rules of the Supreme Court of South Africa (proceedings by and against partnerships, firms and associations).

638 Act 61 of 1973 as amended.

639 Chapter IV of the Companies Act deals with the formation, objects, capacity, powers, names, registration and incorporation of companies, matters incidental thereto and deregistration. Cf ss 32 to 73 D of the Companies Act.

of the Companies Act which provides that 'place of business' means

"any place where the company transacts or holds itself out as transacting business and includes a share transfer or share registration office."

The words 'registered office' lead to s 170(1) of the Companies Act which provides that every company including every external company shall have a postal address in South Africa to which all communications and notices may be addressed⁶⁴⁰ and a registered office to which all communications and notices may be addressed and at which all process may be served.⁶⁴¹

The maritime divisions of the Supreme Court have jurisdiction over external companies because the Companies Act also applies to external companies.⁶⁴²

The fact that s 3(1)(e) of the 1983 Act refers to the 'company's registered office' does not mean that every company having a registered office in South Africa must necessarily be resident or carry on business in South Africa, or that every company resident or carrying on business in South Africa will have a registered office in South Africa.⁶⁴³

Section 3(2)(e) of the 1983 Act refers to Chapter IV of the Insurance Act 1943.⁶⁴⁴ Chapter IV of the Insurance Act includes s 60 which sets out the requirements in respect of business underwritten by underwriters at Lloyd's.

640 The Companies Act, s 170(1)(a).

641 The Companies Act, s 170(1)(b).

642 The Companies Act, s 2(2). See s 1(1) of the Companies Act which defines an external company as "a company or other association of persons, incorporated outside the Republic (of South Africa), the memorandum of which was lodged with the Registrar under the repealed Act, or which, since the commencement of the (Companies) Act, has established a place of business in the Republic (of South Africa)". Cf also ss 322 to 336 of the Companies Act, dealing with 'external companies', their registration, administration and other duties.

643 Shaw op cit 45.

644 Act 27 of 1943 as amended.

Section 60(1) of the Insurance Act provides as follows:

"The following provisions shall apply in connection with business underwritten by underwriters at Lloyds and any person who does any act in the Republic (of South Africa) relating to the receiving of applications for policies or the issue of policies or the collection of premiums in respect of such business; and any such person shall, for the purpose of this section, be deemed to be carrying on insurance business in the Republic (of South Africa);"

Section 60(1)(a) of the Insurance Act provides further that every person has to have a license to carry on insurance business.⁶⁴⁵ Any person carrying on insurance business must in terms of s 60(1)(d) of the Insurance Act have an office in South Africa at which process in connection with a policy effected through its agency may be served. The Insurance Act, s 60(1)(g) provides that the Committee of Lloyd's shall appoint in a person in South Africa who is authorized to act on its behalf and on behalf of underwriters at Lloyd's, and such person shall lodge with the Registrar of Insurance⁶⁴⁶ a notice of the address of his office and of any change in such address.

Accordingly, any Admiralty Court has jurisdiction in personam in respect of any Lloyd's policy referring to South Africa.⁶⁴⁷

The 1983 Act provides that an action in personam may generally only be instituted in a court whose area of jurisdiction is adjacent to the territorial waters of South Africa.⁶⁴⁸ However, the 1983 Act allows exceptions from this rule:

(a) in the case of a claim contemplated in ss 1(1)(ii)(a) and (b) of the

645 The Insurance Act, s 6(1)(e).

646 Cf s 1 of the Insurance Act for the definition of 'registrar' and s 2 of the Insurance Act.

647 Shaw op cit 46; Hare op cit 63.

648 The 1983 Act, s 3(3). For further details with regard to s 3(3) of the 1983 Act see Shaw op cit 46 and Booysen op cit 78.

1983 Act (relating to ownership and possession), s 1(1)(ii)(i) of the 1983 Act (relating to charterparties) or s 1(1)(ii)(j) of the 1983 Act (marine insurance), if the claim arises out of an agreement concluded within the area of jurisdiction of that court;⁶⁴⁹

- (b) in the case of a claim contemplated in s 1(1)(ii)(g) of the 1983 Act (relating to loss or damage to goods) or in s 1(1)(ii)(h) of the 1983 Act (relating to carriage of goods), if the goods concerned are or were shipped under a bill of lading to or from a place within the area of jurisdiction of that court;⁶⁵⁰ and finally
- (c) if a maritime claim concerned relates to a fund within, or freight payable in, the area of jurisdiction of that court.⁶⁵¹ This category refers to cases where there has been a claim in an action in rem instituted by the arrest of cargo or of the freight in terms of s 3(5)(c) or (d) of the 1983 Act, or where any security given is located in the area of jurisdiction of the inland divisions concerned.

(2) Procedure

Arrests in actions in rem and in personam have, in principle, the same procedural requirements. However, there are peculiarities which have to be observed. Unlike an action in rem, with an action in personam, the application must be made to a court⁶⁵² for an order for attachment. This is done on the strength of a notice of motion supported by an affidavit, a draft order and a writ of attachment prepared by the attorney and submitted by the advocate.⁶⁵³

649 The 1983 Act, s 3(3)(a).

650 The 1983 Act, s 3(3)(b).

651 The 1983 Act, s 3(3)(c).

652 In an action in rem with the Registrar, cf Rule 3(2)(a) of the Admiralty Proceedings Rules.

653 See Chapter XIX (1).

The affidavit contains the following essential allegations⁶⁵⁴:

- that the claim is a maritime claim for which the defendant is liable and that the court will have jurisdiction pursuant to the proposed attachment;
- that the property sought to be attached is property belonging to the defendant or in respect of which he has an attachable interest;
- whether any security has been given in respect of the claim and the reasons for the court's aid being required;
- the source of the signatory's information and that the contents of the affidavit are true and correct;
- the reasons, if any, for urgency.

With regard to the requirements of power of attorney, evidence, security and release of attachment see the following chapters.⁶⁵⁵ Further procedural details are dealt with the action in rem.⁶⁵⁶

The procedural requirements of an attachment to found or confirm jurisdiction are dealt with in Rule 4 of the Admiralty Proceedings Rules and will be discussed more fully later.⁶⁵⁷

654 Findlay & Tait The Enforcement of Maritime Claims in South Africa (1987) at 3 f.

655 Chapters XVIII and XIX.

656 Chapter XVIII. See Hare op cit 89 f.

657 See Chapter XIX (3).

GENERAL PRECONDITIONS AND REQUIREMENTS FOR AN ARREST(1) Power of attorney

South Africa follows the British system of a separate bar. One has to distinguish between attorneys who have no right to appear in the Supreme Court and the advocates who have that right. As in German law, a creditor/ applicant does not need to appoint an attorney when issuing a summons, third party notice or warrant of arrest.⁶⁵⁸ The arrest is obtained on the strength of a certificate by the applicant or his attorney. In the case where the applicant appoints an attorney, a formal power of attorney is usually not required at the arrest stage,⁶⁵⁹ because the action in rem (or in personam) is a summary proceeding, most of the time accompanied by urgency, especially in shipping matters. The applicant contacts an attorney who applies for an arrest order with the Registrar of the court. At this stage an advocate is not yet necessary. When the matter is heard in open court, either from the time of application for attachment in personam or when the pleadings are to be prepared in an action in rem after the arrest has been ordered, an advocate must be briefed by the attorney.⁶⁶⁰ All pleadings after the writ of summons have to be signed by both the attorney and the advocate. The advocate has the advantage of being presented with a prepared case by the attorney.

Rule 20(4)(a) of the Admiralty Proceedings Rules (the Rules)⁶⁶¹ provides

658 Cf Rule 20(3)(a) of the Admiralty Proceedings Rules and Rule 16 of the Uniform Rules of the Supreme Court of South Africa (the Uniform Rules).

659 The requirements for filing a power of attorney are set out in Rule 20(2).

453 Hare op cit 84. In important matters, a party may decide to brief Senior Counsel, either with or without Junior Counsel to assist him. See Findlay & Tait op cit 21.

661 Appendix X. See also Rule 20(4)(c).

that where the parties are described generally by description rather than by name,⁶⁶² the power of attorney may describe the parties as they are described in the action. In that event, the attorney filing the power of attorney must file an undertaking to pay costs and any damages awarded in terms of s 5(4) of the Admiralty Jurisdiction Regulation Act 105 of 1983 (the 1983 Act) (wrongful arrest) against the party represented by him.⁶⁶³ Further requirements of a power of attorney are provided by Rule 7 of the Uniform Rules of the Supreme Court.

(2) Form of application and procedure

Unlike in Germany, no application for an arrest to court is required. The arrest is obtained on the strength of a 'certificate' in terms of Rule 3(3)⁶⁶⁴. The warrant of arrest is issued by the Registrar of the court and served by the Sheriff or his Deputy on the ship to be arrested,⁶⁶⁵ "informing" the defendant/respondent (the ship) that the property arrested will be released upon security in a sum representing the amount of the value of the relevant property (eg ship) or the amount of the claim, whichever amount is lower.⁶⁶⁶ The Deputy Sheriff is the equivalent of the German bailiff.

Normally the application procedure is as follows: The plaintiff himself or his attorney will file with the Registrar⁶⁶⁷ a draft 'warrant of arrest'⁶⁶⁸

662 Rule 2(3). Cf Shaw op cit 106.

663 Shaw op cit 106.

664 Cf Chapter XVIII (2) (a).

665 Cf Rule 5(4) and Chapter XXIII (1).

666 Cf Rule 3(5)(a).

667 Cf Rules 6(4)(a) and (5) of the Uniform Rules.

668 Cf Rules 3 and 5(4) APR. See also Form 2 of the Rules - Appendix XIII (2).

(which only the registrar has to sign) and a 'summons in rem'⁶⁶⁹ in respect of the applicants name, accompanied by a 'certificate' in terms of Rule 3(3).⁶⁷⁰ It is advisable to combine the certificate with an affidavit as to the facts upon which the applicant relies for relief and, if at that stage available, to annex essential documents supporting the application.⁶⁷¹ Notwithstanding this procedure, in general no pleadings are required in an action in rem unless notice of intention to defend the arrest is delivered by the defendant.⁶⁷² Every application, however, must be brought on notice of motion⁶⁷³ (except in cases of urgency) supported by an affidavit and must state the time within which the respondent must deliver any affidavits and the date for the hearing of the application.

(a) Certificate in terms of Rule 3(3)

In accordance with Rule 3(3), a Registrar will, save where the court has ordered the arrest of property, issue a warrant of arrest only if summons in the action has been issued and a certificate signed by the party causing the warrant (this may be the unrepresented plaintiff himself or his attorney) to be issued is submitted to him. Rule 3(3) requires⁶⁷⁴ that the certificate states the following:⁶⁷⁵

669 Cf Rules 2 and 5(2). See also Form 1 of the Rules - Appendix XIII (1). For 'summons' with regard to actions in personam see Rule 5(3).

670 Rule 3(3) provides that the Registrar shall issue a warrant of arrest only if summons in the action has been issued and a certificate signed by the party causing the warrant to be issued is submitted to him.

671 Hare op cit 89.

672 Rule 7.

673 Rule 16 in conjunction with Rule 6 of the Uniform Rules.

674 As already referred to in Chapter XVIII (2) (a).

675 An example of a certificate in terms of Rule 3(3) is given in Appendix XIII (3).

- (i) That the claim is a maritime claim and that the claim is, or that on the effecting of the arrest the claim will be, one in respect of which the court has or will have jurisdiction;⁶⁷⁶
- (ii) that the property sought to be arrested is property in respect of which the claim lies or, where the arrest is sought in terms of s 3(6) of the 1983 Act, that the ship is an associated ship which may be arrested in terms of the said section;⁶⁷⁷
- (iii) whether any security or undertaking has been given in respect of the claim of the party concerned, or to procure the release, or prevent the arrest or attachment of the property sought to be arrested and, if so, what security or undertaking has been given and the grounds for seeking arrest notwithstanding that any such security or undertaking has been given;⁶⁷⁸
- (iv) that the contents of the certificate are true and correct to the best of the knowledge, information and belief of the signatory and what the source of any such knowledge and information is.⁶⁷⁹

Rule 3(3)(a) refers to the maritime claims in s 1(1)(ii) of the 1983 Act and the certificate has to state whether one (or more) of the maritime claim(s) is the claim for an arrest.

Rule 3(3)(b) only requires the statement that the ship is an associated ship in terms of s 3(6) of the 1983 Act. No further particulars set out in section 3(7) AJRA have to be presented at the stage of the arrest application, especially the ones which prove common ownership and common control.⁶⁸⁰

Rule 3(3)(c) refers to cases where security probably has been given but

676 Rule 3(3)(a).

677 Rule 3(3)(b).

678 Rule 3(3)(c).

679 Rule 3(3)(d).

680 Cf Chapter XIV (3).

might be not sufficient enough to cover the claim and interest (for instance a claim referring to collision damage or salvage).

Rule 3(3)(d) refers to the fact that the attorney has to show that his knowledge is from instructions of different sources, either from the plaintiff himself or if the plaintiff is for example a foreigner (eg a German) and represented by 'his' foreign (German) counselors, from the counselors representing the plaintiff in Germany, or from any other sources of information.

(b) Warrant of arrest - Rules 3(1) and (2)

Pursuant to Rule 3(1), an arrest in an action in rem must be effected by the service of a warrant of arrest. The warrant of arrest must be issued by the Registrar and must be in a form corresponding to Form 2 of the First Schedule of the Rules.⁶⁸¹ In general, no order is required for the issue of a warrant.⁶⁸²

The Registrar may refer to a judge the question of whether a warrant should be issued.⁶⁸³ Any such question must be so referred if it appears from a certificate contemplated in Rule 3(3),⁶⁸⁴ or if the Registrar otherwise has knowledge, that security or an undertaking has been given in terms of s 3(10)(a) of the 1983 Act to prevent arrest or attachment of the property in question.⁶⁸⁵ If a question has been so referred to a judge, the judge may authorize the Registrar to issue a warrant of arrest, or may give such directions as he thinks fit to cause the question of whether a warrant of

681 Rule 3(2)(a). See Appendix XIII (2).

682 Except in the case of s 5(3) of the 1983 Act.

683 Rule 3(2)(b).

684 Cf Chapter XVIII (2) (a).

685 Rule 3(2)(c).

arrest should be issued to be argued.⁶⁸⁶ If a question has been so referred to a judge, no warrant will be issued unless the judge has authorized the Registrar to issue the warrant of arrest.⁶⁸⁷

The warrant of arrest is directed against the respondent and is to the effect that notice has to be taken that summons has been issued in an action in rem, and that by the service of the warrant the ship is arrested and is kept in the custody of the Sheriff or his Deputy in terms of Rule 19. Furthermore, the respondent is summoned by the warrant to give satisfactory security for the amount of the claim or the value of the property arrested (whichever is the lesser), if he wants to obtain release of the property (eg the ship) from arrest. In the event of a dispute as to the security, the respondent can make an application to court for the resolving of that dispute. The respondent is also entitled to ask the court to impose conditions with regard to the arrest.

Finally, the warrant of arrest contains a section which is directed to the Sheriff or his Deputy, normally in the following terms (order of execution):

"You are authorized by the warrant of arrest to arrest and keep under arrest the property named herein and you are hereby required duly to serve this warrant and return the original to the Registrar with your Return of Service."

The warrant is prepared by the plaintiff or his attorney.⁶⁸⁸

686 Rule 3(2)(d).

687 Rule 3(2)(e).

688 Every warrant of arrest must be signed by the attorney or the party himself if not represented by an attorney and thereafter be signed and issued by the Registrar - Rule 20(3)(a) - and every warrant of arrest must contain an address of the attorney or party such as referred to in Rule 17(3) of the Uniform Rules which provides as follows:

"Every summons shall be signed by the attorney acting for the plaintiff and shall bear an attorney's address, within eight kilometers of the office of the registrar, or, if no attorney is acting, it shall be signed by the plaintiff, who shall in addition append an address within eight kilometers of the office of the registrar at which he will accept service of all subsequent documents

(c) Summons (in rem) - Rule 2

A summons must be in the form corresponding to Form 1 of the First Schedule of the Rules⁶⁸⁹ and must set forth a statement of the 'nature of the claim' and the 'relief' or 'remedy' required and the 'amount' claimed, if any,⁶⁹⁰ and includes edictal citation.⁶⁹¹

The 'nature of the claim' means any maritime claim in accordance with s 1(1)(ii) of the 1983 Act and can include, for example, the damage to cargo shipped on board a vessel,⁶⁹² or damage to ship caused by collision with another ship or tug. The method of enforcing the claim may be invoked either by an action in personam or an action in rem. Where the relief or remedy is one sounding in money the amount can either be stated in rands or in whatever currency the plaintiff/ applicant thinks fit. When, for instance, a towage contract is on a US-dollar basis, than the amount can specified in US-dollars. In accordance with s 5(2)(g) of the 1983 Act the court may grant a judgment in foreign currency, for instance the US-dollar.⁶⁹³ Section 5(2)(g) of the 1983

in the suit; and shall thereafter be signed and issued by the registrar and made returnable by the sheriff to the Court through the registrar: Provided that such address where the attorney or the plaintiff, as the case may be, will accept service of documents in the suit may be further than eight kilometers from the office of the registrar but within the magisterial district in which such office is situated if such attorney or the plaintiff is a person who is in terms of any law prohibited from being the occupier of land or premises within the distance of eight kilometers of such office."

For the further requirements of filing, delivery and preparation of papers see Rule 20.

689 Appendix XIII (1).

690 Rule 2(1) APR.

691 Rule 1 APR.

692 If there is damage done to cargo, the statement of the 'nature of claim' should include details concerning the kind of cargo, the name of the ship, the port of lading and the port of destination and details of the Bill of Lading. Further, the attorney should state that the plaintiff was at all times the owner of the cargo and the holder of the Bill of Lading and was, accordingly, entitled to the delivery of the cargo.

693 Cf The Torm Helene (unreported) Case No AR 415/86 (N).

Act reads as follows:

"A court may in the exercise of its admiralty jurisdiction - subject to the provisions of any law relating to exchange control, order payment to be made in such currency other than the currency of the Republic as in the circumstances of the case appears appropriate, and make such order as seems just as to the date upon which calculation of the conversion from any currency to any other currency should be based."

According to s 5(2)(g) of the 1983 Act the court has a discretion as to whether to apply the section or not. Thus far there are no reported cases in terms of s 5(2)(g) of the 1983.⁶⁹⁴ The question arises what the words "appropriate", "just" and "in the circumstances of the case" have to have for an influence on the courts decision. Shaw⁶⁹⁵ opined "that in each case the endeavour must be to choose the currency which is appropriate in order to compensate the plaintiff for his loss, or to pay him what he was contracted for, or what is due to him." In a case concerning the ordinary jurisdiction van den Heever J⁶⁹⁶ held that where a foreign creditor sought to enforce implementation of a contract stipulating payment in Japanese Yen in Tokyo

"that there was no absolute bar to its ordering a South African debtor to effect such payment in the stipulated foreign currency ... that the date on which the conversion from South African rand into the stipulated foreign currency should be made is the date when payment is actually effected and not when payment is due."

In Voest Alpine Intertrading Gesellschaft mbH v Burwill and Co SA (Pty) Ltd⁶⁹⁷

694 The Houda Pearl II 1986 (3) SA 960 (A) is not applicable because the facts fall under the admiralty proceedings in terms of the Colonial Courts of Admiralty Act 1890.

695 Op cit 84.

696 Maruta Machinery Ltd v Capelon Yarns (Pty) Ltd 1986 (4) SA 671 (C).

697 1985 (2) SA 149 (W). Cf The Despina R (1979) 1 All ER 421 (HL).

Nestadt J held:

"In a contractual claim for damages (for repudiation of a contract), damages would be due when the breach occurred. Though only quantified by the judgment, the damages are assessed at this date. Even although the price of goods was payable in US dollars, the defendant's liability must likewise be determined. Subsequent fluctuations in the value of currency are to be ignored. In a case such as the present, defendant's refusal then to pay (some three years before the date of trial) will of course have led to plaintiff sustaining a large loss. It may be that this could be claimed as a further head of damages. It could not, however, justify the quite fortuitous and often delayed date of judgment, which may only be established on appeal, being taken as the relevant date for converting defendant's dollar liability to rands."

In Barry Colne and Co (Transvaal) Ltd v Jackson's Ltd⁶⁹⁸ Gardiner J held, on the strength of Roman-Dutch authorities,

"that where the price of goods sold is given in a foreign currency, in the absence of any term in the contract to the contrary, payment may be made in local currency of the place of payment of a value equivalent to the price agreed upon at the rate of exchange ruling at the date when payment falls due."⁶⁹⁹

The authorities quoted above show how inconsistent the courts have been in deciding whether or not to grant judgment in a foreign currency and what the day of conversion should be.

When exercising its discretion in terms of s 5(2)(g) of the 1983 Act a court should use Shaw's definition as a foundation. Each case depends on its own merits, whether based on contract or delict. In, for example, a contract

698 1922 CPD 372.

699 Cf Bassa Ltd v East Asiatic (SA) Co Ltd 1932 NPD 386 at 390 where Hathorn J held that "therefore the parties must have contemplated that the conversion should take place when the bill (of exchange) came into existence."

between two South Africans based on a US dollars agreement the debtor's dollar liability has to be converted at the day of due date because the disadvantage of fluctuations in the exchange rate lies on the debtor having missed to pay. The same rule applies, for example, with wages of a South African seaman under a contract with the shipowner (or charterer by demise) based on US dollars. One cannot agree with van den Heever J that the date on which the conversion from South African rand into the stipulated foreign currency or vice versa should be made is the date when "payment is actually effected" because the creditor will be placed at a disadvantage twice. Firstly, because he cannot use the money owed by the creditor for further business activities⁷⁰⁰ and, secondly, he has to bear possible disadvantageous exchange rates.

In the case of a towage and salvage contract, for example, the date of conversion would be the date when the contract is performed. Furthermore, it seems incongruous that a creditor who receives payment after years of protracted litigation should find himself in a worse position than one who is paid on due date.⁷⁰¹

The principles considered for claims of contract is applicable for claims of damage for breach of contract and all other kinds of damages which may arise in terms of s 1(1)(ii) of the 1983 Act. The fact that damages for breach of contract must be assessed at date of that damage does not mean that those damages must be assessed and quantified in South African currency as at that date. Where a loss is in fact suffered in a foreign currency there is no reason not to assess and quantify the damage in that currency. "Indeed not to do so might be to deny a plaintiff the amount of his actual loss."⁷⁰² This amount prevails and should be the standard when deciding in terms of s 5(2)(g) of the

700 Many debtors owing money quite often have caused the bankruptcy of their creditor.

701 Cf The Torm Helene (unreported) Case No AR 415/86 (N).

702 Ibid.

1983 Act.

Besides the requirements of a summons set out above and that provided by Rule 20, the summons contains an instruction about the defendant's right of appearance to defend and the time for such appearance. The summons must then contain the following statements, directed at the defendant:⁷⁰³

- If you wish to defend the action you must within ten days give notice of your intention so to defend.⁷⁰⁴ That notice must be served to the Registrar and on the plaintiff's attorney and must contain an address in accordance with Rule 19 of the Uniform Rules.⁷⁰⁵
- If you do not give that notice within the time set out, or within any extended time which the court may allow, if you make application for an extension of time, or if you do not thereafter deliver your plea or a claim in reconvention as provided by the Rules regulating the conduct of the admiralty proceedings,⁷⁰⁶ proceedings may continue and judgment may be given against you without further notice.

The summons also contains a request to the Sheriff or his Deputy to effect service of the summons and return the original to the Registrar with his return of service.

703 In this example the plaintiff is represented by an attorney.

704 Rule 6(2).

705 Rule 19(3) of the Uniform Rules reads as follows:

When the defendant delivers notice of intention to defend, he shall therein give his full residential or business address and shall appoint an address, not being a post office box or poste restante within eight kilometers of the office of the registrar, or if he is a person who is in terms of any law prohibited from being the occupier of land or premises within such distance of eight kilometers of such office, he may appoint an address further than eight kilometers from such office but within the magisterial district within which such office is situated, for the service on him thereat of all documents in such action, and service thereof at the address so given shall be valid and effectual, except where by any order or practice of the Court personal service is required.

706 Rule 8 and Rule 24 of the Uniform Rules.

(d) Notice of motion (Rule 16, Rule 6 of the Uniform Rules) and affidavit

Where summons has been issued in an action in rem, any person having an interest in the property concerned can, at any time before the expiry of ten days from the service of the summons, give notice of intention to defend and can defend the said action. Any interested party can enter an appearance, for example the shipowner, the beneficial owner, the charterer, or the master of the ship.

In accordance with Rule 16(2), a notice of motion in an application on notice shall state:

- the time within which the respondent must deliver any affidavits and
- the date for the hearing of the application.

Rule 16(1) provides that Rule 6 of the Uniform Rules is to apply to applications subject to the provisions of Rule 16. The main effect of Rule 6 of the Uniform Rules is that, in terms of Rule 6(2), the applicant is entitled to state the time within which the respondent is to file the respondent's affidavits and the application is, from the beginning, set down for hearing on a specific day.⁷⁰⁷

The notice of motion must be in a form corresponding to Appendix XIII(4), which gives an example of a notice of motion in the matter of an application for the confirmation of the issue of a warrant of arrest and summons in rem.

An affidavit must, for example in the matter of an application for the confirmation of the issue of a warrant of arrest and summons in rem, contain the following:

- The name of the attorney filing the affidavit and declaration of the contents of the affidavit under oath;⁷⁰⁸

707 Cf Shaw op cit 110.

708 The Commissioner of Oath certifies as follows:

'I HEREBY CERTIFY that the Deponent of this Affidavit (normally the

- the full address of the attorney;
- the authorization by the applicant to depose the affidavit and to make the application;
- that the matters to which he deposes in the affidavit, insofar as they are within his personal knowledge, are true and correct and insofar as they are not within his personal knowledge are to the best of his knowledge true. The attorney has to itemize the sources of his knowledge, for instance instructions of his mandator or from documents;
- the name of the applicant and his address;
- the respondents name (name of the ship and where she is presently berthed);
- further details to the previous procedure, information in respect of an associated ship (eg an extract from Lloyd's Maritime Directory) and other facts and documents.

Being a matter of urgency the arrest procedure is always ex parte,⁷⁰⁹ that is without notice, unless the applicant applies to court on notice to the ship.⁷¹⁰ This is only done in extraordinary cases.

(3) Caveat - Rules 3(5)(b), (c) and (d)

It may happen that a claimant desires to bring proceedings against property which is already under attachment or arrest ('first arrest/ attachment'). In accordance with Rule 3(5)(b) any person who intends to institute an action in rem against any property (eg a ship) which has been arrested (in an action in rem) or attached (in an action in personam), may file with the Registrar and

plaintiffs attorney) has acknowledged to me that he knows and understands the contents hereof which was signed and sworn to by him before me at (for example) Durban on the 7th of May 1988 the Regulations contained in Government Notice No R 1258 dated 21th July 1972, as amended by Government Notice No 1648 dated 19 August 1977 having been complied with.

709 Whether by way of petition or upon notice to the registrar supported by an affidavit.

710 The Stavroula 1987 (1) SA 75 (C) at 76E.

serve⁷¹¹ a notice of the said intention (caveat).⁷¹²

When any such notice has been filed, the property will not be released from arrest or attachment unless the person desiring to obtain the release of the property (ship) has given notice to the person who has filed any such notice (caveat) that he desires to obtain the said release of the property (ship) from arrest. If a caveat has been given in terms of Rule 3(5)(b) and the person concerned has not consented to the release of the ship or any other property in accordance with s 3(5) of the 1983 Act, the property is not to be released from arrest or attachment ('second arrest/ attachment') unless the court so orders.⁷¹³

The Rules do not give a time-limit providing within which a court can refuse to release the ship from the 'second arrest/ attachment'. The caveat does not commence proceedings for the caveat-holder. His objection in terms of Rule 3(5)(d) only delays the release of the ship under the custody of the Sheriff because of the 'first arrest/ attachment'. In the case where the prerequisites of the 'first arrest/ attachment' have become void, the court cannot postpone the release of the ship from arrest for an unlimited time. The caveat-holder should therefore be prepared within a reasonable time to approach the court for an order.

Pursuant to Rule 3(5)(b), the person who intends to institute an action in rem against any property set out in s 3(5) of the 1983 Act may serve the notice in accordance with Rule 5(2),⁷¹⁴ and this means in the case of an intended action against a ship (her equipment, furniture, stores or bunkers) by affixing a copy of the caveat (the notice of the intention to institute an action in rem

711 In accordance with the provisions of Rule 5(2).

712 Cf Shaw op cit 108; Hare op cit 85 f.

713 Rule 3(5)(d).

714 Rule 5(2) refers to Rule 5(4) - how to serve a warrant in an action in rem.

against the property) to the mast, or on the outside, or any suitable part of the superstructure of the ship, and by handing a further copy to the master or other person in charge of the ship.⁷¹⁵ Accordingly, Rule 3(5)(b) indicates who has to be given notice of the caveat and accordingly one must disagree with Hare,⁷¹⁶ when he says that the Rules make no mention of who should be given notice of the caveat. If one follows Hare, it is not clear why the claimant who has already obtained an arrest ('first arrest/ attachment') should be served with a copy of the caveat by the Deputy Sheriff. Hare states that the (first) claimant will then at least be aware that there are others "waiting in the wings to whom he must give the necessary notice." The interest of the first plaintiff in receiving notice of a caveat is that he then knows that there are other creditors who might prevent him from realizing his full claim because of a better ranking in terms of s 11 of the 1983 Act. The really interested 'person' who should receive notice of the caveat is the ship, ie the shipowner, because he needs to be informed that a 'second arrest/ attachment' is possible which would cause further delays to the ship's voyage.

(4) Evidence - s 6(3) of the 1983 Act

At the stage of the arrest application the requirements concerning evidence are relatively low. This is because the arrest proceedings are proceedings determined by the fact of urgency.⁷¹⁷ The 1983 Act takes this circumstance into account. In accordance with s 6(3) of the 1983 Act, the court may receive

715 In the case of an action against cargo, freight or in terms of s 3(10)(a) of the 1983 Act see Rules 5(4)(b), (c) and (d).

716 Op cit 85 f.

717 See Rule 6(12)(a) of the Uniform Rules which provides that in urgent applications the court or a judge may dispense with the forms and service provided for in the Uniform Rules of the Supreme Court and may dispose of such matter at such time and place and in such manner and in accordance with such procedure (which shall as far as practicable be in terms of the Uniform Rules) as to it seems meet.

as evidence statements which could otherwise be inadmissible as being in the nature of hearsay evidence, subject to the directions and conditions that the court thinks fit. In cases of urgency, the attorney will get the necessary information either by telephone, telex or telefax, or from the plaintiff himself. The affidavit, made under oath by the plaintiffs attorney (or the plaintiff himself if he is not represented) and giving the relevant facts is, in principle, sufficient evidence at this stage. For further details concerning evidence and trial procedure see Chapter XX (3) and (4).

(5) Competent court

(a) Admiralty jurisdiction in terms of s 2 of the 1983 Act

As already mentioned,⁷¹⁸ the 1983 Act grants admiralty jurisdiction to each provincial and local division (including a circuit local division) of the Supreme Court of South Africa. These courts have admiralty jurisdiction

"to hear and determine any maritime claim (including in the case of salvage, claims in respect of ships, cargo or goods found on land), irrespective of the place where it arose, of the place of registration of the ship concerned or the residence, domicile or nationality of its owner.⁷¹⁹

In principle the Supreme Court⁷²⁰ has jurisdiction concerning all maritime claims enumerated in s 1(1)(ii) of the 1983 Act.⁷²¹

718 Chapter XV (1).

719 The 1983 Act, s 2(1). The area of jurisdiction of a court referred to in s 2(1) of the 1983 Act shall, in accordance with s 2(2) of the 1983 Act, be deemed to include that portion of the territorial waters of South Africa adjacent to the coastline of its area of jurisdiction.

720 The divisions having admiralty jurisdiction are listed in Chapter XV (1).

721 Cf Chapter XV (2).

(b) Transfer of proceedings - appropriate forum (s 7(1) of the 1983 Act)

A court may decline to exercise its admiralty jurisdiction in any proceedings instituted or to be instituted, if it is of the opinion that the action can more appropriately be adjudicated upon by another court in South Africa or by any other court, tribunal⁷²² or body elsewhere.⁷²³ This means that an Admiralty Court can refuse to exercise its admiralty jurisdiction because it is of the opinion that either another court exercising admiralty jurisdiction, or exercising ordinary jurisdiction in South Africa or any other court could hear the action more appropriately. The Admiralty Court can even transfer the action to a court outside South Africa, for example Germany.⁷²⁴

If the matter is one in terms of s 14 of the 1983 Act, the Admiralty Court can transfer the action to a Magistrates' Court.⁷²⁵

Pursuant to s 7(1)(b) of the 1983 Act the Admiralty Court may stay proceedings if the parties concerned agree that the matter in dispute be referred to arbitration in South Africa or elsewhere, or if for any other sufficient reason the court is of the opinion that the proceedings should be stayed.

A further provision dealing with the competence of Admiralty Courts is s 7(2) of the 1983 Act.⁷²⁶ When in any proceeding⁷²⁷ of the Supreme Court of South Africa the question arises as to whether a matter pending or proceeding before that court is one relating to a maritime claim, the court must forthwith decide that question. If the court decides that the matter is one relating to a

722 Cf Chapter XXVI.

723 The 1983 Act, s 7(1).

724 Cf Booyesen op cit 77.

725 The 1983 Act, s 7(2)(b). Cf Chapter XVIII (5) (c).

726 Cf Chapter XXVI.

727 Before a provincial or local division, including a circuit local division, see s 7(2) of the 1983 Act.

maritime claim, it must be proceeded with in a court competent to exercise its admiralty jurisdiction, and any property attached to found jurisdiction shall be deemed to have been attached in admiralty proceedings.⁷²⁸ The 1983 Act, however, does not indicate 'when' the question may be raised whether a matter pending or proceeding before that court is one relating to a maritime claim. Booyesen⁷²⁹ is of the opinion that it seems to be possible for such a question to be raised as late as in concluding argument. If one adopts the view that every maritime claim must be heard in a court exercising admiralty jurisdiction, it might happen that as the procedure and law applicable differ depending on the type of jurisdiction exercised by a court, a sudden change of law and procedure in the middle of the proceedings could bring discredit upon a party's case. In respect of evidence, for example, in the Supreme Court exercising its ordinary jurisdiction neither, the plaintiff nor the defendant can base their respective cases on hearsay statements.⁷³⁰ If the case is proceeded with in an Admiralty Court, however, these statements may suddenly be admissible.⁷³¹ The court therefore should determine its competence meru motu at the beginning of the procedure as in German law to eliminate any prejudice, to preserve certainty in the law, and to ensure that the case will be decided by a legally competent judge,⁷³² especially because no appeal against any decision or order made under s 7(2) of the 1983 Act is possible.⁷³³

728 The 1983 Act, s 7(2)(a). Is the matter not one relating to a maritime claim, the action shall proceed in the division having jurisdiction in respect of the matter. For further details see s 7(2)(b) of the 1983 Act.

729 Op cit 78.

730 See the Law of Evidence Amendment Act which came into force on 1 October 1988 (Act 45 of 1988) which provides that in civil and criminal proceedings hearsay evidence shall be admitted in certain circumstances provided for in the Act, eg when each party against whom the evidence is to be admitted agrees to the admission thereof.

731 Ibid. Cf Chapter XVIII (4).

732 See also ss 7(3) and (5) of the 1983 Act.

733 The 1983 Act, s 7(4).

(c) Magistrates Courts - s 14 of the 1983 Act

The 1983 Act, s 14 itself does not derogate from the jurisdiction which a Magistrates Court has under ss 131, 136 and 151 of the Merchant Shipping Act.⁷³⁴ The 1983 Act retains the Magistrates' Courts jurisdiction concerning seamen.⁷³⁵ Section 131 of the Merchant Shipping Act concerns the rights of suing on allotment notes, s 136 of the Merchant Shipping Act concerns the proceedings for wages, and s 151 concerns the property of deceased seaman which may be recovered as wages.

If, however, the Magistrates Court is the competent court in terms of s 14 of the 1983 Act, only the Magistrates' Courts Act⁷³⁶ with its Rules of Court⁷³⁷ are applicable.

For the rest, the Admiralty Courts remain the competent courts of maritime claims by a master or member of the crew of a ship arising from the employment.⁷³⁸

734 Act 57 of 1951 as amended. Cf Appendix XII.

735 Cf Booyesen op cit 78.

736 Act 32 of 1944 as amended.

737 The Rules came into force on 30 April 1968; see H J Erasmus and O J Barrow Handbook of the Supreme Court Act, 59 of 1959 and the Magistrates' Courts Act 32 of 1944 2ed (1988) at 332.

738 The 1983 Act, s 1(1)(ii)(n).

CHAPTER XIX

PARTICULAR REASONS FOR APPLYING FOR AN ADMIRALTY ACTION IN REM OR IN PERSONAM

The basic reason for a claimant proceeding in an admiralty action is, normally, to enforce a maritime claim. But there are some particular motives for instituting the admiralty proceedings described as follows:

(1) Prejudgment security arrest - s 5(3) of the 1983 Act

If, for example, a German claimant is already engaged in arbitration or legal proceedings in Germany (eg in Hamburg) for a claim based on a German cause of action and subject to German law, the Admiralty Jurisdiction Regulation Act 105 of 1983 (the 1983 Act) empowers a South African court on application of the German claimant to arrest the defendant's ship presently berthed in a South African harbour as a security for the claimant's claim. In other words, s 5(3) of the 1983 Act empowers a court to arrest, at the instance of a foreigner, a ship, owned by a foreigner, as a security for a claim pending in some foreign country which is based on a foreign cause of action and is subject to a foreign law.⁷³⁹ Section 5(3)(a) of the 1983 Act requires:

- (i) that the person seeking the arrest has a claim enforceable by an action in rem;⁷⁴⁰ and
- (ii) that the claim is or may be subject to arbitration or other proceedings contemplated, pending or proceeding either in South Africa or elsewhere.⁷⁴¹

739 The Paz 1984 (3) SA 261 (N) at 263E; The Berg I 1984 (4) SA 647 (N); The Berg II 1986 (2) SA 700 (A); The Stavroula 1987 (1) SA 74 (C); The Tatiana L (unreported) Case No A 102/87 (D); Shaw op cit 42 ff.

740 The 1983 Act, s 5(3)(a)(i).

741 The 1983 Act, s 5(3)(a)(ii).

The first reported case was The Paz.⁷⁴² The case before the court had no connection with South Africa apart from the fact that the ship involved was berthed in the harbour of Durban. The applicant was a Nigerian company, the defendant the ship The Paz, registered in Panama and owned by a Panamanian company. The applicant's claim against the ship related to loss of or damage to cargo conveyed from Antwerp to Lagos almost five years before the application. Litigation over the claim was pending in Hong Kong where an action in rem had been started in the High Court. Because the ship was due to call at Durban in order to refuel, the applicant applied as a matter of urgency for an order for the arrest of the ship so as to provide it with security for the judgment which it hoped would one day be awarded in Hong Kong.

The matter was referred to the full bench by Didcott J who considered that the application raised an important question of judicial policy, namely whether or not the court should, as he put it, allow itself to be "transformed into some sort of judicial Liberia or Panama", to be "turned into a court of convenience for the wandering litigants of the world." Didcott J feared that should an arrest in terms of s 5(3) of the 1983 Act become too freely available, ships would not use South African ports and in turn that would damage local commerce.⁷⁴³

Section 5(3) of the 1983 Act in fact gives the court a discretion whether or not to exercise jurisdiction by providing that it "may" order the arrest and not that it "shall" order the arrest.

The majority judgment in The Paz (per Friedman J and Kriek J) held that the claimant must satisfy the court prima facie that he has a reasonable prospect of success in the main proceedings in Hong Kong and, in addition, why he needs the assistance of a South African court to obtain the security he requires and cannot obtain such security in the other contemplated or pending

742 1984 (3) SA 261 (N).

743 Ibid 270B.

arbitration or proceedings.⁷⁴⁴ Further, the majority referred to the corresponding section to s 5(3) of the 1983 Act on which the South African provision is based, namely s 26 of the English Jurisdiction and Judgment Act. This had come into being as a result of judicial dissatisfaction with the lack of jurisdiction to attach for purposes of security in such situations. The applicant had, notwithstanding the existence of s 5(3) of the 1983 Act, the possibility of commencing a "fresh" action in rem in South Africa, in which event the court's discretion to refuse to entertain that action would not be a general discretion but that circumscribed by s 7(1) of the 1983 Act.⁷⁴⁵

Didcott J agreed with the principles espoused by the majority, but disagreed that the court should be inclined to grant such applications. He opined that despite the fact that s 5(3) of the 1983 Act had been modelled on s 26 of the English Civil Jurisdiction and Judgments Act, this was irrelevant for South African courts.⁷⁴⁶ Ships should not be scared away because attachments were allowed too freely. On the other hand, undue reluctance to permit actions under s 5(3) of the 1983 Act could encourage the necessary commencement of actions in rem to achieve the same purpose. He therefore said that a satisfactory balance would have to be achieved between these extremes.⁷⁴⁷

The majority judgment is to be preferred because Didcott J's fear that, should attachments be allowed too freely, this would be bad for South African business is not likely to occur. A shipowner knows that his ship can be arrested in nearly any port she happens to be in. Shipowners will consequently make arrangements to put up security, and if they have reasons to call at a

744 The Paz 1984 (3) SA 261 (N) at 268B.

745 Ibid 267B. Cf A Beck 'Admiralty Jurisdiction: A New Direction?' 1984 (47) THRHR 472; Friedman (1985) 102 SALJ 45 at 56; H Staniland 'Is the Admiralty Court to Be Turned into a Court of Convenience for the Wandering Litigants of the World?' (1986) 103 SALJ 9, (1985) 4 LMCLQ 462.

746 The Paz 1984 (3) SA 261 (N) at 268H ff.

747 Ibid 270C-F. Cf Beck op cit 473.

South African port, they will do so. Another reason for applying s 5(3) of the 1983 Act is the international aspect. In Art.7(2) the International Convention on Arrest of Sea-going Ships of 1952 provides a similar procedure to s 5(3) of the 1983 Act when it contemplates that a court, which stays an action on the ground that the dispute should be decided by another tribunal, will have the power to retain any security obtained in the action to satisfy any judgment or award of the other tribunal. The jurisdiction of the South African courts in terms of s 5(3) of the 1983 Act is wider than Art.7(2) of the International Arrest Convention of 1952. By avoiding s 5(3) of the 1983 Act, South Africa could find itself isolated yet again, because it has not ratified the International Arrest Convention of 1952. To promote international uniformity and comity in the interests of maritime commerce, s 5(3) of the 1983 Act should be applicable in the manner that the majority in The Paz has shown.⁷⁴⁸

An applicant accordingly needs to present the following to the court to get the writ of attachment:

- He must explain why he needs the court's assistance, including the reason why he needs security that he has not already obtained and why he cannot obtain security in the main proceedings;
- he must satisfy the court prima facie that he has reasonable prospects of success in the main proceedings.

In a second case⁷⁴⁹ concerning s 5(3) of the 1983 Act, it was held that the provisions regarding the arrest of an associated ship are applicable to an arrest under s 5(3) of the 1983 Act.

Lastly, ss 5(3)(b) and (c) of the 1983 Act provide that any property

748 Staniland (1985) 4 LMCLQ 462 at 476; Beck op cit 472.

749 The Berg I 1984 (4) SA 647 (N). This decision was confirmed by the Appellate Division in The Berg II 1986 (2) SA 700 (A). Cf Staniland (1986) 3 LMCLQ 279, where the writer comments on The Berg I in relation to whether ss 3(6) and 5(3) of the 1983 Act are to be applied retrospectively. He concludes that these provisions are not retrospective in operation, ie not applicable for claims which arose before 1 November 1983, the commencement of the 1983 Act.

arrested in terms of s 5(3)(a) of the 1983 Act is deemed to be property arrested in an action in terms of the 1983 Act and that a court may order that any security for or the proceeds of any such property shall be held as security for any such claim pending the outcome of the arbitration or proceedings.

For foreign plaintiffs and their lawyers, s 5(3) of the 1983 Act is a particularly useful procedure for claiming successfully.

(2) Anticipated attachment - s 4(4)(b) of the 1983 Act

In a fundamental deviation from the common law rule requiring physical presence of the property to be arrested within the court's jurisdiction, the 1983 Act offers a claimant the possibility of arresting a ship in anticipation. This means that the court will grant an order of attachment on the application of the plaintiff. This order will be served immediately when the ship arrives in the court's area of jurisdiction. This opportunity is offered by s 4(4)(b) of the 1983 Act⁷⁵⁰ which provides as follows:

"A court may make an order for the attachment of property not within the area of jurisdiction of the court at the time of the application or of the order, and such an order may be carried into effect when that property comes within the area of jurisdiction of the court."

The court will usually order that there be no publication of the arrest until service, and may order the port captain concerned to report the vessel's arrival to the Sheriff who may then serve the warrant.⁷⁵¹

For the applicant, s 4(4)(b) of the 1983 Act is of interest especially when he needs to stay one step ahead of the respondent. This is the case for example if he wants to attach the cargo or the freight of the ship and fears that cargo and freight may be unloaded before he can get the order of arrest.

750 The S.S. Union Carrier 1950 (1) SA 880 (C) at 885.

751 Hare op cit 67.

However there might be some reasons for attaching the ship itself in an anticipatory attachment, especially if the applicant fears that the ship could leave the territorial waters so quickly that he will not be able to serve the order of attachment by the Sheriff or his Deputy in time.

The 1983 Act provides that the anticipatory attachment has to occur by means of an admiralty action in personam, ie an attachment. Hare therefore is inaccurate when he writes that a "claimant may ask the court to issue an arrest in anticipation of the vessel's arrival within its jurisdiction."⁷⁵² The result is the same, but the procedure differs to a certain extent as already shown above. The terminus technicus "arrest" is particular to the admiralty action in rem, whereas the "attachment" is particular to the admiralty action in personam. For legal precision these termini have to be kept separate.

The same principle applies in German law. This does not contravene para 482 HGB because this provision only prohibits placing a ship under distrain (if she is on a voyage and is not lying in a port) and not the order of an arrest.

(3) Attachment to found or confirm jurisdiction

(a) Section 4(4)(a) and 8(2) of the 1983 Act, Rule 4

In accordance with s 4(4)(a) of the 1983 Act in conjunction with Rule 4 of the Admiralty Proceedings Rules (the Rules), an Admiralty Court may make an order for the attachment of property to found⁷⁵³ or confirm jurisdiction although the claimant is not an incola either of the area of jurisdiction of that court or

752 Ibid.

753 An example of an order to found jurisdiction is to be found in The Areti L 1986 (2) SA 446 (C). Cf Chapter XIV (2) (ii). See too The Atlantic Victory 1986 (4) SA 329 (D) and Minesa Energy (Pty) Ltd v Stinnes International AG 1988 (3) SA 903 (D); The Paola (unreported) Case No A 155/87 (D); Manica Freight Services (Malawi) Ltd and others v United States Lines Incorporated (unreported) Case No A 28/87 (D).

of the Republic of South Africa.⁷⁵⁴ An attachment to found jurisdiction is, however, not possible over claims which otherwise do not exist.⁷⁵⁵

The application for an order to found or confirm jurisdiction is regulated by the provisions for an action in personam.⁷⁵⁶

The attachment to found jurisdiction is for attachment of the property of either someone who is domiciled and resident in a foreign country (eg Germany), or who is a South African not resident in the area of jurisdiction of the court (peregrinus).⁷⁵⁷ The reason for attachment is in order to establish the jurisdiction of the court, and to provide security for judgment.⁷⁵⁸

The property can only be attached while it is in the jurisdiction of the court from which the attachment order is issued, and the effect of the attachment is either to confirm the jurisdiction which the court already has in the suit between the parties, or to afford it jurisdiction it would not otherwise have had in the matter.⁷⁵⁹ The attachment gives the court jurisdiction.⁷⁶⁰

The distinction between the attachment to found and confirm jurisdiction is that with the first the existence of any ground of jurisdiction is not necessary, whilst with the latter the existence of such a ground is essential. Accordingly, the Admiralty Court may entertain the claim of a peregrinus

754 Cf A Rycroft 'Changes in South African Admiralty Jurisdiction' (1984) LMCLQ 417 at 421; Friedman (1985) 102 SALJ 45 at 55; Bamford op cit 156; Shaw op cit 25; see also The Maria K 1985 (2) SA 476 (C) and The Atlantic Victory 1986 (4) SA 329 (D).

755 The Farandole 1978 (4) SA 263 (A) at 277.

756 Cf Bamford op cit 157; Araxos (East London) (Pty) Ltd v Contara Lines Ltd and others 1979 (1) SA 1027 (E).

757 The Atlantic Victory 1986 (4) SA 329 (D) at 330I.

758 D G Powles The Mareva Injunction and Associated Orders (1985) at 124.

759 Herbstein and van Winsen The Civil Practice of the Superior Courts in South Africa 3ed (1979) at 782.

760 If the court has already jurisdiction there is no need to attach a ship to found jurisdiction, The Commodore 1943 NPD 27 at 28.

("foreigner" in terms of s 4(4)(a) of the 1983 Act⁷⁶¹). A German plaintiff, for example, can seek to attach the property of an English defendant to found jurisdiction in a South African court in whose jurisdiction the property of the defendant is.

An application for the attachment of property to found or confirm jurisdiction is usually made ex parte, unless the court otherwise orders.⁷⁶²

The applicant must satisfy the court mutatis mutandis with regard to the facts and matters referred to in Rules 3(3)(a) and (c).⁷⁶³

The order of the court on an application to found or confirm jurisdiction results, inter alia, in the attachment of the property in question and further calls upon all interested persons to show cause on a date stated in the order why the order for attachment should not be confirmed.⁷⁶⁴

If property has been attached to found or confirm jurisdiction, the person desiring to obtain the release of the property may, subject to Rule 3(5)(c) and any order made in terms of s 5(2) of the 1983 Act, obtain such release on giving security for the claim (eg by a P & I - Club's letter of undertaking) to the person causing the property to be attached.⁷⁶⁵

Where property has been attached to found or confirm jurisdiction relating to a maritime claim, ss 9, 10 and 11 of the 1983 Act will apply just as if the property had been arrested in an action in rem, whether or not the property has been arrested in terms of the 1983 Act.⁷⁶⁶ This means that these sections apply even where property has been attached to found or confirm jurisdiction

761 Rycroft op cit 421.

762 Rule 4(1).

763 Cf Chapter XVIII (2) (a).

764 Rule 4(3).

765 Pursuant to Rule 4(4)(b). Rule 19 will apply mutatis mutandis in respect of security given in terms of Rule 4(4)(a).

766 The 1983 Act, s 8(2).

under the common law.

(b) Arrest of property already under attachment in terms of the common law - s 8(1) of the 1983 Act

A peculiarity of the action in personam concerning the attachment to found or confirm jurisdiction is provided by s 8(1) of the 1983 Act. Where property has been attached to found or confirm jurisdiction at common law, that property may nevertheless be arrested in connection with a maritime claim in an admiralty action, subject to such directions as the court thinks fit.⁷⁶⁷ This means that the Admiralty Courts obtains jurisdiction over property already under attachment and over which an ordinary court so has jurisdiction. The result is that two courts have jurisdiction over one special kind of property because of different claims, ie maritime claims and ordinary claims.

⁷⁶⁷ The 1983 Act, s 8(1).

TRIAL PROCEDURE AND ADJUDICATION BY THE COURT(1) Preliminary procedure - Rule 12

In general, admiralty proceedings commence by filing the warrant of arrest, the summons and the certificate in terms of Rule 3(3) of the Admiralty Proceedings Rules (the Rules).⁷⁶⁸

In an action in rem, a defendant may, where summons has been issued and at any time before the expiry of ten days from the service of the summons, give notice of intention to defend.⁷⁶⁹

A plaintiff or a defendant, whether in convention or reconvention⁷⁷⁰ or a third party⁷⁷¹ may, after being served with a summons or giving or receiving notice of intention to defend,⁷⁷² or receiving a claim in reconvention or a third party notice, request the party issuing or delivering such document and any other opposing party to attend a conference in terms of Rule 12(2)(a)(i).

At the conference, the party requiring the conference may require any opposing party⁷⁷³ to disclose and make available all documents and give such particulars as the opposing party is then able to make available or give as to

768 Cf s 1(2) of the Admiralty Jurisdiction Regulation Act 105 of 1983 (the 1983 Act) and Chapter XVIII (2).

769 Rule 6(2).

770 Rule 8. Cf Chapter XX (7).

771 Rule 9. Cf Chapter XX (8).

772 Cf Rule 6.

773 For the purpose of Rule 12, any plaintiff, any defendant who has given notice of intention to defend, or any third party who has delivered any pleadings shall be deemed to be an 'opposing party'.

the claim or defence upon which the opposing party relies,⁷⁷⁴ "thereby enabling the parties to know the strengths or weaknesses of their cases at an early stage of the proceedings and before any significant costs are incurred."⁷⁷⁵

If any party fails to attend a conference or to comply with any request made to it, any other party may apply to court for an order that the said party attend such conference or comply with the request.⁷⁷⁶

(2) Pleadings - Rules 1(1), (7) and (10)

The conduct of a case is determined by the "pleadings". Pursuant to Rule 1(1), a "pleading" includes particulars of claim, plea, claim in reconviction, third party notice and pleadings consequent upon the foregoing, but excludes a request for particulars or answer thereto in terms of Rule 11.

There are some general rules as to pleading prescribed by the Rules. Rule 7 provides, inter alia, that no pleadings are required in an action in rem or in personam unless the defendant has delivered notice of intention to defend. Once notice of intention to defend has been delivered, the plaintiff must within ten days thereafter deliver particulars of the claim to the defendant,⁷⁷⁷ "furnishing him with particulars of the claim setting forth the nature of the claim, the conclusions of law on the facts alleged and a prayer for the relief claimed."⁷⁷⁸ This will contain somewhat more detail than the concise statement of claim incorporated in the summons, but is nevertheless

774 Rule 12(2)(b)(i). Any opposing party may in like manner require the party requiring the conference and any other opposing party present at the conference to disclose and make available all documents and give such particulars as he is then able to make available or give concerning his claim or defence: Rule 12(2)(b)(ii).

775 Findlay & Tait op cit 19.

776 Rule 12(3).

777 Rule 7(2)(a).

778 Cf Findlay & Tait op cit 19.

restricted to essential allegations and does not contain detailed evidence such as required in German law⁷⁷⁹ once the main proceedings have commenced.⁷⁸⁰

The defendant must within ten days after the delivery of the particulars of claim deliver a plea.⁷⁸¹

Consequent on a pleading filed by another party to the action, a party may deliver any further pleading within ten days after the delivery of the proceeding pleading provided that no replication or subsequent pleading which would be a mere joinder of issue or bare denial of allegations in the previous pleading would be necessary.⁷⁸²

For further requirements with regard to general rules of pleading see Rule 7, especially where damages are to be claimed,⁷⁸³ where a pleading is vague or embarrassing,⁷⁸⁴ where a pleading lacks averments which are necessary to sustain an action or defence⁷⁸⁵ and when there are vexatious or irregular proceedings.⁷⁸⁶

Pleadings will close when the time has expired for the delivery of any further pleadings after the plea and no such pleadings have been delivered, or when a pleading has been filed joining issue without the addition of any further pleading.⁷⁸⁷

At any time after the close of pleadings a party may, pursuant to Rule 11(1), deliver a request for further particulars with regard to the pleading of

779 Ibid. See paras 355 to 494 ZPO.

780 See para 926 ZPO.

781 Rule 7(2)(b).

782 Rule 7(2)(c).

783 Rule 7(4).

784 Rule 7(5)(a).

785 Rule 7(5)(b)(i).

786 Rules 7(7) and 18 APR. For further details see Shaw op cit 114.

787 Rule 10.

any other party to the action for the purpose of enabling the party delivering the request to prepare the trial.⁷⁸⁸

(3) Pre-trial procedure - Rules 11 and 14

Proprio motu the court may, in order to expedite the trial, from time to time make an order or orders on application of any party. It may give directions for the more effectual carrying out of its order arising from the failure to answer, the inadequacy of any answer to any request for further particulars, or the failure to make any admission requested in such respect, or for the purpose of amplifying any such answer,⁷⁸⁹ or arising from any dispute as to the adequacy of any discovery of documents.⁷⁹⁰

A court may also order any person who is not a party to the action to produce documents relating to any question which may arise in the action which may be in his possession and to permit the same to be copied.⁷⁹¹

Other pre-trial procedures include questions of admission of hearsay evidence,⁷⁹² or the taking of evidence on commission,⁷⁹³ or the holding of (any) conference with regard to curtailing the proceedings and limiting the issues, and the determination of the documents to be placed before the court at the trial.⁷⁹⁴ "Many of these matters can be regulated by agreement between the parties, failing which it is necessary to apply to court for an appropriate

788 See also Rules 11(2), (3) and Rule 14(4).

789 Rule 14(1)(a)(i). Cf Shaw op cit 118.

790 Rule 14(1)(a)(ii).

791 Rule 14(1)(b).

792 Rule 14(1)(c). See Chapter XX (4).

793 Rule 14(1)(d). See Chapter XX (4).

794 Rule 14(1)(f) in conjunction with Rule 37 of the Uniform Rules.

order."⁷⁹⁵

The court may order any person who fails to answer any question satisfactorily or to make sufficient discovery of documents to produce for further particulars or to answer questions from such failure on oath, on affidavit, or otherwise as the court thinks fit.⁷⁹⁶

(4) Evidence, discovery of documents, inspections and examinations

In order to obtain all relevant facts, either because they are of interest to the parties concerned, or because they are necessary for the court's decision, both the court and the parties involved in admiralty proceedings have several legal remedies concerning evidence, discovery of documents, or inspection and examination of the res in respect of which the maritime claim arose. Some remarks with regard to how to obtain evidence and evidential requirements have to be made.

Firstly, the 1983 Act contains "rules of evidence" in ss 6(3) and (4). Section 6(3) of the 1983 Act provides that an Admiralty Court may receive as evidence statements which would otherwise be inadmissible as being in the nature of hearsay evidence, subject to such directions and conditions the court thinks fit.⁷⁹⁷

The court may take evidence on commission, and this corresponds to para 375 ZPO in German law.

The parties have several opportunities of obtaining and presenting evidence, depending on whom the burden of proof lies. With regard to actions in

795 Findlay & Tait op cit 20.

796 Rule 14(1)(a). Any order with regard to any matter referred to in Rule 14(1)(a), (d) or (f) shall be made only after the close of pleadings, unless the court in its discretion is of the opinion that an order should be made before the close of pleadings: Rule 14(4).

797 Cf Rules 14(1)(c) and 12(1)(b).

personam and the question of "ownership" at the time of the arrest, sources of evidence of ownership may be Lloyd's Register of Shipping and Lloyd's Annual Yearbook, updated to the time of the application by Lloyd's Intelligence Service or Lloyd's Confidential Index or an extract of the port registry of the port of registration.⁷⁹⁸ If the plaintiff has to prove common "ownership" or "control" with regard to the arrest of an associated ship,⁷⁹⁹ such evidence can be found in several sources. Hare⁸⁰⁰ gives detailed illustrations which help to prove the requirements of the associated ship provisions and serve as an indicator of ownership:

- The company register where the owning companies are registered, especially if share ownership details are also required to be registered;
- the port register;
- the register of directorships and office bearers of the owning companies;
- registered fleet cross-mortgages and more particularly their supporting documents where these are required to be lodged with the Registrar of Ships (these sometimes contain declarations of common beneficial ownership);
- Lloyd's Annual Yearbook;
- charterparty documents;
- factual evidence of common managers, the same hull and funnel colours, common trading schedules, group discounts with victuallers, fleet insurance negotiations and cover, interchange of officers and crew from one vessel to another, common manning agencies and shared premises.

Rule 13 contains regulations with regard to the discovery of documents before and after the close of pleadings.⁸⁰¹ The court can order such discovery

798 Hare op cit 86.

799 See Chapter XIV (3).

800 Op cit 87.

801 See para 142 ZPO in German law.

from any party whether before or after the close of pleadings in an action.

In accordance with s 5(5) of the 1983 Act and Rule 12(1)(a), the court may at any time on the application of any interested person or of its own motion make an order for the examination, testing or inspection by any person of any ship, cargo, document or any other thing, if it appears to the court to be necessary or desirable for the purpose of determining any maritime claim which has been or may be brought, or any defence thereto.⁸⁰²

In this connection, another procedural device in the form of an interlocutory injunction has emerged, to protect and preserve certain items of evidence vital to the plaintiff's case from destruction by the defendant. This injunction is the so-called "Anton Piller Order" where, without notice to the person whose property or documents are to be examined, the Sheriff or his Deputy may seize this evidence. In South African law it differs from the order granted in English law where it has its origin.⁸⁰³

The court may also make an order that any record, notes or recording whether in existence or not, should be translated or transcribed.⁸⁰⁴ It is thus possible to file documents in a language other than English, for example German.

802 See para 144 ZPO in German law.

803 Cf Powels op cit 92; C Bernstorff 'Die Eintreibung von Forderungen durch auslaendische Glaebiger in England' RIW 1985, 367 at 373; M H Carl 'Arrest und Sicherung von Beweismaterial im englischen Recht' IPRax 1983, 141; Roamer Watch Co SA and others v African Textile Distributors also t/a M K Patel Wholesale Merchants and Direct Importers 1980 (2) SA 254 (W); Easyfind International (SA) (Pty) Ltd v Instaplan Holdings and another 1983 (3) SA 917 (W); House of Jewels & Gems and others v Gilbert and others 1983 (4) SA 824 (W); Anton Piller KG v Manufacturing Processes Ltd and others (1976) All ER 779 (CA).

804 Section 5(5)(b) of the 1983 Act. Cf para 142(3) ZPO.

(5) Forced sale of the ship - s 9 of the 1983 Act, Rules 19(4) and (5)

Section 9 of the 1983 Act⁸⁰⁵ provides that a court in the exercise of its admiralty jurisdiction may at any time order that any property which has been arrested be sold, and that the proceeds thereof be held as a fund⁸⁰⁶ in the court or otherwise dealt with.⁸⁰⁷ The corresponding provision in German law is para 930(3) ZPO. The 1983 Act does not give reasons why the court should sell the property, eg a ship or the cargo. Reasons such as the deterioration of the property, that the safe deposit of a ship or a cargo will cause disproportionate costs, that the security given (which might be not sufficient or safe enough) may influence the court's discretion.⁸⁰⁸

In accordance with s 5(2)(c) of the 1983 Act, the court can order any sale or any order for sale to be subject to such conditions as to the court appears just.⁸⁰⁹ The court has the power to give the directions for the sale.⁸¹⁰ Whereas in German law the sale procedure will be always the same, because of the above mentioned provisions in South Africa, the sale procedure is laid down by the court and can therefore differ from jurisdiction and from case to case. The proceeds of any sale will be invested in such manner as the parties may agree or as the court may order, and this order may be made notwithstanding the fact that the parties have agreed otherwise.⁸¹¹

805 Cf s 8(2) of the 1983 Act.

806 Cf The Uniworld and the Unisingapore 1987 (2) SA 491 (C); The Jade Transporter II 1987 (2) SA 583 (A). See Chapter XXIV in respect of the distribution of the fund.

807 Shaw op cit 68; Hare op cit 79; Findlay & Tait op cit 13 ff. Cf The Brazilia I 1985 (1) SA 787 (C); The Jade Transporter I 1987 (1) SA 935 (N); The Jade Transporter II 1987 (2) SA 583 (A); The Brazilia II 1988 (1) SA 103 (C).

808 Shaw op cit 68.

809 See Rule 19(4).

810 In German law the public auction of a vessel is regulated by paras 162 ff ZVG. See Appendix VII.

811 Rules 19(5) and (6).

(6) Security or undertaking (P & I-Club) - ss 3(10) and 5(2)(d) of the 1983 Act

In order to obtain release of the ship from arrest or attachment, security can be given in terms of s 3(10) of the 1983 Act.⁸¹² The debtor (defendant) can by this avoid a longer delay of the voyage of his ship. Security does not only mean money, pawns or ships-mortgage because the respondent can also give an undertaking, for example a letter of undertaking⁸¹³ of his P & I-Club if he is a member. As the 1983 Act does not specify what sort of security and undertaking may be given, it is⁸¹⁴ within the discretion of the court to decide what kind of security or undertaking must be given.⁸¹⁵

Pursuant to Rule 3(5)(a), any person desiring to obtain the release of a ship from arrest, may also obtain such release with the consent of the person who caused the arrest to be effected.

The security or undertaking will be in a sum representing the amount of the plaintiff's claim or the value of the ship, whichever amount is lower. This amount must be deposited as security with the Registrar and be dealt with in terms of Rule 19.⁸¹⁶

Security given will (for the purposes of ss 9 and 10 of the 1983 Act) be deemed to be the freight or the proceeds of the sale of the property, and this means that the said sections shall apply, mutatis mutandis, in relation to security or any undertaking having been given.

A court may order that any security given should be increased, reduced or discharged subject to such conditions as to the court appears just and, for the

812 In German law this provision finds its equivalent in para 923 ZPO. See Part A - Chapter V (3).

813 Appendix XIV. Cf Part A - Chapter V (3).

814 In accordance with s 5(2)(c) of the 1983 Act.

815 Booyen op cit 82. See Rule 4(4) in conjunction with security in the case of an attachment to found or confirm jurisdiction.

816 Rule 3(5)(a). Cf Rule 3(6).

purpose of an increase of security, authorize the arrest of a ship or any other property. This is notwithstanding s 3(8) of the 1983 Act which states that property will not be arrested and security therefore will not be given more than once in respect of the same maritime claim by the same claimant.⁸¹⁷ This exception to the Rule is necessary because it might happen that in a collision, for example, an unforeseen increase of damage occurs and the security, originally given in order to release the ship from arrest is not sufficient enough anymore. In accordance with s 5(2)(d) of the 1983 Act, it is also possible to arrest a ship although security for a maritime claim has been given.

Unlike German law,⁸¹⁸ the 1983 Act does not protect the respondent from the possibility that a applicant (once the arrest is cancelled and the debtor has a damage claim) is not able to pay compensation for the damage⁸¹⁹ because of his poor financial situation. This inconvenience should lead to an amendment of the Act. A draft amendment could read as follows:

"The court may at any time make an order for the arrest or attachment if the applicant gives security to protect the respondent from any damage which may arise out of the arrest or attachment."

(7) Claim in reconvencion - Rule 8, Rule 24 of the Uniform Rules

A defendant may at any time claim in reconvencion against the plaintiff, either alone or with any other person.⁸²⁰ A defendant who counterclaims, must, together with his pleas, deliver a claim in reconvencion setting out the

817 The 1983 Act, s 5(2)(d).

818 Cf para 921(2)(sentence 2) ZPO and Part A - Chapter V (2).

819 Cf s 5(4) of the 1983 Act and para 945 ZPO.

820 Rule 8. See Shaw op cit 113.

material facts thereof.⁸²¹ The claim in reconvention must be set out either in a separate document or in a portion of the document containing the plea, but headed 'Claim in Reconvention'.⁸²² With regard to German law see para 33 and 347 ZPO.

(8) Third parties - Rule 9

If a party alleges that he is entitled to claim a contribution or indemnification against any other person not a party (a "third party") or that any issue or question in the proceedings to which he is a party has arisen or will arise between him and the third party and should be determined in the proceedings, he may cause a notice to be issued and served upon that third party⁸²³. For further details of procedure see Rules 9(2) to (6) and relative to German law para 72 ZPO.

(9) Trial and adjudication by the court - Rule 15 and Rule 39 of the Uniform Rules

Pursuant to Rule 15, the procedure in respect of setting down and hearing of any trial shall be in accordance with the procedure regulated in the Uniform Rules⁸²⁴ and any rules regulating the conduct of proceedings in the division in respect of which the court is constituted, or as ordered by the court, save that the Registrar, if he thinks fit, or with the authority of a judge in chambers, may assign fixed dates for any trial.

821 Rule 24(1) of the Uniform Rules.

822 Ibid. For further details see Rules 24(2), (3) and (4) of the Uniform Rules.

823 Rule 9(1). Rule 13 of the Uniform Rules, which applies to third party proceedings, is excluded in admiralty proceedings in terms of Rule 22.

824 See Rule 39 of the Uniform Rules.

The trial takes place in the Supreme Court before a judge. He normally decides the case without a jury or assessors. Once the case is in open court, the plaintiff is (as is the defendant) represented by an advocate, assisted by the plaintiff's attorney.⁸²⁵

Evidence will be produced orally, followed by examination, cross examination and re-examination of the witness. Where a matter is dealt with under the 'application' procedure, in which the court can resolve the issue on the affidavits filed by both parties, oral evidence will not be received.⁸²⁶ The judge will grant (or refuse) judgment on the maritime claim which is the subject matter of the action. The arrest and attachment are merely incidental matters which vest the court with effective jurisdiction, that is, they vest the court with the power to decide the case and thereafter to ensure that its judgment is made effective by execution against the property arrested or attached.

825 See Chapter XVIII (1).

826 Findlay & Tait op cit 21. Cf Hare op cit 91.

JUDICIAL REMEDIES

In terms of s 12 of the Admiralty Jurisdiction Regulation Act 105 of 1983 (the 1983 Act), a judgment or order of a court in the exercise of its admiralty jurisdiction may be subject to appeal just as if such judgment or order were that of a provincial or local division of the Supreme Court of South Africa in civil proceedings.

The 1983 Act, s 12 refers to both ss 20 and 21 of the Supreme Court Act⁸²⁷. Section 20 of the Supreme Court Act provides that an appeal from a judgment or order of the court of a provincial or local division will normally be heard by the Appellate Division. In accordance with s 21 of the Supreme Court Act, the Appellate Division has jurisdiction to hear and determine an appeal from any decision of the court of a provincial or local division.

The procedure for an appeal is set out, inter alia, in Rule 49 of the Uniform Rules of the Supreme Court and in the Rules Regulating the Conduct of Proceedings of the Appellate Division of the Supreme Court of South Africa.⁸²⁸

The decision of the court on the question whether or not a matter pending or proceeding before it is a maritime claim is not appealable.⁸²⁹

827 Act 59 of 1959 as amended.

828 See Erasmus & Barrow op cit 172 ff.

829 Section 7(4) of the 1983 Act.

C H A P T E R XXII

ENFORCEMENT OF ARREST AND ATTACHMENT(1) General rules

In an action in rem execution⁸³⁰ of the warrant of arrest is regulated by Rule 5(4) of the Admiralty Proceedings Rules (the Rules). In the case of an action against a ship, her equipment, stores or bunkers, a warrant of arrest must be served by affixing a copy of the warrant of arrest to any mast, or the outside, or any suitable part of the superstructure of the ship, and by handing a further copy to the master or other person in charge of the ship.⁸³¹ The order of execution is included in the warrant of arrest.⁸³² The warrant is served by the Sheriff or his Deputy. He has to forthwith notify the port captain of the arrest (or attachment) in the port in order to prevent the ship from sailing illegally out of the harbour.⁸³³ The Registrar also has to notify the port captain of any release of the ship or any property in terms of s 3(5) of the Admiralty Jurisdiction Regulation Act 105 of 1983 (the 1983 Act) from arrest or attachment.⁸³⁴

In the case of an action against cargo, the warrant of arrest is served and execution effected if the Sheriff or his Deputy hands a copy of the warrant

830 Execution here differs from the levy of execution after judgment where the court has to give directions for the levy of execution, usually by making an order in terms of s 9 of the 1983 Act (sale of arrested property). What is referred to in this chapter is the 'service' of the warrant of arrest or order of attachment rather than the 'levy of execution'. The 1983 Act contains no procedure for execution of judgments, as opposed to the Supreme Court Act of 1959 or the Magistrates' Court Act of 1944.

831 For instance on the local agents of the vessel, The S.S. Fabian 1921 CPD 148 at 149.

832 Cf Chapter XVIII (2) (b).

833 Rule 5(6).

834 Ibid.

to the person in charge of the cargo and, unless the said person does not permit access to the cargo, or the cargo has not been landed, or it is not practicable so to do, if the Sheriff or his Deputy has affixed a further copy to the cargo⁸³⁵.

In the case of an action against freight, the warrant of arrest is served by handing a copy of the warrant to the person by whom the freight is payable.⁸³⁶

The court has a discretion to order any manner of serving the warrant of arrest.⁸³⁷

Unlike German law,⁸³⁸ the arrest or attachment of a ship does not establish a lien on the arrested or attached ship or indeed any other right (for instance the same rights as a ship's mortgage in proportion to other rights).⁸³⁹

After the arrest or attachment, the property has to be kept in the custody of the Sheriff or his Deputy⁸⁴⁰. These officials have the discretion to take such steps as appear to them (or as the court orders) to be appropriate for the custody and preservation of the property, including the removal and storage of any cargo if still on board and especially disposal and storage of perishable goods which have been arrested or attached, or which are on board any ship which has been arrested or attached.⁸⁴¹

With the enforcement of arrest, South African law does not distinguish

835 Rule 5(4)(b).

836 Rule 5(4)(c).

837 Rule 5(4)(d).

838 Cf Part A - Chapter VII (1) (a).

839 Cf para 931(2) ZPO.

840 Part A - Chapter VII (1). Cf paras 931(1) and 808 ZPO.

841 Rule 19(1).

between registered and non-registered ships like German law.⁸⁴² In this respect, South African law is easier to apply than German law. In South African law, however, there is, like in German law, a distinction between registered and non-registered ships, because in accordance with s 13 of the Merchant Shipping Act there is an obligation to apply for the registry of a ship of 25 or more gross tons.

Pursuant to Rule 3(4), one has to note the peculiarity in respect of the arrest of foreign ships because of a claim concerning any claim by a master or a member of the crew of a ship arising from his employment.⁸⁴³ Before arresting the foreign ship, notice of the intention so to arrest the ship has to be given to the consular representative, if any, of the country where the ship is registered at the port where the ship is to be arrested or, if there is no such representative at the port in question, to the chief representative of that country in South Africa. Further, in the certificate in terms of Rule 3(3)⁸⁴⁴ it must be stated that the said notice has been given and when and to what person such notice was given. This is not merely a formality, because the consular representative may be helpful in matters such as the maintenance of the crew pending proceedings and their subsequent repatriation.⁸⁴⁵

(2) Enforcement of foreign arrests in South Africa

The enforcement of foreign (arrest) titles in South Africa is regulated by the Protection of Business Act⁸⁴⁶.

842 Para 930 and 931 ZPO. Cf Part A - Chapter VII (1) (a) and (b).

843 Section 1(1)(ii)(n) of the 1983 Act.

844 Cf Chapter XVIII (2) (a).

845 Shaw op cit 108.

846 Act 99 of 1978 as amended. With regard to that see Part A - Chapter VII (3).

(3) Immunity of State ships

South Africa has not ratified the Immunity of States-Ship Convention of 1926 (Immunity Convention of 1926).⁸⁴⁷ Immunity of foreign State-ships is, however, provided for in the Foreign States Immunities Act (the Immunity Act).⁸⁴⁸

In accordance with s 2 of the Immunity Act a foreign State will be immune from the jurisdiction of the courts of South Africa except as provided in the Immunity Act.

With regard to admiralty proceedings a foreign State will not be immune from the admiralty jurisdiction of any court of South Africa in an action in rem against a ship belonging to the foreign State,⁸⁴⁹ or in an action in personam for enforcing a claim in connection with such a ship, if, at the time when the cause of action arose,⁸⁵⁰ the ship was in use or intended for use for commercial purposes.

Furthermore, a foreign State will not be immune from the admiralty jurisdiction of any court in South Africa in an action in rem against any cargo belonging to the foreign State if both the cargo and the ship carrying it were, at the time when the cause of action arose, in use or intended for use for commercial purposes.⁸⁵¹ A foreign State will not be immune from admiralty jurisdiction in an action in personam for the enforcement of a claim in connection with any such cargo if the ship carrying it was, at the time when the cause of action arose, in use or intended for use for commercial purposes.⁸⁵²

847 Cf Part A - Chapter VII (2) (b); Shaw op cit 59; Inter-Science Research and Development Services (Pty) Ltd v Republica Popular de Mozambique 1980 (2) SA 111 (T).

848 Act 87 of 1981 as amended.

849 The Immunity Act, s 11(1)(a).

850 The Immunity Act, s 11(1)(b).

851 The Immunity Act, s 11(2)(a).

852 The Immunity Act, s 11(2)(b).

Sections 11(1) and (2) of the Immunity Act are in line with the Immunity Convention of 1926, limiting the liability of State-owned ships. To extend its international standard South Africa should ratify the Immunity Convention of 1926.

Finally, for the purpose of this thesis, a foreign State which has agreed in writing to submit a dispute which has arisen, or may arise, to arbitration, will not be immune from the jurisdiction of Admiralty Courts in any proceedings which relate to the arbitration.⁸⁵³ The aforesaid does not apply if the arbitration agreement provides that the proceedings shall be brought in courts of a foreign State, or if the parties to the arbitration agreement are foreign states.⁸⁵⁴

853 The Immunity Act, s 10(1).

854 The Immunity Act, s 10(2).

C H A P T E R X X I I I

LIMITATION OF TIME AND PRESCRIPTION

In order to determine prescription of or limitation of time for the commencement of an action, suit, claim or proceedings, an admiralty action will be deemed to have commenced in terms of the Admiralty Jurisdiction Regulation Act 105 of 1983 (the 1983 Act):

- (a) By the making of an application for the attachment of property to found jurisdiction if the application is granted and the attachment carried into effect;⁸⁵⁵
- (b) by the issue of any process for the institution of any action in rem if that process is thereafter served;⁸⁵⁶
- (c) by the service of any process by which an action is instituted.⁸⁵⁷

This general rule concerning prescription or limitation of time is complemented by several provisions of the Admiralty Proceedings Rules (the Rules). In accordance with Rule 5(1) for example, no summons or warrant will be served if more than one year has expired since the date when it was issued.⁸⁵⁸

Further rules of limitation of time or prescription can be found in Rule 6(2),⁸⁵⁹ Rule 7(2)(a)⁸⁶⁰ or Rule 20(2)(b).⁸⁶¹

855 The 1983 Act, s 1(2)(a).

856 The 1983 Act, s 1(2)(b).

857 The 1983 Act, s 1(2)(c).

858 Save with the leave of the court, which is granted almost as a mere formality.

859 With regard to notice of intention to defend see Chapter XX (1).

860 With regard to general rules to pleadings see Chapter XX (2).

861 With regard to filing, delivery and preparation of papers, especially power of attorney, see Chapter XVIII (1).

Rule 17(1) gives the court the discretion⁸⁶² to abridge or extend any period of time, to advance or postpone any date in respect of any matter for which a time or date is laid down in the Rules, the Uniform Rules of the Supreme Court of South Africa (the Uniform Rules) as applicable to admiralty proceedings, any notice, order of court, or otherwise.⁸⁶³

862 On application of any person, not ex officio.

863 With regard to limitation of time and 'ranking of claims' see s 11(1)(c) of the 1983 Act.

C H A P T E R XXIV

DISTRIBUTION OF FUND AND RANKING OF THE CLAIM(S) - SS 9 AND 11 OF THE 1983 ACT(1) Distribution of the fund

As already pointed out⁸⁶⁴ a court may, in accordance with s 9 of the Admiralty Jurisdiction Regulation Act 105 of 1983 (the 1983 Act) and in the exercise of its admiralty jurisdiction, at any time order that any property which has been arrested in terms of the 1983 Act be sold and the proceeds thereof be held as a fund in the court or otherwise dealt with. The usual procedure after an arrest is for a judicial sale of a ship to be held and for the proceeds thereof to be paid into a fund in the court.

After the fund has been constituted every creditor of the defendant, in accordance with s 11 of the 1983 Act, has to file a claim against the fund in order to participate in the distribution thereof.

The 1983 Act, and especially s 11, does not indicate how claims are to be proved, and the practice so far has been to refer the proof of claims to a referee. This recognizes, inter alia, the fact that some of the claims proved may be claims other than maritime claims. This occurs more frequently in the case where the property, the proceeds of which are being dealt with in terms of s 11 of the 1983 Act, is not the proceeds of a ship. The general rule with regard to execution is that only claims with regard to which there is a writ of execution will rank unless the claim is a secured claim which is dealt with by a special procedure.

Therefore the court, after the fund has been constituted, appoints referee for the purpose of receiving, considering and reporting to the court on the claims filed against the fund. The referee is usually an advocate acting on behalf of the court.

864 Cf Chapter XX (5).

It follows from the above that all claims against the defendant have to be filed against the fund. This means that even the applicant who sought the arrest of the vessel (and eventually her judicial sale) has to file his claim with the referee.

After the referee has been appointed he will give notice to all creditors of the arrested and sold ship (ie all creditors of the defendant) to file their claims within a time-limit set by the court. In order to give creditors who are not known to the referee the opportunity to participate in the distribution of the fund, the court order which provides for the appointment of the referee and the time-limit will be published in national and international newspapers eg Lloyd's List of London. These official steps are necessary especially in shipping matters as the parties involved are often spread over the whole world.

The creditors have to file their claims with the referee supported by an affidavit and by such documentation as is appropriate to prove the said claim. This is to make sure that only creditors with a legal claim participate in the distribution of the fund.

When a creditor, for whatever reason, has not filed his claim with the referee within the time-limit ordered by the court, he is required to wait until all other creditors have been paid out. Only then he can attach the owner's "residual interest" in the fund, ie the money which is left after the distribution of the fund. This has to be done by filing summons in an action in personam against the fund.

The procedure described above is in certain fields similar to German law. When the court which had heard the arrest proceedings orders the sale of the ship by judicial auction, the court competent to execute the judicial sale of the ship is the Magistrates' Court in whose jurisdiction the vessel is arrested.⁸⁶⁵ However, in deviation from South African law, all creditors are requested to reply for registration of their claims before the judicial auction

865 Cf para 163(1) ZVG.

takes place and before a fund has been created.⁸⁶⁶ A maritime lienholder who has not filed his claim in time, will lose his lien and will not have his lien and considered of course all other rights when the proceeds of the judicial sale are. Maritime liens, in other words, lose their right of priority when not filed in the time required in accordance with para 37(4) ZVG. The request to file claims will be published in suitable shipping journals.

The referee, after the lapse of the time-limit and after having received (all) claims, will report to the court on the claims filed against the fund constituted by the proceeds of the sale of the ship. In this report he will give a brief description of the identity of each claimant, the nature of the claims and the priority claimed.

The ranking of the claims, is regulated by s 11 of the 1983 Act.⁸⁶⁷ Furthermore, the referee recommends whether or not a claim is entitled to priority under s 11 of the 1983 Act.

Finally the referee recommends insofar as any claim may need to be converted into a currency other than in which it was lodged for the purpose of payment the way of conversion. This has to be done by the principles set out above.⁸⁶⁸ The court then will decide how the fund has to be distributed.

(2) Ranking of the claims

The ranking of claims is regulated by s 11 of the 1983 Act,⁸⁶⁹ and this gives the order in which the maritime claims of s 1(1)(ii) of the 1983 Act⁸⁷⁰ rank against the fund created in terms of the 1983 Act or security given in respect

866 Cf para 167(2) in conjunction with para 37(4) ZVG.

867 See the following section.

868 Cf Chapter XVIII (2) (c).

869 Cf Appendix X.

870 Cf The Fidias 1986 (1) SA 714 (D).

of property sold pursuant to an order or in the execution of a judgment of an Admiralty Court.⁸⁷¹

Section 11 of the 1983 Act is based, inter alia, on the International Conventions for the Unification of certain Rules relating to Maritime Liens and Mortgages of 1926 and of 1967.⁸⁷²

The 1983 Act, s 11(1)(a) to (f) gives the ranking of the maritime claims, and s 11(2) of the 1983 Act provides for the 'ranking' in between the 'ranking' in ss 11(1)(a) to (f) of the 1983 Act in a rather confusing manner. Section 11(2) of the 1983 Act means as follows:

- Claims in respect of costs and expenses incurred to preserve the property or to procure its sale, and in respect of the distribution of the proceeds of the sale,⁸⁷³ rank before all other claims referred to in s 11(1)(b)-(f) of the 1983 Act.⁸⁷⁴
- Earlier possessory liens rank before all later claims except salvage claims, claims of removal of wreck and contribution in respect of general average acts or sacrifice.⁸⁷⁵
- A salvage claim and claims of removal of wreck and contribution in respect of a general average act or sacrifice, whether or not more than a year old, rank before any claim which came into being earlier.⁸⁷⁶
- All other claims referred to in s 11(1)(c) of the 1983 Act enjoy

871 The 1983 Act, s 11(1). Cf The Brazilia I 1985 (1) SA 787 (C); The Brazilia II 1988 (1) SA 103 (C).

872 Cf Singh International Maritime Law Conventions vol 4 (1983) at 3053 and 3059. See Rycroft op cit 421; Friedman (1985) 102 SALJ 45 at 56 with regard to the influence of English and American law on s 11 of the 1983 Act; Shaw op cit 95; Hare op cit 80.

873 The 1983 Act, s 11(1)(a).

874 The 1983 Act, s 11(2).

875 The 1983 Act, ss 11(2)(a), 11(1)(b) and (c)(vi).

876 The 1983 Act, ss 11(2)(b) and 11(1)(c)(vi).

equal ranking.⁸⁷⁷

- Claims in respect of mortgages, hypothecations, rights of retention of, and other charges on, the ship rank in accordance with the law of the flag of the ship.⁸⁷⁸
- All other maritime liens not mentioned above rank among themselves in their priority according to law.⁸⁷⁹
- All other claims rank in the order of preference to the law of insolvency.⁸⁸⁰
- If s 11(2) of the 1983 Act does not provide for the ranking of any maritime claim, claims rank in the order set forth in s 11(1) of the 1983 Act.⁸⁸¹

For the purpose of matters concerning ranking in s 11(2) of the 1983 Act, salvage claims or claims in connection with the removal of a wreck will be deemed to have accrued when the salvage operation or the removal of the wreck terminated, and a claim in connection with contribution in respect of general average, when the general average act was performed.⁸⁸²

Concerning the judicial sale and any proceeds thereof, an Admiralty Court can, on application of any interested person, make an order declaring how any claim against the proceeds of the sale of the property (eg a ship) will rank.⁸⁸³

A judgment or an arbitration award ranks in accordance with the claim in

877 Section 11(2)(c) of the 1983 Act. Cf Art.4 of the International Convention relating to Maritime Liens of 1967; The Emerald Transporter 1985 (4) SA 133 (N) at 142F-G.

878 The 1983 Act, ss 11(2)(d) and 11(1)(d).

879 The 1983 Act, ss 11(2)(e) and 11(1)(e).

880 The 1983 Act, ss 11(2)(f) and 11(1)(f). See ss 99 ff of the Insolvency Act 24 of 1936 (as amended).

881 The 1983 Act, s 11(2)(g).

882 The 1983 Act, s 11(3).

883 Section 11(4) of the 1983 Act. Cf The Emerald Transporter I 1985 (4) SA 133 (N) at 135.

respect of which it was given or made.⁸⁸⁴ Interest on any claim or the costs of enforcing a claim are part of the main claim.⁸⁸⁵

Section 11(8) of the 1983 Act provides that where the fund arises by reason of an action in rem against an associated ship, claims in respect of the ship whose sale gave rise to the fund ('direct claims') will be paid before claims in respect of any other ship in relation to which the ship was sold was an associated ship ('associated ship claims').⁸⁸⁶ The 1983 Act, s 11(8) gave rise to several judgments.⁸⁸⁷ In The Emerald Transporter I,⁸⁸⁸ Howard J stated that s 11(8) of the 1983 Act provided, in effect, for a marshalling of all the claims against the fund, the direct claims against the vessel (ranked according to s 11 of the 1983 Act) being placed in the first queue for payment and the associated ship claims (also ranked in accordance with s 11 of the 1983 Act) being relegated to the second queue. In the Jade Transporter II it was held⁸⁸⁹

"that s 11(8) of the 1983 Act ... must be interpreted in accordance with the ordinary meaning of the language employed by the Legislature. The subsection brings about a queuing where a fund in the Court arises by reason of an action in rem against an associated ship. Therefore, when a claimant, having instituted an action in rem against a ship (ship B) which is an associated ship vis-a vis the ship against which the claimant has a direct claim (ship A), applies for and obtains a court order under s 9 of the 1983 Act for the sale of ship B and the creation of a fund in the court, and a second claimant lodges a claim against the fund in respect of a direct claim against ship B, then the provisions of s 11(8) of the 1983 Act apply,

884 Section 11(6) of the 1983 Act.

885 Section 11(7) of the 1983 Act.

886 Cf The Emerald Transporter I 1985 (4) SA 133 (N) at 138F-H.

887 The Berg I 1984 (4) SA 647 (N); The Emerald Transporter II 1985 (2) SA 452 (D); The Jade Transporter II 1987 (2) SA 583 (A).

888 1985 (4) SA 133 (N) at 138F-H. See The Berg I 1984 (4) SA 647 (N) at 656G-657D; The Jade Transporter II 1987 (2) SA 583 (A).

889 1987 (2) SA 583 (A).

and in accordance with those provisions, the second claimant's claim will fall into the first queue against the fund, while the original claimant's claim will fall in the second queue against the fund. The fact that s 11(8) of the 1983 Act does not make provision for situations where applicants under s 9 of the 1983 Act have only direct claims in rem and/ or direct claims in personam or only associated claims against the fund does not justify the court's departure from the clearly expressed intention of the Legislature".

With regard to the last sentence of the above quotation, it is for the Legislature to remedy the casus omissus as well as to afford greater clarity in terms of s 11(8) of the 1983 Act.⁸⁹⁰

Notwithstanding the provisions as to ranking, any undertaking or security given with respect to a particular claim will be applied in the first instance in satisfaction of the claim.⁸⁹¹

Lastly, s 11(10) of the 1983 Act provides that any balance remaining after payment of the claims referred to in ss 11(1)(a) to (e) of the 1983 Act has to be paid over to the trustee, liquidator or judicial manager.⁸⁹²

890 Ibid. Cf Shaw op cit 99 f; Hare op cit 80 ff.

891 Section 11(9) of the 1983 Act. Cf Hare op cit 83.

892 With regard to arrest/ attachment and insolvency see Chapter XXV.

ARREST/ ATTACHMENT AND INSOLVENCY

Where arrest or attachment and insolvency proceedings are concerned, one has to distinguish between arrest or attachments prior to commencement of bankruptcy proceedings and arrest or attachments commenced after insolvency proceedings⁸⁹³ have commenced.

Where a ship or any other property has been arrested or attached prior to commencement of bankruptcy proceedings in terms of s 3(5) of the Admiralty Jurisdiction Regulation Act 105 of 1983 (the 1983 Act) the bankruptcy laws are excluded. The property (eg the ship) does not form part of the insolvent estate and no admiralty action is affected by insolvency proceedings, ie no proceedings are stayed by reason of any sequestration, winding-up or judicial management with respect to that owner or person.⁸⁹⁴ With regard to the stay of proceedings, the 1983 Act departs from ordinary civil proceedings, whereas legal proceedings are stayed until the appointment of a trustee.⁸⁹⁵ However, where any money is left after admiralty proceedings against a shipowner or a shipping company (who made bankrupt after the arrest of a ship), this has to be paid over to the trustee, liquidator or judicial manager.⁸⁹⁶

A different legal situation applies if bankruptcy proceedings have already been commenced because it is then not possible to arrest or attach a ship.⁸⁹⁷ The Insolvency and the Companies Acts are applicable because the Insolvency Act deals with a person or partnership or the estate of a person or partnership,

893 Ie winding-up.

894 This follows from s 10 of the 1983 Act. Cf Booyen op cit 82.

895 Cf s 20(1)(b) of the Insolvency Act and s 358 of the Companies Act.

896 The 1983 Act, s 11(10).

897 This is in accordance with the Insolvency Act and the Companies Act.

whereas the Companies Act⁸⁹⁸ deals with a body corporate or a company or other association of persons which may be placed under liquidation. This distinction has to be drawn because not all ships belong to shipping companies; they are also owned by (single) persons and partnerships.

If bankruptcy proceedings have already commenced⁸⁹⁹ against a shipping company, it is not possible to arrest or attach a ship, and any arrest or attachment of a ship already obtained is void. This is in accordance with s 359(1)(b) of the Companies Act. Section 359 of the Companies Act reads as follows:⁹⁰⁰

- (1) When the court has made an order for the winding-up of a company or a special resolution for the voluntary winding-up of a company has been registered in terms of s 200-
 - (a) all civil proceedings by or against the company concerned shall be suspended until the appointment of the liquidator; and
 - (b) any attachment or execution put in force against the estate or assets of the company after the commencement of the winding-up shall be void.
- (2) (a) Every person who, having instituted legal proceedings against a company which were suspended by a winding-up, intends to continue the same, and every person who intends to institute legal proceedings for the purpose of enforcing any claim against the company which arose before the commencement of the winding-up, shall within four weeks after the appointment of the liquidator give the liquidator not less than three weeks' notice in writing before continuing or commencing the proceedings.

898 In terms of s 339 of the Companies Act the law of insolvency is, in so far as it is applicable, to be applied mutatis mutandis in respect of any matter not specially provided for in the Companies Act.

899 In terms of s 348 of the Companies Act, a winding-up of a company by the court shall be deemed to commence at the time of the presentation to the court of the application for the winding-up.

900 Cf paras 14, 117, 126 KO and Part A - Chapter IX.

- (b) If notice is not so given the proceedings shall be considered to be abandoned unless the court otherwise directs.

Section 359(1)(b) of the Companies Act speaks of any 'attachment' or 'execution' and thus one might conclude that admiralty actions in rem do not fall under this provision. Berman J held in The Alkar⁹⁰¹ that the arrest of the vessel was an 'attachment' within the meaning of the word used in s 359(1)(b) of the Companies Act. However, it is not necessary to try to subsume arrest under attachment because s 359(1)(b) of the Companies Act provides that any 'attachment' or 'execution' shall be void. According to this, the execution of arrest shall be void, not the order for an arrest itself.⁹⁰² The result is consequently the same: The attachment or arrest of a vessel cannot be enforced when the (civil) court has already made an order for the winding-up of a company or when a special resolution for the voluntary winding-up of a company has been registered in terms of s 200 of the Companies Act.⁹⁰³ The aforesaid is, as already mentioned, only valid for arrest/ attachment proceedings instituted after insolvency proceedings have commenced.

The same results from the sequestration of the insolvent estate of a (single) person or a partnership. In terms of s 20(1)(c) of the Insolvency Act, a Sheriff or Messenger, whose duty it is to execute any judgment given against a person (not yet insolvent) or partnership, as soon as he becomes aware of the sequestration of the insolvent's estate, has to stay the execution of an arrest or attachment, unless the court otherwise directs. In turn, the Deputy-Sheriff, as soon as he has received a sequestration order, attaches the property of the insolvent's estate. Every Officer having charge of a register of ships must enter a caveat against the transfer of every ship or share in a ship or the

901 1986 (2) SA 138 (C).

902 Cf Shaw op cit 91.

903 Ibid.

cancellation or cessation of every deed of mortgage of a ship registered in the name of or belonging to the insolvent or his or her spouse.⁹⁰⁴

⁹⁰⁴ Section 17(3) bis of the Insolvency Act. Cf Smith The Law of Insolvency 3ed (1988) at 83.

ARREST/ ATTACHMENT AND ARBITRATION

A court may in the exercise of its admiralty jurisdiction order the arrest of any property if the claim is or may be the subject of an arbitration pending or proceeding either in South Africa or elsewhere and whether or not it is subject to the law of South Africa.⁹⁰⁵

The Admiralty Courts have in two circumstances the inherent right to send admiralty actions to an arbitration tribunal. Firstly, the Admiralty Court can decline to exercise its admiralty jurisdiction in any proceedings if it is of the opinion that the action can more appropriately be adjudicated upon by another court, tribunal or body elsewhere.⁹⁰⁶ From this it follows that although no arbitration clause exists, the Admiralty Courts can refer an action in rem or in personam to an arbitration tribunal. Secondly, the Admiralty Courts can stay any proceedings in terms of the Admiralty Jurisdiction Regulation Act 105 of 1983 (the 1983 Act) if it is agreed by the parties concerned that the matter in dispute be referred to arbitration in South Africa or elsewhere.⁹⁰⁷ Shaw⁹⁰⁸ is of the opinion that 'inferentially therefore it appears that the court, tribunal or body referred to in s 7(1)(a) of the 1983 Act is not an arbitration tribunal'. With respect, this conclusion cannot be followed. Section 7(1)(a) of the 1983 Act concerns the fact that a court may

905 Section 5(3)(a)(ii) of the 1983 Act.

906 Section 7(1)(a) of the 1983 Act.

907 Section 7(1)(b) of the 1983 Act.

908 Op cit 54. Cf Staniland 1987 (2) LMCLQ 305 at 313 who agrees with Shaw and says: "If this was accepted, then, of course, it follows that the Admiralty Court cannot, in terms of s 7(1)(a) (of the 1983 Act), decline to exercise its admiralty jurisdiction in any proceedings instituted or to be instituted, even if the court would be of the opinion that the action could more appropriately be adjudicated upon by means of arbitration in London."

decline to exercise its admiralty jurisdiction in any proceedings instituted or to be instituted; s 7(1)(b) of the 1983 Act concerns the fact that a court may stay any proceedings and refer them to arbitration, if agreed by the parties. In the first case, the court makes its decision without having regard to any agreement which the parties concerned may have made, whereas in the second alternative the court makes its decision only if there is an agreement between the parties concerned. Both, ss 7(1)(a) and (b) of the 1983 Act therefore deal with arbitration.

If the Carriage of Goods by Sea Act of 1986 (the 1986 Act)⁹⁰⁹ is applicable, one has to note s 3 of the 1986 Act which provides for an exception to s 7(1)(b) of the 1983 Act and reads as follows:

"(1) Notwithstanding any purported ouster of jurisdiction, exclusive jurisdiction clause or agreement to refer any dispute to arbitration, and notwithstanding the provisions of the Arbitration Act, 1965 (Act No. 42 of 1965), and of s 7(1)(b) of the 1983 Act, any person carrying on business in the Republic and the consignee under, or holder of, any bill of lading, waybill or like document for the carriage of goods to a destination in the Republic or to any port in the Republic, whether for final discharge or for discharge or for discharge for further carriage, may bring an action relating to the carriage of the said goods or any such bill of lading, waybill or document in a competent court in the Republic."

(2) The provisions of subsection (1) of this section shall not apply to arbitration proceedings to be held in the Republic which are subject to the provisions of the Arbitration Act, 1965.

The Carriage of Goods by Sea Act of 1986 preserves the effectiveness of arbitration clauses calling for arbitration in South Africa in relation to cargo claims so that the court's jurisdiction may be validly ousted by a South African arbitration clause or agreement.⁹¹⁰ Sections 3(1) and (2) of the 1986

909 Act 1 of 1986.

910 Cf Staniland 1987 (2) LMCLQ 305 at 312; Hare op cit 79.

Act seem to exclude each other because s 3(1) of the 1986 Act provides that notwithstanding the provisions of the Arbitration Act 1965 any person may bring an action relating to the carriage of goods referred to in that paragraph and to any Bill of Lading, whereas s 3(2) of the 1986 Act provides that s 3(1) of the 1986 Act is not applicable to arbitration proceedings which are subject to the provisions of the Arbitration Act. The South African Legislature should take steps to clear-up this apparent contradiction.

The possibility that South African courts may refer any proceedings to arbitration tribunals ensures that a case can be adjudicated by the venue most familiar with the law to be applied. As an example, when German law is applicable, the proceedings can be referred to a German arbitration center like Hamburg. Finally, arbitration procedures are, usually, cheaper than ordinary Court proceedings.

With regard to German law arrest proceedings and arbitration are linked with para 926(1) ZPO. If the principal matter is not pending the commencement of arrest proceedings, the court issuing the anticipatory seizure can, upon application, order that the party who has secured the order of anticipatory seizure bring an action within a time-limit to be determined. The court of the principal claim at which the applicant has to file suit is either a court within the meaning of the ZPO or of a foreign country or an arbitration tribunal if an arbitration agreement is in existence between the parties in arrest proceedings.⁹¹¹ As the aim of the arrest proceedings is to secure the principal claim but not to decide upon the merits thereof the appropriate forum has to be the one which the parties would have chosen had no arrest proceedings been instituted. Such a forum includes an arbitration tribunal.

911 Cf Part A - Chapter VI (1).

C H A P T E R XXVII

LIABILITY FOR DAMAGES BECAUSE OF UNDUE ARREST OR ATTACHMENT - S 5(4) OF THE
1983 ACT AND RULE 7(4)

Any person who makes an excessive claim or requires excessive security or without good cause obtains an arrest of property or an order of court, is liable to any person suffering loss or damage as a result thereof for that loss or damage.⁹¹² This provisions has its equivalent in German law in para 945 ZPO⁹¹³ although there are slight differences between the two provisions. It is therefore not true that s 5(4) of the Admiralty Jurisdiction Regulation Act 105 of 1983 (the 1983 Act) has no equivalent in any other legislation in the world as was incorrectly stated in The Atlantic Victory.⁹¹⁴

The party who obtained the order of arrest in German law is obliged to indemnify the respondent for damage which originates from the enforcement of the arrest or because of having provided security to prevent the arrest in the case where the arrest proves to be invalid from the outset, or if the regulation in terms of para 926(2) ZPO is to be cancelled. Para 945 ZPO includes the South African part of s 5(4) of the 1983 Act "obtained an arrest of property or an order of court without good cause", because all wrongful arrests are included. Insofar the German provision is wider than the South African one, because the latter only includes "arrests obtained without good cause" whereas the German law includes all arrests, either obtained for any reason include the reason 'without good cause'. Furthermore, para 945 ZPO like s 5(4) of the 1983 Act includes claims for damages against a person who has made an excessive claim or required excessive security. However, South African

912 Section 5(4) of the 1983 Act.

913 Cf Part A - Chapter XII.

914 1986 (4) SA 329 (D) at 334C.

law in this respect might go further than German law, because s 5(4) of the 1983 Act only requires that an excessive claim or excessive security was required, without the necessity of any damage followed by the demand.

The meaning and interpretation of the indefinite legal terms "without good cause" depends on the actual cause. In this respect, an example is provided by The Atlantic Victory:⁹¹⁵

"The defendant companies, both peregrini, were sued for damages by the owners of cargo which had been carried in their vessel and which was allegedly damaged through the fault of plaintiff, also a peregrinus, who had chartered the vessel owned by the defendants. In order to pursue the claim, the defendants attached the bunkers on board a vessel The Atlantic Victory, then under charter to plaintiff in harbour at Durban, in order to found jurisdiction in a South African court. The defendants were subsequently notified that the plaintiff would apply for the order of attachment to be set aside and the bunkers to be released. The defendants thereafter withdrew the attachment and the plaintiff thereafter instituted an action by issuing a writ of summons in personam contending that the attachment had been without good cause within the meaning of s 5(4) of the 1983 Act."

"Without good cause" covers cases where the attachment or arrest ought not to have been granted either because of action or because the basis of the defendant's claim had not been properly and correctly investigated.⁹¹⁶

Where damages are claimed it is not necessary to state particulars of damage, provided that the amount and nature of the damages claimed and the amount of any consequential loss claimed and the alleged basis therefor will be stated.⁹¹⁷

915 1986 (4) SA 329 (D).

916 Cf The Atlantic Victory 1986 (4) SA 329 (D) at 332J.

917 Rule 7(4) of the Admiralty Proceedings Rules.

P A R T C

C O N C L U S I O N

The arrest-of-ship provisions in German and South African law try to effect uniformity with regard to the international nature of maritime law. Although the arrest of ships in German law is regulated by the common civil procedure and not by a special act like the Admiralty Jurisdiction Regulation Act of 1983 (the 1983 Act) in South African law, the arrest proceedings in German law are as effective as the South African ones. However in German law there is the advantage that a creditor can seize the whole property of the debtor. By comparison, in South African law, the creditor who wishes to enforce a maritime claim in terms of s 3(5) of the 1983 Act is restricted to the arrest or attachment of the ship, bunkers, cargo or freight.

The 1983 Act, which was long overdue in South African maritime law, is not always sufficiently clear. Admittedly the practicability of a new act is only tested when it is applied in court and inaccuracies can be removed by subsequent amendments. These amendments should, for example, include s 6 of the 1983 Act and the problem of which law is to be applied. In order to give the South African Admiralty Courts greater flexibility, s 6(1) of the 1983 Act should be amended as regards the application of English law because this is one of the difficulties which has to be faced by a foreign litigant (or his lawyer) when applying for the arrest of a ship. These difficulties are historical and originate from the fact that South Africa was once a British Colony and is still linked by the heritage of that time. Consequently, one not only has to look at South African law but also English and Roman-Dutch law when these are applicable in terms of section 6 AJRA. German law on the other hand is based on statute law which is more than a century old, and which has been amended. It therefore meets all the requirements which are necessary for the purpose of international traffic and cargo trade and international maritime law.

Turning to international conventions, South Africa has not, unlike

Germany, ratified the International Convention for the Unification of Certain Rules Relating to Arrest of Seagoing Ships of 1952 (the Arrest Convention of 1952). It is highly desirable that South Africa in this respect follows the German example. When applying German law, it has to be noted that Germany has joined the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 1968 (the EEC-Convention) - this is particularly so when trying to enforce the arrest of ships. South Africa unlike Germany has also not ratified the Convention on Limitation of Liability for Maritime Claims of 1976 (the 1976 Convention). Regulations concerning the limitation of liability in South African law can be found in ss 261 to 263 of the Merchant Shipping Act of 1951. In German law limitation of liability is codified in paras 486 to 487e HGB with reference to the 1976 Convention.

South Africa has special Admiralty Courts which have jurisdiction in arrest matters. In Germany, when issuing the arrest, jurisdiction is vested in the Court dealing with the principal matter, as well as in the Magistrates' Court (Amtsgericht) in whose district the property which is to be arrested is located.⁹¹⁸

It is necessary to distinguish between the action in rem and the action in personam. In South Africa, when bringing an action in personam, the aim of the applicant is not directed at a person but the whole property of that person. As with an action in rem, a res is the object of an admiralty action. An action in personam in German law however is only directed against a person. An action in personam can take one of the following forms: detention, compulsory registration with the police within a certain time limit or the attachment of a passport. An action in rem in both German and South African law is directed against a res.

South African and German law presume a "claim for an arrest" in order to obtain an order for arrest. In German law the claim has to be a pecuniary claim

918 Para 919 ZPO.

or the claim must be able to become a pecuniary claim.⁹¹⁹ South African law enumerates the maritime claims justifying an order of arrest in s 1(1)(ii) of the 1983 Act and gives a numerus clausus whereas para 916 ZPO enables the court to subsume any pecuniary claim or claim which might become a pecuniary claim within the terms of para 916 ZPO. In this respect then, German law is more extensive than South African law.

With regard to the arrest of ships other than the one in which the maritime claim arose, German law offers the opportunity of arresting a sistership. South African law offers the opportunity of arresting of a so-called "associated ship" in terms of ss 3(6) and (7) of the 1983 Act, a unique provision which attempts to defeat the strategy of sisterships (ie single-ship companies) and enables the South African courts to arrest ships owned by the person who was the owner of the ship concerned at the time the maritime claim arose. The court can also arrest a ship owned by a company in which the shares were controlled or owned by a person who then controlled or owned the shares in the company which owned the ship concerned. Indeed, ships will be deemed to be owned by the same persons if all the shares in the ship are owned by the same persons. A person will further be deemed to control a company if he has the power to control the company directly or indirectly.

South African and German law both allow the possibility of "anticipated arrests." The courts can order the anticipated arrest of ship not yet within the area of jurisdiction of the court at the time of application. Such an order may be brought into effect when the ship comes within the area of jurisdiction of the Court. In German law this principle does not contravene para 482 HGB because this provision only prohibits placing a ship under distraint (if she is on a voyage and is not lying in a port) and not the order of arrest.

With the arrest of ships per se South African law (unlike German law) does not distinguish between registered and non-registered ships. In German law this

919 Para 916 ZPO.

distinction is of vital importance when enforcing an arrest. Execution against non-registered ships follows the principles of levy of execution (Pfaendung) against movable things.⁹²⁰ For practical reasons, registered seagoing ships subsume the provisions relating to the levy of execution of movable property with that of the law of the chattels.⁹²¹ Unlike Germany, in South African law the execution against a ship does not establish a lien over the arrested or attached ship.

Finally, one has to take cognisance of the South African and German particulars concerning arrests and insolvency of the debtor. In both jurisdictions there are similarities concerning the liability for damages owing to unlawful arrest.

This thesis has thus shown that in certain fields German and South African law do not differ or are at least substantially similar. This fact makes the application of both laws easier for litigants and lawyers, whether from Germany or from South Africa.

920 Para 930 ZPO.

921 Para 931(1) ZPO.

P A R T D

A P P E N D I X I

GERMAN CODE OF CIVIL PROCEDURE (ZPO)

A. German:

para 23 (Besonderer Gerichtsstand des Vermoegens und des Streitgegenstandes)

Fuer Klagen wegen vermögensrechtlicher Ansprueche gegen eine Person, die im Inland keinen Wohnsitz hat, ist das Gericht zustaendig, in dessen Bezirk sich Vermoegen derselben oder der mit der Klage in Anspruch genomene befindet.

Bei Forderungen gilt als derselbe Ort, wo das Vermoegen sich befindet, der Wohnsitz des Schuldners und, wenn fuer die Forderungen eine Sache zur Sicherheit haftet, auch der Ort, wo die Sache sich befindet.

para 32 (Besonderer Gerichtsstand der unerlaubten Handlung)

Fuer Klagen aus unerlaubten Handlungen ist das Gericht zustaendig, in dessen Bezirk die Handlung begangen ist.

para 35 (Wahl unter mehreren Gerichtsstaenden)

Unter mehreren zustaendigen Gerichten hat der Klaeger die Wahl.

para 78 (Anwaltsprozess)

(1) Vor den Langerichten und vor allen Gerichten des hoeheren Rechtszuges muessen die Parteien sich durch einen bei dem Prozessgericht zugelassenen Rechtsanwalt als Bevollmaechtigten vertreten lassen (Anwaltsprozess).

(2), (3), (4).

para 108 (Art und Hoehe der Sicherheit)

(1) In den Faellen der Bestellung einer prozessualen Sicherheit kann das Gericht nach freiem Ermessen bestimmen, in welcher Art und Hoehe die Sicherheit zu leisten ist. Soweit das Gericht eine Bestimmung nicht getroffen hat und die Parteien ein anderes nicht vereinbart haben, ist die Sicherheitsleistung durch Hinterlegung von Geld oder solchen Wertpapieren zu bewirken, die nach Paragraph 234 Abs.1,3 des Buergerlichen Gesetzbuches zur Sicherheitsleistung geeignet sind.

(2) Die Vorschriften des Paragraphen 234 Abs.2 und des Paragraphen 235 des Buergerlichen Gesetzbuches sind entsprechend anzuwenden.

para 109 (Rueckgabe der Sicherheit)

(1) Ist die Veranlassung fuer eine Sicherheitsleistung weggefallen, so hat auf Antrag das Gericht, das die Bestellung der Sicherheit angeordnet oder zugelassen hat, eine Frist zu bestimmen, binnen der ihm die Partei, zu deren Gunsten die Sicherheit geleistet ist, die Einwilligung in die Rueckgabe der Sicherheit zu erklaren oder die Erhebung der Klage wegen ihrer Ansprueche nachzuweisen hat.

(2) Nach Ablauf der Frist hat das Gericht auf Antrag die Rueckgabe der Sicherheit anzuordnen, wenn nicht inzwischen die Erhebung der Klage nachgewiesen ist; ist die Sicherheit durch eine Buergschaft bewirkt worden, so ordnet das Gericht das Erloeschen der Buergschaft an. Die Anordnung wird erst mit der Rechtskraft wirksam.

(3) Die Antraege und die Einwilligung in die Rueckgabe der Sicherheit koennen vor der Geschaeftsstelle zu Protokoll erklart werden. Die Entscheidungen koennen ohne muendliche Verhandlung ergehen.

(4) Gegen den Beschluss, durch den der in Absatz 1 vorgesehene Antrag abgelehnt wird, steht dem Antragsteller, gegen die im Absatz 2 bezeichnete Entscheidung steht beiden Teilen die sofortige Beschwerde zu.

para 128 (Grundsatz der Muendlichkeit)

(1) Die Parteien verhandeln ueber den Rechtsstreit vor dem erkennenden Gericht muendlich.

(2) Mit Zustimmung der Parteien, die nur bei einer wesentlichen Aenderung der Prozesslage widerruflich ist, kann das Gericht eine Entscheidung ohne muendliche Verhandlung treffen. Es bestimmt alsbald den Zeitpunkt, bis zu dem Schriftsaetze eingereicht werden koennen, und den Termin zur Verkuendung der Entscheidung. Eine Entscheidung ohne muendliche Verhandlung ist unzuulaessig, wenn seit der Zustimmung der Parteien mehr als drei Monate verstrichen sind.

(3) Bei Streitigkeiten ueber vermoegensrechtliche Ansprueche kann das Gericht von Amts wegen anordnen, dass schriftlich zu verhandeln ist, wenn eine Vertretung durch einen Rechtsanwalt nicht geboten ist, der Wert des Streitgegenstandes bei Einreichung der Klage fuenfhundert Deutsche Mark nicht uebersteigt und einer Partei das Erscheinen vor Gericht wegen grosser Entfernung oder aus sonstigem wichtigen Grunde nicht zuzumuten ist. Das Gericht bestimmt mit der Anordnung nach Satz 1 den Zeitpunkt, der dem Schluss der muendlichen Verhandlung entspricht, und den Termin zur Verkuendung des Urteils. Es kann hierueber erneut bestimmen, wenn dies auf Grund einer Aenderung der Prozesslage geboten ist. Es kann auch ohne Einverstaendnis der Parteien nach Paragraph 377 Abs.4 verfahren. Die Anordnung nach Satz 1 ist aufzuheben, wenn die Partei, zu deren Gunsten sie ergangen ist, es beantragt oder wenn das persoenliche Erscheinen der Parteien zur Aufklaerung des Sachverhalts unumgaenglich erscheint.

para 139 (Richterliche Aufklaerungspflicht)

(1) Der Vorsitzende hat dahin zu wirken, dass die Parteien ueber alle erheblichen Tatsachen sich vollstaendig erklaeren und die sachdienlichen Antraege stellen, insbesondere auch ungenuegende Angaben der geltend gemachten Tatsachen ergaenzen und die Beweismittel bezeichnen. Er hat zu diesem Zwecke, soweit erforderlich, das Sach- und Streitverhaeltnis mit den Parteien nach der tatsaechlichen und der rechtlichen Seite zu eroertern und Fragen zu stellen.

(2) Der Vorsitzende hat auf die Bedenken aufmerksam zu machen, die in Ansehung der von Amts wegen zu beruecksichtigenden Punkte obwalten.

(3) Er hat jedem Mitglied des Gerichts auf Verlangen zu gestatten, Fragen zu stellen.

para 253 (Klagschrift)

(1) Die Erhebung der Klage erfolgt durch Zustellung eines Schriftsatzes (Klagschrift).

(2) Die Klagschrift muss enthalten:

1. die Bezeichnung der Parteien und des Gerichts;
2. die bestimmte Angabe des Gegenstandes und des Grundes des erhobenen Anspruchs, sowie einen bestimmten Antrag.

(3) Die Klagschrift soll ferner die Angabe des Wertes des Streitgegenstandes enthalten, wenn hiervon die Zustaendigkeit des Gerichts abhaengt und der Streitgegenstand nicht in einer bestimmten Geldsumme besteht, sowie eine Aeußerung dazu, ob einer Uebertragung der Sache auf den Einzelrichter Gruende entgegenstehen.

(4) Ausserdem sind die allgemeinen Vorschriften ueber die vorbereitenden Schriftsaetze auch auf die Klagschrift anzuwenden.

(5) Die Klagschrift sowie sonstige Antraege und Erklaerungen einer Partei, die zugestellt werden sollen, sind bei dem Gericht schriftlich unter Beifuegung der fuer die Zustellung oder Mitteilung erforderlichen Zahl von Abschriften einzureichen.

para 278 (Haupttermin)

(1) Im Haupttermin fuehrt das Gericht in den Sach- und Streitstand ein. Die erschienenen Parteien sollen hierzu persoendlich gehoert werden.

(2) Der streitigen Verhandlung soll die Beweisaufnahme unmittelbar folgen. Im Anschluss an die Beweisaufnahme ist der Sach- und Streitstand erneut mit den Parteien zu eroertern.

(3) Auf einen rechtlichen Gesichtspunkt, den eine Partei erkennbar uebersehen oder fuer unerheblich gehalten hat, darf das Gericht, soweit nicht nur eine Nebenforderung betroffen ist, seine Entscheidung nur stuetzen, wenn es Gelegenheit zur Aeußerung dazu

gegeben hat.

(4) Ein erforderlicher neuer Termin ist moeglichst kurzfristig anzuberaumen.

para 305a (Urteil unter Vorbehalt der seerechtlichen Haftungsbeschraenkung)

Unterliegt der in der Klage geltend gemachte Anspruch der Haftungsbeschraenkung nach Paragraph 486 Abs.1 oder 3, Paragraphen 487 bis 487d des Handelsgesetzbuchs und macht der Beklagte geltend, dass

1. aus demselben Ereignis weitere Ansprueche, fuer die er die Haftung beschraenken kann, entstanden sind und
2. die Summe der Ansprueche die Haftungshoechstbetrage uebersteigt, die fuer diese Ansprueche in Artikel 6 oder 7 des Haftungsbeschraenkungsuebereinkommens (Paragraph 486 Abs.1 des Handelsgesetzbuchs) oder in den Paragraphen 487, 487a oder 487c des Handelsgesetzbuchs bestimmt sind,

so kann das Gericht das Recht auf Beschraenkung der Haftung bei der Entscheidung unberuecksichtigt lassen, wenn die Erledigung des Rechtsstreits wegen Ungewissheit ueber Grund oder Betrag der weiteren Ansprueche nach der freien Ueberzeugung des Gerichts nicht unwesentlich erschwert waere. In diesem Fall ergeht das Urteil unter dem Vorbehalt, dass der Beklagte das Recht auf Beschraenkung der Haftung geltend machen kann, wenn ein Fonds nach dem Haftungsbeschraenkungsuebereinkommen errichtet worden ist oder bei Geltendmachung des Rechts auf Beschraenkung der Haftung errichtet wird.

para 328 (Anerkennung auslaendischer Urteile)

(1) Die Anerkennung des Urteils eines auslaendischen Gerichts ist ausgeschlossen:

1. wenn die Gerichte des Staates, dem das auslaendische Gericht angehoert, nach den deutschen Gesetzen nicht zustaendig sind;
2. wenn dem Beklagten, der sich auf das Verfahren nicht eingelassen hat und sich hierauf beruft, das verfahrensleitende Schriftstueck nicht ordnungsgemaess oder nicht so rechtzeitig zugestellt worden ist, dass er sich verteidigen konnte;
3. wenn das Urteil mit einem hier erlassenen oder einem anzuerkennenden fruerehen auslaendischen Urteil oder wenn das ihm zugrundeliegende Verfahren mit einem fruereher hier rechtshaengig gewordenen Verfahren unvereinbar ist;
4. wenn die Anerkennung des Urteils zu einem Ergebnis fuehrt, das mit wesentlichen Grundsuetzen des deutschen Rechts offensichtlich unvereinbar ist, insbesondere wenn die Anerkennung mit den Grundrechten unvereinbar ist;
5. wenn die Gegenseitigkeit nicht verbuergt ist.

(2) Die Vorschrift der Nummer 5 steht der Anerkennung des Urteils nicht entgegen, wenn das Urteil einen nichtvermoegensrechtlichen

Anspruch betrifft und nach den deutschen Gesetzen ein Gerichtsstand im Inland nicht begründet war oder wenn es sich um eine Kindschaftssache (Paragraph 640) handelt.

para 511 (Zulaessigkeit der Berufung)

Die Berufung findet gegen die im ersten Rechtszuge erlassenen Endurteile statt.

para 545 (Zulaessigkeit der Revision)

(1) Die Revision findet gegen die in der Berufungsinstanz von den Oberlandesgerichten erlassenen Endurteile nach Massgabe der folgenden Vorschriften statt.

(2) Gegen Urteile, durch die ueber die Anordnung, Abaenderung oder Aufhebung eines Arrestes oder einer einstweiligen Verfuegung entschieden wird, ist die Revision nicht zulaessig. Dasselbe gilt fuer die Urteile ueber die vorzeitige Besitzeinweisung im Enteignungsverfahren oder im Umlegungsverfahren.

para 707 (Einstweilige Einstellung der Zwangsvollstreckung bei Wiedereinsetzungs- und Wiederaufnahmeantrag)

(1) Wird die Wiedereinsetzung in den vorigen Stand oder eine Wiederaufnahme des Verfahrens beantragt oder wird der Rechtsstreit nach der Verkuendung eines Vorbehaltsurteils fortgesetzt, so kann das Gericht auf Antrag anordnen, dass die Zwangsvollstreckung gegen oder ohne Sicherheitsleistung einstweilen eingestellt werde oder nur gegen Sicherheitsleistung stattfinden und dass die Vollstreckungsmassregeln gegen Sicherheitsleistung aufzuheben seien. Die Einstellung der Zwangsvollstreckung ohne Sicherheitsleistung ist nur zulaessig, wenn glaubhaft gemacht wird, dass der Schuldner zur Sicherheitsleistung nicht in der Lage ist und die Vollstreckung einen nicht zu ersetzenden Nachteil bringen wuerde.

(2) Die Entscheidung kann ohne muendliche Verhandlung ergehen. Eine Anfechtung des Beschlusses findet nicht statt.

para 712 (Abwendung der Vollstreckung durch Sicherheitsleistung)

(1) Wuerde die Vollstreckung dem Schuldner einen nicht zu ersetzenden Nachteil bringen, so hat ihm das Gericht auf Antrag zu gestatten, die Vollstreckung durch Sicherheitsleistung oder Hinterlegung ohne Ruecksicht auf eine Sicherheitsleistung des Glaebigers abzuwenden. Ist der Schuldner dazu nicht in der Lage, so ist das Urteil nicht fuer vorlaeufig vollstreckbar zu erklaren oder die Vollstreckung auf die in Paragraph 720a Abs.1,2 bezeichneten Massregeln zu beschraenken.

(2) Dem Antrag des Schuldners ist nicht zu entsprechen, wenn ein ueberwiegendes Interesse des Glaebigers entgegensteht. In den Faellen des Paragraph 708 kann das Gericht anodnen, dass das Urteil nur gegen Sicherheitsleistung vorlaeufig vollstreckbar ist.

para 719 (Einstweilige Einstellung bei Rechtsmittel und Einspruch)

(1) Wird gegen ein fuer vorlaeufig vollstreckbar erklaertes Urteil der Einspruch oder die Berufung eingelegt, so gelten die Vorschriften des Paragraph 707 entsprechend. Die Zwangsvollstreckung aus einem Versaeumnisurteil darf nur gegen Sicherheitsleistung eingestellt werden, es sei denn, dass das Versaeumnisurteil nicht in gesetzlicher Weise ergangen ist oder die saeuimige Partei glaubhaft macht, dass ihre Saeumnis unverschuldet war.

(2) Wird Revision gegen ein fuer vorlaeufig vollstreckbar erklaertes Urteil eingelegt, so ordnet das Revisionsgericht auf Antrag an, dass die Zwangsvollstreckung einstweilen eingestellt wird, wenn die Vollstreckung dem Schuldner einem nicht zu ersetzenden Nachteil bringen wuerde und nicht ein ueberwiegendes Interesse des Glaebigers entgegensteht. Die Parteien haben die tatsaechlichen Voraussetzungen glaubhaft zu machen.

(3) Die Entscheidung kann ohne muendliche Verhandlung ergehen.

para 722 (Vollstreckbarkeit auslaendischer Urteile)

(1) Aus dem Urteil eines auslaendischen Gerichts findet die Zwangsvollstreckung nur statt, wenn ihre Zulaessigkeit durch ein Vollstreckungsurteil ausgesprochen ist.

(2) Fuer die Klage auf Erlass des Urteils ist das Amtsgericht oder Landgericht, bei dem der Schuldner seinen allgemeinen Gerichtsstand hat, und sonst das Amtsgericht oder Landgericht zustaendig, bei dem nach Paragraph 23 gegen den Schuldner Klage erhoben werden kann.

para 723 (Vollstreckungsurteil fuer auslaendische Urteile)

(1) Das Vollstreckungsurteil ist ohne Pruefung der Gesetzmæssigkeit der Entscheidung zu erlassen.

(2) Das Vollstreckungsurteil ist erst zu erlassen, wenn das Urteil des auslaendischen Gerichts nach dem fuer dieses Gericht geltenden Recht die Rechtskraft erlangt hat. Es ist nicht zu erlassen, wenn die Anerkennung des Urteils nach Paragraph 328 ausgeschlossen ist.

para 731 (Klage auf Erteilung der Vollstreckungsklausel)

Kann der nach dem Paragraph 726 Abs.1 und den Paragraphen 727 bis 729 erforderliche Nachweis durch oeffentliche oder oeffentlich beglaubigte Urkunden nicht gefuehrt werden, so hat der Glaebiger bei dem Prozessgericht des ersten Rechtszuges aus dem Urteil auf Erteilung der Vollstreckungsklausel Klage zu erheben.

para 751 (Bedingungen fuer Vollstreckungsbeginn)

(1) Ist die Geltendmachung des Anspruchs von dem Eintritt eines Kalendertages abhaengig, so darf die Zwangsvollstreckung nur

beginnen, wenn der Kalendertag abgelaufen ist.

(2) Haengt die Vollstreckung von einer dem Glaebiger obliegenden Sicherheitsleistung ab, so darf mit der Zwangsvollstreckung nur begonnen werden oder sie nur fortgesetzt werden, wenn die Sicherheitsleistung durch oeffentliche oder oeffentlich beglaubigte Urkunde nachgewiesen und eine Abschrift dieser Urkunde bereits zugestellt ist oder gleichzeitig zugestellt wird.

para 758 (Durchsuchung; Gewaltanwendung)

(1) Der Gerichtsvollzieher ist befugt, die Wohnung und die Behaeltnisse des Schuldners zu durchsuchen, soweit der Zweck der Vollstreckung dies erfordert.

(2) Er ist befugt, die verschloessenen Haustueren, Zimmertueren und Behaeltnisse oeffnen zu lassen.

(3) Er ist, wenn er Widerstand findet, zur Anwendung von Gewalt befugt und kann zu diesem Zwecke die Unterstuetzung der polizeilichen Vollzugsorgane nachsuchen.

para 764 (Vollstreckungsgericht)

(1) Die den Gerichten zugewiesene Anordnung von Vollstreckungshandlungen und Mitwirkung bei solchen gehoert zur Zustaendigkeit der Amtsgerichte als Vollstreckungsgerichte.

(2) Als Vollstreckungsgericht ist, sofern nicht das Gesetz ein anderes Amtsgericht bezeichnet, das Amtsgericht anzusehen, in dessen Bezirk das Vollstreckungsverfahren stattfinden soll oder stattgefunden hat.

(3) Die Entscheidungen des Vollstreckungsgerichts koennen ohne muendliche Verhandlung ergehen.

para 766 (Erinnerung gegen Art und Weise der Zwangsvollstreckung)

(1) Ueber Antraege, Einwendungen und Erinnerungen, welche die Art und Weise der Zwangsvollstreckung oder das vom Gerichtsvollzieher bei ihr zu beobachtende Verfahren betreffen, entscheidet das Vollstreckungsgericht. Es ist befugt, die im Paragraph 732 Abs.2 bezeichneten Anordnungen zu erlassen.

(2) Dem Vollstreckungsgericht steht auch die Entscheidung zu, wenn ein Gerichtsvollzieher sich weigert, einen Vollstreckungsauftrag zu uebernehmen oder eine Vollstreckungshandlung dem Auftrag gemaess auszufuehren, oder wenn wegen der von dem Gerichtsvollzieher in Ansatz gebrachten Kosten Erinnerungen erhoben werden.

para 775 (Einstellung und Beschraenkung der Zwangsvollstreckung)

Die Zwangsvollstreckung ist einzustellen oder zu beschraenken:

1. wenn die Ausfertigung einer vollstreckbaren Entscheidung vorgelegt wird, aus der sich ergibt, dass das zu vollstreckende Urteil oder seine vorläufige Vollstreckbarkeit aufgehoben oder dass die Zwangsvollstreckung fuer unzulässig erklärt oder ihre Einstellung angeordnet ist;
2. wenn die Ausfertigung einer gerichtlichen Entscheidung vorgelegt wird, aus der sich ergibt, dass die einstweilige Einstellung der Vollstreckung oder einer Vollstreckungsmassregel angeordnet ist oder dass die Vollstreckung nur gegen Sicherheitsleistung fortgesetzt werden darf;
3. wenn eine öffentliche Urkunde vorgelegt wird, aus der sich ergibt, dass die zur Abwendung der Vollstreckung erforderliche Sicherheitsleistung oder Hinterlegung erfolgt ist;
4. wenn eine öffentliche Urkunde oder eine von dem Gläubiger ausgestellte Privaturkunde vorgelegt wird, aus der sich ergibt, dass der Gläubiger nach Erlass des zu vollstreckenden Urteils befriedigt ist oder Stundung bewilligt hat;
5. wenn ein Postschein vorgelegt wird, aus dem sich ergibt, dass nach Erlass des Urteils die zur Befriedigung des Gläubigers erforderliche Summe zur Auszahlung an den letzteren bei der Post eingezahlt ist.

para 776 (Aufhebung von Vollstreckungsmassregeln)

In den Fällen des Paragraph 775 Nr.1,3 sind zugleich die bereits getroffenen Vollstreckungsmassregeln aufzuheben. In den Fällen der Nummern 4,5 bleiben diese Massregeln einstweilen bestehen; dasselbe gilt in den Fällen der Nummer 2, sofern nicht durch die Entscheidung auch die Aufhebung der bisherigen Vollstreckungshandlungen angeordnet ist.

para 786a (Seerechtliche Haftungsbeschränkung)

(1) Die Vorschriften des Paragraph 780 Abs.1 und des Paragraph 781 sind auf die nach Paragraph 486 Abs.1,3, Paragraphen 487 bis 487d des Handelsgesetzbuches eintretende beschränkte Haftung entsprechend anzuwenden.

(2) Ist das Urteil nach Paragraph 305a unter Vorbehalt ergangen, so gelten fuer die Zwangsvollstreckung die folgenden Vorschriften:

1. Wird im Geltungsbereich dieses Gesetzes die Eröffnung eines Seerechtlichen Verteilungsverfahrens beantragt, an dem der Gläubiger mit dem Anspruch teilnimmt, so entscheidet das Gericht nach Paragraph 5 Abs.3 der Seerechtlichen Verteilungsordnung ueber die Einstellung der Zwangsvollstreckung; nach Eröffnung des Verteilungsverfahrens sind die Vorschriften des Paragraph 8 Abs.4 und 5 der Seerechtlichen Verteilungsordnung anzuwenden.

2. I s t n a c h A r t i k e l 1 1 d e s

Haftungsbeschränkungsübereinkommens (Paragraph 486 Abs.1 des Handelsgesetzbuches) von dem Schuldner oder fuer ihn ein Fonds in einem anderen Vertragsstaat des Uebereinkommens errichtet worden, so sind, sofern der Glaebiger den Anspruch gegen den Fonds geltend gemacht hat, die Vorschriften des Paragraph 34 der Seerechtlichen Verteilungsordnung anzuwenden. Hat der Glaebiger den Anspruch nicht gegen den Fonds geltend gemacht oder sind die Voraussetzungen des Paragraph 34 Abs.2 der Seerechtlichen Verteilungsordnung nicht gegeben, so werden Einwendungen, die auf Grund des Rechts auf Beschränkung der Haftung nach Paragraph 486 Abs.1,3, Paragraphen 487 bis 487d des Handelsgesetzbuches erhoben werden, nach den Vorschriften der Paragraphen 767, 769, 770 erledigt; das gleiche gilt, wenn der Fonds in dem anderen Vertragsstaat erst bei Geltendmachung des Rechts auf Beschränkung der Haftung errichtet wird.

(3) Ist das Urteil eines Gerichts, das seinen Sitz ausserhalb des Geltungsbereichs dieses Gesetzes hat, unter dem Vorbehalt ergangen, dass der Beklagte das Recht auf Beschränkung der Haftung nach dem Haftungsbeschränkungsübereinkommen geltend machen kann, wenn ein Fonds nach Artikel 11 des Uebereinkommens errichtet worden ist oder bei Geltendmachung des Rechts auf Beschränkung der Haftung errichtet wird, so gelten fuer die Zwangsvollstreckung wegen des durch das Urteil festgestellten Anspruchs die Vorschriften des Absatzes 2 entsprechend.

para 802 (Ausschliessliche Gerichtsstaende)

Die in diesem Buche angeordneten Gerichtsstaende sind ausschliessliche.

para 804 (Pfaendungspfandrecht)

(1) Durch die Pfaendung erwirbt der Glaebiger ein Pfandrecht an dem gepfaendeten Gegenstande.

(2) Das Pfandrecht gewaehrt dem Glaebiger im Verhaeltnis zu anderen Glaebigern dieselben Rechte wie ein durch Vertrag erworbenes Faustpfandrecht; es geht Pfand- und Vorzugsrechten vor, die fuer den Fall des Konkurses den Faustpfandrechten nicht gleichgestellt sind.

(3) Das durch eine fruehere Pfaendung begruendete Pfandrecht geht demjenigen vor, das durch eine spaetere Pfaendung begruendet wird.

para 808 (Pfaendung beim Schuldner)

(1) Die Pfaendung der im Gewahrsam des Schuldners befindlichen koerperlichen Sachen wird dadurch bewirkt, dass der Gerichtsvollzieher sie in Besitz nimmt.

(2) Andere Sachen als Geld, Kostbarkeiten und Wertpapiere sind im Gewahrsam des Schuldners zu belassen, sofern nicht hierdurch die Befriedigung des Glaebigers gefaehrdet wird. Werden die Sachen im

Gewahrsam des Schuldners belassen, so ist die Wirksamkeit der Pfaendung dadurch bedingt, dass durch Anlegung von Siegeln oder auf sonstige Weise die Pfaendung ersichtlich gemacht ist.

(3) Der Gerichtsvollzieher hat den Schuldner von der erfolgten Pfaendung in Kenntnis zu setzen.

para 826 (Anschlusspfaendung)

(1) Zur Pfaendung bereits gepfaendeter Sachen genuegt die in das Protokoll aufzunehmende Erklaerung des Gerichtsvollziehers, dass er die Sachen fuer seinen Auftraggeber pfaende.

(2) Ist die erste Pfaendung durch einen anderen Gerichtsvollzieher bewirkt, so ist diesem eine Abschrift des Protokolls zuzustellen.

(3) Der Schuldner ist von den weiteren Pfaendungen in Kenntnis zu setzen.

para 828 (Zustaendigkeit)

(1) Die gerichtlichen Handlungen, welche die Zwangsvollstreckung in Forderungen und andere Vermoegensrechte zum Gegenstand haben, erfolgen durch das Vollstreckungsgericht.

(2) Als Vollstreckungsgericht ist das Amtsgericht, bei dem der Schuldner im Inland seinen allgemeinen Gerichtsstand hat, und sonst das Amtsgericht zustaendig, bei dem nach Paragraph 23 gegen den Schuldner Klage erhoben werden kann.

para 857 (Zwangsvollstreckung in andere Vermoegensrechte)

(1)Fuer die Zwangsvollstreckung in andere Vermoegensrechte, die nicht Gegenstand der Zwangsvollstreckung in das unbewegliche Vermoegen sind, gelten die vorstehenden Vorschriften entsprechend.

(2) Ist ein Drittschuldner nicht vorhanden, so ist die Pfaendung mit dem Zeitpunkt als bewirkt anzusehen, in welchem dem Schuldner das Gebot, sich jeder Verfuegung ueber das Recht zu enthalten, zugestellt ist.

(3) Ein unveraeusserliches Recht ist in Ermangelung besonderer Vorschriften der Pfaendung insoweit unterworfen, als die Ausuebung einem anderen ueberlassen werden kann.

(4) Das Gericht kann bei der Zwangsvollstreckung in unveraeusserliche Rechte, deren Ausuebung einem anderen ueberlassen werden kann, besondere Anordnungen erlassen. Es kann insbesondere bei der Zwangsvollstreckung in Nutzungsrechte eine Verwaltung anordnen; in diesem Falle wird die Pfaendung durch Uebergabe der zu benutzenden Sache an den Verwalter bewirkt, sofern sie nicht durch Zustellung des Beschlusses bereits vorher bewirkt ist.

(5) Ist die Veraeusserung des Rechts selbst zulaessig, so kann auch diese Veraeusserung von dem Gericht angeordnet werden.

(6) Auf die Zwangsvollstreckung in eine Reallast, eine Grundschuld oder eine Rentenschuld sind die Vorschriften ueber die Zwangsvollstreckung in eine Forderung, fuer die eine Hypothek besteht, entsprechend anzuwenden.

(7) Die Vorschrift des Paragraph 845 Abs.1 Satz 2 ist nicht anzuwenden.

para 858 (Zwangsvollstreckung in Schiffspart)

(1) Fuer die Zwangsvollstreckung in die Schiffspart (Paragraph 489 ff. des Handelsgesetzbuches) gilt Paragraph 857 mit folgenden Abweichungen:

(2) Als Vollstreckungsgericht ist das Amtsgericht zustaendig, bei dem das Register fuer das Schiff gefuehrt wird.

(3) Die Pfaendung bedarf der Eintragung in das Schiffsregister; die Eintragung erfolgt auf Grund des Pfaendungsbeschlusses. Der Pfaendungsbeschluss soll dem Korrespondentreeeder zugestellt werden; wird der Beschluss diesem vor der Eintragung zugestellt, so gilt die Pfaendung ihm gegenueber mit der Zustellung als bewirkt.

(4) Verwertet wird die gepfaendete Schiffspart im Wege der Veraeussderung. Dem Antrag auf Anordnung der Veraeussderung ist ein Auszug aus dem Schiffsregister beizufuegen, der alle das Schiff und die Schiffspart betreffenden Eintragungen enthaelt; der Auszug darf nicht aelter als eine Woche sein.

(5) Ergibt der Auszug aus dem Schiffsregister, dass die Schiffspart mit einem Pfandrecht belastet ist, das einem anderen als dem betreibenden Glaebiger zusteht, so ist die Hinterlegung des Erloeses anzuordnen. Der Erloes wird in diesem Fall nach den Vorschriften der Paragraphen 873 bis 882 verteilt; Forderungen, fuer die ein Pfandrecht an der Schiffspart eingetragen ist, sind nach dem Inhalt des Schiffsregisters in den Teilungsplan aufzunehmen.

para 864 (Gegenstaende)

(1) Der Zwangsvollstreckung in das unbewegliche Vermoegen unterliegen ausser den Grundstuecken die Berechtigungen, fuer welche die sich auf das Grundstueck beziehenden Vorschriften gelten, die im Schiffsregister eingetragenen Schiffe und die Schiffsbauwerke, die im Schiffsbauregister eingetragen sind oder in dieses Register eingetragen werden koennen.

(2) Die Zwangsvollstreckung in den Bruchteil eines Grundstuecks, einer Berechtigung der im Absatz 1 bezeichneten Art oder eines Schiffes oder Schiffsbauwerks ist nur zulaessig, wenn der Bruchteil in dem Anteil eines Miteigentuemers besteht oder wenn sich der Anspruch des Glaebigers auf ein Recht richtet, mit dem der Bruchteil als solcher belastet ist.

para 866 (Arten der Vollstreckung in ein Grundstueck)

(1) Die Zwangsvollstreckung in ein Grundstueck erfolgt durch Eintragung einer Sicherungshypothek fuer die Forderung, durch Zwangsversteigerung und durch Zwangsverwaltung.

(2) Der Glaebiger kann verlangen, dass eine dieser Massregeln allein oder neben den uebrigen ausgefuehrt werde.

(3) Eine Sicherungshypothek (Absatz 1) darf nur fuer einen Betrag von mehr als fuenfhundert Deutsche Mark eingetragen werden; Zinsen bleiben dabei unberuecksichtigt, soweit sie als Nebenforderung geltend gemacht sind. Auf Grund mehrerer demselben Glaebiger zustehender Schuldtitel kann eine einheitliche Sicherungshypothek eingetragen werden.

para 867 (Zwangshypothek)

(1) Die Sicherungshypothek wird auf Antrag des Glaebigers in das Grundbuch eingetragen; die Eintragung ist auf dem vollstreckbaren Titel zu vermerken. Mit der Eintragung entsteht die Hypothek. Das Grundstueck haftet auch fuer die dem Schuldner zur Last fallenden Kosten der Eintragung.

(2) Sollen mehrere Grundstuecke des Schuldners mit der Hypothek belastet werden, so ist der Betrag der Forderung auf die einzelnen Grundstuecke zu verteilen; die Groesse der Teile bestimmt der Glaebiger.

para 870a (Zwangsvollstreckung in Schiff oder Schiffsbauwerk)

(1) Die Zwangsvollstreckung in ein eingetragenes Schiff oder in ein Schiffsbauwerk, das im Schiffsbauregister eingetragen ist oder in dieses Register eingetragen werden kann, erfolgt durch Eintragung einer Schiffshypothek fuer die Forderung oder durch Zwangsversteigerung.

(2) Paragraph 866 Abs.2,3, Paragraph 867 gelten entsprechen.

(3) Wird durch eine vollstreckbare Entscheidung die zu vollstreckende Entscheidung oder ihre vorlaeufige Vollstreckbarkeit aufgehoben oder die Zwangsvollstreckung fuer unzuessaessig erklaert oder deren Einstellung angeordnet, so erlischt die Schiffshypothek; Paragraph 57 Abs.3 des Gesetzes ueber Rechte an eingetragenen Schiffen und Schiffsbauwerken vom 15. November 1940 (Reichsgesetzbl. I S.1499) ist anzuwenden. Das gleiche gilt, wenn durch eine gerichtliche Entscheidung die einstweilige Einstellung der Zwangsvollstreckung und zugleich die Aufhebung der erfolgten Vollstreckungsmassregeln angeordnet wird oder wenn die zur Abwendung der Vollstreckung nachgelassene Sicherheitsleistung oder Hinterlegung erfolgt.

para 887 (Vertretbare Handlungen)

(1) Erfuellt der Schuldner die Verpflichtung nicht, eine Handlung vorzunehmen, deren Vornahme durch einen Dritten erfolgen kann, so ist

der Glaeubiger von dem Prozessgericht des ersten Rechtszuges auf Antrag zu ermächtigen, auf Kosten des Schuldners die Handlung vornehmen zu lassen.

(2) Der Glaeubiger kann zugleich beantragen, den Schuldner zur Vorauszahlung der Kosten zu verurteilen, die durch die Vornahme der Handlung entstehen werden, unbeschadet des Rechts auf eine Nachforderung, wenn die Vornahme der Handlung einen groesseren Kostenaufwand verursacht.

(3) Auf die Zwangsvollstreckung zur Erwirkung der Herausgabe oder Leistung von Sachen sind die vorstehenden Vorschriften nicht anzuwenden.

para 893 (Klage auf Leistung des Interesses)

(1) Durch die Vorschriften dieses Abschnitts wird das Recht des Glaeubigers nicht beruehrt, die Leistung des Interesses zu verlangen.

(2) Den Anspruch auf Leistung des Interesses hat der Glaeubiger im Wege der Klage bei dem Prozessgericht des ersten Rechtszuges geltend zu machen.

para 909 (Verhaftung)

Die Verhaftung des Schuldners erfolgt durch einen Gerichtsvollzieher. Der Haftbefehl muss bei der Verhaftung dem Schuldner vorgezeigt und auf Begehren abschriftlich mitgeteilt werden.

para 916 (Arrestanspruch)

(1) Der Arrest findet zur Sicherung der Zwangsvollstreckung in das bewegliche oder unbewegliche Vermoegen wegen einer Geldforderung oder wegen eines Anspruchs statt, der in eine Geldforderung uebergehen kann.

(2) Die Zulaessigkeit des Arrestes wird nicht dadurch ausgeschlossen, dass der Anspruch betagt oder bedingt ist, es sei denn, dass der bedingte Anspruch wegen der entfernten Moeglichkeit des Eintritts der Bedingung einen gegenwaertigen Vermoegenwert nicht hat.

para 917 (Arrestgrund bei dinglichem Arrest)

(1) Der dingliche Arrest findet statt, wenn zu besorgen ist, dass ohne dessen Verhaengung die Vollstreckung des Urteils vereitelt oder wesentlich erschwert werden wuerde.

(2) Als ein zureichender Arrestgrund ist es anzusehen, wenn das Urteil im Ausland vollstreckt werden muesste.

para 918 (Arrestgrund bei persoenlichem Arrest)

Der persoenliche Sicherheitsarrest findet nur statt, wenn er erforderlich ist, um die gefaehrdete Zwangsvollstreckung in das Vermoegen des Schuldners zu sichern.

para 919 (Arrestgericht)

Fuer die Anordnung des Arrestes ist sowohl das Gericht der Hauptsache als das Amtsgericht zustaendig, in dessen Bezirk der mit Arrest zu belegende Gegenstand oder die in ihrer persoenlichen Freiheit zu beschraenkende Person sich befindet.

para 920 (Arrestgesuch)

(1) Das Gesuch soll die Bezeichnung des Anspruchs unter Angabe des Geldbetrages oder des Geldwertes sowie die Bezeichnung des Arrestgrundes enthalten.

(2) Der Anspruch und der Arrestgrund sind glaubhaft zu machen.

(3) Das Gesuch kann vor der Geschaefsstelle zu Protokoll erklaert werden.

para 921 (Entscheidung ueber das Arrestgesuch)

(1) Die Entscheidung kann ohne muendliche Verhandlung ergehen.

(2) Das Gericht kann, auch wenn der Anspruch oder der Arrestgrund nicht glaubhaft gemacht ist, den Arrest anordnen, sofern wegen der dem Gegner drohenden Nachteile Sicherheit geleistet wird. Es kann die Anordnung des Arrestes von einer Sicherheitsleistung abhaengig machen, selbst wenn der Anspruch und der Arrestgrund glaubhaft gemacht sind.

para 922 (Arresturteil und Arrestbeschluss)

(1) Die Entscheidung ueber das Gesuch ergeht im Falle einer muendlichen Verhandlung durch Endurteil, andernfalls durch Beschluss.

(2) Den Beschluss, durch den ein Arrest angeordnet wird, hat die Partei, die den Arrest erwirkt hat, zustellen zu lassen.

(3) Der Beschluss, durch den das Arrestgesuch zurueckgewiesen oder vorherige Sicherheitsleistung fuer erforderlich erklaert wird, ist dem Gegener nicht mitzuteilen.

para 923 (Abwendungsbefugnis)

In dem Arrestbefehl ist ein Geldbetrag festzustellen, durch dessen Hinterlegung die Vollziehung des Arrestes gehemmt und der Schuldner zu dem Antrag auf Aufhebung des vollzogenen Arrestes berechtigt wird.

para 924 (Widerspruch)

(1) Gegen den Beschluss, durch den ein Arrest angeordnet wird, findet Widerspruch statt.

(2) Die widersprechende Partei hat in dem Widerspruch die Gruende darzulegen, die sie fuer die Aufhebung des Arrestes geltend machen will. Das Gericht hat Termin zur muendlichen Verhandlung von Amts wegen zu bestimmen. Ist das Arrestgericht ein Amtsgericht, so ist der Widerspruch unter Angabe der Gruende, die fuer die Aufhebung des Arrestes geltend gemacht werden sollen, schriftlich oder zum Protokoll der Geschaefsstelle zu erheben.

(3) Durch Erhebung des Widerspruchs wird die Vollziehung des Arrestes nicht gehemmt. Das Gericht kann aber eine einstweilige Anordnung nach Paragraph 707 treffen; Paragraph 707 Abs.1 Satz 2 ist nicht anzuwenden.

para 925 (Entscheidung auf Widerspruch)

(1) Wird Widerspruch erhoben, so ist ueber die Rechtmassigkeit des Arrestes durch Endurteil zu entscheiden.

(2) Das Gericht kann den Arrest ganz oder teilweise bestaetigen, abaendern oder aufheben, auch die Bestaetigung, Abaenderung oder Aufhebung von einer Sicherheitsleistung abhaengig machen.

para 926 (Anordnung der Klageerhebung)

(1) Ist die Hauptsache nicht anhaengig, so hat das Arrestgericht auf Antrag ohne muendliche Verhandlung anzuordnen, dass die Partei, die den Arrestbefehl erwirkt hat, binnen einer zu bestimmenden Frist Klage zu erheben habe.

(2) Wird dieser Anordnung nicht Folge geleistet, so ist auf Antrag die Aufhebung des Arrestes durch Endurteil auszusprechen.

para 927 (Aufhebung wegen veraenderter Umstaende)

(1) Auch nach der Bestaetigung des Arrestes kann wegen veraenderter Umstaende, insbesondere wegen Erledigung des Arrestgrundes oder auf Grund des Erbietens zur Sicherheitsleistung die Aufhebung des Arrestes beantragt werden.

(2) Die Entscheidung ist durch Endurteil zu erlassen; sie ergeht durch das Gericht, das den Arrest angeordnet hat, und wenn die Hauptsache anhaengig ist, durch das Gericht der Hauptsache.

para 928 (Arrestvollziehung)

Auf die Vollziehung des Arrestes sind die Vorschriften ueber die Zwangsvollstreckung entsprechend anzuwenden, soweit nicht die nachfolgenden Paragraphen abweichende Vorschriften enthalten.

para 929 (Vollstreckungsklausel; Vollziehungsfrist)

(1) Arrestbefehle beduerfen der Vollstreckungsklausel nur, wenn die Vollziehung fuer einen anderen als den in dem Befehl bezeichneten Glaebiger oder gegen einen anderen als den in dem Befehl bezeichneten Schuldner erfolgen soll.

(2) Die Vollziehung des Arrestbefehls ist unstatthaft, wenn seit dem Tage, an dem der Befehl verkuendet oder der Partei, auf deren Gesuch er erging, zugestellt ist, ein Monat verstrichen ist.

(3) Die Vollziehung ist vor der Zustellung des Arrestbefehls an den Schuldner zulaessig. Sie ist jedoch ohne Wirkung, wenn die Zustellung nicht innerhalb einer Woche nach der Vollziehung und vor Ablauf der fuer diese im vorherigen Absatz bestimmten Frist erfolgt.

para 930 (Vollziehung in bewegliches Vermoegen und Forderungen)

(1) Die Vollziehung des Arrestes in bewegliches Vermoegen wird durch Pfaendung bewirkt. Die Pfaendung erfolgt nach denselben Grundsuetzen wie jede andere Pfaendung und begruendet ein Pfandrecht mit den im Paragraph 804 bestimmten Wirkungen. Fuer die Pfaendung einer Forderung ist das Arrestgericht als Vollstreckungsgericht zustaendig.

(2) Gepfaendetes Geld und ein im Verteilungsverfahren auf den Glaebiger fallender Betrag des Erloeses werden hinterlegt.

(3) Das Vollstreckungsgericht kann auf Antrag anordnen, dass eine bewegliche koerperliche Sache, wenn sie der Gefahr einer beträchtlichen Wertveringerung ausgesetzt ist oder wenn ihre Aufbewahrung unverhaeltnismaessige Kosten verursachen wuerde, versteigert und der Erloes hinterlegt werde.

para 931 (Vollziehung in eingetragenes Schiff)

(1) Die Vollziehung des Arrestes in ein eingetragenes Schiff oder Schiffsbauwerk wird durch Pfaendung nach den Vorschriften ueber die Pfaendung beweglicher Sachen mit folgenden Abweichungen Bewirkt:

(2) Die Pfaendung begruendet ein Pfandrecht an dem gepfaendeten Schiff oder Schiffsbauwerk; das Pfandrecht gewaehrt dem Glaebiger im Verhaeltnis zu anderen Rechten dieselben Rechte wie eine Schiffshypothek.

(3) Die Pfaendung wird auf Antrag des Glaebigers vom Arrestgericht als Vollstreckungsgericht angeordnet; das Gericht hat zugleich das Registergericht um die Eintragung einer Vormerkung zur Sicherung des Arrestpfandrechts in das Schiffsregister oder Schiffsbauregister zu ersuchen; die Vormerkung erlischt, wenn die Vollziehung des Arrestes unstatthaft wird.

(4) Der Gerichtsvollzieher hat bei der Vornahme der Pfaendung das Schiff oder Schiffsbauwerk in Bewachung und Verwahrung zu nehmen.

(5) Ist zur Zeit der Arrestvollziehung die Zwangsversteigerung des Schiffes oder Schiffsbauwerkes eingeleitet, so gilt die in diesem

Verfahren erfolgte Beschlagnahme des Schiffes oder Schiffsbauwerkes als erste Pfaendung im Sinne des Paragraph 826; die Abschrift des Pfaendungsprotokolls ist dem Vollstreckungsgericht einzureichen.

(6) Das Arrestpfandrecht wird auf Antrag des Glaebigers in das Schiffsregister oder Schiffsbauregister eingetragen; der nach Paragraph 923 festgestellte Geldbetrag ist als der Hoechtsbetrag zu bezeichnen, fuer den das Schiff oder Schiffsbauwerk haftet. Im uebrigen gelten der Paragraph 867 und der Paragraph 870a Abs.3 entsprechend, soweit nicht vorstehend etwas anderes bestimmt ist.

para 932 (Arresthypothek)

(1) Die Vollziehung des Arrestes in ein Grundstueck oder in eine Berechtigung, fuer welche die sich auf Grundstuecke beziehende Vorschriften gelten, erfolgt durch Eintragung einer Sicherungshypothek fuer die Forderung; der nach Paragraph 923 festgestellte Geldbetrag ist als der Hoechstbetrag zu bezeichnen, fuer den das Grundstueck oder die Berechtigung haftet. Ein Anspruch nach Paragraph 1179a oder Paragraph 1179b des Buergerlichen Gesetzbuchs steht dem Glaebiger oder im Grundbuch eingetragenen Glaebiger der Sicherungshypothek nicht zu.

(2) Im uebrigen gelten die Vorschriften des Paragraph 866 Abs.3 Satz 1 und der Paragraphen 867, 868.

(3) Der Antrag auf Eintragung der Hypothek gilt im Sinne des Paragraph 929 Abs.2, 3 als Vollziehung des Arrestbefehls.

para 933 (Vollziehung des persoenlichen Arrests)

(1) Die Vollziehung des persoenlichen Sicherheitsarrestes richtet sich, wenn sie durch Haft erfolgt, nach den Vorschriften der Paragraphen 904 bis 913 und, wenn sie durch sonstige Beschraenkung der persoenlichen Freiheit erfolgt, nach den vom Arrestgericht zu treffenden besonderen Anordnungen, fuer welche die Beschraenkung der Haft massgebend sind. In den Haftbefehl ist der nach Paragraph 923 festgestellte Geldbetrag aufzunehmen.

para 934 (Aufhebung der Arrestvollziehung)

(1) Wird der in dem Arrestbefehl festgestellte Geldbetrag hinterlegt, so wird der vollzogene Arrest von dem Vollstreckungsgericht aufgehoben.

(2) Das Vollstreckungsgericht kann die Aufhebung des Arrestes auch anordnen, wenn die Fortdauer besondere Aufwendungen erfordert und die Partei, auf deren Gesuch der Arrest verhaengt wurde, den noetigen Geldbetrag nicht vorschiesst.

(3) Die in diesem Paragraphen erwaehten Entscheidungen koennen ohne muendliche Verhandlung ergehen.

(4) Gegen den Beschluss, durch den der Arrest aufgehoben wird, findet sofortige Beschwerde statt.

para 943 (Gericht der Hauptsache)

(1) Als Gericht der Hauptsache im Sinne der Vorschriften dieses Abschnitts ist das Gericht des ersten Rechtszuges und, wenn die Hauptsache in der Berufungsinstanz anhaengig ist, das Berufungsgericht anzusehen.

(2) Das Gericht der Hauptsache ist fuer die nach Paragraph 109 zu treffenden Anordnungen ausschliesslich zustaendig, wenn die Hauptsache anhaengig ist oder anhaengig gewesen ist.

para 945 (Schadensersatzpflicht)

Erweist sich die Anordnung eines Arrestes oder einer einstweiligen Verfuegung als von Anfang an ungerechtfertigt oder wird die angeordnete Massregel auf Grund des Paragraph 926 Abs.2 oder des Paragraph 942 Abs.3 aufgehoben, so ist die Partei, welche die Anordnung erwirkt hat, verpflichtet, dem Gegner den Schaden zu ersetzen, der ihm aus der Vollziehung der angeordneten Massregel oder dadurch entsteht, dass er Sicherheit leistet, um die Vollziehung abzuwenden oder die Aufhebung der Massregel zu erwirken.

B. English:

- Translated in the Office of the Supreme Restitution Court Herford. *
- Translated in the Faculty of Arts, Department of German, University of Natal (1988).**

para 23 (Special jurisdiction governed by the location of the property) *

In the case of actions involving pecuniary claims against a person who has no ordinary residence in Germany, jurisdiction is vested in the Court in whose district property owned by that person or the subject matter of the action is situated.

As regards claims arising out of an obligation whether ex contractu or ex lege the debtor's ordinary residence is deemed to be the place where the property is situated and, where tangible property is a collateral security for the claim, both the debtor's place of residence and the place where the tangible property is situated.

para 32 (Forum delicti commissi) *

For actions arising from torts the court in whose district the act was committed shall have jurisdiction.

para 35 (Elected forum) *

The claimant may choose among several competent courts.

para 78 (Proceedings requiring representation by counsel) *

(1) Before the Higher District Courts (Landgerichts) and all higher courts parties must be represented by an attorney at law who is admitted to practice before the court seised of the matter (Anwaltsprozess).

(2), (3), (4).

para 139 (Duty of the court to clarify the issues) *

(1) The presiding judge shall exert his influence upon the parties so that they state all the relevant facts completely and make the proper applications, and especially so that they supplement insufficient statements of alleged facts and specify the sources of evidence. For this purpose, he shall, as far as is necessary, discuss with the parties the issues of fact and of law of the case and ask questions.

(2) The presiding judge shall point out doubts arising with regard to any point that must be considered ex officio.

(3) He shall permit every member of the court to ask questions, if so requested.

para 305a (Judgment subject to the maritime law limitation of liability) **

If the claim asserted in the case is subject to the limitation of liability according to para 486(1) or (3), paras 487 to 487d Commercial Code, and if the defendant asserts that

1. from the same incident further claims arose for which he can limit his liability and that
2. the sum of claims exceeds the limits of liability that have been set for those claims in Article 6 or 7 of the CLLMC (para 486(1) Commercial Code) or in paras 487, 487a or 487c Commercial Code

the court can leave the right to limit the liability unconsidered in its decision, if according to the independent conviction of the court the termination of the case would not be non-essentially impeded because of the uncertainty about cause or amount of the further claims. In this case the judgment is rendered subject to the defendant's right to limit the liability provided that a fund has been constituted according to the CLLMC or is constituted when asserting the right to limit the liability.

para 511 (Appeal on facts and law. Admissibility) *

Appeals on facts and law (Berufung) lie from final judgments (Endurteil) of the courts of first instance.

para 723 (Judgment of execution for foreign judgments) **

(1) The judgment of execution is to be rendered without examination of the legality of the decision.

(2) The judgment of execution is only to be rendered when the judgment of the foreign court has become non-appealable according to the law applicable for this court. It is not to be rendered if the acknowledgment of the judgment is excluded according to para 328.

para 786a (Maritime law limitation of liability) **

(1) The provisions of para 780(1) and para 781 are to be applied mutatis mutandis to the limited liability according to para 486(1), (3), para 487 to 487d Commercial Code.

(2) If a judgment according to para 305a has been rendered with reservation, the following provisions are applicable for the execution:

1. If in the scope of application of this law the opening of a maritime law proceedings for partition and distribution is requested, which the creditor of the claim is a part of, the court, according to para 5(3) of the Maritime Law Order of Partition and Distribution (MLOPD), decides about the suspension of the execution; after opening of the proceedings for partition and distribution the provisions of para 8(4) and (5) MLOPD are to be applied.

2. If according to Article 11 CLLMC (para 486(1) Commercial Code) a fund has been constituted by or for the debtor in another contracting State of the agreement, the provisions of para 34 MLOPD have to be applied provided that the creditor has asserted the claim against the fund. If the creditor has not asserted the claim against the fund, or if the preconditions of para 34(2) MLOPD are not fulfilled, the objections that are raised on grounds of the right of limitation of liability according to para 486(1), (3), para 487 to 487d Commercial Code are settled according to the provisions of para 767, 769, 770. The same applies if the fund is constituted in another contracting State only when claiming the right to limit the liability.

(3) If the judgment of a court outside of the scope of the application of this law has been rendered subject to the defendant's ability to assert the right of limitation of liability according to the CLLMC, if a fund has been constituted according to Article 11 of the Convention or is constituted when asserting the right to limit the liability, the provisions of subpara 2 are applicable mutatis mutandis for the execution on grounds of the claim declared by judgment.

para 858 (Execution in ship's part) **

(1) For the execution in ship's part (para 489 ff Commercial Code) para 857 is to be applied with the following deviations:

(2) Debtor's court is the Magistrates' Court (Amtsgericht) in which the register for the ship is kept.

(3) The levy of execution needs to be entered in the register of ships. The entry is made according to the attachment order. The attachment order has to be delivered to the ship's husband. If the order is delivered to him before the entry, the levy of execution is to be regarded operated towards him with delivery.

(4) The attached ship's part is used by means of alienation. The application for an order for alienation must be accompanied by an extract from the register of ships containing all entries concerning the ship and the ship's part; the extract must not be older than one week.

(5) If the extract from the register of ships shows that the ship's part is encumbered with a lien that another creditor than the pursuing one is entitled to, the depositing of the profit is to be required. In this case the profit is distributed according to the provisions of paras 873 to 882; claims for which a lien in the ship's part is entered are to be entered in the plan of distribution according to the contents of the register of ships.

para 870a (Execution in ship or ship under construction) **

(1) The execution in a registered ship or in a ship under construction that has been or can be entered in the register of ships under construction is made by the entry of a ship mortgage for the

claim or by execution.

(2) Para 866(2), (3), para 867 are to be applied mutatis mutandis.

(3) If, by an enforceable decision, the decision to be enforced or its provisional enforceability by execution is overruled or the execution is declared inadmissible or ordered to be suspended, the ship mortgage is cancelled; para 57(3) of the Act on Rights of Registered Ships and Ships under Construction of the November 15, 1940 (Reichsgesetzbl. I p 1499) is to be applied. The same applies if, by a court's decisions, the provisional suspension of the execution and, at the same time, the reversal of the undertaken enforcement measures is ordered or if the security deposit or bailment necessary for the warding off of the execution is made.

para 916 (Admissibility of anticipatory seizure (Arrest) *

(1) The anticipatory seizure takes place to secure the execution against movable or immovable property on account of a claim that is expressed in money or may be converted into a claim expressed in money.

(2) The admissibility of an anticipatory seizure is not to be excluded by the fact that the claim is owing, but not due, or is subject to a condition, unless the latter claim, because of the remoteness of the possibility that the condition will be fulfilled, does not at present have a pecuniary value.

para 917 (Ground of anticipatory seizure in rem) *

(1) Anticipatory seizure in rem takes place when it is to be feared that, without its being granted, the execution of the judgment will be rendered impossible or substantially more difficult.

(2) If the judgment would have to be enforced in a foreign country this is to be regarded as sufficient ground of anticipatory seizure.

para 918 (Ground of anticipatory seizure of the person) *

The anticipatory seizure of the person only takes place when it becomes necessary to safeguard the endangered execution against the debtor's property.

para 919 (Jurisdiction in cases of anticipatory seizure) *

For issuing the anticipatory seizure, jurisdiction is vested in the court dealing with the principal matter as well as in the Amtsgericht in whose district the property to be seized or the person to be restricted in his personal freedom is located.

para 920 (Petition for anticipatory seizure) *

(1) The petition shall contain the description of the claim including the amount of money or value involved as well as the ground of the anticipatory seizure.

(2) So much evidence shall be produced as will make the court reasonable certain that the claim and the ground of anticipatory seizure exist.

(3) The petition may be declared orally in the court office where it shall be recorded.

para 921 (Decision on petition for anticipatory seizure) *

(1) The decision may be made without an oral hearing.

(2) The court may issue the anticipatory seizure even though it is not satisfied that the claim or the ground of anticipatory seizure has been established if, because of the disadvantages threatening the opponent, security is given. The court may make the order for anticipatory seizure dependent on the giving of security even if it is reasonably certain that the claim and ground of anticipatory seizure exist.

para 922 (Form of decision on anticipatory seizure) *

(1) In the case of an oral hearing the decision on the petition is made by a final judgment, otherwise by an order.

(2) The order by which anticipatory seizure is issued shall be served by the party that secured the anticipatory seizure.

(3) The opponent is not to be informed of any order by which the petition for anticipatory seizure is dismissed or the previous giving of security is declared to be required.

para 923 (Right to avert anticipatory seizure) *

In the order of anticipatory seizure an amount of money is to be fixed which, if deposited, will stay the execution of the anticipatory seizure and entitle the debtor to apply for the withdrawal of the executed seizure.

para 924 (Protest) *

(1) Against the order by which an anticipatory seizure is issued a protest (Widerspruch) may be filed.

(2) In the protest the protesting party shall state the grounds that he proposes to advance for a withdrawal of the anticipatory seizure. The court shall ex officio set a date for an oral hearing. If the court issuing the anticipatory seizure is an Amtsgericht, the protest, including the ground intended to be advanced for a

withdrawal of the anticipatory seizure, shall be made in writing or declared orally and recorded at the court office.

(3) The filing of a protest does not operate to stay the execution of the anticipatory seizure. The court, may, however, make an interim order under para 707; para 707(1)(sentence 2) is not applicable.

para 925 (Decision upon protest) *

(1) If a protest is made, the justice of the anticipatory seizure is to be decided by final judgment.

(2) The court may wholly or in part affirm, modify or withdraw the anticipatory seizure or make the affirmation, modification or withdrawal dependent on the giving of security.

para 926 (Order for an action to be brought) *

(1) If the principal matter is not pending, the court issuing the anticipatory seizure shall, upon application and without an oral hearing, order that the party who has secured the order of anticipatory seizure shall bring an action within a time limit to be determined (by the court).

(2) If this order is not complied with, the withdrawal of the anticipatory seizure is to be pronounced by final judgment.

para 927 (Withdrawal when circumstances have changed) *

(1) Even after the affirmation of the anticipatory seizure the withdrawal of the anticipatory seizure may be applied for because of a change of conditions, especially on the ground that there is no longer any reason for an anticipatory seizure or that security has been offered.

(2) The decision shall be made by final judgment; it shall be rendered by the court who issued the anticipatory seizure and, if the principal matter is pending, by the court dealing with the principal matter.

para 928 (Execution of anticipatory seizure) *

To the execution of anticipatory seizure the provisions on execution apply mutatis mutandis unless the following sections contain anything to the contrary.

para 929 (Execution clause. Time limit for execution) *

(1) Orders of anticipatory seizure require an execution clause only if execution is to be effected on behalf of a creditor other than the one stated in the order or against a debtor other than the one stated in the order.

(2) The execution of the order of anticipatory seizure is not permissible if one month has elapsed since the day on which the order was pronounced or served on the party on whose request it was issued.

(3) The execution is admissible before the service of the order of anticipatory seizure on the debtor. It is, however, without effect unless service is effected within one week from the execution and before the time limit provided for it in the preceding paragraph has expired.

para 930 (Execution against movables and claims) *

(1) The execution of an order of anticipatory seizure against movable property is effected by attachment (Pfaendung). The attachment is effected according to the same principles as any other attachment and gives rise to a right of pledge (Pfandrecht) with the effects provided for in para 804. For the attachment of a claim the court that issued the order of anticipatory seizure shall have jurisdiction as court of execution.

(2) Attached money and any amount of the proceeds falling to the creditor in distribution proceedings shall be deposited.

(3) Upon application the court of execution may order that a movable corporeal thing be sold by auction and the proceeds be deposited if it is exposed to the danger of a considerable diminution of value or if its storage would cause disproportionate costs.

para 931 (Execution against registered ships) *

(1) The execution of an order of anticipatory seizure against a registered ship or a ship under construction is effected according to the provisions of levy of execution against movable property, with the following deviation:

(2) The execution gives rise to a right of pledge (Pfandrecht) over the seized ship or ship under construction; the right of pledge (Pfandrecht) gives the creditor the same rights as a ships mortgage in proportion to other rights.

(3) On application of the creditor the execution is ordered by the Court competent for arrest proceedings acting as a Court competent for enforcement matters; the Court simultaneously has to request the Registry Court to have a priority caution (Vormerkung) entered in the ships register or register for ships under construction; the priority caution (Vormerkung) expires if the enforcement of the arrest becomes inadmissible.

(4) The bailiff, when undertaking the execution, has to take the ship under guard and custody.

(5) If at the time of enforcement of the arrest the execution sale is instituted by public auction, then the arrest of the ship or ship under construction which took place under this procedure is deemed to be the first levy of execution in terms of para 826; the copy of the bailiff's return has to be filed with the Court competent for

enforcement matters.

(6) On application of the creditor the attachment lien will be entered into the ships register or register of ships under construction; the amount determined in accordance with para 923 has to be denoted as the maximum amount for which the ship or the ship under construction is liable. For the rest, paras 867 and para 870a(3) are applicable mutatis mutandis provided the aforesaid provisions do not determine otherwise.

para 932 (Real property, rights tantamount to real property) *

(1) The execution of an order of anticipatory seizure against real property or against a right to which the provisions relating to real property apply is effected by the registration of a mortgage securing the claim; the amount specified in accordance with para 923 is to be stated as the maximum amount for which the real property or the right is pledged. The creditor of a cautionary mortgage or the creditor of a cautionary mortgage registered in the Land Register is not entitled to take legal action in terms of para 1179a or para 1179b of the Civil Code.

(2) In all other respects the provisions of paras 867, 868 apply.

(3) The application for registration of the mortgage is deemed to be the execution of anticipatory seizure order within the meaning of para 929(2) and (3).

para 933 (Execution of anticipatory seizure of the person) *

The execution of anticipatory seizure of the person is governed by the provisions of paras 904 to 913 if it is effected by detention; if it is effected by other restrictions of personal freedom, it is governed by the special orders to be made by the court issuing the order of anticipatory seizure. In making such orders the court shall be guided by the restriction of detention. The amount of money specified under para 923 shall be shown on the warrant of anticipatory seizure.

para 934 (Withdrawal of anticipatory seizure) *

(1) If the amount of money specified in the order of anticipatory seizure is deposited, the executed anticipatory seizure is withdrawn by the court of execution.

(2) The court of execution may also order the withdrawal of the anticipatory seizure if its continuation would require extraordinary expenses and the party on whose request the anticipatory seizure was ordered does not advance the necessary amount of money.

(3) The decisions mentioned in this section may be made without oral hearing.

(4) An immediate objection lies from the order by which the anticipatory seizure is withdrawn.

para 943 (Refund of security. Jurisdiction) *

(1) The Court dealing with the principal matter within the meaning of the provisions of this Chapter is the Court of first instance and, if the principal matter is pending in appeal (Berufung), the appellate Court.

(2) If the principal matter is or has been pending, the Court dealing with the principal matter has exclusive jurisdiction for any orders to be made in accordance with para 109.

para 945 (Damages) *

If the issuing of an order of anticipatory seizure or an interim injunction proves to have been unjustified from its inception or if the ordered measure is withdrawn in accordance with para 926(2) or para 942(3), the party who secured the order is liable to compensate the opponent for the damage arising from the execution of the ordered measure or from his giving security in order to avert the execution or to secure the withdrawal of the measure.

A P P E N D I X II

GERMAN COMMERCIAL CODE (HGB)

A. German:

para 476 (Gewinn und Verlust bei Veräußerung)

Wird ein Schiff oder eine Schiffspart veräußert, während sich das Schiff auf der Reise befindet, so ist im Verhältnisse zwischen dem Veräußerer und dem Erwerber in Ermangelung einer anderen Vereinbarung anzunehmen, dass dem Erwerber der Gewinn der laufenden Reise gebühre oder der Verlust der laufenden Reise zur Last falle.

para 482 (Unzulässigkeit der Zwangsvollstreckung und des Arrestes)

Die Anordnung der Zwangsversteigerung eines Schiffes im Wege der Zwangsvollstreckung sowie die Vollziehung des Arrestes in das Schiff ist nicht zulässig, wenn sich das Schiff auf der Reise befindet und nicht in einem Hafen liegt.

para 484 (Reeder)

Reeder ist der Eigentümer eines ihm zum Erwerb durch die Seefahrt dienenden Schiffes.

para 485 (Haftung für die Schiffsbesatzung)

Der Reeder ist für den Schaden verantwortlich, den eine Person der Schiffsbesatzung oder ein an Bord tätiger Lotse einem Dritten in Ausführung von Dienstverrichtungen schuldhaft zufügt. Er haftet den Ladungsbeteiligten jedoch nur soweit, wie der Verfrachter ein Verschulden der Schiffsbesatzung zu vertreten hat.

para 486 (Haftungsbeschränkungsübereinkommen und Oelhaftungsübereinkommen)

(1) Die Haftung für Seeforderungen kann nach den Bestimmungen des Übereinkommens vom 19. November 1976 über die Beschränkung der Haftung für Seeforderungen (BGBl. 1986 II S. 786; Haftungsbeschränkungsübereinkommen) beschränkt werden.

(2) Die Haftung auf Grund des Internationalen Übereinkommens vom 29. November 1969 über die zivilrechtliche Haftung für Ölverschmutzungsschäden (BGBl. 1975 II S. 301; Ölhaftungsübereinkommen) kann nach den Bestimmungen dieses Übereinkommens beschränkt werden.

(3) Werden Ansprüche wegen Verschmutzungsschäden im Sinne des Artikels I Nr. 6 des Ölhaftungsübereinkommens gegen andere Personen

als den Eigentüemer des das Oel befoerdernden Schiff geltend gemacht oder werden Ansprueche wegen Verschmutzungsschaeden im Sinne des Art I Nr.6 des Oelhaftungsuebereinkommens geltend gemacht, fuer die das Oelhaftungsuebereinkommens nach Artikel II nicht gilt, so koennen die in Artikel 1 des Haftungsbeschraenkungsuebereinkommens bezeichneten Personen ihre Haftung fuer diese Ansprueche in entsprechender Anwendung der Bestimmungen des Haftungsbeschraenkungsuebereinkommens beschraenken. Sind aus demselben Ereignis sowohl Ansprueche der in Satz 1 bezeichneten Art als auch Ansprueche, fuer welche die Haftung nach Absatz 1 beschraenkt werden kann, entstanden, so gelten die im Haftungsbeschraenkungsuebereinkommen bestimmten Haftungshoechstbeträge jeweils gesondert fuer die Gesamtheit der in Satz 1 bezeichneten Ansprueche und fuer die Gesamtheit derjenigen Ansprueche, fuer welche die Haftung nach Absatz 1 beschraenkt werden kann.

(4) Die Haftung kann nicht beschraenkt werden fuer

1. die in Artikel 3 Buchstabe e des Haftungsbeschraenkungsuebereinkommens bezeichneten Ansprueche, sofern der Dienstvertrag inlaendischem Recht unterliegt;
2. Ansprueche auf Ersatz der Kosten der Rechtsverfolgung;

(5) Ergaenzend zu den Bestimmungen des Haftungsbeschraenkungsuebereinkommens und des Oelhaftungsuebereinkommens gelten die Paragraphen 487 bis 487e.

para 487 (Sonderregelung fuer Kostenansprueche; Haftungshoechstbetrag)

(1) Das Haftungsbeschraenkungsuebereinkommen (Paragraph 486 Abs.1) ist auf Ansprueche auf Erstattung der Kosten fuer

1. die Hebung, Beseitigung, Vernichtung oder Unschaedlichmachung eines gesunkenen, havarierten, gestrandeten oder verlassenen Schiffes, samt allem, was sich an Bord eines solchen Schiffes befindet oder befunden hat, oder
2. die Beseitigung, Vernichtung oder Unschaedlichmachung der Ladung des Schiffes

mit der Massgabe anzuwenden, dass fuer diese Ansprueche, unabhaengig davon, auf welcher Rechtsgrundlage sie beruhen, ein gesonderter Haftungshoechstbetrag gilt.

(2) Der Haftungshoechstbetrag nach Absatz 1 errechnet sich nach Artikel 6 Absatz 1 Buchstabe b des Haftungsbeschraenkungsuebereinkommens. Der Haftungshoechstbetrag gilt fuer die Gesamtheit der in Absatz 1 bezeichneten Ansprueche, die aus demselben Ereignis gegen Personen entstanden sind, die dem gleichen Personenkreis im Sinne des Artikels 9 Abs.1 Buchstabe a, b oder c des Haftungsbeschraenkungsuebereinkommens angehoren. Er steht ausschliesslich zur Befriedigung der in Absatz 1 bezeichneten Ansprueche zur Verfuegung; Artikel 6 Abs.2 und 3 des Haftungsbeschraenkungsuebereinkommens ist nicht anzuwenden.

para 487a (Haftungshoehchstbetrag fuer kleine Schiffe)

Fuer ein Schiff mit einem Raumgehalt bis zu 250 Tonnen wird der nach Artikel 6 Abs.1 Buchstabe b des Haftungsbeschraenkungsuebereinkommens (Paragraph 486 Abs.1) zu errechnende Haftungshoehchstbetrag auf die Haelfte des fuer ein Schiff mit einem Rauminhalt von 500 Tonnen geltenden Haftungshoehchstbetrages festgesetzt.

para 487b (Vorrang von Anspruechen wegen Beschaedigung von Hafenanlagen und Wasserstrassen)

Unbeschadet des Rechts nach Artikel 6 Abs.2 des Haftungsbeschraenkungsuebereinkommens (Paragraph 486 Abs.1) in bezug auf Ansprueche wegen Tod oder Koerperverletzung haben Ansprueche wegen Beschaedigung von Hafenanlagen, Hafenbecken, Wasserstrassen und Navigationshilfen Vorrang vor sonstigen Anspruechen nach Artikel 6 Abs.1 Buchstabe b des Haftungsbeschraenkungsuebereinkommens.

para 487c (Haftungshoehchstbeträge fuer Lotsen)

(1) Die in Artikel 6 Abs.1 Buchstabe a und b des Haftungsbeschraenkungsuebereinkommens (Paragraph 486 Abs.1) bestimmten Haftungshoehchstbeträge gelten fuer Ansprueche gegen einen an Bord taetigen Lotsen mit der Massgabe, dass der Lotse, falls der Raumgehalt des gelotsten Schiffes 1000 Tonnen uebersteigt, seine Haftung auf die Betraege beschraenken kann, die sich unter Zugrundelegung eines Raumgehalts von 1000 Tonnen errechnen.

(2) Der in Artikel 7 Abs.1 des Haftungsbeschraenkungsuebereinkommens bestimmte Haftungshoehchstbetrag gilt fuer Ansprueche gegen einen an Bord taetigen Lotsen mit der Massgabe, dass der Lotse, falls die Anzahl der Reisenden, die das Schiff nach dem Schiffszeugnis befoerdern darf, die Zahl 12 uebersteigt, seine Haftung auf den Betrag beschraenken kann, der sich unter Zugrundelegung einer Anzahl von 12 Reisenden errechnet.

(3) Die Errichtung und Verteilung eines Fonds in der Hoehe der nach Absatz 1 oder 2 zu errechnenden Betraege sowie die Wirkungen der Errichtung eines solchen Fonds bestimmen sich nach den Vorschriften ueber die Errichtung, die Verteilung und die Wirkungen der Errichtung eines Fonds im Sinne des Artikels 11 des Haftungsbeschraenkungsuebereinkommens. Jedoch ist Artikel 11 Abs.3 des Haftungsbeschraenkungsuebereinkommens nicht anzuwenden, wenn im Falle des Absatzes 1 der Raumgehalt des gelotsten Schiffes 1000 Tonnen oder im Falle des Absatzes 2 die Anzahl der Reisenden, die das Schiff nach dem Schiffszeugnis befoerdern darf, die Zahl 12 uebersteigt.

para 487d (Ausschluss der Haftungsbeschraenkung)

(1) Ist der Schuldner eine juristische Person oder eine Personenhandels-gesellschaft, so kann er seine Haftung nicht beschraenken, wenn der Schaden auf eine die Beschraenkung der Haftung nach Artikel 4 des Haftungsbeschraenkungsuebereinkommens (Paragraph 486 Abs.1) ausschliessende Handlung oder Unterlassung oder das

schaedigende Ereignis auf ein die Beschraenkung der Haftung nach Artikel V Abs.2 des Oelhaftungsuebereinkommens (Paragraph 486 Abs.2) ausschliessendes persoenliches Verschulden eines Mitglieds des zur Vertretung berechtigten Organs oder eines zur Vertretung berechtigten Gesellschafters zurueckzufuehren ist. Mitreeder koennen ihre Haftung auch dann nicht beschraenken, wenn der Schaden auf eine die Beschraenkung der Haftung nach Artikel 4 des Haftungsbeschraenkungsuebereinkommens ausschliessende Handlung oder Unterlassung oder das schaedigende Ereignis auf ein die Beschraenkung der Haftung nach Artikel V Abs.2 des Oelhaftungsuebereinkommens ausschliessendes persoenliches Verschulden des Korrespondentreeders zurueckzufuehren ist.

(2) Ist der Schuldner eine Personenhandelsgesellschaft, so kann auch jeder Gesellschafter seine persoenliche Haftung fuer Ansprueche beschraenken, fuer welche die Gesellschaft ihre Haftung beschraenken kann.

para 487e (Errichtung und Verteilung eines Fonds)

(1) Die Errichtung und Verteilung eines Fonds im Sinne des Artikels 11 des Haftungsbeschraenkungsuebereinkommens (Paragraph 486 Abs.1) oder im Sinne des Artikels V Abs.3 des Oelhaftungsuebereinkommens (Paragraph 486 Abs.2) bestimmt sich nach den Vorschriften der Seerechtlichen Verteilungsordnung vom 25 Juli 1986 (BGBl.I S.1130).

(2) Die Beschraenkung der Haftung nach dem Haftungsbeschraenkungsuebereinkommen kann auch dann geltend gemacht werden, wenn ein Fonds im Sinne des Artikels 11 des Haftungsbeschraenkungsuebereinkommens nicht errichtet worden ist. Paragraph 305 der Zivilprozessordnung bleibt unberuehrt.

para 489 (Begriff der Reederei; Partenreederei)

(1) Wird von mehreren Personen ein ihnen gemeinschaftlich zustehendes Schiff zum Erwerbe durch die Seefahrt fuer gemeinschaftliche Rechnung verwendet, so besteht eine Reederei.

(2) Der Fall, wenn das Schiff einer Handelsgesellschaft gehoert, wird durch die Vorschriften ueber die Reederei nicht beruehrt.

para 510 (Ausruester)

(1) Wer ein ihm nicht gehoerendes Schiff zum Erwerbe durch die Seefahrt fuer seine Rechnung verwendet und es entweder selbst fuehrt oder die Fuehrung einem Kapitaen anvertraut, wird im Verhaeltnis zu Dritten als der Reeder angesehen.

(2) Der Eigentuemer kann denjenigen, welcher aus der Verwendung einen Anspruch als Schiffsglaebiger herleitet, an der Durchfuehrung des Anspruchs nicht hindern, es sei denn, dass die Verwendung ihm gegenueber eine widerrechtliche und der Glaebiger nicht in gutem Glauben war.

para 559 Haftung des Verfrachters fuer See- und Ladungstuechtigkeit)

(1) Bei jeder Art von Frachtvertrag hat der Verfrachter dafuer zu sorgen, dass das Schiff in seetuechtigem Stand, gehoerig eingerichtet, ausgeruestet, bemannt und mit genuegenden Vorraeten versehen ist (Seetuechtigkeit) sowie dass sich die Laderaeume einschliesslich der Kuehl- und Gefrierraeume in dem fuer die Aufnahme, Befoerderung und Erhaltung der Gueter erforderlichen Zustand befinden (Ladungstuechtigkeit).

(2) Er haftet dem Ladungsbeteiligten fuer den Schaden, der auf einen Mangel der See- oder Ladungstuechtigkeit beruht, es sei denn, dass der Mangel bei Anwendung der Sorgfalt eines ordentlichen Verfrachters bis zum Antritt der Reise nicht zu entdecken war.

para 606 (Haftung des Verfrachters fuer Verschulden)

Der Verfrachter ist verpflichtet, beim Einladen, Stauen, Befoerdern, Behandeln und Ausladen der Gueter mit der sorgfalt eines ordentlichen Verfrachters zu verfahren. Er haftet fuer den Schaden, der durch Verlust oder Beschaedigung der Gueter in der Zeit von der Annahme bis zur Ablieferung entsteht, es sei denn, dass der Verlust oder die Beschaedigung auf Umstaenden beruht, die durch die Sorgfalt eines ordentlichen Verfrachters nicht abgewendet werden konnten.

para 607a (Geltung der Haftungsbefreiungen und -beschraenkungen)

(1) Die in diesem Abschnitt vorgesehenen Haftungsbefreiungen und Haftungsbeschraenkungen gelten fuer jeden Anspruch gegen den Verfrachter auf Ersatz des Schadens wegen Verlusts oder Beschaedigung von Guetern die Gegenstand eines Frachtvertrages sind, auf welchem Rechtsgrund der Anspruch auch beruht.

(2) Wird ein Anspruch auf Ersatz des Schadens wegen Verlusts oder Beschaedigung von Guetern, die Gegenstand eines Frachtvertrages sind, gegen einen der Leute des Verfrachters oder eine Person der Schiffsbesatzung geltend gemacht, so kann diese Person sich auf Haftungsbefreiungen und Haftungsbeschraenkungen berufen, die in diesem Abschnitt fuer den Verfrachter vorgesehen sind.

(3) Der Gesamtbetrag, der in diesem Falle von dem Verfrachter, seinen Leuten und den Personen der Schiffsbesatzung als Ersatz zu leisten ist, darf den in diesem Abschnitt vorgesehenen Haftungshoechtsbetrag nicht uebersteigen.

(4) Ist der Schaden jedoch auf eine Handlung oder Unterlassung zurueckzufuehren, die einer der Leute des Verfrachters oder eine Person der Schiffsbesatzung in der Absicht, einen Schaden herbeizufuehren, oder leichtfertig und in dem Bewusstsein begangen hat, dass ein Schaden mit Wahrscheinlichkeit eintreten werde, so kann diese Person sich auf die Haftungsbefreiungen und Haftungsbeschraenkungen, die in diesem Abschnitt fuer den Verfrachter vorgesehen sind, nicht berufen.

para 608 (Ausschluss der Haftung)

Der Verfrachter haftet nicht fuer Schaeden, die entstehen:

1. aus Gefahren oder Unfaellen der See oder anderer schiffbarer Gewaesser;
2. aus kriegerischen Ereignissen, Unruhen, Handlungen oeffentlicher Feinde oder Verfuegungen von hoher Hand sowie aus Quarantaenebeschraenkungen;
3. aus gerichtlicher Beschlagnahme;
4. aus Streik, Aussperrung oder einer sonstigen Arbeitsbehinderung;
5. aus Handlungen oder Unterlassungen des Abladers oder Eigentuemers des Gutes, seiner Agenten oder Vertreter;
6. aus der Rettung oder dem Versuch der Rettung von Leben oder Eigentum zur See;
7. aus Schwund an Raumgehalt oder Gewicht oder aus verborgenen Maengeln oder der eigentuemlichen natuerlichen Art oder Beschaffenheit des Gutes.

(2) Ist ein Schaden eingetreten, der nach den Umstaenden des Falles aus einer der in Absatz 1 bezeichneten Gefahren entstehen konnte, so wird vermutet, dass der Schaden aus dieser Gefahr entstanden ist.

(3) Die Haftungsbefreiung tritt nicht ein, wenn nachgewiesen wird, dass der Eintritt der Gefahr auf einem Umstand beruht, den der Verfrachter zu vertreten hat.

para 609 (Ausschluss der Haftung bei wissentlich falschen Angaben ueber Art oder Wert der Gueter)

Der Verfrachter ist von jeder Haftung frei, wenn der Befrachter oder der Ablader wissentlich bewirkt hat, dass die Art oder der Wert des Gutes im Konnossement falsch angegeben ist.

para 623 (Gesetzliches Pfandrecht des Verfrachters)

(1) Der Verfrachter hat wegen der in Paragraph 614 erwaehten Forderungen ein Pfandrecht an den Guetern.

(2) Das Pfandrecht besteht, solange die Gueter zurueckbehalten oder hinterlegt sind; es dauert auch nach der Ablieferung fort, sofern es binnen dreissig Tagen nach der Beendigung der Ablieferung gerichtlich geltend gemacht wird und das Gut noch im Besitze des Empfaengers ist.

(3) Die nach Paragraph 366 Abs.3 und Paragraph 368 fuer das Pfandrecht des Frachtfuehrers geltenden Vorschriften finden auch auf das Pfandrecht des Verfrachters Anwendung.

(4) Die in Paragraph 1234 Abs.1 des Buergerlichen Gesetzbuchs bezeichnete Androhung des Pfandverkaufs sowie die in den Paragraphen 1237 und 1241 des Buergerlichen Gesetzbuchs vorgesehenen Benachrichtigungen sind an den Empfaenger zu richten. Ist dieser nicht zu ermitteln oder verweigert er die Annahme des Gutes, so hat die Androhung und Benachrichtigung gegenueber dem Absender zu erfolgen.

para 644 (Fehlende oder falsche Angabe des Verfrachters im Konnossement)

Ist in einem vom Kapitaen oder einem anderen Vertreter des Reeders ausgestellten Konnossement der Name des Verfrachters nicht angegeben, so gilt der Reeder als Verfrachter. Ist der Name des Verfrachters unrichtig angegeben, so haftet der Reeder dem Empfaenger fuer den Schaden, der aus der Unrichtigkeit der Angabe entsteht.

para 660 (Hoechstbetrag der Haftung)

(1) Sofern nicht die Art und der Wert der Gueter vor ihrer Einladung vom Ablader angegeben sind und diese Angabe in das Konnossement aufgenommen ist, haftet der Verfrachter fuer Verlust oder Beschaedigung der Gueter in jedem Fall hoechstens bis zu einem Betrag von 666,67 Rechnungseinheiten fuer das Stueck oder die Einheit oder einem Betrag von 2 Rechnungseinheiten fuer das Kilogramm des Rohgewichts der verlorenen oder beschaedigten Gueter, je nachdem, welcher Betrag hoeher ist. Die in Satz 1 genannte Rechnungseinheit ist das Sonderziehungsrecht des Internationalen Waehrungsfonds. Die in Satz 1 genannten Betraege werden in Deutsche Mark entsprechend dem Wert der Deutschen Mark gegenueber dem Sonderziehungsrecht am Tag des Urteils oder an dem von den Parteien vereinbarten Tag umgerechnet. Der Wert der Deutschen Mark gegenueber dem Sonderziehungsrecht wird nach der Berechnungsmethode ermittelt, die der Internationale Waehrungsfond an dem betreffenden Tag fuer seine Operationen und Transaktionen anwendet.

(2) Wird ein Behaelter, eine Palette oder ein aehnliches Geraet verwendet, um die Gueter fuer die Befoerderung zusammenzufassen, so gilt jedes Stueck und jede Einheit, welche in dem Konnossement als in einem solchen Geraet enthalten angegeben sind, als Stueck oder Einheit im Sinne des Absatzes 1. Soweit das Konnossement solche Angaben nicht enthaelt, gilt das Geraet als Stueck oder Einheit.

(3) Der Verfrachter verliert das Recht auf Haftungsbeschraenkung nach Absatz 1 sowie nach den Paragraphen 658, 659, wenn der Schaden auf eine Handlung oder Unterlassung zurueckzufuehren ist, die der Verfrachter in der Absicht, einen Schaden herbeizufuehren, oder leichtfertig und in dem Bewusstsein begangen hat, dass ein Schaden mit Wahrscheinlichkeit eintreten werde.

para 700 (Grosse Haverei)

(1) Alle Schaeden, die dem Schiff oder der Ladung oder beiden zum Zwecke der Errettung beider aus einer gemeinsamen Gefahr von dem Kapitaen oder auf dessen Geheiss vorsaeztlich zugefuegt werden, sowie auch die durch solche Massregeln ferner verursachten Schaeden, ingleichen die Kosten, die zu demselben Zwecke aufgewendet werden, sind grosse Haverei.

(2) Die grosse Haverei wird von Schiff, Fracht und Ladung gemeinschaftlich getragen.

para 726 (Pfandrechte der Verguetungsberechtigten)

(1) Wegen der von dem Schiff und der Fracht zu entrichtenden Beitraege haben die Verguetungsberechtigten an dem Schiff die Rechte von Schiffsglaebigern.

(2) Auch an den beitragspflichtigen Guetern steht den Verguetungsberechtigten wegen des von den Guetern zu entrichtenden Beitrags ein Pfandrecht zu.

para 754 (Schiffsglaebigerrechte)

(1) Folgende Forderungen gewaehren die Rechte eines Schiffsglaebigers:

1. Heuerforderungen des Kapitaens und der uebrigen Schiffsbesatzung;
2. oeffentliche Schiffs-, Schiffahrts- und Hafengebuehren sowie Lotsgebuehren;
3. Schadenseratzforderungen wegen der Toetung oder Verletzung von Menschen sowie wegen des Verlustes oder der Beschadigung von Sachen, sofern diese Forderungen aus der Verwendung des Schiffes entstanden sind; ausgenommen sind jedoch Forderungen wegen des Verlustes oder der Beschadigung von Sachen, die aus einem Vertrag hergeleitet werden oder aus einem Vertrag hergeleitet werden koennen;
4. Bergungs- und Hilfskosten, auch im Falle des Paragraph 743; Beitraege des Schiffes und der Fracht zur grossen Haverei; Forderungen wegen der Beseitigung des Wracks;
5. Forderungen der Traeger der Sozialversicherung einschliesslich der Arbeitslosenversicherung gegen den Reeder.

(2) Absatz 1 Nr.3 findet keine Anwendung auf Ansprueche, die auf die radioaktiven Eigenschaften oder eine Verbindung der radioaktiven Eigenschaften mit giftigen, explosiven oder sonstigen gefaehrlichen Eigenschaften von Kernbrennstoffen oder radioaktiven Erzeugnissen oder Abfaellen zurueckzufuehren sind.

para 755 (Gesetzliches Pfandrecht der Schiffsglaebiger)

(1) Die Schiffsglaebiger haben fuer ihre Forderungen ein gesetzliches Pfandrecht an dem Schiff. Das Pfandrecht kann gegen jeden Besitzer des Schiffes verfolgt werden.

(2) Das Schiff haftet auch fuer die gesetzlichen Zinsen der Forderungen sowie fuer die Kosten der Befriedigung aus dem Schiff bezweckenden Rechtsverfolgung.

para 759 (Erloeschen des Pfandrechts durch Zeitablauf)

(1) Das Pfandrecht eines Schiffsglaebigers erlischt nach Ablauf eines Jahres seit der Entstehung der Forderung.

(2) Das Pfandrecht erlischt nicht, wenn der Glaebiger innerhalb der

Frist des Absatzes 1 die Beschlagnahme des Schiffes wegen des Pfandrechts erwirkt, sofern das Schiff spaeter im Wege der Zwangsvollstreckung veraeusert wird, ohne dass das Schiff in der Zwischenzeit von einer Beschlagnahme zugunsten des Glaebigers frei geworden ist. Das gleiche gilt fuer das Pfandrecht eines Glaebigers, der wegen seines Pfandrechts dem Zwangsvollstreckungsverfahren innerhalb dieser Frist beitrifft.

(3) Ein Zeitraum, waehrend dessen ein Glaebiger rechtlich daran gehindert ist, sich aus dem Schiff zu befriedigen, wird in die Frist nicht eingerechnet. Eine Hemmung oder Unterbrechung der Frist aus anderen Gruenden findet nicht statt.

para 760 (Befriedigung des Schiffsglaebigers; Passivlegitimation)

(1) Die Befriedigung des Schiffsglaebigers aus dem Schiff erfolgt nach den Vorschriften ueber die Zwangsvollstreckung.

(2) Die Klage auf Duldung der Zwangsvollstreckung kann ausser gegen den Eigentuemer des Schiffes auch gegen den Ausruester oder gegen den Kapitaen gerichtet werden. Das gegen den Ausruester oder gegen den Kapitaen gerichtete Urteil ist auch gegenueber dem Eigentuemer wirksam.

(3) Bei der Verfolgung des Pfandrechts des Schiffsglaebigers gilt zugunsten des Glaebigers als Eigentuemer, wer im Schiffsregister als Eigentuemer eingetragen ist. Das Recht des nicht eingetragenen Eigentuemers, die ihm gegen das Pfandrecht zustehenden Einwendungen geltend zu machen, bleibt unberuehrt.

para 761 (Vorrang des Pfandrechts des Schiffsglaebigers)

Die Pfandrechte der Schiffsglaebiger haben den Vorrang vor allen anderen Pfandrechten am Schiff.

para 762 (Rangordnung der Pfandrechte)

(1) Die Rangordnung der Pfandrechte der Schiffsglaebiger bestimmt sich nach der Reihenfolge der Nummern, unter denen die Forderungen in Paragraph 754 aufgefuehrt sind.

(2) Die Pfandrechte fuer die in Paragraph 754 Abs.1 Nr.4 aufgefuehrten Forderungen haben jedoch den Vorrang vor den Pfandrechten aller anderen Schiffsglaebiger, deren Forderungen frueher entstanden sind.

(3) Beitragsforderungen zur grossen Haverei gelten als im Zeitpunkt des Havereifalles, Forderungen auf Bergungs- und Hilfskosten als im Zeitpunkt der Beendigung des Bergungs- oder Hilfsleistungswerks und Forderungen wegen der Beseitigung des Wracks als im Zeitpunkt der Beendigung der Wrackbeseitigung entstanden.

para 763 (Rangordnung der Pfandrechte nach Paragraph 754 Abs.1 Nr.1 bis 3, 5

(1) Von den Pfandrechten fuer die in Paragraph 754 Abs.1 Nr.1 bis 3,5 aufgefuehrten Forderungen haben die Pfandrechte fuer die unter derselben Nummer genannten Forderungen ohne Ruecksicht auf den Zeitpunkt ihrer Entstehung den gleichen Rang.

(2) Pfandrechte fuer die in Paragraph 754 Abs.1 Nr.3 aufgefuehrten Forderungen wegen Personenschaeden gehen jedoch Pfandrechten fuer die unter derselben Nummer aufgefuehrten Forderungen wegen Sachschaeden vor.

para 764 (Rangordnung der Pfandrechte nach Paragraph 754 Abs.1 Nr.4)

Von den Pfandrechten fuer die in Paragraph 754 Abs.1 Nr.4 aufgefuehrten Forderungen geht das fuer die spaeter entstandene Forderung dem fuer die frueher entstandene Forderung vor. Pfandrechte wegen gleichzeitig entstandener Forderungen sind gleichberechtigt.

B.English:

- Translated by Simon L. Goren and Ian S. Forrester. *
- Translated in the Faculty of Arts, Department of German, University of Natal (1988). **

para 476 (Allocation of profit and loss of current voyage) *

If a ship or a share in a ship is disposed of while the ship is on a voyage, it is to be presumed in respect of the relationship between the seller and the acquirer, unless there is some other agreement, that either the profit of the current voyage will belong to the acquirer or the loss of the current voyage will be borne by him.

para 482 (No execution to be levied when ship is at sea) *

An order for the compulsory auction by way of execution of a ship, as well as placing her under distraint, is not permitted if the ship is on a voyage and is not lying in a port.

para 484 (Shipowner) *

The shipowner is the proprietor of a ship which is in his service for business purposes.

para 485 (Liability for delict of the ship's company) *

The shipowner is liable for damage which a member of the ship's company or a pilot engaged on board in the course of his duty culpably causes to a third party. However, he is liable to the parties interested in the cargo only to such extent as the carrier is responsible for a delict by the ship's company

para 486 (Limitation of Liability Convention (CLLMC) and Oil Liability Convention (CLOPD) **

(1) Liability for maritime claims can be limited according to the terms of the Convention of November 19, 1976, regarding the limitation of liability for maritime claims (BGBl. 1986 II p 786; CLLMC).

(2) Liability on grounds of the International Convention of November 26, 1969, regarding the civil liability for oil pollution damage (BGBl. 1975 II p 301; CLOPD) can be limited according to the terms of this Convention.

(3) If claims are asserted on account of pollution damage in accordance with Article I No. 6 CLOPD against persons other than the owner of the ship transporting the oil, or claims asserted on account of pollution damage in accordance with Article I No. 6 CLOPD for which the CLOPD according to Article II is not applicable, persons as

defined in Article 1 of the CLLMC can limit their liability for those claims according to the terms of the CLLMC. On claims from the same occurrence as defined in sentence 1 as well as claims for which the liability according to (1) can be limited, the limits of liability as defined in the CLLMC have to be applied separately for all those claims determined in (1) and for all those claims for which the liability according to (1) can be limited.

(4) Liability cannot be limited for

1. claims defined in Article 3 (e) of the CLLMC if the contract of service is subject to national law;
2. claims for compensation of the costs of the prosecution.

(5) Supplementary to the provisions of the CLLMC and the CLOPD para 487 to 487e are applicable.

para 487 (Special provisions for claims to the reimbursement of costs and expenses. Limit of liability) **

(1) The CLLMC (para 486(1)) is applicable to claims to the reimbursement of costs and expenses for

1. the raising, removal, destruction or transformation to innocent material of a sunk, averaged, stranded or deserted with all that is or has been on board of this ship, or
2. the removal, destruction or transformation to innocent material of the ship's load

on the understanding that for those claims, independent of their legal basis, a separate limit of liability is applied.

(2) The limit of liability according to (1) is calculated according to Article 6(1)(b) of the CLLMC. The limit of liability is valid for all claims defined in (1) on account of the same occurrence against persons who belong to the same group of people in the meaning of Article 9(1)(a), (b) or (c) of the CLLMC. The limit of liability is only applicable for claims defined in (1); Article 6(2) and (3) of the CLLMC cannot be applied.

para 487a (Limit of liability for small ships) **

According to Article 6(1)(b) of the CLLMC (para 486(1)) the calculated limit of liability for a ship with a tonnage up to 250 tons is assessed to be half of the limit of liability valid for a ship with a tonnage of 500 tons.

para 487b (Priority of claims on account of damages of port installations and waterways) **

Irrespective of the right according to Article 6(2) of the CLLMC (para 486(1)) regarding claims on account of death or physical injury, claims on account of damage of port installations, docks, waterways and helps for navigation take priority over other claims

according to Article 6(1) (b) of the CLLMC.

para 487c (Limits of liability for pilots) **

(1) The limits of liability defined in Article 6(1)(a) and (b) of the CLLMC (para 486(1)) are applicable for claims against a pilot working on board on the understanding that the pilot, if the tonnage of the piloted ship exceeds 1000 tons, can limit his liability to those amounts that are calculated on the basis of a tonnage of 1000 tons.

(2) The limit of liability defined in Article 7(1) of the CLLMC is applicable for claims against a pilot working on board on the understanding that the pilot, if the number of travellers the ship is allowed to transport according to the ship's certificate exceeds 12, can limit his liability to the amount that is calculated on the basis of a number of 12 travellers.

(3) The constitution and distribution of a fund of the amount calculated according to (1) or (2) as well as the effects of the constitution of such a fund are defined by the provisions on the constitution, distribution and the effects of a fund in accordance with Article 11 of the CLLMC. But Article 11(3) of the CLLMC is not applicable if in the case of (1) the tonnage of the piloted ship exceeds 1000 tons, or in the case of (2) the number of travellers the ship is allowed to transport according to the ship's certificate exceeds 12.

para 487d (Exclusion of limitation of liability) **

(1) If the debtor is a juristic person or a business partnership the liability cannot be limited if the damage can be ascribed to an act or an act of omission that excludes the limitation of liability according to Article 4 of the CLLMC (para 486(1)), or if the damaging incident can be ascribed to the personal fault of a member of the representative body or of an authorized representative partner that excludes the limitation of liability according to Article V(2) CLOPD (para 486(2)). Co-owners of a ship cannot limit their liability if the damage can be ascribed to an act or an act of omission that excludes the limitation of liability according to Article 4 CLLMC or if the damaging incident can be ascribed to the personal fault of the ship's husband which excludes the limitation of liability according to Article V(2) CLOPD.

(2) If the debtor is a business partnership also every partner can limit his liability for claims for which the partnership can limit his liability.

para 487e (Constitution and distribution of a fund) **

(1) The constitution and distribution of a fund in accordance with Art.11 CLLMC (para 486(1)), or accordance with Art(3) CLOPD (para 486(2)) is governed by the provisions of the Maritime Law Order of Distribution of July 25, 1986 (BGBl.I p 1130).

(2) The limitation of liability according to the CLLMC can also be

asserted if a fund in the meaning of Art.11 CLLMC has not been constituted. Para 305 of the Code of Civil Procedure remains unaffected.

para 489 (The concept of shipping enterprise) *

(1) If several persons utilize a ship jointly owned by them for profit by means of maritime commerce for a common account, there is a shipping enterprise.

(2) The case, when the ship belongs to a trading company, is not affected by the provisions concerning shipping enterprises.

para 510 (Use of ships by non-owners) *

(1) Whoever makes use of a ship not belonging to him for profit by maritime commerce for his own account and navigates it by himself or entrusts the navigation to a captain, is considered in relations with third parties as the shipowner.

(2) The owner may not prevent a person who derives a claim as ship's creditor arising from the use, from enforcing his claim, unless the use was made in violation of the law against the owner and the creditor was in bad faith.

para 606 (Liability of the carrier) *

The carrier is under an obligation to proceed with the care of a prudent carrier in the loading, stowage, forwarding, handling and unloading of the goods. He is liable for the damage which is caused by the loss of, or damage to, the goods from the time of their receipt until they are delivered, unless such loss or damage is the result of circumstances which could not have been avoided by the care of prudent carrier.

para 607a (Validity of exemption from and limitation of liability) **

(1) The exemptions from and limitations of liability defined in this passage are applicable for any claim against the carrier by sea on compensation for the damage on account of loss or damage of goods which are object to a contract of carriage, on which ever legal basis the claim may be based.

(2) If a claim on compensation for the damage on account of loss or damage of goods, which are object to a contract of carriage, is asserted against one of the men of the carrier or against a person of the ship's crew, this person can rely on the exemptions from and limitations of liability provided for the carrier in this passage.

(3) The total amount which in this case is to be produced as compensation by the carrier, his people and the persons of the ship's crew, must not exceed the limit of liability defined in this passage.

(4) But if the damage can be ascribed to an act or an act of omission

that one of the men of the carrier or a person of the ship's crew committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result, this person cannot rely on the exemptions from and limitations of liability defined for the carrier in this passage.

para 608 (Exemption from liability) *

(1) The carrier is not liable for damages which arise:

1. from perils or accidents of the sea or of other navigable waters;
2. from acts of war, riots, acts of public enemies or of rulers, as well as from quarantine restrictions;
3. from seizure under legal process;
4. from strikes or lock-outs, or other restraint of labor;
5. from acts or omissions of the forwarder or owner of the goods, his agent or representative;
6. from saving or attempting to save life or property at sea;
7. from wastage in bulk or weight or from hidden defects, or a peculiar inherent property or quality of the goods.

(2) If a damage has occurred which according to the circumstances of the case could arise from one of the contingencies set forth in (1), it is presumed that the damage arose from such contingency.

(3) The exemption from liability does not obtain if it is proved that the occurrence of the contingency is the result of a circumstance for which the carrier is responsible.

para 609 (Exemption from liability when Bill of Lading is false) *

The carrier is exempted from any liability, if the shipper or forwarder has knowingly caused the making of a false declaration in the Bill of Lading as to the nature or value of the goods.

para 623 (Right of lien of the carrier) *

(1) The carrier has a lien on the goods with regard to the claims stated in para 614.

(2) The right of lien continues so long as the goods are retained or deposited; it continues even after the delivery, provided that it is judicially asserted within thirty days from the completion of delivery and the goods are still in the possession of the consignee.

(3) The provisions applicable to the lien of a common carrier, pursuant to paras 366(3) and 368, also apply to the right of lien of the carrier by sea.

(4) The warning before the sale of the pledge indicated in para 1234 (1) of the Civil Code, as well as the notifications provided in paras 1237 and 1241 of the Civil Code shall be addressed to the consignee. If the latter cannot be found or refuses to accept the goods, the

warning and the notification shall be given to the consignor.

para 644 (Failure to state name of carrier) *

If the name of the carrier is not given in a bill of lading issued by the captain or by another representative of the shipowner, the shipowner is considered as the carrier. If the name of the carrier is stated incorrectly, the shipowner is liable to the consignee for any losses which arise from the incorrectness of the statement.

para 660 (Limit of liability) **

(1) Unless the unloader stated the kind and value of the goods before commencement of the loading and this statement has been included in the bill of lading, the carrier is liable for loss or damage of goods in any event up to the maximum of an amount of 666,67 units of account for the piece or the unit, or an amount of 2 units of account for the kilogram of the gross weight of the lost or damaged goods depending on which amount is higher. The unit of account mentioned in sentence 1 is the Special Drawing Right of the International Monetary Fund (I M F). The amounts mentioned in sentence 1 are converted to German Marks according to the value of the German Mark as against the Special Drawing Right on the day of the judgment or on a day agreed upon by the parties. The value of the German Mark as against the Special Drawing Right is determined according to the method of calculation the I M F uses on this day for its operations and transactions.

(2) If a container, a pallet or a similar piece of equipment is used to keep the goods together for transport, any piece and any unit that is included in the bill of lading as included in such a piece of equipment is considered as a piece or a unit in accordance with (1). As far as the bill of lading does not include such specifications, the piece of equipment is considered one piece or unit.

(3) The carrier loses the right to limit the liability according to (1) as well as according to paras 658, 659, if the damage can be ascribed to an act or an act of omission that the carrier committed with the intent to cause such damage or recklessly and with knowledge that such damage would probably result.

para 700 (General average) *

(1) All the damage intentionally caused by the captain, or at his command, to the ship, or to the cargo, or both, for the purpose of saving both from a common danger, as well as any further damage caused as a consequence of such measures, including the expenses which are incurred for the same purpose, are general average.

(2) Ship, freightage, and cargo shall jointly bear the general average.

para 726 (Lien of persons entitled to indemnification) *

(1) The persons entitled to indemnification have the rights of maritime lienholders of the ship as regards amounts payable out of the ship and the freightage.

(2) The persons entitled to indemnification also possess a lien on the goods liable to make contributions, on account of the amounts payable out of the goods.

para 754 (Establishment of rights of maritime lienholders) *

(1) The following claims confer the rights of a maritime lienholder:

1. wage and maintenance claims of the captain and the rest of the ship's company;
2. the official ship, navigation, and port charges as well as pilotage fees;
3. claims for damages for the killing or injuring of persons as well as for the loss of or damage to things, insofar as these claims arose from the use of the ship; excepted are, however, claims on account of the loss of or damage to articles, which derive their origin from a contract or can derive from a contract;
4. expenses of salvage or of marine assistance, also in cases falling under para 743; contributions of the ship and of the freightage to general average, claims for the removal of wreck;
5. claims against the shipowner by the carriers of social security insurance inclusive of unemployment insurance.

(2) (1)(No 3) shall not be applicable to claims which are attributable to radioactivity, or to a combination of radioactive properties with noxious, explosive or other dangerous properties of nuclear fuel or radioactive products or waste.

para 755 (Statutory rights of a maritime lienholder) *

(1) The maritime lienholders possess for their claims a statutory lien on the ship. Such lien may be enforced against each owner of the ship.

(2) The ship is also liable for legal interest on the claims as well as for the costs of legal steps taken for the purpose of obtaining satisfaction out of the ship.

para 759 (Expiration of lien by lapse of time) *

(1) The lien of a maritime lienholder expires one year after the coming into being of the claim.

(2) The lien does not expire, if within the period mentioned in (1) the creditor brings about the seizure of the ship on account of his lien, insofar as the ship is later sold by way of execution, without the ship having been released in the meantime from seizure in favor

of such creditor. The same applies to a lien of a creditor, who within this period joins the execution proceedings on the basis of his lien.

(3) A period of time during which a creditor is judicially prevented from obtaining satisfaction out of the ship, shall not be taken into account for the period of limitation. No stay or interruption of the period for other reasons is allowed.

para 760 (Satisfaction of maritime lienholders) *

(1) The satisfaction of maritime lienholders takes place in accordance with the provisions concerning execution.

(2) The action for tolerating execution may be directed, as well as against the owner of the ship, also against the outfitter or against the captain. A judgment issued against the outfitter or against the captain is also effective against the owner.

(3) When the lien of a maritime lienholder is enforced, the person who is registered in the Register of Ships as owner is considered for the benefit of the creditor to be the owner. The right of an unregistered owner to assert his rightful objections against the lien remains unaffected.

para 761 (Ranking of liens of maritime lienholders) *

The liens of maritime lienholders have precedence over all other liens of the ship.

para 762 (Ranking of liens among maritime lienholders) *

(1) The priority of liens of the maritime lienholders is established according to the sequence of the numbers under which the claims indicated in para 754 are listed.

(2) The liens for the claims shown in para 754(1)(No 4), precede, however, the liens of all other maritime lienholders whose claims came into being earlier.

(3) Claims for contributions to general average are deemed to have come into being at the time of the occurrence of the average event; claims for salvage and assistance costs, at the time of completion of the salvage or marine assistance work; and claims on account of removal of a wreck at the time when the removal of the wreck has been completed.

para 763 (Priority of liens under para 754(1) Nos 1 to 3 and 5) *

(1) Among the liens for the claims indicated in para 754(1) Nos 1 to 3 and 5, the liens for claims mentioned under the same number rank equally, regardless of the time of their origin.

(2) Liens for claims indicated in para 754(1)(No 3), on account of personal damages have, however, priority over liens for claims for property damage indicated under the same number.

para 764 (Priority of liens under para 764(1)(No 4) *

Among liens for claims indicated in para 764 (1)(No 4), those for claims created later have priority over claims created earlier. Liens on account of claims created at the same time rank equally.

APPENDIX III

INTERNATIONAL CONVENTION FOR THE UNIFICATION OF CERTAIN RULES RELATING TO THE
ARREST OF SEAGOING SHIPS OF 1952

Cf Federal Law Gazette (Bundesgesetzblatt) 1972 II, p 655.

Cf Singh International Maritime Law Conventions vol 4 (1983) at 3101.

Les Hautes Parties Contractantes,	The High Contracting Parties,	Die Hohen Vertragsparteien —
Ayant reconnu l'utilité de fixer de commun accord certaines règles uniformes sur la saisie conservatoire de navires de mer, ont décidé de conclure une convention à cet effet et ont convenu de ce qui suit:	Having recognised the desirability of determining by agreement certain uniform rules of law relating to the arrest of seagoing ships, have decided to conclude a convention, for this purpose and thereto have agreed as follows:	In Erkenntnis der Zweckmäßigkeit einer vertraglichen Festlegung einheitlicher Regeln über den Arrest in Seeschiffe — haben beschlossen, zu diesem Zweck ein Übereinkommen zu treffen, und haben demgemäß folgendes vereinbart:
Article 1	Article 1	Artikel 1
Dans la présente Convention, les expressions suivantes sont employées, avec les significations indiquées ci-dessous:	In this Convention the following words shall have the meanings hereby assigned to them:	In diesem Übereinkommen werden die folgenden Ausdrücke in der nachstehend aufgeführten Bedeutung gebraucht:
(1) «Créance Maritime» signifie allégation d'un droit ou d'une créance ayant l'une des causes suivantes:	(1) "Maritime Claim" means a claim arising out of one or more of the following:	(1) „Seeforderung" bezeichnet ein Recht oder einen Anspruch aus einem der nachfolgenden Entstehungsgründe:
(a) dommages causés par un navire soit par abordage, soit autrement;	(a) damage caused by any ship either in collision or otherwise;	a) Schäden, die ein Schiff durch Zusammenstoß oder in anderer Weise verursacht;
(b) pertes de vies humaines ou dommages corporels causés par un navire ou provenant de l'exploitation d'un navire;	(b) loss of life or personal injury caused by any ship or occurring in connexion with the operation of any ship;	b) Schäden an Leben oder Gesundheit, die durch ein Schiff verursacht sind oder die auf den Betrieb eines Schiffes zurückgehen;
(c) assistance et sauvetage;	(c) salvage;	c) Bergung und Hilfeleistung;
(d) contrats relatifs à l'utilisation ou la location d'un navire par charte-partie ou autrement;	(d) agreement relating to the use or hire of any ship whether by charterparty or otherwise;	d) nach Maßgabe einer Chartepartie oder auf andere Weise abgeschlossene Nutzungs- oder Mietverträge über ein Schiff;
(e) contrats relatifs au transport des marchandises par un navire en vertu d'une charte-partie, d'un connaissement ou autrement;	(e) agreement relating to the carriage of goods in any ship whether by charterparty or otherwise;	e) nach Maßgabe einer Chartepartie oder eines Konnossements oder auf andere Weise abgeschlossene Verträge über die Beförderung von Gütern auf einem Schiff;
(f) pertes ou dommages aux marchandises et bagages transportés par un navire;	(f) loss of or damage to goods including baggage carried in any ship;	f) Verlust oder Beschädigung von zu Schiff beförderten Gütern einschließlich des Gepäcks;
(g) avarie commune;	(g) general average;	g) große Haverei;
(h) prêt à la grosse;	(h) bottomry;	h) Bodmerei;
(i) remorquage;	(i) towage;	i) Schleppdienste;
(j) pilotage;	(j) pilotage;	j) Lotsendienste;
(k) fournitures, quel qu'en soit le lieu, de produits ou de matériel faites à un navire en vue de son exploitation ou de son entretien;	(k) goods or materials wherever supplied to a ship for her operation or maintenance;	k) Lieferung von Gütern oder Ausrüstungsgegenständen an ein Schiff, gleichviel an welchem Ort, im Hinblick auf seinen Einsatz oder seine Instandhaltung;
(l) construction, réparations, équipement d'un navire ou frais de cale;	(l) construction, repair or equipment of any ship or dock charges and dues;	l) Bau, Reparatur oder Ausrüstung eines Schiffes sowie Hafengebühren;

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|---|--|---|
| (m) salaires des Capitaine, Officiers ou hommes d'équipage; | (m) wages of Masters, Officers, or crew; | m) Gehalt oder Heuer der Kapitäne, Schiffsoffiziere und Besatzungsmitglieder; |
| (n) débours du Capitaine et ceux effectués par les chargeurs, les affréteurs ou les Agents pour le compte du navire ou de son propriétaire; | (n) Master's disbursements, including disbursements made by shippers, charterers or agents on behalf of a ship or her owner; | n) Auslagen des Kapitäns und der Ablader, Befrachter und Beauftragten für Rechnung des Schiffes oder seines Eigentümers; |
| (o) la propriété contestée d'un navire; | (o) disputes as to the title to or ownership of any ship; | o) Streitigkeiten über das Eigentum an einem Schiff; |
| (p) la copropriété contestée d'un navire ou sa possession, ou son exploitation, ou les droits aux produits d'exploitation d'un navire en copropriété; | (p) disputes between co-owners of any ship as to the ownership, possession employment or earnings of that ship; | p) Streitigkeiten zwischen Mitelgentümern eines Schiffes über das Eigentum, den Besitz, den Einsatz oder die Erträge dieses Schiffes; |
| (q) toute hypothèque maritime et tout mortgage. | (q) the mortgage or hypothecation of any ship. | q) Schiffshypotheken und sonstige vertragliche Pfandrechte an einem Schiff. |

(2) « Saisie » signifie l'immobilisation d'un navire avec l'autorisation de l'autorité judiciaire compétente pour garantie d'une créance maritime, mais ne comprend pas la saisie d'un navire pour l'exécution d'un titre.

(2) "Arrest" means the detention of a ship by judicial process to secure a maritime claim, but does not include the seizure of a ship in execution or satisfaction of a judgment.

(2) „Arrest“ bezeichnet das Festhalten eines Schiffes auf Grund einer Anordnung des zuständigen Gerichts zur Sicherung einer Seeforderung; hierunter fällt jedoch nicht die Zwangsvollstreckung in ein Schiff auf Grund und zur Befriedigung eines vollstreckbaren Titels.

(3) « Personne » comprend toute personne physique ou morale, société de personnes ou de capitaux ainsi que les États, les Administrations et Établissements publics.

(3) "Person" includes individuals, partnerships and bodies corporate, Governments, their Departments, and Public Authorities.

(3) „Person“ ist jede natürliche oder juristische Person, jede Personen- oder Kapitalgesellschaft; Personen sind auch die Staaten, Behörden und öffentlichen Körperschaften.

(4) « Demandeur » signifie une personne, invoquant à son profit, l'existence d'une créance maritime.

(4) "Claimant" means a person who alleges that a maritime claim exists in his favour.

(4) „Gläubiger“ ist eine Person, die sich zu ihren Gunsten auf das Bestehen einer Seeforderung beruft.

Article 2

Un navire battant pavillon d'un des États contractants ne pourra être saisi dans le ressort d'un État Contractant qu'en vertu d'une créance maritime, mais rien dans les dispositions de la présente Convention ne pourra être considéré comme une extension ou une restriction des droits et pouvoirs que les États, Autorités publiques ou Autorités portuaires tiennent de leur loi interne ou de leurs règlements, de saisir, détenir ou autrement empêcher un navire de prendre la mer dans leur ressort.

Article 2

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

Artikel 2

Ein Schiff, das die Flagge eines Vertragsstaates führt, kann im Bereich eines Vertragsstaates nur wegen einer Seeforderung mit Arrest belegt werden; doch werden durch dieses Übereinkommen nach innerstaatlichem Recht bestehende Befugnisse der Staaten, Behörden oder Hafendienststellen, Schiffe in ihrem Bereich zu beschlagnehmen, zurückzuhalten oder in anderer Weise am Auslaufen zu hindern, nicht erweitert oder beschränkt.

Article 3

(1) Sans préjudice des dispositions du paragraphe 4) et de l'article 10, tout Demandeur peut saisir soit le navire auquel la créance se rapporte, soit tout autre navire appartenant à celui qui était, au moment où est née la créance maritime, propriétaire du navire auquel cette créance se rapporte, alors même que le navire saisi est prêt à faire voile, mais aucun navire ne pourra être saisi pour une créance prévue aux alinéas o), p) ou q) de l'article premier à l'exception du navire même que concerne la réclamation.

Article 3

(1) Subject to the provisions of para 4) of this Article and of Article 10, a claimant may arrest either the particular ship in respect of which the maritime claim arose, or any other ship which is owned by the person who was, at the time when the maritime claim arose, the owner of the particular ship, even though the ship arrested be ready to sail; but no ship, other than the particular ship in respect of which the claim arose, may be arrested in respect of any of the maritime claims enumerated in Article 1, 1) o), p) or q).

Artikel 3

(1) Unbeschadet des Absatzes 4 dieses Artikels und des Artikels 10 kann jeder Gläubiger sowohl das Schiff, auf das sich die Seeforderung bezieht, als auch jedes andere Schiff, das demjenigen gehört, wer im Zeitpunkt des Entstehens der Seeforderung Eigentümer jenes Schiffes war, mit Arrest belegen lassen, und zwar auch dann, wenn das mit Arrest zu belegende Schiff segelfertig ist; doch kann wegen einer der in Artikel 1 Abs. 1 Buchstabe o, p oder q aufgeführten Ansprüche und Rechte nur das Schiff mit Arrest belegt werden, auf das sich die Seeforderung bezieht.

(2) Des navires seront réputés avoir le même propriétaire lorsque toutes

(2) Ships shall be deemed to be in the same ownership when all the

(2) Schiffe gelten als demselben Eigentümer gehörend, wenn alle Eigen-

les parts de propriété appartiendront à une même ou aux mêmes personnes.

(3) Un navire ne peut être saisi et caution ou garantie ne sera donnée, plus d'une fois dans la juridiction d'un ou plusieurs des États Contractants, pour la même créance et par le même Demandeur; et si un navire est saisi dans une des dites juridictions et une caution ou une garantie a été donnée, soit pour obtenir la mainlevée de la saisie, soit pour éviter celle-ci, toute saisie ultérieure de ce navire, ou de n'importe quel autre navire, appartenant au même propriétaire, par le Demandeur et pour la même créance maritime, sera levée et le navire sera libéré par le Tribunal ou toute autre juridiction compétente du dit État, à moins que le Demandeur ne prouve, à la satisfaction du Tribunal ou de toute autre Autorité Judiciaire compétente, que la garantie ou la caution a été définitivement libérée avant que la saisie subséquente n'ait été pratiquée ou qu'il n'y ait une autre raison valable pour la maintenir.

(4) Dans le cas d'un affrètement d'un navire avec remise de la gestion nautique, lorsque l'affréteur répond, seul, d'une créance maritime relative à ce navire, le Demandeur peut saisir ce navire ou tel autre appartenant à l'affréteur, en observant les dispositions de la présente Convention, mais nul autre navire appartenant au propriétaire ne peut être saisi en vertu de cette créance maritime.

L'alinéa qui précède s'applique également à tous les cas où une personne autre que le propriétaire est tenue d'une créance maritime.

Article 4

Un navire ne peut être saisi qu'avec l'autorisation d'un Tribunal ou de toute autre Autorité Judiciaire compétente de l'État Contractant dans lequel la saisie est pratiquée.

Article 5

Le Tribunal ou toute autre Autorité Judiciaire compétente dans le ressort duquel le navire a été saisi, accordera la mainlevée de la saisie lorsqu'une caution ou une garantie suffisantes auront été fournies, sauf dans le cas où la saisie est pratiquée en raison des créances maritimes énumérées à l'article premier ci-dessus, sous les lettres o) et p); en ce cas, le juge peut permettre l'exploitation du navire par le Possesseur, lorsque celui-ci aura fourni des garanties suffisantes, ou

shares therein are owned by the same person or persons.

(3) A ship shall not be arrested, nor shall bail or other security be given more than once in any one or more of the jurisdictions of any of the Contracting States in respect of the same maritime claim by the same claimant; and, if a ship has been arrested in any one of such jurisdictions, or bail or other security has been given in such jurisdiction either to release the ship or to avoid a threatened arrest, any subsequent arrest of the ship or of any ship in the same ownership by the same claimant for the same maritime claim shall be set aside, and the ship released by the Court or other appropriate judicial authority of that State, unless the claimant can satisfy the Court or other appropriate judicial authority that the bail or other security had been finally released before the subsequent arrest or that there is other good cause for maintaining that arrest.

(4) When in the case of a charter by demise of a ship the charterer and not the registered owner is liable in respect of a maritime claim relating to that ship, the claimant may arrest such ship or any other ship in the ownership of the charterer by demise, subject to the provisions of this Convention, but no other ship in the ownership of the registered owner shall be liable to arrest in respect of such maritime claims.

The provisions of this paragraph shall apply to any case in which a person other than the registered owner of a ship is liable in respect of a maritime claim relating to that ship.

Article 4

A ship may only be arrested under the authority of a Court or of the appropriate judicial authority of the Contracting State in which the arrest is made.

Article 5

The Court or other appropriate judicial authority within whose jurisdiction the ship has been arrested shall permit the release of the ship upon sufficient bail or other security being furnished, save in cases in which a ship has been arrested in respect of any of the maritime claims enumerated in Article 1 l), o) and p). In such cases the Court or other appropriate judicial authority may permit the person in possession of the ship to continue trading the ship,

tumsanteile derselben Person oder denselben Personen zustehen.

(3) Wegen derselben Seeforderung desselben Gläubigers darf ein Schiff im Hoheitsbereich eines oder mehrerer Vertragsstaaten nur einmal mit Arrest belegt werden und braucht Bürgschaft oder andere Sicherheit nur einmal geleistet zu werden; ist ein Schiff im Hoheitsbereich eines Vertragsstaates mit Arrest belegt oder ist zur Aufhebung oder Abwendung des Arrestes Bürgschaft oder andere Sicherheit geleistet worden, so ist jeder spätere Arrest in dieses Schiff oder in ein anderes Schiff desselben Eigentümers durch denselben Gläubiger wegen derselben Seeforderung aufzuheben und das Schiff von dem Gericht oder der sonst zuständigen Gerichtsbehörde des betreffenden Staates freizugeben, sofern nicht der Gläubiger dem Gericht oder der zuständigen Gerichtsbehörde nachweist, daß die Bürgschaft oder andere Sicherheit vor dem nachfolgenden Arrest endgültig freigegeben worden ist oder daß ein anderer triftiger Grund für die Aufrechterhaltung des Arrestes besteht.

(4) Ist bei der Überlassung des Gebrauchs eines Schiffes die Schiffsführung dem Ausrüster unterstellt und schuldet dieser und nicht der Schiffseigner eine dieses Schiff betreffende Seeforderung, so kann der Gläubiger dieses Schiff oder jedes andere dem Ausrüster gehörende Schiff unter Beachtung der Bestimmungen dieses Übereinkommens mit Arrest belegen lassen, nicht jedoch auf Grund derselben Seeforderung ein anderes Schiff des Schiffseigners.

Diese Bestimmung ist entsprechend anzuwenden in allen Fällen, in denen eine andere Person als der Schiffseigner Schuldner einer Seeforderung ist.

Artikel 4

Ein Schiff kann nur auf Anordnung eines Gerichts oder einer sonst zuständigen Gerichtsbehörde des Vertragsstaates mit Arrest belegt werden, in dem der Arrest vollzogen wird.

Artikel 5

Das Gericht oder eine sonst zuständige Gerichtsbehörde, in deren Zuständigkeitsbereich das Schiff mit Arrest belegt worden ist, hebt den Arrest auf, sobald eine ausreichende Bürgschaft oder andere Sicherheit geleistet worden ist. Ausgenommen von dieser Regelung sind die Fälle, in denen ein Schiff auf Grund der in Artikel 1 Abs. 1 Buchstaben o und p aufgeführten Seeforderungen mit Arrest belegt worden ist; in diesen Fällen kann der Richter den weiteren

régler la gestion du navire pendant la durée de la saisie.

Faute d'accord entre les Parties sur l'importance de la caution ou de la garantie, le Tribunal ou l'Autorité Judiciaire compétente en fixera la nature et le montant.

La demande de mainlevée de la saisie moyennant une telle garantie, ne pourra être interprétée ni comme une reconnaissance de responsabilité, ni comme une renonciation au bénéfice de la limitation légale de la responsabilité du propriétaire du navire.

Article 6

Toutes contestations relatives à la responsabilité du Demandeur, pour dommages causés à la suite de la saisie du navire ou pour frais de caution ou de garantie fournies en vue de le libérer ou d'en empêcher la saisie seront réglées par la loi de l'État Contractant dans le ressort duquel la saisie a été pratiquée ou demandée.

Les règles de procédure relatives à la saisie d'un navire, à l'obtention de l'autorisation visée à l'Article 4 et à tous autres incidents de procédure qu'une saisie peut soulever sont régies par la loi de l'État Contractant dans lequel la saisie a été pratiquée ou demandée.

Article 7

(1) Les Tribunaux de l'État dans lequel la saisie a été opérée, seront compétents pour statuer sur le fond du procès:

soit si ces Tribunaux sont compétents en vertu de la loi interne de l'État dans lequel la saisie est pratiquée; soit dans les cas suivants, nommément définis:

- (a) si le Demandeur a sa résidence habituelle ou son principal établissement dans l'État où la saisie a été pratiquée;
- (b) si la créance maritime est elle-même née dans l'État Contractant dont dépend le lieu de la saisie;
- (c) si la créance maritime est née au cours d'un voyage pendant lequel la saisie a été faite;
- (d) si la créance provient d'un abordage ou de circonstances visées par l'Article 13 de la Convention Internationale pour l'unification de certaines règles en matière d'abordage, signée à Bruxelles, le 23 septembre 1910;

upon such person furnishing sufficient bail or other security, or may otherwise deal with the operation of the ship during the period of the arrest.

In default of agreement between the parties as to the sufficiency of the bail or other security, the Court or other appropriate judicial authority shall determine the nature and amount thereof.

The request to release the ship against such security shall not be construed as an acknowledgment of liability or as a waiver of the benefit of the legal limitation of liability of the owner of the ship.

Article 6

All questions whether in any case the claimant is liable in damages for the arrest of a ship or for the costs of the bail or other security furnished to release or prevent the arrest of a ship, shall be determined by the law of the Contracting State in whose jurisdiction the arrest was made or applied for.

The rules of procedure relating to the arrest of a ship, to the application for obtaining the authority referred to in Article 4, and to all matters of procedure which the arrest may entail, shall be governed by the law of the Contracting State in which the arrest was made or applied for.

Article 7

(1) The Courts of the country in which the arrest was made shall have jurisdiction to determine the case upon its merits if the domestic law of the country in which the arrest is made gives jurisdiction to such Courts, or in any of the following cases namely:

- (a) if the claimant has his habitual residence or principal place of business in the country in which the arrest was made;
- (b) if the claim arose in the country in which the arrest was made;
- (c) if the claim concerns the voyage of the ship during which the arrest was made;
- (d) if the claim arose out of a collision or in circumstances covered by Article 13 of the International Convention for the unification of certain rules of law with respect to collisions between vessels, signed at Brussels on 23rd September 1910;

Einsatz des Schiffes durch den Besitzer gestatten, wenn dieser ausreichend Sicherheit geleistet hat, oder den Einsatz des Schiffes für die Dauer des Arrestes anderweitig regeln.

Einigen sich die Parteien nicht über die Angemessenheit der Bürgschaft oder anderen Sicherheit, so setzt das Gericht oder die sonst zuständige Gerichtsbehörde deren Art und Höhe fest.

Der Antrag, einen Arrest gegen Sicherheitsleistung aufzuheben, ist weder als Anerkenntnis der Schuld oder Haftung noch als Verzicht auf das Recht auszulegen, eine gesetzliche Haftungsbeschränkung des Schiffseigners geltend zu machen.

Artikel 6

Die Haftung des Gläubigers für alle Schäden, die durch den Arrest in das Schiff oder durch die Leistung von Bürgschaft oder anderer Sicherheit für die Aufhebung oder zur Abwendung des Arrestes entstanden sind, bestimmt sich nach dem Recht des Vertragsstaates, in dessen Hoheitsbereich der Arrest vollzogen oder beantragt worden ist.

Das Verfahren beim Arrest in ein Schiff, bei Erwirkung der in Artikel 4 erwähnten Anordnung und bei allen anderen Verfahren, zu denen ein Arrest Anlaß geben kann, bestimmt sich nach dem Recht des Vertragsstaates, in dem der Arrest vollzogen oder beantragt worden ist.

Artikel 7

(1) Die Gerichte des Staates, in dem der Arrest vollzogen wurde, sind zur Entscheidung der Hauptsache zuständig, wenn diese Gerichte nach dem innerstaatlichen Recht des Staates, in dem der Arrest vollzogen wurde, zuständig sind, sowie in den nachstehend genannten Fällen:

- a) wenn der Gläubiger seinen gewöhnlichen Aufenthalt oder seine Hauptniederlassung in dem Staat hat, in dem der Arrest vollzogen wurde;
- b) wenn die Seeforderung in dem Vertragsstaat entstanden ist, in dem der Arrest vollzogen wurde;
- c) wenn die Seeforderung im Verlauf der Reise entstanden ist, während derer der Arrest vollzogen wurde;
- d) wenn die Seeforderung auf einem Zusammenstoß oder auf Umständen beruht, die in Artikel 13 des Internationalen Übereinkommens zur einheitlichen Feststellung von Regeln über den Zusammenstoß von Schiffen, unterzeichnet in Brüssel am 23. September 1910, bezeichnet sind;

- (e) si la créance est née d'une assistance ou d'un sauvetage;
- (f) si la créance est garantie par une hypothèque maritime ou un mortgage sur le navire saisi.

(2) Si le Tribunal, dans le ressort duquel le navire a été saisi n'a pas compétence pour statuer sur le fond, la caution ou la garantie à fournir conformément à l'article 5 pour obtenir la mainlevée de la saisie, devra garantir l'exécution de toutes les condamnations qui seraient ultérieurement prononcées par le Tribunal compétent de statuer sur le fond, et le Tribunal ou toute autre Autorité Judiciaire du lieu de la saisie, fixera le délai endéans lequel le Demandeur devra introduire une action devant le Tribunal compétent.

(3) Si les conventions des parties contiennent soit une clause attributive de compétence à une autre juridiction, soit une clause arbitrale le Tribunal pourra fixer un délai dans lequel le saisissant devra engager son action au fond.

(4) Dans les cas prévus aux deux alinéas précédents, si l'action n'est pas introduite dans le délai imparti, le Défendeur pourra demander la mainlevée de la saisie ou la libération de la caution fournie.

(5) Cet article ne s'appliquera pas aux cas visés par les dispositions de la convention révisée sur la navigation du Rhin du 17 octobre 1868.

Article 8

(1) Les dispositions de la présente Convention sont applicables dans tout État Contractant à tout navire battant pavillon d'un État Contractant.

(2) Un navire battant pavillon d'un État non-Contractant peut être saisi dans l'un des États Contractants, en vertu d'une des créances énumérées à l'article 1^{er}, ou de toute autre créance permettant la saisie d'après la loi de cet État.

(3) Toutefois, chaque État Contractant peut refuser toute ou partie des avantages de la présente Convention à tout État non-Contractant et à toute personne qui n'a pas, au jour de la saisie, sa résidence habituelle ou son principal établissement dans un État Contractant.

(4) Aucune disposition de la présente Convention ne modifiera ou

(e) if the claim is for salvage;

(f) if the claim is upon a mortgage or hypothecation of the ship arrested.

(2) If the Court within whose jurisdiction the ship was arrested has not jurisdiction to decide upon the merits, the bail or other security given in accordance with Article 5 to procure the release of the ship shall specifically provide that it is given as security for the satisfaction of any judgment which may eventually be pronounced by a Court having jurisdiction so to decide; and the Court or other appropriate judicial authority of the country in which the arrest is made shall fix the time within which the claimant shall bring an action before a Court having such jurisdiction.

(3) If the parties have agreed to submit the dispute to the jurisdiction of a particular Court other than that within whose jurisdiction the arrest was made or to arbitration, the Court or other appropriate judicial authority within whose jurisdiction the arrest was made may fix the time within which the claimant shall bring proceedings.

(4) If, in any of the cases mentioned in the two preceding paragraphs, the action or proceedings are not brought within the time so fixed, the defendant may apply for the release of the ship or of the bail or other security.

(5) This article shall not apply in cases covered by the provisions of the revised Rhine Navigation Convention of October 17, 1868.

Article 8

(1) The provisions of this Convention shall apply to any vessel flying the flag of a Contracting State in the jurisdiction of any Contracting State.

(2) A ship flying the flag of a non-Contracting State may be arrested in the jurisdiction of any Contracting State in respect of any of the maritime claims enumerated in Article 1 or of any other claim for which the law of the Contracting State permits arrest.

(3) Nevertheless any Contracting State shall be entitled wholly or partly to exclude from the benefits of this Convention any Government of a non-Contracting State or any person who has not, at the time of the arrest, his habitual residence or principal place of business in one of the Contracting States.

(4) Nothing in this Convention shall modify or affect the rules of law

e) wenn die Seeforderung auf Hilfeleistung oder Bergung beruht;

f) wenn die Seeforderung durch eine Schiffshypothek oder ein sonstiges vertragliches Pfandrecht an dem Schiff gesichert ist, das mit Arrest belegt wurde.

(2) Ist das Gericht, in dessen Zuständigkeitsbereich der Arrest in das Schiff vollzogen wurde, nicht für die Entscheidung der Hauptsache zuständig, so muß die nach Artikel 5 für die Aufhebung des Arrestes zu leistende Bürgschaft oder andere Sicherheit dazu bestimmt sein, die Vollstreckung jeder Entscheidung zu sichern, die später durch das für die Entscheidung der Hauptsache zuständige Gericht ergehen könnte; das Gericht oder die sonst zuständige Gerichtsbehörde des Bezirkes, in dem der Arrest vollzogen wurde, bestimmt die Frist, innerhalb derer der Gläubiger bei dem zuständigen Gericht Klage zu erheben hat.

(3) Haben die Parteien die Zuständigkeit eines anderen Gerichts vereinbart oder einen Schiedsvertrag geschlossen, so kann das Gericht des Bezirkes, in dem der Arrest vollzogen wurde, dem Gläubiger eine Frist für die Erhebung der Klage zur Hauptsache oder die Anrufung des Schiedsgerichts setzen.

(4) Wird in den Fällen der Absätze 2 und 3 nicht fristgemäß Klage erhoben oder das Schiedsgericht angerufen, so kann der Schuldner die Aufhebung des Arrestes oder die Freigabe der Bürgschaft oder anderen Sicherheit verlangen.

(5) Dieser Artikel gilt nicht für Fälle, die durch die Revidierte Rheinschiffahrts-Akte vom 17. Oktober 1868 erfaßt sind.

Artikel 8

(1) Dieses Übereinkommen gilt in jedem Vertragsstaat für jedes Schiff, das die Flagge eines Vertragsstaates führt.

(2) Ein Schiff, das die Flagge eines Nichtvertragsstaates führt, kann in einem Vertragsstaat wegen der in Artikel 1 aufgeführten Seeforderungen und wegen jedes anderen Anspruchs, der nach dem Recht dieses Staates den Arrest rechtfertigt, mit Arrest belegt werden.

(3) Jeder Vertragsstaat kann jedoch jedem Nichtvertragsstaat und jeder Person, die im Zeitpunkt des Arrestes ihren gewöhnlichen Aufenthalt oder ihre Hauptniederlassung nicht in einem Vertragsstaat hat, die Berufung auf die Vergünstigungen dieses Übereinkommens ganz oder teilweise verweigern.

(4) Dieses Übereinkommen ändert oder berührt nicht das innerstaatliche

n'affectera la loi interne des États Contractants en ce qui concerne la saisie d'un navire dans le ressort de l'État dont il bat pavillon par une personne ayant sa résidence habituelle ou son principal établissement dans cet État.

(5) Tout tiers, autre que le demandeur originaire qui excipe d'une créance maritime par l'effet d'une subrogation, d'une cession ou autrement, sera réputé, pour l'application de la présente Convention, avoir la même résidence habituelle ou le même établissement principal que le créancier originaire.

Article 9

Rien dans cette Convention ne doit être considéré comme créant un droit à une action qui, en dehors des stipulations de cette Convention, n'existerait pas d'après la loi à appliquer par le Tribunal saisi du litige. La présente Convention ne confère aux Demandeurs aucun droit de suite, autre que celui accordé par cette dernière loi ou par la Convention Internationale sur les Privilèges et Hypothèques maritimes, si celle-ci est applicable.

Article 10

Les Hautes Parties Contractantes peuvent au moment de la signature, du dépôt des ratifications ou lors de leur adhésion à la Convention, se réserver

- (a) le droit de ne pas appliquer les dispositions de la présente Convention à la saisie d'un navire pratiquée en raison d'une des créances maritimes visées aux o) et p) de l'article premier et d'appliquer à cette saisie leur loi nationale;
- (b) Le droit de ne pas appliquer les dispositions du premier paragraphe de l'article 3 à la saisie pratiquée sur leur territoire en raison des créances prévues à l'alinéa q) de l'article 1.

Article 11

Les Hautes Parties Contractantes s'engagent à soumettre à arbitrage tous différends entre États pouvant résulter de l'interprétation ou l'application de la présente Convention, sans préjudice toutefois des obligations des Hautes Parties Contractantes qui ont convenu de soumettre leurs différends à la Cour Internationale de Justice.

in force in the respective Contracting States relating to the arrest of any ship within the jurisdiction of the State of her flag by a person who has his habitual residence or principal place of business in that State.

(5) When a maritime claim is asserted by a third party other than the original claimant, whether by subrogation, assignment or otherwise, such third party shall, for the purpose of this Convention, be deemed to have the same habitual residence or principal place of business as the original claimant.

Article 9

Nothing in this Convention shall be construed as creating a right of action, which, apart from the provisions of this Convention, would not arise under the law applied by the Court which had seisin of the case, nor as creating any maritime liens which do not exist under such law or under the Convention on Maritime Mortgages and Liens, if the latter is applicable.

Article 10

The High Contracting Parties may at the time of signature, deposit or ratification or accession, reserve

- (a) the right not to apply this Convention to the arrest of a ship for any of the claims enumerated in paragraphs o) and p) of Article 1, but to apply their domestic laws to such claims;
- (b) the right not to apply the first paragraph of Article 3 to the arrest of a ship, within their jurisdiction, for claims set out in Article 1 paragraph q).

Article 11

The High Contracting Parties undertake to submit to arbitration any disputes between States arising out of the interpretation or application of this Convention, but this shall be without prejudice to the obligations of those High Contracting Parties who have agreed to submit their disputes to the International Court of Justice.

Recht der Vertragsstaaten in bezug auf den Arrest in ein Schiff im Bereich des Staates, dessen Flagge es führt, auf Veranlassung einer Person, die in diesem Staat ihren gewöhnlichen Aufenthalt oder ihre Hauptniederlassung hat.

(5) Ist eine Seeforderung von dem ursprünglichen Gläubiger durch Rechtsnachfolge, Abtretung oder in anderer Weise auf einen Dritten übergegangen, so gilt für die Anwendung dieses Übereinkommens der gewöhnliche Aufenthalt oder die Hauptniederlassung des ursprünglichen Gläubigers auch als gewöhnlicher Aufenthalt oder Hauptniederlassung des Dritten.

Artikel 9

Aus diesem Übereinkommen kann kein klagbarer Anspruch zur Hauptsache hergeleitet werden, der nicht auch ohne dieses Übereinkommen nach dem Recht, das das mit dem Streitfall befaßte Gericht anzuwenden hat, begründet und einklagbar wäre. Dieses Übereinkommen gewährt dem Gläubiger kein Schiffsgläubigerrecht oder Folgerrecht, das nicht nach dem Recht, welches das mit dem Streitfall befaßte Gericht anzuwenden hat, oder, soweit das Internationale Übereinkommen über Schiffsgläubigerrechte und Schiffshypotheken anwendbar ist, nach diesem besteht.

Artikel 10

Die Hohen Vertragsparteien können sich bei der Unterzeichnung dieses Übereinkommens, bei der Hinterlegung der Ratifikationsurkunden oder bei dem Beitritt zu diesem Übereinkommen das Recht vorbehalten,

- a) bei Arrest in ein Schiff wegen einer in Artikel 1 Abs. 1 Buchstaben o und p bezeichneten Seeforderung nicht dieses Übereinkommen, sondern das innerstaatliche Recht anzuwenden;
- b) bei Arrest in ein Schiff innerhalb ihres Zuständigkeitsbereiches wegen einer in Artikel 1 Abs. 1 Buchstabe q aufgeführten Seeforderung Artikel 3 Abs. 1 nicht anzuwenden.

Artikel 11

Die Hohen Vertragsparteien verpflichten sich, alle zwischenstaatlichen Streitigkeiten, die sich aus der Auslegung oder Anwendung dieses Übereinkommens ergeben, einem Schiedsverfahren zu unterwerfen; jedoch bleiben die Verpflichtungen derjenigen Hohen Vertragsparteien unberührt, die übereingekommen sind, ihre Streitigkeiten dem Internationalen Gerichtshof zu unterbreiten.

Article 12

La présente Convention est ouverte à la signature des États représentés à la neuvième Conférence diplomatique de Droit Maritime. Le procès-verbal de signature sera dressé par les soins du Ministère des Affaires étrangères de Belgique.

Article 13

La présente Convention sera ratifiée et les instruments de ratification seront déposés auprès du Ministère des Affaires étrangères de Belgique qui en notifiera le dépôt à tous les États signataires et adhérents.

Article 14

- (a) La présente Convention entrera en vigueur entre les deux premiers États qui l'auront ratifiée, six mois après la date du dépôt du deuxième instrument de ratification.
- (b) Pour chaque État signataire ratifiant la Convention après le deuxième dépôt, celle-ci entrera en vigueur six mois après la date du dépôt de son instrument de ratification.

Article 15

Tout État non représenté à la neuvième Conférence diplomatique de Droit Maritime pourra adhérer à la présente Convention.

Les adhésions seront notifiées au Ministère des Affaires étrangères de Belgique qui en avisera par la voie diplomatique tous les États signataires et adhérents.

La Convention entrera en vigueur pour l'État adhérent six mois après la date de réception de cette notification, mais pas avant la date de son entrée en vigueur telle qu'elle est fixée à l'article 14 a).

Article 16

Toute Haute Partie Contractante pourra à l'expiration du délai de trois ans qui suivra l'entrée en vigueur à son égard de la présente Convention, demander la réunion d'une Conférence chargée de statuer sur toutes les propositions tendant à la révision de la Convention.

Toute Haute Partie Contractante qui désirerait faire usage de cette faculté en avisera le Gouvernement belge qui se chargera de convoquer la conférence dans les six mois.

Article 12

This Convention shall be open for signature by the States represented at the Ninth Diplomatic Conference on Maritime Law. The protocol of signature shall be drawn up through the good offices of the Belgian Ministry of Foreign Affairs.

Article 13

This Convention shall be ratified and the instruments of ratification shall be deposited with the Belgian Ministry of Foreign Affairs which shall notify all signatory and acceding States of the deposit of any such instruments.

Article 14

- (a) This Convention shall come into force between the two States which first ratify it, six months after the date of the deposit of the second instrument of ratification.
- (b) This Convention shall come into force in respect of each signatory State which ratifies it after the deposit of the second instrument of ratification six months after the date of the deposit of the instrument of ratification of that State.

Article 15

Any State not represented at the Ninth Diplomatic Conference on Maritime Law may accede to this Convention.

The accession of any State shall be notified to the Belgian Ministry of Foreign Affairs which shall inform through diplomatic channels all signatory and acceding States of such notification.

The Convention shall come into force in respect of the acceding State six months after the date of the receipt of such notification but not before the Convention has come into force in accordance with the provisions of Article 14 a).

Article 16

Any High Contracting Party may three years after the coming into force of this Convention in respect of such High Contracting Party or at any time thereafter request that a conference be convened in order to consider amendments to the Convention.

Any High Contracting Party proposing to avail itself of this right shall notify the Belgian Government which shall convene the conference within six months thereafter.

Artikel 12

Dieses Übereinkommen liegt für die auf der Neunten Diplomatischen Seerechtskonferenz vertretenen Staaten zur Unterzeichnung auf. Für die Aufsetzung des Unterzeichnungsprotokolls trägt das belgische Ministerium für Auswärtige Angelegenheiten Sorge.

Artikel 13

Dieses Übereinkommen bedarf der Ratifikation. Die Ratifikationsurkunden werden beim belgischen Ministerium für Auswärtige Angelegenheiten hinterlegt; dieses notifiziert jede Hinterlegung allen Staaten, die das Übereinkommen unterzeichnet haben oder ihm beigetreten sind.

Artikel 14

- a) Dieses Übereinkommen tritt zwischen den beiden zuerst ratifizierenden Staaten sechs Monate nach Hinterlegung der zweiten Ratifikationsurkunde in Kraft.
- b) Das Übereinkommen tritt für jeden Unterzeichnerstaat, der es nach Hinterlegung der zweiten Ratifikationsurkunde ratifiziert, sechs Monate nach Hinterlegung seiner eigenen Ratifikationsurkunde in Kraft.

Artikel 15

Jeder auf der Neunten Diplomatischen Seerechtskonferenz nicht vertretene Staat kann diesem Übereinkommen beitreten.

Der Beitritt wird dem belgischen Ministerium für Auswärtige Angelegenheiten notifiziert; dieses setzt alle Staaten, die das Übereinkommen unterzeichnet haben oder ihm beigetreten sind, auf diplomatischem Wege davon in Kenntnis.

Das Übereinkommen tritt für den beitretenden Staat sechs Monate nach Eingang seiner Notifikation in Kraft, jedoch nicht vor dem Inkrafttreten des Übereinkommens nach Artikel 14 Buchstabe a).

Artikel 16

Jede Hohe Vertragspartei kann jederzeit nach Ablauf von drei Jahren, nachdem dieses Übereinkommen für sie in Kraft getreten ist, die Einberufung einer Konferenz zur Behandlung von Änderungsvorschlägen zu diesem Übereinkommen verlangen.

Jede Hohe Vertragspartei, die von dieser Möglichkeit Gebrauch zu machen wünscht, notifiziert dies der belgischen Regierung; diese beruft die Konferenz binnen sechs Monaten ein.

Article 17

Chacune des Hautes Parties Contractantes aura le droit de dénoncer la présente Convention à tout moment après son entrée en vigueur à son égard. Toutefois, cette dénonciation ne prendra effet qu'un an après la date de réception de la notification de dénonciation au Gouvernement belge qui en avisera les autres Parties Contractantes par la voie diplomatique.

Article 18

- (a) Toute Haute Partie Contractante peut, au moment de la ratification, de l'adhésion, ou à tout moment ultérieur, notifier par écrit au Gouvernement belge que la présente Convention s'applique aux territoires ou à certains des territoires dont elle assure les relations internationales. La Convention sera applicable aux dits territoires six mois après la date de réception de cette notification par le Ministère des Affaires étrangères de Belgique, mais pas avant la date d'entrée en vigueur de la présente Convention à l'égard de cette Haute Partie Contractante.
- (b) Toute Haute Partie Contractante qui a souscrit une déclaration au titre du paragraphe a) de cet article, pourra à tout moment aviser le Ministère des Affaires étrangères de Belgique que la Convention cesse de s'appliquer au Territoire en question. Cette dénonciation prendra effet dans le délai d'un an prévu à l'article 17.
- (c) Le Ministère des Affaires étrangères de Belgique avisera par la voie diplomatique tous les États signataires et adhérents de toute notification reçue par lui au titre du présent article.

FAIT à Bruxelles, le 10 mai 1952, en langues française et anglaise, les deux textes faisant également foi.

Article 17

Any High Contracting Party shall have the right to denounce this Convention at any time after the coming into force thereof in respect of such High Contracting Party. This denunciation shall take effect one year after the date on which notification thereof has been received by the Belgian Government which shall inform through diplomatic channels all the other High Contracting Parties of such notification.

Article 18

- (a) Any High Contracting Party may at the time of its ratification or accession to this Convention or at any time thereafter declare by written notification to the Belgian Ministry of Foreign Affairs that the Convention shall extend to any of the territories for whose international relations it is responsible. The Convention shall six months after the date of the receipt of such notification by the Belgian Ministry of Foreign Affairs extend to the territories named therein, but not before the date of the coming into force of the Convention in respect of such High Contracting Party.
- (b) A High Contracting Party which has made a declaration under paragraph a) of this Article extending the Convention to any territory for whose international relations it is responsible may at any time thereafter declare by notification given to the Belgian Ministry of Foreign Affairs that the Convention shall cease to extend to such territory and the Convention shall one year after the receipt of the notification by the Belgian Ministry of Foreign Affairs cease to extend thereto.
- (c) The Belgian Ministry of Foreign Affairs shall inform through diplomatic channels all signatory and acceding States of any notification received by it under this Article.

DONE in Brussels, on May 10, 1952, in the French and English languages, the two texts being equally authentic.

Artikel 17

Jede Hohe Vertragspartei ist berechtigt, dieses Übereinkommen, nachdem es für sie in Kraft getreten ist, jederzeit zu kündigen. Die Kündigung wird ein Jahr nach Eingang der entsprechenden Notifikation bei der belgischen Regierung wirksam; diese setzt alle anderen Hohen Vertragsparteien auf diplomatischem Wege von der Notifikation in Kenntnis.

Artikel 18

- a) Jede Hohe Vertragspartei kann bei der Ratifikation, dem Beitritt oder jederzeit danach dem belgischen Ministerium für Auswärtige Angelegenheiten schriftlich notifizieren, daß dieses Übereinkommen auch für alle oder einzelne Hoheitsgebiete gilt, deren internationale Beziehungen sie wahrnimmt. Das Übereinkommen findet sechs Monate nach Eingang der Notifikation beim belgischen Ministerium für Auswärtige Angelegenheiten auf die darin genannten Hoheitsgebiete Anwendung, jedoch nicht vor seinem Inkrafttreten für die betreffende Hohe Vertragspartei.
- b) Jede Hohe Vertragspartei, die eine Erklärung nach Buchstabe a) abgegeben hat, welche dieses Übereinkommen auf ein Hoheitsgebiet erstreckt, dessen internationale Beziehungen die Hohe Vertragspartei wahrnimmt, kann jederzeit dem belgischen Ministerium für Auswärtige Angelegenheiten notifizieren, daß das Übereinkommen für das betreffende Hoheitsgebiet nicht mehr gilt. Diese Kündigung wird ein Jahr nach Eingang der Notifikation beim belgischen Ministerium für Auswärtige Angelegenheiten wirksam.
- c) Das belgische Ministerium für Auswärtige Angelegenheiten setzt alle Staaten, die das Übereinkommen unterzeichnet haben oder ihm beigetreten sind, auf diplomatischem Wege von jeder auf Grund dieses Artikels bei ihm eingegangenen Notifikation in Kenntnis.

GESCHEHEN zu Brüssel am 10. Mai 1952 in französischer und englischer Sprache, wobei jeder Wortlaut gleichermaßen verbindlich ist.

A P P E N D I X I V

THE CONVENTION ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND
 COMMERCIAL MATTERS (EEC-CONVENTION)

Cf OJ C 97, 11 April 1983 at 2.

Cf The Public General Acts and General Synod Measures (Great Britain) 1982
 (Part I) Chapter 27 (Civil Jurisdiction and Judgment Act 1982) at 544.

Cf Zoeller Zivilprozessordnung Appendix II at 2455.

Title I: Scope

Art.1 This Convention shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters.

The Convention shall not apply to:

1. the status or capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession;
2. bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings;
3. social security;
4. arbitration.

Title II: Jurisdiction

Art.2 Subject to the provisions of this Convention, persons domiciled in a Contracting State shall, whatever their nationality, be sued in the courts of that State.

Persons who are not nationals of the State in which they are domiciled shall be governed by the rules of jurisdiction applicable to nationals of that State.

Art.3 Persons domiciled in a Contracting State may be sued in the courts of another Contracting State only by virtue of the rules set out in Sections 2 to 6 of this Title.

In particular the following provisions shall not be applicable as against them:

- in Belgium: Article 15 of the civil code (Code civil-

- Burgerlijk Wetboek) and Article 638 of the judicial code (Code judiciaire - Gerechtelijk Wetboek),
- in Denmark: Article 248(2) of the law on civil procedure (Lov om retsens pleje) and Chapter 3, Article 3 of the Greenland law on civil procedure (Lov for Gronland om retsens pleje),
 - in the Federal Republic of Germany: Article 23 of the code of civil procedure (Zivilprozessordnung),
 - in Greece: Article 40 of the code of civil procedure
 - in France: Articles 14 and 15 of the civil code (Code civil),
 - in Ireland: the rules which enable jurisdiction to be founded on the document instituting the proceedings having been served on the defendant during his temporary presence in Ireland,
 - in Italy: Articles 2 and 4, Nos 1 and 2 of the code of civil procedure (Code di procedura civile),
 - in Luxembourg: Articles 14 and 15 of the civil code (Code civil),
 - in the Netherlands: Articles 126(3) and 127 of the code of civil procedure (Wetboek van Burgerlijke Rechtsvordering),
 - in the United Kingdom: the rules which enable jurisdiction to be founded on:
 - (a) the document instituting the proceedings having been served on the defendant during his temporary presence in the United Kingdom; or
 - (b) the presence within the United Kingdom of property belonging to the defendant; or
 - (c) the seizure by the plaintiff of property situated in the United Kingdom.

Art.5

A person domiciled in a Contracting State may, in another Contracting State, be sued:

1. in matters relating to a contract, in the courts for the place of performance of the obligation in question;
2. in matters relating to maintenance, in the courts for the place where the maintenance creditor is domiciled or habitually resident or, if the matter is ancillary to proceedings concerning the status of a person, in the court which, according to its own law, has jurisdiction to entertain those proceedings, unless that jurisdiction is based solely on the nationality of one of the parties;
3. in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred;
4. as regards a civil claim for damages or restitution which is based on an act giving rise to criminal proceedings, in the court seised of those proceedings, to the extent that that court has jurisdiction under its own law to entertain civil proceedings;
5. as regards a dispute arising out of the operations of a branch, agency or other establishment, in the courts for the place in which the branch, agency or other establishment is situated;
6. as settlor, trustee or beneficiary of a trust created by the operation of a statute, or by a written instrument, or

- created orally and evidenced in writing, in the courts of the Contracting State in which the trust is domiciled;
7. as regards a dispute concerning the payment of remuneration claimed in respect of the salvage of a cargo or freight, in the court under the authority of which the cargo or freight in question:
- (a) has been arrested to secure such payment, or
 - (b) could have been so arrested, but bail or other security has been given;

provided that this provision shall apply only if it is claimed that the defendant has an interest in the cargo or freight or had such an interest at the time of salvage.

Art.17

If the parties, one or more of whom is domiciled in a Contracting State, have agreed that a court or the courts of a Contracting State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have exclusive jurisdiction. Such an agreement conferring jurisdiction shall be either in writing or evidenced in writing or, in international trade or commerce, in a form which accords with practices in that trade or commerce of which the parties are or ought to have been aware. Where such an agreement is concluded by parties, none of whom is domiciled in a Contracting State, the courts of other Contracting States shall have no jurisdiction over their disputes unless the court or courts chosen have declined jurisdiction.

The court or courts of a Contracting State on which a trust instrument has conferred jurisdiction shall have exclusive jurisdiction in any proceedings brought against a settlor, trustee or beneficiary, if relations between these persons or their rights or obligations under the trust are involved.

Agreements or provisions of a trust instrument conferring jurisdiction shall have no legal force if they are contrary to the provisions of Articles 12 or 15, or if the courts whose jurisdiction they purport to exclude have exclusive jurisdiction by virtue of Article 16.

If an agreement conferring jurisdiction was concluded for the benefit of only one of the parties, that party shall retain the right to bring proceedings in any other court which has jurisdiction by virtue of this Convention.

Art.24

Application may be made to the court of a Contracting State for such provisional, including protective, measures as may be available under the law of that state, even if, under this Convention, the courts of another Contracting State have jurisdiction as to the substance of the matter.

Title III: Recognition and Enforcement

Art.25 For the purposes of this Convention, 'judgment' means any judgment given by a court or tribunal of a Contracting State, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as the determination of costs or expenses by an officer of the court.

Art.26 A judgment given in a Contracting State shall be recognized in the other Contracting States without any special procedure being required.

Any interested party who raises the recognition of a judgment as the principal issue in a dispute may, in accordance with the procedures provided for in Section 2 and 3 of this Title, apply for a decision that the judgment be recognized.

If the outcome of proceedings in a court of a Contracting State depends on the determination of an incidental question of recognition that court shall have jurisdiction over that question.

Art.27 A judgment shall not be recognized:

1. if such recognition is contrary to public policy in the State in which recognition is sought;
2. where it was given in default of appearance, if the defendant was not duly served with the document which instituted the proceedings or with an equivalent document in sufficient time to enable him to arrange for his defence;
3. if the judgment is irreconcilable with a judgment given in a dispute between the same parties in the State in which recognition is sought;
4. if the court of the State in which the judgment was given, in order to arrive at its judgment, has decided a preliminary question concerning the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills or succession in a way that conflicts with a rule of the private international law of the State in which the recognition is sought, unless the same result would have been reached by the application of the rules of private international law of that state;
5. if the judgment is irreconcilable with an earlier judgment given in a non-contracting State involving the same cause of action and between the same parties, provided that this latter judgment fulfills the conditions necessary for its recognition in the State addressed.

Art.28 Moreover, a judgment shall not be recognized if it conflicts with the provisions of Sections 3, 4 or 5 of Title II, or in a case provided for in Article 59.

In its examination of the grounds of jurisdiction referred to in the foregoing paragraph, the court or authority applied shall be bound by

the findings of fact on which the court of the State in which the judgment was given based its jurisdiction.

Subject to the provisions of the first paragraph, the jurisdiction of the court of the State in which the judgment was given may not be reviewed; the test of public policy referred to in point 1 of Article 27, may not be applied to the rules relating to jurisdiction.

Art.29 Under no circumstances may a foreign judgment be reviewed as to its substance.

Art.30 A court of a Contracting State in which recognition is sought of a judgment given in another Contracting State may stay proceedings if an ordinary appeal against the judgment has been lodged.

A court of a Contracting State in which recognition is sought of a judgment given in Ireland or the United Kingdom may stay the proceedings if enforcement is suspended in the State in which the judgment was given by reason of an appeal.

Art.31 A judgment given in a Contracting State and enforceable in that State shall be enforced in another Contracting State when, on the application of any interested party, the order for its enforcement has been issued there.

However, in the United Kingdom, such a judgment shall be enforced in England and Wales, in Scotland, or in Northern Ireland when, on the application of any interested party, it has been registered for enforcement in that part of the United Kingdom.

Art.32 The application shall be submitted:

- in Belgium, to the tribunal de premiere instance or rechtbank van eerste aanleg,
- in Denmark, to the underret,
- in the Federal Republic of Germany, to the presiding judge of a chamber of the Landgericht,
- in Greece, to the
- in France, to the presiding judge of the tribunal de grande instance
- in Ireland, to the High Court,
- in Italy, to the court d'appello,
- in Luxembourg, to the presiding judge of the tribunal d'arrondissement;
- in the Netherlands, to the presiding judge of the arrondissementsrechtbank,
- in the United Kingdom:
 1. in England and Wales, to the High Court of Justice, or in the case of maintenance judgment to the Magistrates' Court on transmission by the Secretary of State;
 2. in Scotland to the Court of Session, or in the case of maintenance judgment to the Sheriff Court on

- transmission by the Secretary of State;
3. in Northern Ireland, to the High Court of Justice, or in the case of a maintenance judgment to the Magistrates' Court on transmission by the Secretary of State.

The jurisdiction of local courts shall be determined by reference to the place of domicile of the party against whom enforcement is sought. If he is not domiciled in the State in which enforcement is sought, it shall be determined by reference to the place of enforcement.

Art. 36 If enforcement is authorized, the party against whom enforcement is sought may appeal against the decision within one month of service thereof.

If that party is domiciled in a Contracting State other than that in which the decision authorizing enforcement was given, the time for appealing shall be two month and shall run from the date of service, either on him in person or at his residence. No extension of time may be granted on account of distance.

Art.37 An appeal against the decision authorizing enforcement shall be lodged in accordance with the rules governing procedure in contentious matters:

- in Belgium, with the tribunal de premiere instance or rechtbank van eerste aanleg,
- in Denmark, with the landsret,
- in the Federal Republic of Germany, with the Oberlandesgericht,
- in Greece, with the,
- in France, with the cour d'appel,
- in Ireland, with the High Court,
- in Italy, with the corte d'appello,
- in Luxembourg, with the Cour superieure de justice sitting as a court of civil appeal,
- in the Netherlands, with the arrondissementsrechtbank,
- in the United Kingdom:
 1. in England and Wales, with the High Court of Justice, or in the case of a maintenance judgment with the Magistrates' Court;
 2. in Scotland with the Court of Session, or in the case of a maintenance judgment with the Sheriff Court;
 3. in Northern Ireland, with the High Court of Justice, or in the case of a maintenance judgment with the Magistrates' Court.

The judgment given on the appeal may be contested only:

- in Belgium, Greece, France, Italy, Luxembourg and in the Netherlands, by appeal in cassation,
- in Denmark, by am appeal to the hojesteret, with the leave of the Minister of Justice,
- in the Federal Republic of Germany, by a Rechtsbeschwerde,

- in Ireland, by an appeal on a point of law to the Supreme Court,
- in the United Kingdom, by a single further appeal on a point of law.

Art.40

If the application for enforcement is refused, the applicant may appeal:

- in Belgium, to the cour d'appel or hof van beroep,
- in Denmark, to the landsret,
- in the Federal Republic of Germany, to the Oberlandesgericht,
- in Greece, to the,
- in France, to the court d'appel,
- in Ireland, to the High Court,
- in Italy, to the corte d'appello,
- in Luxembourg, to the Cour superieure de justice sitting as a court of civil appeal,
- in the Netherlands, to the gerechtshof,
- in the United Kingdom:
 1. in England and Wales, to the High Court of Justice, or in the case of a maintenance judgment to the Magistrates' Court;
 2. in Scotland, to the Court of Session, or in the case of a maintenance judgment to the Sheriff Court;
 3. in Northern Ireland, to the High Court of Justice, or in the case of a maintenance judgment to the Magistrates' Court.

The party against whom enforcement is sought shall be summoned to appear before the appellate court. If he fails to appear, the provisions of the second and third paragraphs of Article 20 shall apply even where he is not domiciled in any of the Contracting States.

Title IV: Authentic Instruments and Court SettlementsArt.53

For the purpose of this Convention the seat of a company or other legal person or association of natural or legal persons shall be treated as its domicile. However, in order to determine that seat, the court shall apply its rules of private international law.

In order to determine whether a trust is domiciled in the Contracting State whose courts are seised of the matter, the court shall apply its rules of private international law.

A P P E N D I X V

THE INTERNATIONAL CONVENTION FOR THE UNIFICATION OF CERTAIN RULES CONCERNING
THE IMMUNITY OF STATE-OWNED SHIPS (1926)

Cf Bruhns Schiffahrtsrecht at 2330;

Cf Singh International Maritime Law Conventions vol 4 (1983) at 3096.

Art.1 Sea-going ships owned or operated by States, cargoes owned by them, and cargoes and passengers carried on State-owned ships, as well as the States which own or operate such ships and own such cargoes shall be subject, as regards claims in respect of the operation of such ships or in respect of the carriage of such cargoes, to the same rules of liability and the same obligations as those applicable in the case of privately-owned ships, cargoes and equipment.

Art.2 As regards such liabilities and obligations, the rules relating to the jurisdiction of the Courts, rights of actions and procedure shall be the same as for merchant ships belonging to private owners and for private cargoes and their owners.

Art.3 (1) The provisions of the two preceding Articles shall not apply to ships of war, State-owned yachts, patrol vessels, hospital ships, fleet auxiliaries, supply ships and other vessels owned or operated by a State and employed exclusively at the time when the cause of action arises on Government and non-commercial service, and such ships shall not be subject to seizure, arrest or detention by any legal process, nor to any proceedings in rem.

Nevertheless, claimants shall have the right to proceed before the appropriate Courts of the State which owns or operates the ship in the following cases:

- (i) Claims in respect of collision or other accidents of navigation;
- (ii) Claims in respect of salvage or in the nature of salvage and in respect of general average;
- (iii) Claims in respect of repairs, supplies or other contracts relating to the ship:

and the State shall not be entitled to rely upon any immunity as a defence.

(2) The same rules shall apply to State-owned cargoes carried on board any of the above-mentioned ships.

(3) State-owned cargoes carried on board merchant ships for Government and non-commercial purposes shall not be subject to seizure, arrest or detention by any legal process nor any proceedings in rem.

Nevertheless, claims in respect of collision and nautical accidents, claims in respect of salvage or in the nature of salvage and in respect of general average, as well as claims in respect of contracts relating to such cargoes, may be brought before the Court which has jurisdiction in virtue of Article 2.

Art.6

The provisions of the present Convention shall be applied in each Contracting State, but without any obligation to extend the benefit thereof to non-contracting States and their nationals, and with the right in making any such extension to impose a condition of reciprocity.

Nothing in the present Convention shall be held to prevent a Contracting State from prescribing by its own laws the rights of its nationals before its own Courts.

A P P E N D I X VI

CONVENTION ON LIMITATION OF LIABILITY FOR MARITIME CLAIMS 1976

Cf Federal Law Gazette (Bundesgesetzblatt) 1986 II, p 786.

Cf Singh International Maritime Law Conventions vol 4 (1983) at 2976.

The States Parties to this Convention,

Having recognised the desirability of determining by agreement certain uniform rules relating to the limitation of liability for maritime claims;

Have decided to conclude a Convention for this purpose and have thereto agreed as follows:

Chapter I

The right of limitation

Article 1

Persons entitled to limit liability

1. Shipowners and salvors, as hereinafter defined, may limit their liability in accordance with the rules of this Convention for claims set out in art. 2.

2. The term shipowner shall mean the owner, charterer, manager and operator of a sea-going ship.

3. Salvor shall mean any person rendering services in direct connection with salvage operations. Salvage operations shall also include operations referred to in art. 2, par.1 (d), (e) and (f).

4. If any claims set out in art. 2 are made against any person for whose act, neglect or default the shipowner or salvor is responsible, such person shall be entitled to avail himself of the limitation of liability provided for in this Convention.

5. In this Convention the liability of a shipowner shall include liability in an action brought against the vessel herself.

Les Etats Parties à la présente Convention,

ayant reconnu l'utilité de fixer d'un commun accord certaines règles uniformes relatives à la limitation de responsabilité en matière de créances maritimes;

ont décidé de conclure une convention à cet effet, et, en conséquence, sont convenus de ce qui suit:

Chapitre premier

Le droit à limitation

Article premier

Personnes en droit de limiter leur responsabilité

1. Les propriétaires de navires et les assistants, tels que définis ci-après, peuvent limiter leur responsabilité conformément aux règles de la présente Convention à l'égard des créances visées à l'article 2.

2. L'expression «propriétaire de navire» désigne le propriétaire, l'affrètement, l'armateur et l'armateur-gerant d'un navire de mer.

3. Par «assistant», on entend toute personne fournissant des services en relation directe avec les opérations d'assistance ou de sauvetage. Ces opérations comprennent celles que vise l'article 2, paragraphe 1 d), e) et f).

4. Si l'une quelconque des créances prévues à l'article 2 est formée contre toute personne dont les faits, négligences et fautes entraînent la responsabilité du propriétaire ou de l'assistant, cette personne est en droit de se prévaloir de la limitation de responsabilité prévue dans la présente Convention.

5. Dans la présente Convention, l'expression «responsabilité du propriétaire de navire» comprend la responsabilité résultant d'une action portant sur le navire lui-même.

Die Vertragsstaaten dieses Übereinkommens -

In Erkenntnis der Zweckmäßigkeit einer vertraglichen Festlegung einheitlicher Regeln über die Beschränkung der Haftung für Seeforderungen -

haben beschlossen, zu diesem Zweck ein Übereinkommen zu schließen, und haben demgemäß folgendes vereinbart:

Kapitel I

Recht auf Haftungsbeschränkung

Artikel 1

Zur Beschränkung der Haftung berechnete Personen

(1) Schiffseigentümer und Berger oder Retter im Sinn der nachstehenden Begriffsbestimmungen können ihre Haftung für die in Artikel 2 angeführten Ansprüche nach den Bestimmungen dieses Übereinkommens beschränken.

(2) Der Ausdruck Schiffseigentümer umfaßt den Eigentümer, Charterer, Reeder und Ausrüster eines Seeschiffs.

(3) Berger oder Retter bedeutet jede Person, die in unmittelbarem Zusammenhang mit einer Bergung oder Hilfeleistung Dienste leistet. Zu einer Bergung oder Hilfeleistung gehören auch die in Artikel 2 Absatz 1 Buchstaben d, e und f erwähnten Arbeiten.

(4) Wird einer der in Artikel 2 angeführten Ansprüche gegen eine Person geltend gemacht, für deren Handeln, Unterlassen oder Verschulden der Schiffseigentümer oder der Berger oder Retter haftet, so ist diese Person berechnete, sich auf die in diesem Übereinkommen vorgesehene Haftungsbeschränkung zu berufen.

(5) In diesem Übereinkommen schließt die Haftung des Schiffseigentümers die Haftung für Ansprüche ein, die gegen das Schiff selbst geltend gemacht werden.

6. An insurer of liability for claims subject to limitation in accordance with the rules of this Convention shall be entitled to the benefits of this Convention to the same extent as the assured himself.

7. The act of invoking limitation of liability shall not constitute an admission of liability.

Article 2

Claims subject to limitation

1. Subject to arts. 3 and 4 the following claims, whatever the basis of liability may be, shall be subject to limitation of liability:

- (a) claims in respect of loss of life or personal injury or loss of or damage to property (including damage to harbour works, basins and waterways and aids to navigation), occurring on board or in direct connection with the operation of the ship or with salvage operations, and consequential loss resulting therefrom;
- (b) claims in respect of loss resulting from delay in the carriage by sea of cargo, passengers or their luggage;
- (c) claims in respect of other loss resulting from infringement of rights other than contractual rights, occurring in direct connection with the operation of the ship or salvage operations;
- (d) claims in respect of the raising, removal, destruction or the rendering harmless of a ship which is sunk, wrecked, stranded or abandoned, including anything that is or has been on board such ship;
- (e) claims in respect of the removal, destruction or the rendering harmless of the cargo of the ship;
- (f) claims of a person other than the person liable in respect of measures taken in order to avert or minimize loss for which the person liable may limit his liability in accordance with this Convention, and further loss caused by such measures.

2. Claims set out in par. 1 shall be subject to limitation of liability even if brought by way of recourse or for indemnity under a contract or otherwise. However, claims set out under par. 1 (d), (e) and (f) shall not be subject to limitation of liability to the extent that they relate to

8. L'assureur qui couvre la responsabilité à l'égard des créances soumises à limitation conformément aux règles de la présente Convention est en droit de se prévaloir de celle-ci dans la même mesure que l'assuré lui-même.

7. Le fait d'invoquer la limitation de responsabilité n'emporte pas la reconnaissance de cette responsabilité.

Article 2

Créances soumises à la limitation

1. Sous réserve des articles 3 et 4, les créances suivantes, quel que soit le fondement de la responsabilité, sont soumises à la limitation de responsabilité:

- a) créances pour mort, pour lésions corporelles, pour pertes et pour dommages à tous biens (y compris les dommages causés aux ouvrages d'art des ports, bassins, voies navigables et aides à la navigation), survenus à bord du navire ou en relation directe avec l'exploitation de celui-ci ou avec des opérations d'assistance ou de sauvetage, ainsi que tout autre préjudice en résultant;
- b) créances pour tout préjudice résultant d'un retard dans le transport par mer de la cargaison, des passagers ou de leurs bagages;
- c) créances pour d'autres préjudices résultant de l'atteinte à tous droits de source extracontractuelle, et survenus en relation directe avec l'exploitation du navire ou avec des opérations d'assistance ou de sauvetage;
- d) créances pour avoir renfloué, enlevé, détruit ou rendu inoffensif un navire coulé, naufragé, échoué ou abandonné, y compris tout ce qui se trouve et s'est trouvé à bord;
- e) créances pour avoir enlevé, détruit ou rendu inoffensif la cargaison du navire;
- f) créances produites par une autre personne que la personne responsable pour les mesures prises afin de prévenir ou de réduire un dommage pour lequel la personne responsable peut limiter sa responsabilité conformément à la présente Convention, et pour les dommages ultérieurement causés par ces mesures.

2. Les créances visées au paragraphe 1 sont soumises à la limitation de responsabilité même si elles font l'objet d'une action, contractuelle ou non, récursoire ou en garantie. Toutefois, les créances produites aux termes des alinéas d), e) et f) du paragraphe 1 ne sont pas soumises

(6) Ein Versicherer, der die Haftung in bezug auf Ansprüche versichert, die der Beschränkung nach diesem Übereinkommen unterliegen, kann sich im gleichen Umfang wie der Versicherte auf die Bestimmungen dieses Übereinkommens berufen.

(7) Die Geltendmachung der Haftungsbeschränkung bedeutet keine Anerkennung der Haftung.

Artikel 2

Der Beschränkung unterliegende Ansprüche

(1) Vorbehaltlich der Artikel 3 und 4 unterliegen folgende Ansprüche, ungeachtet des Grundes der Haftung, der Haftungsbeschränkung:

- a) Ansprüche wegen Tod oder Körperverletzung oder wegen Verlust oder Beschädigung von Sachen (einschließlich Beschädigung von Hafenanlagen, Hafenbecken, Wasserstraßen und Navigationshilfen), die an Bord oder in unmittelbarem Zusammenhang mit dem Betrieb des Schiffes oder mit Bergungs- oder Hilfeleistungsarbeiten eintreten, sowie wegen daraus entstehender weiterer Schäden;
- b) Ansprüche wegen Schäden infolge Verspätung bei der Beförderung von Gütern, Reisenden oder deren Gepäck auf See;
- c) Ansprüche wegen sonstiger Schäden, die sich aus der Verletzung nichtvertraglicher Rechte ergeben und in unmittelbarem Zusammenhang mit dem Betrieb des Schiffes oder mit Bergungs- oder Hilfeleistungsarbeiten stehen;
- d) Ansprüche aus der Hebung, Beseitigung, Vernichtung oder Unschädlichmachung eines gesunkenen, havarierten, gestrandeten oder verlassenen Schiffes, samt allem, was sich an Bord eines solchen Schiffes befindet oder befunden hat;
- e) Ansprüche aus der Beseitigung, Vernichtung oder Unschädlichmachung der Ladung des Schiffes;
- f) Ansprüche einer anderen Person als des Haftpflichtigen wegen Maßnahmen, die ergriffen wurden, um Schäden, für die der Haftpflichtige seine Haftung nach diesem Übereinkommen beschränken kann, abzuwenden oder zu verringern, sowie wegen weiterer durch solche Maßnahmen entstandener Schäden.

(2) Die in Absatz 1 angeführten Ansprüche unterliegen auch dann der Haftungsbeschränkung, wenn sie auf Grund eines Vertrags oder sonstwie als Rückgriffs- oder Entschädigungsansprüche geltend gemacht werden. Die in Absatz 1 Buchstaben d, e und f angeführten Ansprüche

out of the same occurrence, their respective claims shall be set off against each other and the provisions of this Convention shall only apply to the balance, if any.

une créance née du même événement, leurs créances respectives se compensent et les dispositions de la présente Convention ne s'appliquent qu'au solde éventuel.

gen den Gläubiger einen Anspruch, der aus dem gleichen Ereignis entstanden ist, so sind die beiderseitigen Ansprüche gegeneinander aufzurechnen und die Bestimmungen dieses Übereinkommens nur auf den etwa verbleibenden Anspruch anzuwenden.

Chapter II
Limits of liability

Article 6
The general limits

1. The limits of liability for claims other than those mentioned in art. 7, arising on any distinct occasion, shall be calculated as follows:

(a) in respect of claims for loss of life or personal injury,

(i) 333,000 Units of Account for a ship with a tonnage not exceeding 500 tons,

(ii) for a ship with a tonnage in excess thereof, the following amount in addition to that mentioned in (i):

for each ton from 501 to 3,000 tons, 500 Units of Account;

for each ton from 3,001 to 30,000 tons, 333 Units of Account;

for each ton from 30,001 to 70,000 tons, 250 Units of Account; and

for each ton in excess of 70,000 tons, 167 Units of Account,

(b) in respect of any other claims,

(i) 167,000 Units of Account for a ship with a tonnage not exceeding 500 tons,

(ii) for a ship with a tonnage in excess thereof the following amount in addition to that mentioned in (i):

for each ton from 501 to 30,000 tons, 167 Units of Account;

for each ton from 30,001 to 70,000 tons, 125 Units of Account; and

for each ton in excess of 70,000 tons, 83 Units of Account.

2. Where the amount calculated in accordance with par. 1 (a) is insufficient to pay the claims mentioned therein in full, the amount calculated in accordance with par. 1 (b) shall be available for payment of the unpaid balance of claims under par. 1 (a) and such unpaid balance shall rank rateably with claims mentioned under par. 1 (b).

Chapitre II
Limites de responsabilité

Article 6
Limites générales

1. La limite de responsabilité à l'égard des créances autres que celles mentionnées à l'article 7, nées d'un même événement, est calculée comme suit:

a) à l'égard des créances pour mort ou lésions corporelles,

i) 333 000 unités de compte pour un navire dont la jauge ne dépasse pas 500 tonneaux;

ii) pour un navire dont la jauge dépasse le chiffre ci-dessus, le montant suivant qui vient s'ajouter au montant indiqué à l'alinéa i):
pour chaque tonneau de 501 à 3 000 tonneaux, 500 unités de compte;

pour chaque tonneau de 3 001 à 30 000 tonneaux, 333 unités de compte;

pour chaque tonneau de 30 001 à 70 000 tonneaux, 250 unités de compte;

et pour chaque tonneau au-dessus de 70 000 tonneaux, 167 unités de compte,

b) à l'égard de toutes les autres créances,

i) 167 000 unités de compte pour un navire dont la jauge ne dépasse pas 500 tonneaux;

ii) pour un navire dont la jauge dépasse le chiffre ci-dessus, le montant suivant qui vient s'ajouter au montant indiqué à l'alinéa i):
pour chaque tonneau de 501 à 30 000 tonneaux, 167 unités de compte;

pour chaque tonneau de 30 001 à 70 000 tonneaux, 125 unités de compte;

et pour chaque tonneau au-dessus de 70 000 tonneaux, 83 unités de compte.

2. Lorsque le montant calculé conformément à l'alinéa a) du paragraphe 1 est insuffisant pour régler intégralement les créances visées dans cet alinéa, le montant calculé conformément à l'alinéa b) du paragraphe 1 peut être utilisé pour régler le solde impayé des créances visées à l'alinéa a) du paragraphe 1 et ce solde impayé vient en concurrence avec les créances visées à l'alinéa b) du paragraphe 1.

Kapitel II
Haftungshöchstbeträge

Artikel 6
Allgemeine Höchstbeträge

(1) Die Haftungshöchstbeträge für andere als die in Artikel 7 angeführten Ansprüche, die aus demselben Ereignis entstanden sind, errechnen sich wie folgt:

a) für Ansprüche wegen Tod oder Körperverletzung:

i) für ein Schiff mit einem Raumgehalt bis zu 500 Tonnen 333 000 Rechnungseinheiten;

ii) für ein Schiff mit einem darüber hinausgehenden Raumgehalt erhöht sich der unter Ziffer I genannte Betrag wie folgt:

500 Rechnungseinheiten je Tonne von 501 bis 3 000 Tonnen;

333 Rechnungseinheiten je Tonne von 3 001 bis 30 000 Tonnen;

250 Rechnungseinheiten je Tonne von 30 001 bis 70 000 Tonnen;

167 Rechnungseinheiten je Tonne über 70 000 Tonnen;

b) für sonstige Ansprüche:

i) für ein Schiff mit einem Raumgehalt bis zu 500 Tonnen 167 000 Rechnungseinheiten;

ii) für ein Schiff mit einem darüber hinausgehenden Raumgehalt erhöht sich der unter Ziffer I genannte Betrag wie folgt:

167 Rechnungseinheiten je Tonne von 501 bis 30 000 Tonnen;

125 Rechnungseinheiten je Tonne von 30 001 bis 70 000 Tonnen;

83 Rechnungseinheiten je Tonne über 70 000 Tonnen.

(2) Reicht der nach Absatz 1 Buchstabe a errechnete Betrag zur vollen Befriedigung der darin genannten Ansprüche nicht aus, so steht der nach Absatz 1 Buchstabe b errechnete Betrag zur Befriedigung der nicht befriedigten Restansprüche nach Absatz 1 Buchstabe a zur Verfügung, wobei diese Restansprüche den gleichen Rang wie die in Absatz 1 Buchstabe b genannten Ansprüche haben.

remuneration under a contract with the person liable.

à la limitation de responsabilité dans la mesure où elles sont relatives à la rémunération en application d'un contrat conclu avec la personne responsable.

unterliegen jedoch nicht der Haftungsbeschränkung, soweit sie ein mit dem Haftpflichtigen vertraglich vereinbartes Entgelt betreffen.

Article 3

Claims excepted from limitation

The rules of this Convention shall not apply to:

- (a) claims for salvage or contribution in general average;
- (b) claims for oil pollution damage within the meaning of the International Convention on Civil Liability for Oil Pollution Damage, dated Nov. 29, 1969 or of any amendment or Protocol thereto which is in force;
- (c) claims subject to any international convention or national legislation governing or prohibiting limitation of liability for nuclear damage;
- (d) claims against the shipowner of a nuclear ship for nuclear damage;
- (e) claims by servants of the shipowner or salvor whose duties are connected with the ship or the salvage operations, including claims of their heirs, dependants or other persons entitled to make such claims, if under the law governing the contract of service between the shipowner or salvor and such servants the shipowner or salvor is not entitled to limit his liability in respect of such claims, or if he is by such law only permitted to limit his liability to an amount greater than that provided for in art. 8.

Article 4

Conduct barring limitation

A person liable shall not be entitled to limit his liability if it is proved that the loss resulted from his personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result.

Article 5

Counterclaims

Where a person entitled to limitation of liability under the rules of this Convention has a claim against the claimant arising

Article 3

Créances exclues de la limitation

Les règles de la présente Convention ne s'appliquent pas:

- a) aux créances du chef d'assistance, de sauvetage, ou de contribution en avarie commune;
- b) aux créances pour dommages dus à la pollution par les hydrocarbures au sens de la Convention internationale sur la responsabilité civile pour les dommages dus à la pollution par les hydrocarbures en date du 29 novembre 1969, ou de tout amendement ou de tout protocole à celle-ci qui est en vigueur;
- c) aux créances soumises à toute convention internationale ou législation nationale régissant ou interdisant la limitation de responsabilité pour dommages nucléaires;
- d) aux créances contre le propriétaire d'un navire nucléaire pour dommages nucléaires;
- e) aux créances des préposés du propriétaire du navire ou de l'assistant dont les fonctions se rattachent au service du navire ou aux opérations d'assistance ou de sauvetage ainsi qu'aux créances de leurs héritiers, ayants cause ou autres personnes fondées à former de telles créances si, selon la loi régissant le contrat d'engagement conclu entre le propriétaire du navire ou l'assistant et les préposés, le propriétaire du navire ou l'assistant n'a pas le droit de limiter sa responsabilité relativement à ces créances, ou, si, selon cette loi, il ne peut le faire qu'à concurrence d'un montant supérieur à celui prévu à l'article 8.

Article 4

Conduite supprimant la limitation

Une personne responsable n'est pas en droit de limiter sa responsabilité s'il est prouvé que le dommage résulte de son fait ou de son omission personnels, commis avec l'intention de provoquer un tel dommage, ou commis témérairement et avec conscience qu'un tel dommage en résulterait probablement.

Article 5

Compensation des créances

Si une personne en droit de limiter sa responsabilité selon les règles de la présente Convention a contre son créancier

Artikel 3

Von der Beschränkung ausgenommene Ansprüche

Dieses Übereinkommen ist nicht anzuwenden auf

- a) Ansprüche aus Bergung oder Hilfeleistung oder Beitragsleistung zur großen Haverei;
- b) Ansprüche wegen Överschmutzungsschäden im Sinn des Internationalen Übereinkommens vom 29. November 1969 über die zivilrechtliche Haftung für Överschmutzungsschäden oder einer Änderung oder eines Protokolls, die das Übereinkommen betreffen und in Kraft getreten sind;
- c) Ansprüche, die unter ein internationales Übereinkommen oder innerstaatliche Rechtsvorschriften fallen, welche die Haftungsbeschränkung bei nuklearen Schäden regeln oder verbieten;
- d) Ansprüche gegen den Schiffseigentümer eines Reaktorschiffs wegen nuklearer Schäden;
- e) Ansprüche von Bediensteten des Schiffseigentümers oder des Bergers oder Retters, deren Aufgaben mit dem Betrieb des Schiffes oder mit Bergungs- oder Hilfeleistungsarbeiten zusammenhängen, sowie Ansprüche ihrer Erben, Angehörigen oder sonstiger zur Geltendmachung solcher Ansprüche berechtigter Personen, wenn der Schiffseigentümer oder der Berger oder Retter nach dem Recht, das für den Dienstvertrag zwischen ihm und diesen Bediensteten gilt, seine Haftung für diese Ansprüche nicht beschränken oder nur auf einen Betrag beschränken kann, der den in Artikel 8 vorgesehenen übersteigt.

Artikel 4

Die Beschränkung ausschließendes Verhalten

Ein Haftpflichtiger darf seine Haftung nicht beschränken, wenn nachgewiesen wird, daß der Schaden auf eine Handlung oder Unterlassung zurückzuführen ist, die von ihm selbst in der Absicht, einen solchen Schaden herbeizuführen, oder leichtfertig und in dem Bewußtsein begangen wurde, daß ein solcher Schaden mit Wahrscheinlichkeit eintreten werde.

Artikel 5

Gegenansprüche

Hat eine Person, die zur Beschränkung der Haftung nach den Bestimmungen dieses Übereinkommens berechtigt ist, ge-

3. However, without prejudice to the right of claims for loss of life or personal injury according to par. 2, a State Party may provide in its national law that claims in respect of damage to harbour works, basins and waterways and aids to navigation shall have such priority over other claims under par. 1 (b) as is provided by that law.

4. The limits of liability for any salvor not operating from any ship or for any salvor operating solely on the ship to, or in respect of which, he is rendering salvage services, shall be calculated according to a tonnage of 1,500 tons.

5. For the purpose of this Convention the ship's tonnage shall be the gross tonnage calculated in accordance with the tonnage measurement rules contained in Annex I of the International Convention on Tonnage Measurement of Ships, 1969.

3. Toutefois, sans préjudice du droit des créances pour mort ou lésions corporelles conformément au paragraphe 2, un Etat Partie peut stipuler dans sa législation nationale que les créances pour dommages causés aux ouvrages d'art des ports, bassins, voies navigables et aides à la navigation, ont la priorité sur les autres créances visées à l'alinéa b) du paragraphe 1 qui est prévue par cette législation.

4. Les limites de responsabilité de tout assistant n'agissant pas à partir d'un navire, ou de tout assistant agissant uniquement à bord du navire auquel ou à l'égard duquel il fournit des services d'assistance ou de sauvetage, sont calculées selon un tonnage de 1 500 tonneaux de jauge.

5. Aux fins de la présente Convention, le calcul du tonnage du navire est effectué conformément aux règles de mesure sur le tonnage brut prévues à l'Annexe I de la Convention internationale de 1969 sur le jaugeage des navires.

(3) Unbeschadet der Rechte nach Absatz 2 in bezug auf Ansprüche wegen Tod oder Körperverletzung kann ein Vertragsstaat in seinen innerstaatlichen Rechtsvorschriften jedoch bestimmen, daß Ansprüche wegen Beschädigung von Hafenanlagen, Hafenbecken, Wasserstraßen und Navigationshilfen den ihnen in diesen Rechtsvorschriften eingeräumten Vorrang vor sonstigen Ansprüchen nach Absatz 1 Buchstabe b haben.

(4) Die Haftungshöchstbeträge für einen Berger oder Retter, der nicht von einem Schiff aus arbeitet, oder für einen Berger oder Retter, der ausschließlich auf dem Schiff arbeitet, für das er Bergungs- oder Hilfeleistungsdienste leistet, errechnen sich unter Zugrundelegung eines Raumgehalts von 1 500 Tonnen.

(5) Raumgehalt des Schiffes im Sinn dieses Artikels ist die Bruttoreaumzahl, errechnet nach den in Anlage I des Internationalen Schiffsvermessungs-Übereinkommens von 1969 enthaltenen Bestimmungen über die Vermessung des Raumgehalts.

Article 7

The limit for passenger claims

1. In respect of claims arising on any distinct occasion for loss of life or personal injury to passengers of a ship, the limit of liability of the shipowner thereof shall be an amount of 46,666 Units of Account multiplied by the number of passengers which the ship is authorised to carry according to the ship's certificate, but not exceeding 25 million Units of Account.

2. For the purpose of this Article "claims for loss of life or personal injury to passengers of a ship" shall mean any such claims brought by or on behalf of any person carried in that ship:

- (a) under a contract of passenger carriage, or
- (b) who, with the consent of the carrier, is accompanying a vehicle or live animals which are covered by a contract for the carriage of goods.

Article 8

Unit of Account

1. The Unit of Account referred to in arts. 6 and 7 is the Special Drawing Right as defined by the International Monetary Fund. The amounts mentioned in arts. 6 and 7 shall be converted into the national currency of the State in which limitation is sought, according to the value of that currency at the date the limitation fund shall have been constituted, payment is made, or security is given which under the law of that State is equivalent to such payment. The value of a national currency

Article 7

Limite applicable aux créances des passagers

1. Dans le cas de créances résultant de la mort ou de lésions corporelles des passagers d'un navire et nées d'un même événement, la limite de la responsabilité du propriétaire du navire est fixée à une somme de 46 666 unités de compte multipliées par le nombre de passagers que le navire est autorisé à transporter d'après le certificat du navire, sans pouvoir excéder 25 millions d'unités de compte.

2. Aux fins du présent article «créances résultant de la mort ou de lésions corporelles des passagers d'un navire» signifie toute créance formée par toute personne transportée sur ce navire ou pour le compte de cette personne:

- a) en vertu d'un contrat de transport de passager; ou
- b) qui, avec le consentement du transporteur, accompagne un véhicule ou des animaux vivants faisant l'objet d'un contrat de transport de marchandises.

Article 8

Unité de compte

1. L'unité de compte visée aux articles 6 et 7 est le Droit de Tirage spécial tel que défini par le Fonds monétaire international. Les montants mentionnés aux articles 6 et 7 sont convertis dans la monnaie nationale de l'Etat dans lequel la limitation de responsabilité est invoquée; la conversion s'effectue suivant la valeur de cette monnaie à la date où le fonds aura été constitué, le paiement effectué ou la garantie équivalente fournie conformément à la loi de cet Etat. La valeur, en Droit

Artikel 7

Höchstbetrag für Ansprüche von Reisenden

(1) Bei aus demselben Ereignis entstandenen Ansprüchen wegen des Todes oder der Körperverletzung von Reisenden eines Schiffes haftet der Schiffseigentümer bis zu einem Betrag von 46 666 Rechnungseinheiten multipliziert mit der Anzahl der Reisenden, die das Schiff nach dem Schiffszeugnis befördern darf, höchstens jedoch bis zu einem Betrag von 25 Millionen Rechnungseinheiten.

(2) „Ansprüche wegen des Todes oder der Körperverletzung von Reisenden eines Schiffes“ im Sinn dieses Artikels bedeutet diejenigen Ansprüche, die durch oder für eine auf diesem Schiff beförderte Person geltend gemacht werden,

- a) die auf Grund eines Beförderungsvertrags für Reisende befördert wird oder
- b) die mit Zustimmung des Beförderers ein Fahrzeug oder lebende Tiere begleitet, die Gegenstand eines Vertrags über die Beförderung von Gütern sind.

Artikel 8

Rechnungseinheit

(1) Die in den Artikeln 6 und 7 genannte Rechnungseinheit ist das Sonderziehungsrecht des Internationalen Währungsfonds. Die in den Artikeln 6 und 7 genannten Beträge werden in die Landeswährung des Staates umgerechnet, in dem die Beschränkung der Haftung geltend gemacht wird; die Umrechnung erfolgt entsprechend dem Wert der betreffenden Währung im Zeitpunkt der Errichtung des Haftungsfonds, der Zahlung oder der Leistung einer nach dem

in terms of the Special Drawing Right, of a State Party which is a member of the International Monetary Fund, shall be calculated in accordance with the method of valuation applied by the International Monetary Fund in effect at the date in question for its operations and transactions. The value of a national currency in terms of the Special Drawing Right, of a State Party which is not a member of the International Monetary Fund, shall be calculated in a manner determined by that State Party.

2. Nevertheless, those States which are not members of the International Monetary Fund and whose law does not permit the application of the provisions of par. 1 may, at the time of signature without reservation as to ratification, acceptance or approval or at the time of ratification, acceptance, approval or accession or at any time thereafter, declare that the limits of liability provided for in this Convention to be applied in their territories shall be fixed as follows:

(a) in respect of art. 6, par. 1 (a) at an amount of:

- (i) 5 million monetary units for a ship with a tonnage not exceeding 500 tons;
- (ii) for a ship with a tonnage in excess thereof, the following amount in addition to that mentioned in (i):
for each ton from 501 to 3,000 tons, 7,500 monetary units;

for each ton from 3,001 to 30,000 tons, 5,000 monetary units;

for each ton from 30,001 to 70,000 tons, 3,750 monetary units; and

for each ton in excess of 70,000 tons, 2,500 monetary units; and

(b) in respect of art. 6, par. 1 (b), at an amount of:

- (i) 2.5 million monetary units for a ship with a tonnage not exceeding 500 tons;
- (ii) for a ship with a tonnage in excess thereof, the following amount in addition to that mentioned in (i):
for each ton from 501 to 30,000 tons, 2,500 monetary units;

for each ton from 30,001 to 70,000 tons, 1,850 monetary units; and

for each ton in excess of 70,000 tons, 1,250 monetary units; and

de Tirage special, d'une monnaie nationale d'un Etat Partie qui est membre du Fonds monetaire international, est calculée selon la methode d'évaluation appliquée par le Fonds monetaire international à la date en question pour ses propres opérations et transactions. La valeur, en Droit de Tirage special, d'une monnaie nationale d'un Etat Partie qui n'est pas membre du Fonds monetaire international, est calculée de la façon déterminée par cet Etat Partie.

2. Toutefois, les Etats qui ne sont pas membres du Fonds monetaire international et dont la législation ne permet pas d'appliquer les dispositions du paragraphe 1 peuvent, au moment de la signature sans réserve quant à la ratification, l'acceptation ou l'approbation, ou au moment de la ratification, de l'acceptation, de l'approbation ou de l'adhésion, ou encore à tout moment par la suite, déclarer que la limite de la responsabilité prévue dans la présente Convention et applicable sur leur territoire est fixée de la manière suivante:

a) en ce qui concerne l'alinéa a) du paragraphe 1 de l'article 6, à une somme de:

- i) 5 millions d'unités monétaires pour un navire dont la jauge ne dépasse pas 500 tonneaux;
- ii) pour un navire dont la jauge dépasse le chiffre ci-dessus, le montant suivant qui vient s'ajouter au montant indiqué à l'alinéa i):
pour chaque tonneau de 501 à 3 000 tonneaux, 7 500 unités monétaires;

pour chaque tonneau de 3 001 à 30 000 tonneaux, 5 000 unités monétaires;

pour chaque tonneau de 30 001 à 70 000 tonneaux, 3 750 unités monétaires;

et pour chaque tonneau au-dessus de 70 000 tonneaux, 2 500 unités monétaires, et

b) en ce qui concerne l'alinéa b) du paragraphe 1 de l'article 6, à une somme de:

- i) 2,5 millions d'unités monétaires pour un navire dont la jauge ne dépasse pas 500 tonneaux;
- ii) pour un navire dont la jauge dépasse le chiffre ci-dessus, le montant suivant qui vient s'ajouter au montant indiqué à l'alinéa i):
pour chaque tonneau de 501 à 30 000 tonneaux, 2 500 unités monétaires;

pour chaque tonneau de 30 001 à 70 000 tonneaux, 1 850 unités monétaires;

et pour chaque tonneau au-dessus de 70 000 tonneaux, 1 250 unités monétaires, et

Recht dieses Staates gleichwertigen Sicherheit. Der in Sonderziehungsrechten ausgedrückte Wert der Landeswährung eines Vertragsstaats, der Mitglied des Internationalen Währungsfonds ist, wird nach der vom Internationalen Währungsfonds angewendeten Bewertungsmethode errechnet, die an dem betreffenden Tag für seine Operationen und Transaktionen gilt. Der in Sonderziehungsrechten ausgedrückte Wert der Landeswährung eines Vertragsstaats, der nicht Mitglied des Internationalen Währungsfonds ist, wird auf eine von diesem Vertragsstaat bestimmte Weise errechnet.

(2) Dessen ungeachtet können die Staaten, die nicht Mitglieder des Internationalen Währungsfonds sind und deren Recht die Anwendung des Absatzes 1 nicht zuläßt, bei der Unterzeichnung ohne Vorbehalt der Ratifikation, Annahme oder Genehmigung oder bei der Ratifikation, der Annahme, der Genehmigung oder dem Beitritt oder jederzeit danach erklären, daß die in ihren Hoheitsgebieten geltenden Haftungshöchstbeträge dieses Übereinkommens wie folgt festgesetzt werden:

a) bezüglich Artikel 6 Absatz 1 Buchstabe a auf folgende Beträge:

- i) für ein Schiff mit einem Raumgehalt bis zu 500 Tonnen 5 Millionen Werteinheiten;
- ii) für ein Schiff mit einem darüber hinausgehenden Raumgehalt erhöht sich der unter Ziffer i genannte Betrag wie folgt:
7 500 Werteinheiten je Tonne von 501 bis 3 000 Tonnen;

5 000 Werteinheiten je Tonne von 3 001 bis 30 000 Tonnen;

3 750 Werteinheiten je Tonne von 30 001 bis 70 000 Tonnen und

2 500 Werteinheiten je Tonne über 70 000 Tonnen und

b) bezüglich Artikel 6 Absatz 1 Buchstabe b auf folgende Beträge:

- i) für ein Schiff bis zu 500 Tonnen 2,5 Millionen Werteinheiten;
- ii) für ein Schiff mit einem darüber hinausgehenden Raumgehalt erhöht sich der unter Ziffer i genannte Betrag wie folgt:
2 500 Werteinheiten je Tonne von 501 bis 30 000 Tonnen;

1 850 Werteinheiten je Tonne von 30 001 bis 70 000 Tonnen und

1 250 Werteinheiten je Tonne über 70 000 Tonnen und

(c) in respect of art. 7, par. 1, at an amount of 700,000 monetary units multiplied by the number of passengers which the ship is authorised to carry according to its certificate, but not exceeding 375 million monetary units.

Paragraphs 2 and 3 of art. 6 apply correspondingly to sub-pars. (a) and (b) of this paragraph.

3. The monetary unit referred to in par. 2 corresponds to 65½ milligrammes of gold of millesimal fineness 900. The conversion of the amounts specified in par. 2 into the national currency shall be made according to the law of the State concerned.

4. The calculation mentioned in the last sentence of par. 1 and the conversion mentioned in par. 3 shall be made in such a manner as to express in the national currency of the State Party as far as possible the same real value for the amounts in arts. 6 and 7 as is expressed there in units of account. States Parties shall communicate to the depositary the manner of calculation pursuant to par. 1, or the result of the conversion in par. 3, as the case may be, at the time of the signature without reservation as to ratification, acceptance or approval, or when depositing an instrument referred to in art. 16 and whenever there is a change in either.

c) en ce qui concerne le paragraphe 1 de l'article 7 à une somme de 700 000 unités monétaires multipliées par le nombre de passagers que le navire est autorisé à transporter conformément à son certificat, mais ne dépassant pas 375 millions d'unités monétaires.

Les paragraphes 2 et 3 de l'article 6 s'appliquent en conséquence aux alinéas a) et b) du présent paragraphe.

3. L'unité monétaire mentionnée au paragraphe 2 correspond à soixante-cinq milligrammes et demi d'or au titre de neuf cent millièmes de fin. La conversion de cette somme en monnaie nationale s'effectue conformément à la législation de l'Etat en cause.

4. Le calcul mentionné à la dernière phrase du paragraphe 1 et la conversion mentionnée au paragraphe 3 doivent être faits de façon à exprimer en monnaie nationale de l'Etat Partie la même valeur réelle, dans la mesure du possible, que celle exprimée en unités de compte dans les articles 6 et 7. Au moment de la signature sans réserve quant à la ratification, l'acceptation ou l'approbation, ou lors du dépôt de l'instrument visé à l'article 16, et chaque fois qu'un changement se produit dans leur méthode de calcul ou dans la valeur de leur monnaie nationale par rapport à l'unité de compte ou à l'unité monétaire, les Etats Parties communiquent au depositaire leur méthode de calcul conformément au paragraphe 1, ou les résultats de la conversion conformément au paragraphe 3, selon le cas.

c) bezüglich Artikel 7 Absatz 1 auf einen Betrag von 700 000 Werteinheiten multipliziert mit der Anzahl der Reisenden, die das Schiff nach seinem Schiffszeugnis befördern darf, höchstens jedoch auf einen Betrag von 375 Millionen Werteinheiten.

Artikel 6 Absätze 2 und 3 findet auf die Buchstaben a und b dieses Absatzes entsprechende Anwendung.

(3) Die in Absatz 2 genannte Werteinheit entspricht 65½ Milligramm Gold von 900/1000 Feingehalt. Die Umrechnung der Beträge nach Absatz 2 in die Landeswährung erfolgt nach dem Recht des betreffenden Staates.

(4) Die in Absatz 1 letzter Satz genannte Berechnung und die in Absatz 3 genannte Umrechnung erfolgen in der Weise, daß die Beträge nach den Artikeln 6 und 7, in der Landeswährung des Vertragsstaates ausgedrückt, soweit wie möglich dem dort in Rechnungseinheiten ausgedrückten tatsächlichen Wert entsprechen. Die Vertragsstaaten teilen dem Verwahrer die Art der Berechnung nach Absatz 1 oder das Ergebnis der Umrechnung nach Absatz 3 bei der Unterzeichnung ohne Vorbehalt der Ratifikation, Annahme oder Genehmigung oder bei der Hinterlegung einer der in Artikel 16 genannten Urkunden sowie immer dann mit, wenn sich die Berechnungsart oder das Umrechnungsergebnis ändert.

Article 9

Aggregation of claims

1. The limits of liability determined in accordance with art. 8 shall apply to the aggregate of all claims which arise on any distinct occasion:

- (a) against the person or persons mentioned in par. 2 of art. 1 and any person for whose act, neglect or default he or they are responsible; or
- (b) against the shipowner of a ship rendering salvage services from that ship and the salvor or salvors operating from such ship and any person for whose act, neglect or default he or they are responsible; or
- (c) against the salvor or salvors who are not operating from a ship or who are operating solely on the ship to, or in respect of which, the salvage services are rendered and any person for whose act, neglect or default he or they are responsible.

Article 9

Concours de créances

1. Les limites de la responsabilité déterminées selon l'article 8 s'appliquent à l'ensemble de toutes les créances nées d'un même événement:

- a) à l'égard de la personne ou des personnes visées au paragraphe 2 de l'article premier et de toute personne dont les faits, négligences ou fautes entraînent la responsabilité de celle-ci ou de celles-ci; ou
- b) à l'égard du propriétaire d'un navire qui fournit des services d'assistance ou de sauvetage à partir de ce navire et à l'égard de l'assistant ou des assistants agissant à partir dudit navire et de toute personne dont les faits, négligences ou fautes entraînent la responsabilité de celui-ci ou de ceux-ci;
- c) à l'égard de l'assistant ou des assistants n'agissant pas à partir d'un navire ou agissant uniquement à bord du navire auquel ou à l'égard duquel des services d'assistance ou de sauvetage sont fournis et de toute personne dont les faits, négligences ou fautes entraînent la responsabilité de celui-ci ou de ceux-ci.

Artikel 9

Mehrere Ansprüche

(1) Die nach Artikel 8 bestimmten Haftungshöchstbeträge gelten für die Gesamtheit der aus demselben Ereignis entstandenen Ansprüche

- a) gegen eine oder mehrere der in Artikel 1 Absatz 2 bezeichneten Personen sowie gegen jeden, für dessen Handeln, Unterlassen oder Verschulden sie haften,
- b) gegen den Eigentümer eines Schiffes, der von diesem aus Bergungs- oder Hilfeleistungsdienste leistet, und gegen von dem Schiff aus arbeitende Berger oder Retter sowie gegen jeden, für dessen Handeln, Unterlassen oder Verschulden Eigentümer, Berger oder Retter haften, oder
- c) gegen Berger oder Retter, die nicht von einem Schiff aus arbeiten oder die ausschließlich auf dem Schiff arbeiten, für das Bergungs- oder Hilfeleistungsdienste geleistet werden, sowie gegen jeden, für dessen Handeln, Unterlassen oder Verschulden Berger oder Retter haften.

2. The limits of liability determined in accordance with art. 7 shall apply to the aggregate of all claims subject thereto which may arise on any distinct occasion against the person or persons mentioned in par. 2 of art. 1 in respect of the ship referred to in art. 7 and any person for whose act, neglect or default he or they are responsible.

Article 10

Limitation of liability without constitution of a limitation fund

1. Limitation of liability may be invoked notwithstanding that a limitation fund as mentioned in art. 11 has not been constituted. However, a State Party may provide in its national law that, where an action is brought in its courts to enforce a claim subject to limitation, a person liable may only invoke the right to limit liability if a limitation fund has been constituted in accordance with the provisions of this Convention or is constituted when the right to limit liability is invoked.

2. If limitation of liability is invoked without the constitution of a limitation fund, the provisions of art. 12 shall apply correspondingly.

3. Questions of procedure arising under the rules of this Article shall be decided in accordance with the national law of the State Party in which action is brought.

Chapter III

The limitation fund

Article 11

Constitution of the fund

1. Any person alleged to be liable may constitute a fund with the court or other competent authority in any State Party in which legal proceedings are instituted in respect of claims subject to limitation. The fund shall be constituted in the sum of such of the amounts set out in arts. 8 and 7 as are applicable to claims for which that person may be liable, together with interest thereon from the date of the occurrence giving rise to the liability until the date of the constitution of the fund. Any fund thus constituted shall be available only for the payment of claims in respect of which limitation of liability can be invoked.

2. A fund may be constituted, either by depositing the sum, or by producing a guarantee acceptable under the legislation of the State Party where the

2. Les limites de la responsabilité déterminées selon l'article 7 s'appliquent à l'ensemble de toutes les créances pouvant naître d'un même événement à l'égard de la personne ou des personnes visées au paragraphe 2 de l'article premier s'agissant du navire auquel il est fait référence à l'article 7 et de toute personne dont les faits, négligences ou fautes entraînent la responsabilité de celle-ci ou de celles-ci.

Article 10

Limitation de la responsabilité sans constitution d'un fonds de limitation

1. La limitation de la responsabilité peut être invoquée même si le fonds de limitation visé à l'article 11 n'a pas été constitué. Toutefois, un Etat Partie peut stipuler dans sa législation nationale que lorsqu'une action est intentée devant ses tribunaux pour obtenir le paiement d'une créance soumise à limitation, une personne responsable n'a le droit d'invoquer le droit de limiter sa responsabilité que si un fonds de limitation a été constitué conformément aux dispositions de la présente Convention ou est constitué lorsque le droit de limiter la responsabilité est invoqué.

2. Si la limitation de la responsabilité est invoquée sans constitution d'un fonds de limitation, les dispositions de l'article 12 s'appliquent.

3. Les règles de procédure pour l'application du présent article sont régies par la législation nationale de l'Etat Partie dans lequel l'action est intentée.

Chapitre III

Le fonds de limitation

Article 11

Constitution du fonds

1. Toute personne dont la responsabilité peut être mise en cause peut constituer un fonds auprès du tribunal ou de toute autre autorité compétente de tout Etat Partie dans lequel une action est engagée pour des créances soumises à limitation. Le fonds est constitué à concurrence du montant tel qu'il est calculé selon les dispositions des articles 8 et 7 applicables aux créances dont cette personne peut être responsable, augmenté des intérêts courus depuis la date de l'événement donnant naissance à la responsabilité jusqu'à celle de la constitution du fonds. Tout fonds ainsi constitué n'est disponible que pour payer les créances à l'égard desquelles la limitation de la responsabilité peut être invoquée.

2. Un fonds peut être constitué, soit en consignnant la somme, soit en fournissant une garantie acceptable en vertu de la législation de l'Etat Partie dans lequel le

(2) Die nach Artikel 7 bestimmten Haftungshöchstbeträge gelten für die Gesamtheit der Ansprüche, die sich aus demselben Ereignis gegen eine oder mehrere der in Artikel 1 Absatz 2 bezeichneten Personen hinsichtlich des in Artikel 7 genannten Schiffes sowie gegen jeden ergeben, für dessen Handeln, Unterlassen oder Verschulden sie haften.

Artikel 10

Haftungsbeschränkung ohne Errichtung eines Haftungsfonds

(1) Eine Beschränkung der Haftung kann auch dann geltend gemacht werden, wenn ein Haftungsfonds im Sinn des Artikels 11 nicht errichtet worden ist. Ein Vertragsstaat kann jedoch in seinem innerstaatlichen Recht für den Fall, daß vor seinen Gerichten eine Klage zwecks Durchsetzung eines der Beschränkung unterliegenden Anspruchs erhoben wird, bestimmen, daß ein Haftpflichtiger das Recht auf Beschränkung der Haftung nur geltend machen darf, wenn ein Haftungsfonds nach diesem Übereinkommen errichtet worden ist oder bei Geltendmachung des Rechts auf Beschränkung der Haftung errichtet wird.

(2) Wird Haftungsbeschränkung ohne Errichtung eines Haftungsfonds geltend gemacht, so ist Artikel 12 entsprechend anzuwenden.

(3) Das Verfahren für die Anwendung dieses Artikels richtet sich nach dem innerstaatlichen Recht des Vertragsstaats, in dem die Klage erhoben wird.

Kapitel III

Haftungsfonds

Artikel 11

Errichtung des Fonds

(1) Derjenige, der haftbar gemacht wird, kann bei dem Gericht oder einer sonst zuständigen Behörde eines Vertragsstaats, in dem ein gerichtliches Verfahren wegen der Beschränkung unterliegender Ansprüche eingeleitet wird, einen Fonds errichten. Er hat den Fonds in Höhe derjenigen in den Artikeln 8 und 7 angeführten Beträge zu errichten, die für Ansprüche gelten, bezüglich deren seine Haftung in Betracht kommt, zuzüglich Zinsen vom Zeitpunkt des zur Haftung führenden Ereignisses bis zum Zeitpunkt der Errichtung des Fonds. Dieser Fonds steht zur Befriedigung nur der Ansprüche zur Verfügung, für die eine Beschränkung der Haftung geltend gemacht werden kann.

(2) Ein Fonds kann entweder durch Hinterlegung des Betrags oder durch Leistung einer Sicherheit errichtet werden, die nach dem Recht des Vertragsstaats,

fund is constituted and considered to be adequate by the court or other competent authority.

3. A fund constituted by one of the persons mentioned in par. 1 (a), (b) or (c) or par. 2 of art. 9 or his insurer shall be deemed constituted by all persons mentioned in par. 1 (a), (b) or (c) or par. 2, respectively.

Article 12

Distribution of the fund

1. Subject to the provisions of pars. 1, 2 and 3 of art. 8 and of art. 7, the fund shall be distributed among the claimants in proportion to their established claims against the fund.

2. If, before the fund is distributed, the person liable, or his insurer, has settled a claim against the fund such person shall, up to the amount he has paid, acquire by subrogation the rights which the person so compensated would have enjoyed under this Convention.

3. The right of subrogation provided for in par. 2 may also be exercised by persons other than those therein mentioned in respect of any amount of compensation which they may have paid, but only to the extent that such subrogation is permitted under the applicable national law.

4. Where the person liable or any other person establishes that he may be compelled to pay, at a later date, in whole or in part any such amount of compensation with regard to which such person would have enjoyed a right of subrogation pursuant to pars. 2 and 3 had the compensation been paid before the fund was distributed, the court or other competent authority of the State where the fund has been constituted may order that a sufficient sum shall be provisionally set aside to enable such person at such later date to enforce his claim against the fund.

Article 13

Bar to other actions

1. Where a limitation fund has been constituted in accordance with art. 11, any person having made a claim against the fund shall be barred from exercising any right in respect of such claim against any other assets of a person by or on behalf of whom the fund has been constituted.

2. After a limitation fund has been constituted in accordance with art. 11, any ship or other property, belonging to a person on behalf of whom the fund has been constituted, which has been

fonds est constitué, et considérée comme adéquate par le tribunal ou toute autre autorité compétente.

3. Un fonds constitué par l'une des personnes mentionnées aux alinéas a), b) ou c) du paragraphe 1 ou au paragraphe 2 de l'article 9, ou par son assureur, est réputé constitué par toutes les personnes visées aux alinéas a), b) ou c) du paragraphe 1 ou au paragraphe 2 respectivement.

Article 12

Répartition du fonds

1. Sous réserve des dispositions des paragraphes 1, 2 et 3 de l'article 8 et de celles de l'article 7, le fonds est réparti entre les créanciers, proportionnellement au montant de leurs créances reconnues contre le fonds.

2. Si, avant la répartition du fonds, la personne responsable, ou son assureur, a réglé une créance contre le fonds, cette personne est subrogée jusqu'à concurrence du montant qu'elle a réglé, dans les droits dont le bénéficiaire de ce règlement aurait joui en vertu de la présente Convention.

3. Le droit de subrogation prévu au paragraphe 2 peut aussi être exercé par des personnes autres que celles ci-dessus mentionnées, pour toute somme qu'elles auraient versée à titre de réparation, mais seulement dans la mesure où une telle subrogation est autorisée par la loi nationale applicable.

4. Si la personne responsable ou toute autre personne établit qu'elle pourrait être ultérieurement contrainte de verser en tout ou partie à titre de réparation une somme pour laquelle elle aurait joui d'un droit de subrogation en application des paragraphes 2 et 3 si cette somme avait été versée avant la distribution du fonds, le tribunal ou toute autre autorité compétente de l'Etat dans lequel le fonds est constitué peut ordonner qu'une somme suffisante soit provisoirement réservée pour permettre à cette personne de faire valoir ultérieurement ses droits contre le fonds.

Article 13

Fin de non-recevoir

1. Si un fonds de limitation a été constitué conformément à l'article 11, aucune personne ayant produit une créance contre le fonds ne peut être admise à exercer des droits relatifs à cette créance sur d'autres biens d'une personne au nom de laquelle le fonds a été constitué.

2. Après constitution d'un fonds de limitation conformément à l'article 11, tout navire ou tout autre bien appartenant à une personne au profit de laquelle le fonds a été constitué, qui a été saisi dans

in dem der Fonds errichtet wird, annehmbar ist und die vom Gericht oder der sonst zuständigen Behörde als angemessen erachtet wird.

(3) Ein Fonds, der von einer der in Artikel 9 Absatz 1 Buchstabe a, b oder c oder Absatz 2 angeführten Personen oder ihrem Versicherer errichtet worden ist, gilt als von allen in Artikel 9 Absatz 1 Buchstabe a, b oder c oder Absatz 2 angeführten Personen errichtet.

Artikel 12

Verteilung des Fonds

(1) Vorbehaltlich des Artikels 8 Absätze 1, 2 und 3 und des Artikels 7 wird der Fonds unter die Gläubiger im Verhältnis der Höhe ihrer festgestellten Ansprüche gegen den Fonds verteilt.

(2) Hat der Haftpflichtige oder sein Versicherer vor der Verteilung des Fonds einen Anspruch gegen den Fonds befriedigt, so tritt er bis zur Höhe des gezahlten Betrags in die Rechte ein, die dem so Entschädigten auf Grund dieses Übereinkommens zugestanden hätten.

(3) Das in Absatz 2 vorgesehene Eintrittsrecht kann auch von anderen als den darin genannten Personen für von ihnen gezahlte Entschädigungsbeträge ausgeübt werden, jedoch nur, soweit ein derartiger Eintritt nach dem anzuwendenden Innerstaatlichen Recht zulässig ist.

(4) Weist der Haftpflichtige oder ein anderer nach, daß er gezwungen sein könnte, einen solchen Entschädigungsbetrag, für den ihm ein Eintrittsrecht nach den Absätzen 2 und 3 zugestanden hätte, wenn die Entschädigung vor Verteilung des Fonds gezahlt worden wäre, zu einem späteren Zeitpunkt ganz oder teilweise zu zahlen, so kann das Gericht oder die sonst zuständige Behörde des Staates, in dem der Fonds errichtet worden ist, anordnen, daß ein ausreichender Betrag vorläufig zurückbehalten wird, um es dem Betreffenden zu ermöglichen, zu dem späteren Zeitpunkt seinen Anspruch gegen den Fonds geltend zu machen.

Artikel 13

Ausschluß anderer Klagen

(1) Ist ein Haftungsfonds nach Artikel 11 errichtet worden, so kann derjenige, der einen Anspruch gegen den Fonds geltend gemacht hat, für diesen Anspruch kein Recht mehr gegen das sonstige Vermögen einer Person geltend machen, durch oder für die der Fonds errichtet worden ist.

(2) Nach der Errichtung eines Haftungsfonds nach Artikel 11 kann ein Schiff oder sonstiges Vermögen, das einer Person gehört, für die der Fonds errichtet worden ist, und das im Hoheitsbe-

arrested or attached within the jurisdiction of a State Party for a claim which may be raised against the fund, or any security given, may be released by order of the court or other competent authority of such State. However, such release shall always be ordered if the limitation fund has been constituted:

- (a) at the port where the occurrence took place, or, if it took place out of port, at the first port of call thereafter; or
- (b) at the port of disembarkation in respect of claims for loss of life or personal injury; or
- (c) at the port of discharge in respect of damage to cargo; or
- (d) in the State where the arrest is made.

3. The rules of pars. 1 and 2 shall apply only if the claimant may bring a claim against the limitation fund before the court administering that fund and the fund is actually available and freely transferable in respect of that claim.

la juridiction d'un Etat Partie pour une créance qui peut être opposée au fonds, ou toute garantie fournie, peut faire l'objet d'une mainlevée ordonnée par le tribunal ou toute autre autorité compétente de cet Etat. Toutefois, cette mainlevée est toujours ordonnée si le fonds de limitation a été constitué:

- a) au port où l'événement s'est produit ou, si celui-ci s'est produit en dehors d'un port, au port d'escale suivant;
- b) au port de débarquement pour les créances pour mort ou lésions corporelles;
- c) au port de déchargement pour les créances pour dommages à la cargaison; ou.
- d) dans l'Etat où la saisie a lieu.

3. Les dispositions des paragraphes 1 et 2 ne s'appliquent que si le créancier peut produire une créance contre le fonds de limitation devant le tribunal administrant ce fonds et si ce dernier est effectivement disponible et librement transférable en ce qui concerne cette créance.

reich eines Vertragsstaats wegen eines möglichen Anspruchs gegen den Fonds mit Arrest belegt worden ist, oder eine geleistete Sicherheit auf Anordnung des Gerichts oder der sonst zuständigen Behörde dieses Staates freigegeben werden. Eine solche Freigabe muß angeordnet werden, wenn der Haftungsfonds errichtet worden ist

- a) in dem Hafen, in dem das Ereignis eingetreten ist, oder, falls es außerhalb eines Hafens eingetreten ist, in dem ersten danach angelaufenen Hafen,
- b) bei Ansprüchen wegen Tod oder Körperverletzung im Ausschiffungshafen,
- c) bei an der Ladung entstandenen Schäden im Löschhafen oder
- d) in dem Staat, in dem der Arrest ergangen ist.

(3) Die Absätze 1 und 2 gelten nur dann, wenn der Gläubiger einen Anspruch gegen den Fonds vor dem Gericht geltend machen kann, das den Fonds verwaltet, und wenn der Fonds für den Anspruch tatsächlich zur Verfügung steht und frei transferierbar ist.

Article 14

Governing law

Subject to the provisions of this chapter the rules relating to the constitution and distribution of a limitation fund, and all rules of procedure in connection therewith, shall be governed by the law of the State Party in which the fund is constituted.

Article 14

Loi applicable

Sous réserve des dispositions du présent chapitre, les règles relatives à la constitution et à la répartition d'un fonds de limitation, ainsi que toutes règles de procédure en rapport avec elles, sont régies par la loi de l'Etat Partie dans lequel le fonds est constitué.

Artikel 14

Anzuwendendes Recht

Vorbehaltlich dieses Kapitels richten sich die Errichtung und die Verteilung eines Haftungsfonds sowie das gesamte damit zusammenhängende Verfahren nach dem Recht des Vertragsstaats, in dem der Fonds errichtet wird.

Chapter IV

Scope of application

Article 15

1. This Convention shall apply whenever any person referred to in art. 1 seeks to limit his liability before the court of a State Party or seeks to procure the release of a ship or other property or the discharge of any security given within the jurisdiction of any such State. Nevertheless, each State Party may exclude wholly or partially from the application of this Convention any person referred to in art. 1, who at the time when the rules of this Convention are invoked before the courts of that State does not have his habitual residence in a State Party, or does not have his principal place of business in a State Party or any ship in relation to which the right of limitation is invoked or whose release is sought and which does not at the time specified above fly the flag of a State Party.

Chapitre IV

Champ d'application

Article 15

1. La présente Convention s'applique chaque fois qu'une personne mentionnée à l'article 1 cherche à limiter sa responsabilité devant le tribunal d'un Etat Partie, tente de faire libérer un navire ou tout autre bien saisi ou de faire lever toute autre garantie fournie devant la juridiction dudit Etat. Néanmoins, tout Etat Partie a le droit d'exclure totalement ou partiellement de l'application de la présente Convention toute personne mentionnée à l'article 1 qui n'a pas, au moment où les dispositions de la présente Convention sont invoquées devant les tribunaux de cet Etat, sa résidence habituelle ou son principal établissement dans l'un des Etats Parties ou dont le navire à l'égard duquel elle invoque le droit de limiter sa responsabilité ou dont elle veut obtenir la libération, ne bat pas, à la date ci-dessus prévue, le pavillon de l'un des Etats Parties.

Kapitel IV

Anwendungsbereich

Artikel 15

(1) Dieses Übereinkommen findet in jedem Fall Anwendung, in dem eine in Artikel 1 bezeichnete Person vor dem Gericht eines Vertragsstaats eine Beschränkung ihrer Haftung geltend macht oder im Hoheitsbereich eines Vertragsstaats die Freigabe eines Schiffes oder sonstigen Vermögensgegenstands oder einer geleisteten Sicherheit betreibt. Diesen ungeschützt kann jeder Vertragsstaat jede in Artikel 1 bezeichnete Person, die zur Zeit der Berufung auf die Bestimmungen dieses Übereinkommens vor den Gerichten dieses Staates ihren gewöhnlichen Aufenthalt oder ihre Hauptniederlassung nicht in einem Vertragsstaat hat, oder jedes Schiff, für das eine Beschränkung der Haftung geltend gemacht oder dessen Freigabe betrieben wird und das zu der oben angegebenen Zeit nicht die Flagge eines Vertragsstaats führt, von der Anwendung dieses Übereinkommens ganz oder teilweise ausschließen

COMPULSORY AUCTION OF IMMOVABLE PROPERTY ACT (ZVG)

Cf Schoenfelder Deutsche Gesetze No 108.

Zwangsversteigerung von Schiffen, Schiffsbauwerken und Luftfahrzeugen im Wege der Zwangsvollstreckung

Erster Titel.* Zwangsversteigerung von Schiffen und Schiffsbauwerken**

§ 162.* [Anzuwendende Vorschriften]** Auf die Zwangsversteigerung eines im Schiffsregister eingetragenen Schiffs oder eines Schiffsbauwerks, das im Schiffsbauregister eingetragen ist oder in dieses Register eingetragen werden kann, sind die Vorschriften des Ersten Abschnitts entsprechend anzuwenden, soweit sich nicht aus den §§ 163 bis 170 a etwas anderes ergibt.

§ 163.† [Zuständiges Amtsgericht; Beteiligte] (1) Für die Zwangsversteigerung eines eingetragenen Schiffs ist als Vollstreckungsgericht das Amtsgericht zuständig, in dessen Bezirk sich das Schiff befindet; § 1 Abs. 2 gilt entsprechend.

(2) Für das Verfahren tritt an die Stelle des Grundbuchs das Schiffsregister.

(3) ¹ Die Träger der Sozialversicherung einschließlich der Arbeitslosenversicherung gelten als Beteiligte, auch wenn sie eine Forderung nicht angemeldet haben. ² Bei der Zwangsversteigerung eines Seeschiffes vertritt die Seeberufsgenossenschaft, bei der Zwangsversteigerung eines Binnenschiffes die Binnenschiffahrts-Berufsgenossenschaft die übrigen Versicherungsträger gegenüber dem Vollstreckungsgericht.

§ 164.* [Voraussetzungen des Antrags]** Die Beschränkung des § 17 gilt für die Zwangsversteigerung eines eingetragenen Schiffs nicht, soweit sich aus den Vorschriften des Handelsgesetzbuchs oder des Gesetzes, betreffend die privatrechtlichen Verhältnisse der Binnenschifffahrt, etwas anderes ergibt: die hiernach zur Begründung des Antrags auf Zwangsversteigerung erforderlichen Tatsachen sind durch Urkunden glaubhaft zu machen, soweit sie nicht dem Gericht offenkundig sind; dem Antrag auf Zwangsversteigerung ist ein Zeugnis der Registerbehörde über die Eintragung des Schiffs im Schiffsregister beizufügen.

* Abschnittsüberschrift neu gefaßt und Titelüberschrift eingefügt durch Gesetz vom 26. 2. 1959 (BGBl. I S. 57).

** Beachte hierzu auch § 482 Handelsgesetzbuch – abgedruckt in Anm. zu § 931 ZPO (Nr. 100) – sowie Gesetz über Vollstreckungsschutz für die Binnenschifffahrt vom 24. 5. 1933 (RGBl. I S. 289) mit Änderung durch Gesetz vom 30. 10. 1934 (RGBl. I S. 1082), vom 20. 8. 1975 (BGBl. I S. 2189) und vom 1. 2. 1979 (BGBl. I S. 127).

*** §§ 162 und 164 neu gefaßt durch Verordnung vom 21. 12. 1940 (RGBl. I S. 1609).

† § 163 neu gefaßt durch Verordnung vom 21. 12. 1940 (RGBl. I S. 1609), Abs. 1 Halbsatz 2 neu gefaßt mit Wirkung vom 1. 7. 1979 durch Gesetz vom 1. 2. 1979 (BGBl. I S. 127), Abs. 3 neu gefaßt durch Seerechtsänderungsgesetz vom 21. 6. 1972 (BGBl. I S. 966).

ZVG §§ 165–168 b

§ 165.* [Bewachung und Verwahrung des Schiffes] (1) ¹ Bei der Anordnung der Zwangsversteigerung hat das Gericht zugleich die Bewachung und Verwahrung des Schiffes anzuordnen. ² Die Beschlagnahme wird auch mit der Vollziehung dieser Anordnung wirksam.

(2) ¹ Das Gericht kann zugleich mit der einstweiligen Einstellung des Verfahrens im Einverständnis mit dem betreibenden Gläubiger anordnen, daß die Bewachung und Verwahrung einem Treuhänder übertragen wird, den das Gericht auswählt. ² Der Treuhänder untersteht der Aufsicht des Gerichts und ist an die ihm erteilten Weisungen des Gerichts gebunden. ³ Das Gericht kann ihn im Einverständnis des Gläubigers auch ermächtigen, das Schiff für Rechnung und im Namen des Schuldners zu nutzen. ⁴ Über die Verwendung des Reinertrages entscheidet das Gericht. ⁵ In der Regel soll er nach den Grundsätzen des § 155 verteilt werden.

§ 166. [Wirkung gegen den Schiffseigner]** (1) Ist gegen den Schiffer auf Grund eines vollstreckbaren Titels, der auch gegenüber dem Eigentümer wirksam ist, das Verfahren angeordnet, so wirkt die Beschlagnahme zugleich gegen den Eigentümer.

(2) Der Schiffer gilt in diesem Falle als Beteiligter nur so lange, als er das Schiff führt; ein neuer Schiffer gilt als Beteiligter, wenn er sich bei dem Gerichte meldet und seine Angabe auf Verlangen des Gerichts oder eines Beteiligten glaubhaft macht.

§ 167. [Bezeichnung bei Terminsbestimmung]** (1) Die Bezeichnung des Schiffes in der Bestimmung des Versteigerungstermins soll nach dem Schiffsregister erfolgen.

(2) Die im § 37 Nr. 4 bestimmte Aufforderung muß ausdrücklich auch auf die Rechte der Schiffsgläubiger hinweisen.

§ 168. [Bekanntmachung]** (1) Die Terminsbestimmung soll auch durch ein geeignetes Schifffahrtssachblatt*** bekanntgemacht werden; der *Reichsminister der Justiz* kann hierüber nähere Bestimmungen erlassen.

(2) Befindet sich der Heimatshafen oder Heimatsort des Schiffes in dem Bezirk eines anderen Gerichts, so soll die Terminsbestimmung auch durch das für Bekanntmachungen dieses Gerichts bestimmte Blatt bekanntgemacht werden.

(3) Die im § 39 Abs. 2 vorgesehene Anordnung ist unzulässig.

§ 168 a.† (aufgehoben)

§ 168 b. [Anmeldung beim Registergericht vor Terminsbestimmung]** ¹ Hat ein Schiffsgläubiger sein Recht innerhalb der letzten sechs Monate vor der Bekanntmachung der Terminsbestimmung bei dem Registergericht angemeldet, so gilt die Anmeldung als bei dem Versteigerungsgericht bewirkt.

* § 165 Abs. 2 eingefügt durch Gesetz vom 20. 8. 1953 (BGBl. I S. 952).

** § 166 Abs. 1 und § 167 Abs. 2 neu gefaßt sowie § 168 Abs. 1 und § 168 b eingefügt durch Verordnung vom 21. 12. 1940 (RGBl. I S. 1609).

*** Als Schifffahrtssachblatt kommen in Betracht für Binnenschiffe die „Binnenschifffahrtsnachrichten“, 41 Duisburg-Ruhrort, Dammstr. 15. und „Die Rheinschifffahrt“, 68 Mannheim 23, Rheinvorlandstr. 5, für Seeschiffe die Seeschifffahrtszeitschrift „Hansa“, 2 Hamburg 11, Stubbenhuk 10.

† § 168 a eingefügt durch Verordnung vom 21. 12. 1940 (RGBl. I S. 1609) und aufgehoben durch Gesetz vom 4. 12. 1968 (BGBl. I S. 1295).

§§ 168 c-169 a ZVG

² Das Registergericht hat bei der Übersendung der im § 19 Abs. 2 bezeichneten Urkunden und Mitteilungen die innerhalb der letzten sechs Monate bei ihm eingegangenen Anmeldungen an das Versteigerungsgericht weiterzugeben.

§ 168 c.* [Schiffshypothek in ausländischer Währung] Für die Zwangsversteigerung eines Schiffes, das mit einer Schiffshypothek in ausländischer Währung belastet ist, gelten folgende Sonderbestimmungen:

1. Die Terminbestimmung muß die Angabe, daß das Schiff mit einer Schiffshypothek in ausländischer Währung belastet ist, und die Bezeichnung dieser Währung enthalten.
2. ¹ In dem Zwangsversteigerungstermin wird vor der Aufforderung zur Abgabe von Geboten festgestellt und bekanntgemacht, welchen Wert die in ausländischer Währung eingetragene Schiffshypothek nach dem amtlich ermittelten letzten Kurs in Deutscher Mark hat. ² Dieser Kurswert bleibt für das weitere Verfahren maßgebend.
3. ¹ Der bar zu zahlende Teil des geringsten Gebots wird in Deutscher Mark festgestellt. ² Die Gebote sind in Deutscher Mark abzugeben.
4. Der Teilungsplan wird in Deutscher Mark aufgestellt.
5. ¹ Wird ein Gläubiger einer in ausländischer Währung eingetragenen Schiffshypothek nicht vollständig befriedigt, so ist der verbleibende Teil seiner Forderung in der ausländischen Währung festzustellen. ² Die Feststellung ist für die Haftung mitbelasteter Gegenstände, für die Verbindlichkeit des persönlichen Schuldners und für die Geltendmachung des Ausfalls im Konkurs maßgebend.

§ 169. [Vorausverfügungen über Miet- oder Pachtzins; Schiffshypothek gegen Ersteher]** (1) ¹ Ist das Schiff einem Mieter oder Pächter überlassen, so gelten die Vorschriften des § 580 a des Bürgerlichen Gesetzbuchs entsprechend. ² Soweit nach § 580 a Abs. 2 für die Wirkung von Verfügungen und Rechtsgeschäften über den Miet- oder Pachtzins der Übergang des Eigentums in Betracht kommt, ist an dessen Stelle die Beschlagnahme des Schiffes maßgebend; ist der Beschluß, durch den die Zwangsversteigerung angeordnet wird, auf Antrag des Gläubigers dem Mieter oder Pächter zugestellt, so gilt mit der Zustellung die Beschlagnahme als dem Mieter oder Pächter bekannt.

(2) ¹ Soweit das Bargebot im Verteilungstermin nicht berichtigt wird, ist für die Forderung gegen den Ersteher eine Schiffshypothek an dem Schiff in das Schiffsregister einzutragen. ² Die Schiffshypothek entsteht mit der Eintragung, auch wenn der Ersteher das Schiff inzwischen veräußert hat. ³ Im übrigen gelten die Vorschriften des Gesetzes über Rechte an eingetragenen Schiffen und Schiffsbauwerken vom 15. November 1940 (Reichsgesetzbl. I S. 1499)*** über die durch Rechtsgeschäft bestellte Schiffshypothek.

§ 169 a.† [Kein Antrag auf Versagung des Zuschlags bei Seeschiffen] Auf die Zwangsversteigerung eines Seeschiffes sind die Vorschriften der §§ 74 a, 74 b und 85 a nicht anzuwenden.

* § 168 c eingefügt durch Gesetz vom 3. 5. 1963 (BGBl. I S. 293).

** § 169 neu gefaßt durch Verordnung vom 21. 12. 1940 (RGBl. I S. 1609), Abs. 2 Satz 1 neu gefaßt durch Gesetz vom 20. 8. 1953 (BGBl. I S. 952).

*** Abgedruckt unter Nr. 38.

† § 169 a eingefügt durch Gesetz vom 4. 12. 1968 (BGBl. I S. 1295) und geändert mit Wirkung vom 1. 7. 1979 durch Gesetz vom 1. 2. 1979 (BGBl. I S. 127).

ZVG §§ 170–171

§ 170. [Bewachung und Verwahrung des versteigerten Schiffes] (1) An die Stelle der nach § 94 Abs. 1 zulässigen Verwaltung tritt die gerichtliche Bewachung und Verwahrung des versteigerten Schiffes.

(2) Das Gericht hat die getroffenen Maßregeln aufzuheben, wenn der zu ihrer Fortsetzung erforderliche Geldbetrag nicht vorgeschossen wird.

§ 170 a.* [Zwangsversteigerung eines Schiffsbauwerks] (1) ¹ Die Zwangsversteigerung eines Schiffsbauwerks darf erst angeordnet werden, nachdem es in das Schiffsbauregister eingetragen ist. ² Der Antrag auf Anordnung der Zwangsversteigerung kann jedoch schon vor der Eintragung gestellt werden.

(2) ¹ § 163 Abs. 1, §§ 165, 167 Abs. 1, §§ 168 c, 169 Abs. 2, § 170 gelten sinngemäß. ² An die Stelle des Grundbuchs tritt das Schiffsbauregister. ³ Wird das Schiffsbauregister von einem anderen Gericht als dem Vollstreckungsgericht geführt, so soll die Terminsbestimmung auch durch das für Bekanntmachungen dieses Gerichts bestimmte Blatt bekanntgemacht werden. ⁴ An Stelle der im § 43 Abs. 1 bestimmten Frist tritt eine Frist von zwei Wochen, an Stelle der im § 43 Abs. 2 bestimmten Frist eine solche von einer Woche.

§ 171.** [Ausländische Schiffe] (1) Auf die Zwangsversteigerung eines ausländischen Schiffes, das, wenn es ein deutsches Schiff wäre, in das Schiffsregister eingetragen werden müßte, sind die Vorschriften des Ersten Abschnitts entsprechend anzuwenden, soweit sie nicht die Eintragung im Schiffsregister voraussetzen und sich nicht aus den folgenden Vorschriften etwas anderes ergibt.

(2) ¹ Als Vollstreckungsgericht ist das Amtsgericht zuständig, in dessen Bezirk sich das Schiff befindet; § 1 Abs. 2 gilt entsprechend. ² Die Zwangsversteigerung darf, soweit sich nicht aus den Vorschriften des Handelsgesetzbuchs oder des Gesetzes, betreffend die privatrechtlichen Verhältnisse der Binnenschifffahrt, etwas anderes ergibt, nur angeordnet werden, wenn der Schuldner das Schiff im Eigenbesitz hat; die hiernach zur Begründung des Antrags auf Zwangsversteigerung erforderlichen Tatsachen sind durch Urkunden glaubhaft zu machen, soweit sie nicht beim Gericht offenkundig sind.

(3) ¹ Die Terminsbestimmung muß die Aufforderung an alle Berechtigten, insbesondere an die Schiffsgläubiger, enthalten, ihre Rechte spätestens im Versteigerungstermin vor der Aufforderung zur Abgabe von Geboten anzumelden und, wenn der Gläubiger widerspricht, glaubhaft zu machen, widrigenfalls die Rechte bei der Verteilung des Versteigerungserlöses dem Anspruch des Gläubigers und den übrigen Rechten nachgesetzt werden würden. ² Die Terminsbestimmung soll, soweit es ohne erhebliche Verzögerung des Verfahrens tunlich ist, auch den aus den Schiffspapieren ersichtlichen Schiffsgläubigern und sonstigen Beteiligten zugestellt und, wenn das Schiff im Schiffsregister eines fremden Staates eingetragen ist, der Registerbehörde mitgeteilt werden.

* § 170a eingefügt durch Verordnung vom 21. 12. 1940 (RGBl. I S. 1609), Abs. 2 geändert durch Gesetz vom 8. 5. 1963 (BGBl. I S. 293).

** § 171 neu gefaßt durch Verordnung vom 21. 12. 1940 (RGBl. I S. 1609), Abs. 2 Satz 1 Halbsatz 2 neu gefaßt mit Wirkung vom 1. 7. 1979 durch Gesetz vom 1. 2. 1979 (BGBl. I S. 127), Abs. 3 Satz 1 geändert durch Verordnung vom 27. 1. 1944 (RGBl. I S. 47), Abs. 5 Satz 1 neu gefaßt durch Gesetz vom 4. 12. 1968 (BGBl. I S. 1295).

ZVG

(4) ¹ Die Vorschriften über das geringste Gebot sind nicht anzuwenden. ² Das Meistgebot ist in seinem ganzen Betrag durch Zahlung zu berichtigen.

(5) ¹ Die Vorschriften der §§ 165, 166, 168 Abs. 1 und 3, §§ 169 a, 170 Abs. 1 sind anzuwenden. ² Die vom Gericht angeordnete Überwachung und Verwahrung des Schiffs darf erst aufgehoben und das Schiff dem Ersteher erst übergeben werden, wenn die Berichtigung des Meistgebots oder die Einwilligung der Beteiligten nachgewiesen wird.

A P P E N D I X VIII

A. Civil Code (BGB)1. Germanpara 232: (Arten der Sicherheitsleistung)

(1) Wer Sicherheit zu leisten hat, kann dies bewirken durch Hinterlegung von Geld oder Wertpapieren, durch Verpfaendung von Forderungen, die in das Reichsschuldbuch oder in das Staatsschuldbuch eines Bundesstaates eingetragen sind, durch Verpfaendung beweglicher Sachen, durch Bestellung von Schiffshypotheken an Schiffen oder Schiffsbauwerken, die in einem deutschen Schiffsregister oder Schiffsbauregister eingetragen sind, durch Bestellung von Hypotheken an inlaendischen Grundstuecken, durch Verpfaendung von Forderungen, fuer die eine Hypothek an einem inlaendischen Grundstuecke besteht, oder durch Verpfaendung von Grundsulden oder Rentenschulden an inlaendischen Grundstuecken.

(2) Kann die Sicherheit nicht in dieser Weise geleistet werden, so ist die Stellung eines tauglichen Buergen zulaessig.

para 233: (Wirkung der Hinterlegung)

Mit der Hinterlegung erwirbt der Berechtigte ein Pfandrecht an dem hinterlegten Gelde oder an den hinterlegten Wertpapieren und, wenn das Geld oder die Wertpapiere in das Eigentum des Fiskus oder der als Hinterlegungsstelle bestimmten Anstalt uebergehen, ein Pfandrecht an der Forderung auf Rueckerstattung.

para 249: (Art und Umfang des Schadensersatzes)

Wer zum Schadensersatz verpflichtet ist, hat den Zustand herzustellen, der bestehen wuerde, wenn der zum Ersatze verpflichtende Umstand nicht eingetreten waere. Ist wegen Verletzung einer Person oder wegen Beschaedigung einer Sache Schadensersatz zu leisten, so kann der Glaebiger statt der Herstellung den dazu erforderlichen Geldbetrag verlangen.

para 250: (Schadensersatz in Geld nach Fristsetzung)

Der Glaebiger kann dem Ersatzpflichtigen zur Herstellung eine angemessene Frist mit der Erklaerung bestimmen, dass er die Herstellung nach dem Ablaufe der Frist ablehne. Nach dem Ablaufe der Frist kann der Glaebiger den Ersatz in Geld verlangen, wenn nicht die Herstellung rechtzeitig erfolgt; der Anspruch auf die Herstellung ist ausgeschlossen.

para 251: (Schadensersatz in Geld ohne Fristsetzung)

(1) Soweit die Herstellung nicht moeglich oder zur Entschaedigung des Glaebigers nicht genuegend ist, hat der Ersatzpflichtige den Glaebiger in Geld zu entschaeidigen.

(2) Der Ersatzpflichtige kann den Glaebiger in Geld entschaeidigen, wenn die Herstellung nur mit unverhaeltnismaessigen Aufwendungen moeglich ist.

para 252: (Entgangener Gewinn)

Der zu ersetzende Schaden umfasst auch den entgangenen Gewinn. Als entgangen gilt der Gewinn, welcher nach dem gewoehnlichen Laufe der Dinge oder nach den besonderen Umstaenden, insbesondere nach den getroffenen Anstalten und Vorkehrungen, mit Wahrscheinlichkeit erwartet werden konnte.

para 254: (Mitverschulden)

(1) Hat bei der Entstehung des Schadens ein Verschulden des Beschaedigten mitgewirkt, so haengt die Verpflichtung zum Ersatze sowie der Umfang des zu leistenden Ersatzes von den Umstaenden, insbesondere davon ab, inwieweit der Schaden vorwiegend von dem einen oder dem anderen Teile verursacht worden ist.

(2) Dies gilt auch dann, wenn sich das Verschulden des Beschaedigten darauf beschraenkt, dass er unterlassen hat, den Schuldner auf die Gefahr eines ungewoehnlich hohen Schadens aufmerksam zu machen, die der Schuldner weder kannte noch kennen musste, oder dass er unterlassen hat, den Schaden abzuwenden oder zu mindern. Die Vorschrift des Paragraph 278 findet entsprechende Anwendung.

para 1208: (Gutglaebiger Erwerb des Vorrangs)

Ist die Sache mit dem Rechte eines Dritten belastet, so geht das Pfandrecht dem Rechte vor, es sei denn, dass der Pfandglaebiger zur Zeit des Erwerbes des Pfandrechts in Ansehung des Rechtes nicht in gutem Glauben ist. Die Vorschriften des Paragraph 932 Abs.1 Satz 2, des Paragraph 935 und des Paragraph 936 Abs.3 finden entsprechende Anwendung.

2. English

- Translated by Ian S Forrester, Simon L Goren and Hans-Michael Ilgen, 1975.

para 232: (Types of security)

(1) If a person has to give security, he may do so
 by depositing money or securities,
 by pledge of claims which have been registered in the (Federal debt
 ledger) or the State debt ledger of one of the (States),
 by pledge of movables,
 by creation of a ship-mortgage on a ship or a ship under construction
 which is recorded in a German ship-register or ship-construction
 register,
 by creation of a mortgage on domestic land,
 by pledge of claims for which there exists a mortgage on domestic
 land or by pledge of land charges or annuity charges on domestic
 land.

(2) If security cannot be given in this manner it is permissible to
 furnish an appropriate guarantor.

para 233: (Effect of deposit)

By the deposit the person entitled acquires a right of pledge over
 the money or securities deposited, and if the money or the securities
 pass into the ownership of the Treasury or to the institution
 designated as the deposit office, a right of pledge on the claim for
 restitution.

para 249: (Compensation in kind)

A person who is obliged to make compensation shall restore the
 situation which would have existed if the circumstance rendering him
 liable to make compensation had not occurred. If compensation is
 required to be made for injury to a person or damage to a thing, the
 creditor may demand, instead of restitution in kind, the sum of money
 necessary for such restitution.

para 250: (Compensation in money after laying down a period of notice)

The creditor may fix a reasonable period for the restitution by the
 person liable to compensate with a declaration that he will refuse to
 accept restitution after the expiration of the period. After the
 expiration of the period the creditor may demand the compensation in
 money if the restitution is not effected in due time; the claim for
 restitution is barred.

para 251: (Compensation in money without laying down a period of notice)

(1) Insofar as restitution in kind is impossible or is insufficient to compensate the creditor, the person liable shall compensate him in money.

(2) The person liable may compensate the creditor in money if restitution in kind is possible only through disproportionate outlays.

para 252: (Lost profit)

The compensation shall also include lost profits. Profit is deemed to have been lost which could probably have been expected in the ordinary course of events, or according to the special circumstances, especially in the light of the preparations and arrangements made.

para 254: (Joint debts)

(1) If any fault of the injured party has contributed to causing the damage, the obligation to compensate the injured party and the extent of the compensation to be made depends upon the circumstances, especially upon how far the injury has been caused predominantly by the one or the other party.

(2) This applies also even if the fault of the injured party consisted only in an omission to call the attention of the debtor to the danger of unusually high damage which the debtor neither knew nor should have known, or in an omission to avert or mitigate the damage. The provision of para 278 applies mutatis mutandis.

para 1208: (Obtaining priority of rank in good faith)

If the thing is encumbered with the right of a third party, the right of pledge takes precedence over such right, unless the pledgee at the time of acquiring the right of pledge is not in good faith in respect of that right. The provisions of para 939(1) Sent.2, of para 935 and para 936(3) apply mutatis mutandis.

B. Constitution of Courts Act (GVG)1. Germanpara 14: (Besondere Gerichte)

Als besondere Gerichte werden Gerichte der Schifffahrt fuer die in den Staatsvertraegen bezeichneten Angelegenheiten zugelassen.

para 23: (Zustaendigkeit in Zivilsachen)

Die Zustaendigkeit der Amtsgerichte umfasst in buergerlichen Rechtsstreitigkeiten, soweit sie nicht ohne Ruecksicht auf den Wert des Streitgegenstandes den Landgerichten zugewiesen sind:

(1)

(2) ohne Ruecksicht auf den Wert des Streitgegenstandes:

(a)

(b) Streitigkeiten zwischen Reisenden und Wirten, Fuhrleuten, Schiffern, Floessern oder Auswanderungsexpedienten in den Einschiffungshaefen, die ueber Wirtszechen, Fuhrlohn, Ueberfahrtsgelder, Befoerderung der Reisenden und ihrer Habe und ueber Verlust und Beschaedigung der letzteren, sowie Streitigkeiten zwischen Reisenden und Handwerkern, die aus Anlass der Reise entstanden sind;

(c) bis (h).

para 184: (Deutsche Sprache)

Die Gerichtssprache ist deutsch.

2. English

- Translated in the Faculty of Arts, Department of German, University of Natal, 1988.

para 14: (Special courts of law)

As special Admiralty Courts courts for the matters defined in the international treaties are admitted.

para 23: (Jurisdiction in civil cases)

The jurisdiction of the local Courts encloses the following civil cases, unless they are transferred to the Higher District Courts (Landgerichten) due to the value of the matter in dispute:

(1)

(2) regardless of the value of the matter in dispute:

(a)

(b) disputes between travellers and landlords, carrier (carters), masters, men handling floating logs or emigration shipping clerks in ports of embarkation that started over restaurant bills, freight, passage moneys, transport of travellers and their belongings and over loss or damage of the latter, as well as disputes between travellers and craftsmen that started on the occasion of the journey;

(c) to (h).

para 184: (German language)

The official language used in Court is German.

C. Bankruptcy Law (KO)1. Germanpara 14: (Keine Einzelzwangsvollstreckung)

(1) Waehrend der Dauer des Konkursverfahrens finden Arreste und Zwangsvollstreckungen zugunsten einzelner Konkursglaebiger weder in das zur Konkursmasse gehoerige noch in das sonstige Vermoegen des Gemeinschuldners statt.

(2) Hinsichtlich der zur Konkursmasse gehoerigen Grundstuecke und eingetragenen Schiffe und Schiffsbauwerke sowie der fuer den Gemeinschuldner eingetragenen Rechte an Grundstuecken, an eingetragenen Schiffen und Schiffsbauwerken oder an eingetragenen Rechten kann waehrend der Dauer des Konkursverfahrens eine Vormerkung auf Grund einer einstweiligen Verfuegung zugunsten einzelner Konkursglaebiger nicht eingetragen werden.

para 117: (Pflichten des Konkursverwalters)

(1) Nach der Eröffnung des Verfahrens hat der Verwalter das gesamte zur Konkursmasse gehörende Vermögen sofort in Besitz und Verwaltung zu nehmen und dasselbe zu verwerten.

(2) Die Geschäftsbücher des Gemeinschuldners dürfen nur mit dem Geschäft im Ganzen und nur insoweit veraussetert werden, als sie zur Fortführung des Geschäftsbetriebs unentbehrlich sind.

para 126: (Zwangsverwaltung und Zwangsversteigerung)

Die Zwangsverwaltung und die Zwangsversteigerung der zur Masse gehörenden unbeweglichen Gegenstände kann bei der zuständigen Behörde durch den Konkursverwalter betrieben werden.

2. English

- Translated in the Faculty of Arts, Department of German, University of Natal, 1988.

para 14: (No separate execution)

(1) During the bankruptcy proceedings no arrests or execution in favour of single creditors in bankruptcy can be made, neither from the bankrupt's estate nor from any other estate of the common debtor.

(2) During the bankruptcy proceedings no caution regarding real property belonging to the bankrupt's estate and registered ships and ships under construction as well as regarding the common debtor's registered rights in real property, in registered ships and ships under construction or in registered rights can be have entered on grounds of an interim injunction in favour of single creditors in bankruptcy.

para 117: (Duties of trustee in bankruptcy)

(1) After the opening of the proceedings the trustee has to take possession and administration of the bankrupt's estate and utilize it.

(2) The business records of the common debtor may only be sold together with the business as a whole and only so far as they are necessary for the continuation of the course of business.

para 126: (Judicial Sequestration and Judicial Sale)

The judicial sequestration and the judicial sale of the immovable objects belonging to the bankrupt's estate may be pursued at the proper authority by a trustee in bankruptcy.

D. Composition Code of Procedure for Arrangements between Debtor and Creditor to avert Bankruptcy (VglO)

1. German

para 47: (Vollstreckungsverbot)

Die Vergleichsgläubiger sowie die im Paragraph 29 bezeichneten Gläubiger können nach der Eröffnung des Vergleichsverfahrens bis zur Rechtskraft der Entscheidung, die das Verfahren abschliesst, Zwangsvollstreckungen gegen den Schuldner nicht vornehmen.

para 124: (Arrest und einstweilige Verfügung)

Zwangsvollstreckung im Sinne dieses Gesetzes ist auch die Vollziehung eines Arrestes oder einer einstweiligen Verfügung.

2. English

- Translated in the Faculty of Arts, Department of German, University of Natal, 1988.

para 47: (Prohibition of execution)

The creditors in composition proceedings as well as the creditors mentioned in para 29, after the opening of the composition proceedings until the decision ending the proceedings becomes res judicata, cannot levy execution against the debtor.

para 124: (Arrest and interim injunction)

Execution in the meaning of this law is also the enforcement of an arrest or an interim injunction.

**PROTECTION OF BUSINESSES ACT
NO. 99 OF 1978**

[ASSENTED TO 20 JUNE, 1978]

[DATE OF COMMENCEMENT: 4 AUGUST, 1978]

*(English text signed by the State President)***as amended by**

Protection of Businesses Amendment Act, No. 114 of 1979

Protection of Business Amendment Act, No. 71 of 1984

Protection of Businesses Amendment Act, No. 87 of 1987

ACT

To restrict the enforcement in the Republic of certain foreign judgments, orders, directions, arbitration awards and letters of request; to prohibit the furnishing of information relating to businesses in compliance with foreign orders, directions or letters of request; and to provide for matters connected therewith.

1. Prohibition of enforcement of certain foreign judgments, orders, directions, arbitration awards and letters of request and furnishing of information relating to businesses in compliance with foreign orders, directions or letters of request.—(1) Notwithstanding anything to the contrary contained in any law or other legal rule, and except with the permission of the Minister of Economic Affairs—

(a) no judgment, order, direction, arbitration award, interrogatory, commission rogatoire, letters of request or any other request delivered, given or issued or emanating from outside the Republic and arising from any act or transaction contemplated in subsection (3), shall be enforced in the Republic;

[Para. (a) substituted by s. 1 (a) of Act No. 87 of 1987.]

(b) no person shall in compliance with or in response to any order, direction, interrogatory, commission rogatoire, letters of request or any other request issued or emanating from outside the Republic, furnish any information as to any business whether carried on in or outside the Republic.

[Para. (b) substituted by s. 1 (b) of Act No. 87 of 1987.]

(2) The permission contemplated in subsection (1) (b) may—

(a) be granted either by notice in the *Gazette* or by written authority addressed to a particular person;

(b) be granted subject to such conditions as the said Minister may deem fit;

(c) relate only to specified goods or businesses or classes of goods or businesses, or to orders, directions, interrogatories, commissions rogatoire, letters of request or any other request issued in or emanating from a specified country;

[Para. (c) substituted by s. 1 (c) of Act No. 87 of 1987.]

(d) if it is granted by notice in the *Gazette*, relate only to specified persons or classes of persons.

(3) In the application of subsection (1) (a) an act or transaction shall be an act or transaction which took place at any time, whether before or after the commencement of this Act, and is connected with the mining, production, importation, exportation, refinement, possession, use or sale of or ownership to any matter or material, of whatever nature, whether within, outside, into or from the Republic.

[Sub-s. (3) substituted by s. 1 of Act No. 114 of 1979 and by s. 1 (d) of Act No. 87 of 1987.]

1A. Prohibition of recognition or enforcement of certain judgments.—(1) No judgment delivered by a court outside the Republic, arising from any act or transaction referred to in section 1 (3) and directing the payment of multiple or punitive damages shall be recognized or enforced in the Republic, irrespective of whether or not the Minister has in terms of section 1 granted his consent as contemplated in that section.

(2) In this section and in section 1B “multiple or punitive damages” means that part of the amount awarded as damages which exceeds the amount determined by the court as compensation for the damage or loss actually sustained by the person to whom the damages have been awarded.

[S. 1A inserted by s. 1 of Act No. 71 of 1984.]

1B. Recovery of certain amounts paid by way of multiple or punitive damages.—

(1) (a) A qualifying defendant against whom a judgment for multiple or punitive damages has been delivered by a court outside the Republic, whether before or after the commencement of the Protection of Businesses Amendment Act, 1984, and who in compliance with that judgment has paid an amount to the person in whose favour the judgment has been delivered or to another person as against whom the qualifying defendant is liable to make a contribution in respect of such damages, may recover from the person in whose favour the judgment was delivered so much of the amount paid as exceeds the part attributable to compensation for damage or loss actually sustained.

(b) The “part” referred to in paragraph (a) shall be deemed to be that part of the amount paid which bears to the whole of it the same proportion as the amount assessed by the court which delivered the judgment as compensation for damage or loss actually sustained bears to the whole of the damages awarded.

(2) This section shall not apply—

(a) if the qualifying defendant at the material time carried on business outside the Republic and the proceedings in respect of which the judgment was given related to activities exclusively carried on outside the Republic in connection with that business; or

(b) if the qualifying defendant was at the material time ordinarily resident outside the Republic or, in the case of a juristic person, had at that time its principal place of business outside the Republic.

(3) In the application of subsection (1) an amount obtained by execution against the property of the qualifying defendant, or against the property of any company the interests of which are according to a judgment referred to in that subsection integrated with the interests of the qualifying defendant to an extent which requires that an act or omission of that company be regarded in law as an act or omission of the qualifying defendant also, shall be deemed to be an amount paid by the qualifying defendant, and in such application any person upon whom devolved, by succession or otherwise, the rights of the person in whose favour the judgment was delivered or of any person who is entitled to a contribution in respect of such damages, shall be deemed to be the person in whose favour the judgment was delivered or, as the case may be, the person who is entitled to such contribution.

(4) Where the person in whose favour a judgment for multiple or punitive damages was delivered is a company, any other company which is the controlling company or a controlled company of the first-mentioned company or is a company which is controlled by the same controlling company as controls the first-mentioned company, shall be liable, jointly and severally, together with the first-mentioned company, in respect of any liability imposed upon the first-mentioned company as contemplated in subsection (1).

(5) In this section, unless the context otherwise indicates—

“controlled company” means a controlled company as defined in section 1 of the Companies Act, 1973 (Act No. 61 of 1973), and “control” has a corresponding meaning;

“controlling company” means a controlling company as defined in section 1 of the Companies Act, 1973;

“material time” means the time when the proceedings were instituted pursuant to which a judgment for multiple or punitive damages was delivered;

“qualifying defendant” means—

- (a) a natural person who at the material time was domiciled or ordinarily resident in the Republic; or
- (b) a juristic person who at the material time was incorporated in the Republic; or
- (c) any person who at the material time carried on business in the Republic.

[S. 1B inserted by s. 1 of Act No. 71 of 1984.]

1C. Saving.—The provisions of section 1A shall not derogate from—

- (a) the provisions of section 1;
- (b) the power of the defendant to avail himself of any defence which he may by law raise in any action for the recognition or enforcement of a judgment of a court outside the Republic.

[S. 1C inserted by s. 1 of Act No. 71 of 1984.]

1D. Prohibition of recognition or enforcement of certain judgments, orders, directions, arbitration awards, interrogatories, commissions rogatoire, letters of request or other requests.—No judgment, order, direction, arbitration award, interrogatory, commission rogatoire, letters of request or any other request delivered, given or issued outside the Republic or emanating from outside the Republic and which arises from any act or transaction referred to in subsection (3) of section 1 shall be recognized or enforced in the Republic, irrespective of whether or not the Minister has given his consent in terms of that section, if such judgment, order, direction, arbitration award, interrogatory, commission rogatoire, letters of request or other request is connected with any liability which arises from any bodily injury of any person resulting directly or indirectly from the consumption or use of or exposure to any natural resource of the Republic, whether unprocessed or partially processed or wholly processed, or any product containing or processed from any such natural resource, unless the same liability would have arisen under the law of the Republic, as it existed at the time of the occurrence of the event which gave rise to the liability.

[S. 1D inserted by s. 2 of Act No. 87 of 1987.]

1E. Conduct of person against whom judgment was delivered in foreign country which shall not be regarded as submission by such person to jurisdiction of such court, and circumstances relating to such person which shall not be regarded as having conferred jurisdiction on such court.—(1) For the purposes of determining the question whether or not a judgment delivered by a court in a foreign country relating to any act or transaction referred to in section 1 (3) can be recognized or enforced in the Republic—

- (a) the person against whom the judgment was given shall not be regarded as having submitted to the jurisdiction of that court by reason only of the fact that he appeared, whether conditionally or otherwise, in the proceedings in question or of the fact that he took any steps in connection with such proceedings for the following purposes, or any one or more of them, namely—
 - (i) to contest the jurisdiction of that court;
 - (ii) to apply for the dismissal of the action in question or for the setting aside of the writ or summons in those proceedings on the ground that the court did not have the required jurisdiction;
 - (iii) to protect or to obtain the release of any property attached for the purpose of such proceedings, or threatened with attachment in those proceedings;

- (iv) to apply to the court not to exercise its jurisdiction, if it was a case where that court had a discretion to decide whether or not to exercise its jurisdiction;
 - (v) to apply to such court for the dismissal of, or a stay of, the proceedings on the ground that the matter should be referred to arbitration or to a court in another country for a decision;
 - (vi) to institute review proceedings in connection with, or to lodge an appeal against, any order made in the proceedings mentioned in paragraphs (i) to (v);
- (b) it shall not be regarded that such court had jurisdiction in respect of the person against whom such judgment was given merely on the ground of the fact that such person did business within the area of that court, unless such person, at the time when the events occurred which gave rise to the relevant proceedings, conducted a permanent business establishment within that area.

(2) Where the person against whom judgment was delivered by a court in a foreign country in respect of any act or transaction referred to in section 1 (3), entered appearance in the proceedings in which such judgment was given in order to defend the action on the merits thereof or took any other step in such proceedings in order to defend the action on the merits thereof, such entry of appearance and such step shall not be regarded as a submission to the jurisdiction of the court if in terms of the law governing such court and the proceedings conducted therein, such person was not entitled to contest the jurisdiction of the court unless he entered such appearance or took such step, as the case may be, in order to defend the action on the merits thereof.

[S. 1E inserted by s. 3 of Act No. 87 of 1987.]

1F. Foreign judgment to constitute *res judicata*.—It shall be a defence to any action brought in any court in the Republic if it is proved to the satisfaction of such court that the cause of action founding the action so brought was the subject of a judgment given by a court in a foreign country, if—

- (a) in terms of the laws of the foreign country the court which gave such judgment was competent to give that judgment;
- (b) in terms of such laws such judgment is final and conclusive; and
- (c) the parties to the proceedings in which such judgment was given, or their successors in title, are the same as the parties to the proceedings in the Republic.

[S. 1F inserted by s. 4 of Act No. 87 of 1987.]

1G. Application of sections 1D, 1E and 1F.—The provisions of sections 1D, 1E and 1F shall apply in respect of any judgment, order, direction, arbitration award, interrogatory, commission rogatoire, letters of request or other request, as the case may be, irrespective of whether it was or is delivered, given or issued before or after the commencement of the Protection of Businesses Amendment Act, 1987.

[S. 1G inserted by s. 5 of Act No. 87 of 1987.]

2. Offences and penalties.—Any person who contravenes the provisions of section 1 (1) (b) shall be guilty of an offence and on conviction liable to a fine not exceeding two thousand rand or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment.

3. Repeal of section 2 of Act 94 of 1974.—Section 2 of the Second General Law Amendment Act, 1974, is hereby repealed.

4. Short title and commencement.—This Act shall be called the Protection of Businesses Act, 1978, and shall come into operation on a date fixed by the State President by proclamation in the *Gazette*.

A P P E N D I X X

ADMIRALTY JURISDICTION REGULATION ACT OF 1983

Cf Government Gazette, 12 September 1983, No 8891.

ACT

To provide for the vesting of the powers of the admiralty courts of the Republic in the provincial and local divisions of the Supreme Court of South Africa, and for the extension of those powers; for the law to be applied by, and the procedure applicable in, those divisions; for the repeal of the Colonial Courts of Admiralty Act, 1890, of the United Kingdom, in so far as it applies in relation to the Republic; and for incidental matters.

(Afrikaans text signed by the State President.)
(Assented to 8 September 1983.)

BE IT ENACTED by the State President and the House of Assembly of the Republic of South Africa, as follows:—

Definitions.

1. (1) In this Act, unless the context indicates otherwise—
- (i) "admiralty action" means proceedings in terms of this Act for the enforcement of a maritime claim; (i) 5
 - (ii) "maritime claim" means—
 - (a) any claim relating to the ownership or possession of a ship;
 - (b) any claim relating to the ownership of a share in a ship or to any dispute between co-owners of a ship as to the ownership, possession, employment or earnings of that ship; 10
 - (c) any claim in respect of a mortgage, hypothecation, right of retention or pledge of, or charge on, a ship; 15
 - (d) any claim for damage caused by a ship, whether by collision or otherwise;
 - (e) any claim for damage done to a ship, whether by collision or otherwise;
 - (f) any claim for loss of life or personal injury caused 20 by a ship or any defect in a ship, or occurring in connection with the employment of a ship;
 - (g) any claim for loss of or damage to goods (including the baggage and personal belongings of the master or crew of a ship) carried or which ought to have 25 been carried in a ship, including a claim in terms of section 311 of the Merchant Shipping Act, 1951 (Act No. 57 of 1951); *
 - (h) any claim arising out of any agreement for or relating to the carriage of goods in a ship; 30
 - (i) any claim relating to any charterparty or the use or

*Section 311 repealed by s 5 of the Carriage of Goods by Sea Act of 1986.

- (j) any claim for or in the nature of salvage, including any claim relating to the sharing or apportionment of salvage and any claim by any person having a right in respect of property salvaged or which would, but for the negligence or default of the salvor or would-be salvor, have been salvaged: 5
- (k) any claim in the nature of towage or pilotage:
- (l) any claim in respect of goods supplied or services rendered to a ship for the employment or maintenance thereof: 10
- (m) any claim in respect of the design, construction, repair or equipment of any ship or any dock or harbour dues or any similar dues:
- (n) any claim by a master or member of the crew of a ship arising out of his employment: 15
- (o) any claim by a master, shipper, charterer or agent in respect of payments or disbursements made for or on behalf or on account of a ship or any ship-owner;
- (p) any claim relating to general average or arising out of any act claimed to be a general average act: 20
- (q) any claim arising out of bottomry or any respondentia bond;
- (r) any claim relating to marine insurance or any policy of marine insurance, including any claim by or against any association, society or mutual insurance organization concerned mainly with the protection and indemnity of its members in respect of any maritime claim: 25
- (s) any claim with regard to the forfeiture of any ship or any goods carried therein or for the restoration of any ship or any such goods forfeited: 30
- (t) any claim relating to the limitation of the liability of the owner of a ship or of any other person entitled to any similar limitation of liability: 35
- (u) any claim with regard to the distribution of a fund or any portion of a fund paid or to be paid into or to or held or to be held by a court in the exercise of its admiralty jurisdiction or an officer of such a court: 40
- (v) any claim relating to any maritime lien, whether or not falling under any of the preceding paragraphs:
- (w) any claim relating to the pollution of the sea or the seashore by oil or any other similar substance, whether in terms of the Prevention and Combating of Pollution of the Sea by Oil Act, 1981 (Act No. 6 of 1981), or otherwise, and any claim for a refund under that Act; 45
- (x) any claim for the enforcement of, or arising out of, any judgment or arbitration award relating to a maritime claim, whether given or made in the Republic or elsewhere;
- (y) any claim to an indemnity with regard to or arising out of any of the aforesaid claims and any claim in respect of any matter ancillary to or arising out of any of the aforesaid claims, including the attachment of property to found or to confirm jurisdiction, the giving or release of security, and the payment of interest; 55
- (z) any claim not falling under any of the previous paragraphs which a court of admiralty of the Republic referred to in the Colonial Courts of Admi- 60

- United Kingdom, could have heard and determined immediately before the commencement of this Act, or relating to any matter in respect of which any court of the Republic is empowered to exercise admiralty jurisdiction; (iii) 5
- (iii) "Minister" means the Minister of Justice; (iv)
- (iv) "rules" means the rules made under section 4 or in force thereunder; (v)
- (v) "ship" means any vessel used or capable of being used on the sea or internal waters, and includes any hovercraft, power boat, yacht, fishing boat, submarine vessel, barge, crane barge, floating crane, floating dock, oil or other floating rig, floating mooring installation or similar floating installation, whether self-propelled or not; (vi) 10 15
- (vi) "this Act" includes the rules. (ii)

(2) For the purposes of any law, whether of the Republic or not, relating to the prescription of or the limitation of time for the commencement of any action, suit, claim or proceedings, an admiralty action shall be deemed to have commenced— 20

(a) by the making of an application for the attachment of property to found jurisdiction if the application is granted and the attachment carried into effect;

(b) by the issue of any process for the institution of an action *in rem* if that process is thereafter served; 25

(c) by the service of any process by which that action is instituted.

Admiralty
jurisdiction of
Supreme Court.

2. (1) Subject to the provisions of this Act each provincial and local division, including a circuit local division, of the Supreme Court of South Africa shall have jurisdiction (hereinafter referred to as admiralty jurisdiction) to hear and determine any maritime claim (including, in the case of salvage, claims in respect of ships, cargo or goods found on land), irrespective of the place where it arose, of the place of registration of the ship concerned or of the residence, domicile or nationality of its owner. 30 35

(2) For the purposes of this Act the area of jurisdiction of a court referred to in subsection (1) shall be deemed to include that portion of the territorial waters of the Republic adjacent to the coastline of its area of jurisdiction.

Form of
proceedings.

3. (1) Subject to the provisions of this Act any maritime claim 40 may be enforced by an action *in personam*.

(2) An action *in personam* may only be instituted against a person—

- (a) resident or carrying on business at any place in the Republic; 45
- (b) whose property within the court's area of jurisdiction has been attached to found or to confirm jurisdiction;
- (c) who has consented or submitted to the jurisdiction of the court;
- (d) in respect of whom any court in the Republic has jurisdiction in terms of Chapter IV of the Insurance Act, 1943 (Act No. 27 of 1943); 50
- (e) in the case of a company, if the company has a registered office in the Republic.

(3) An action *in personam* may not be instituted in a court of 55 which the area of jurisdiction is not adjacent to the territorial waters of the Republic unless—

- (a) in the case of a claim contemplated in paragraph (a), (b), (i) or (r) of the definition of "maritime claim", the claim arises out of an agreement concluded within the 60 area of jurisdiction of that court;
- (b) in the case of a claim contemplated in paragraph (g) or (h) of that definition, the goods concerned are or were shipped under a bill of lading to or from a place

- (c) the maritime claim concerned relates to a fund within, or freight payable in, the area of jurisdiction of that court.
- (4) Without prejudice to any other remedy that may be available to a claimant or to the rules relating to the joinder of causes of action a maritime claim may be enforced by an action *in rem*—
- (a) if the claimant has a maritime lien over the property to be arrested; or
 - (b) if the owner of the property to be arrested would be liable to the claimant in an action *in personam* in respect of the cause of action concerned.
- (5) An action *in rem* shall be instituted by the arrest within the area of jurisdiction of the court concerned of property of one or more of the following categories against or in respect of which the claim lies:
- (a) The ship, with or without its equipment, furniture, stores or bunkers;
 - (b) the whole or any part of the equipment, furniture, stores or bunkers;
 - (c) the whole or any part of the cargo;
 - (d) the freight.
- (6) Subject to the provisions of subsection (9) an action *in rem*, other than such an action in respect of a maritime claim contemplated in paragraph (a), (b) or (c) of the definition of "maritime claim", may be brought by the arrest of an associated ship instead of the ship in respect of which the maritime claim arose.
- (7) (a) For the purposes of subsection (6) an associated ship means a ship, other than the ship in respect of which the maritime claim arose—
- (i) owned by the person who was the owner of the ship concerned at the time when the maritime claim arose; or
 - (ii) owned by a company in which the shares, when the maritime claim arose, were controlled or owned by a person who then controlled or owned the shares in the company which owned the ship concerned.
- (b) For the purposes of paragraph (a)—
- (i) ships shall be deemed to be owned by the same persons if all the shares in the ships are owned by the same persons;
 - (ii) a person shall be deemed to control a company if he has power, directly or indirectly, to control the company.
- (c) If a charterer or subcharterer of a ship by demise, and not the owner thereof, is alleged to be liable in respect of a maritime claim, the charterer or subcharterer, as the case may be, shall for the purposes of subsection (6) and this subsection be deemed to be the owner.
- (8) Property shall not be arrested and security therefor shall not be given more than once in respect of the same maritime claim by the same claimant.
- (9) The Minister may, by notice in the *Gazette* and subject to such conditions as he may prescribe, exclude from the provisions of subsection (6) any ship owned by a company named in the notice or by a company in which the shares are owned or controlled by a company so named.
- (10) (a) Property shall be deemed to have been arrested or attached and to be under arrest or attachment if at any time, whether before or after the arrest or attachment, security or an undertaking has been given to prevent

- (b) That security shall for the purposes of sections 9 and 10 be deemed to be the freight or the proceeds of the sale of the property.

Procedure and rules
of court.

4. (1) Subject to the provisions of this Act the provisions of the Supreme Court Act, 1959 (Act No. 59 of 1959), and the rules made under section 43 of that Act shall *mutatis mutandis* apply in relation to proceedings in terms of this Act except in so far as those rules are inconsistent with the rules referred to in subsection (2).

(2) The rules of the courts of admiralty of the Republic in force in terms of the Colonial Courts of Admiralty Act, 1890, of the United Kingdom, immediately before the commencement of this Act, shall be deemed to be rules made under section 43 (2) (a) of the Supreme Court Act, 1959, and shall apply in respect of proceedings in terms of this Act.

(3) The power of the Chief Justice to make rules under section 43 of the Supreme Court Act, 1959, shall include the power to make rules prescribing the following:

- (a) The appointment of any person or body for the assessment of fees and costs and the manner in which such fees and costs are to be assessed;
 - (b) measures aimed at avoiding circuitry or multiplicity of actions;
 - (c) the practice and procedure for referring to arbitration any matter arising out of proceedings relating to a maritime claim, and the appointment, remuneration and powers of an arbitrator.
- (4) (a) Notwithstanding anything to the contrary in any law relating to attachment to found or confirm jurisdiction, a court in the exercise of its admiralty jurisdiction may make an order for the attachment of the property concerned although the claimant is not an *incola* either of the area of jurisdiction of that court or of the Republic.
- (b) A court may make an order for the attachment of property not within the area of jurisdiction of the court at the time of the application or of the order, and such an order may be carried into effect when that property comes within the area of jurisdiction of the court.

Powers of court.

5. (1) A court may in the exercise of its admiralty jurisdiction permit the joinder in proceedings in terms of this Act of any person from whom any party to those proceedings is entitled to claim a contribution or an indemnification, or in respect of whom any question or issue in the action is substantially the same as a question or issue which has arisen or will arise between the party and the person to be joined and which should be determined in such a manner as to bind that person, whether or not the claim against the latter is a maritime claim and notwithstanding the fact that he is not otherwise amenable to the jurisdiction of the court, whether by reason of the absence of attachment of his property or otherwise.

(2) A court may in the exercise of its admiralty jurisdiction—

- (a) consider and decide any matter arising in connection with any maritime claim, notwithstanding that any such matter may not be one which would give rise to a maritime claim;
- (b) order any person to give security for costs or for any claim;
- (c) order that any arrest or attachment made or to be made or that anything done or to be done in terms of this Act or any order of the court be subject to such conditions as to the court appears just, whether as to the furnishing of security or the liability for costs, expenses, loss or damage caused or likely to be caused, or otherwise:

- (d) order that any security given be increased, reduced or discharged subject to such conditions as to the court appears just and, for the purpose of an increase of security, authorize the arrest of property notwithstanding the provisions of section 3 (8); 5
- (e) order that any matter pending or arising in proceedings before it be referred to an arbitrator or referee for decision or report and provide for the appointment, remuneration and powers of the arbitrator or referee and for the giving of effect to his decision or report; 10
- (f) make such order as to interest, the rate of interest in respect of any sum awarded by it and the date from which interest is to accrue, whether before or after the date of the commencement of the action, as to it appears just; 15
- (g) subject to the provisions of any law relating to exchange control, order payment to be made in such currency other than the currency of the Republic as in the circumstances of the case appears appropriate, and make such order as seems just as to the date upon which the calculation of the conversion from any currency to any other currency should be based. 20
- (3) (a) A court may in the exercise of its admiralty jurisdiction order the arrest of any property if—
- (i) the person seeking the arrest has a claim enforceable by an action *in rem* against the property concerned or which would be so enforceable but for an arbitration or proceedings contemplated in subparagraph (ii); 25
- (ii) the claim is or may be the subject of an arbitration or any proceedings contemplated, pending or proceeding either in the Republic or elsewhere and whether or not it is subject to the law of the Republic. 30
- (b) Unless the court orders otherwise any property so arrested shall be deemed to be property arrested in an action in terms of this Act. 35
- (c) A court may order that any security for or the proceeds of any such property shall be held as security for any such claim or pending the outcome of the arbitration or proceedings. 40
- (4) Any person who makes an excessive claim or requires excessive security or without good cause obtains the arrest of property or an order of court, shall be liable to any person suffering loss or damage as a result thereof for that loss or damage. 45
- (5) (a) A court may in the exercise of its admiralty jurisdiction at any time on the application of any interested person or of its own motion—
- (i) make an order for the examination, testing or inspection by any person of any ship, cargo, documents or any other thing, if it appears to the court to be necessary or desirable for the purpose of determining any maritime claim which has been or may be brought, or any defence thereto; 50
- (ii) order that any record, notes or recording, whether then in existence or not, be transcribed or translated. 55
- (b) The provisions of this Act shall not affect any privilege relating to any document in the possession of, or any communication to or the giving of any evidence by, any person. 60
6. (1) Notwithstanding anything to the contrary in any law or the common law contained a court in the exercise of its admiralty jurisdiction shall—
- (a) with regard to any matter in respect of which a court of admiralty of the Republic referred to in the Colonial Courts of Admiralty Act, 1890, of the United King- 65

dom. had jurisdiction immediately before the commencement of this Act, apply the law which the High Court of Justice of the United Kingdom in the exercise of its admiralty jurisdiction would have applied with regard to such a matter at such commencement, in so far as that law can be applied;

(b) with regard to any other matter, apply the Roman-Dutch law applicable in the Republic.

(2) The provisions of subsection (1) shall not derogate from the provisions of any law of the Republic applicable to any of the matters contemplated in paragraph (a) or (b) of that subsection.

(3) A court may in the exercise of its admiralty jurisdiction receive as evidence statements which would otherwise be inadmissible as being in the nature of hearsay evidence, subject to such directions and conditions as the court thinks fit.

(4) The weight to be attached to evidence contemplated in subsection (3) shall be in the discretion of the court.

(5) The provisions of subsection (1) shall not supersede any agreement relating to the system of law to be applied in the event of a dispute.

Disputes as to
venue or
jurisdiction.

7. (1) (a) A court may decline to exercise its admiralty jurisdiction in any proceedings instituted or to be instituted, if it is of the opinion that the action can more appropriately be adjudicated upon by another court in the Republic or by any other court, tribunal or body elsewhere.

(b) A court may stay any proceedings in terms of this Act if it is agreed by the parties concerned that the matter in dispute be referred to arbitration in the Republic or elsewhere, or if for any other sufficient reason the court is of the opinion that the proceedings should be stayed.

(2) When in any proceedings before a provincial or local division, including a circuit local division, of the Supreme Court of South Africa the question arises as to whether a matter pending or proceeding before that court is one relating to a maritime claim, the court shall forthwith decide that question, and if the court decides that—

(a) the matter is one relating to a maritime claim, it shall be proceeded with in a court competent to exercise its admiralty jurisdiction, and any property attached to found jurisdiction shall be deemed to have been attached in terms of this Act;

(b) the matter is not one relating to a maritime claim, the action shall proceed in the division having jurisdiction in respect of the matter: Provided that if jurisdiction was conferred by the attachment of property by a person other than an *incola* of the court, the court may order the action to proceed as if the property had been attached by an *incola*, or may make such other order, including an order dismissing the action for want of jurisdiction, as to it appears just.

(3) The provisions of subsection (2) shall not affect any other objection to the jurisdiction of any court.

(4) No appeal shall lie against any decision or order made under subsection (2).

(5) The Minister may, on the recommendation of the judge president of any provincial division of the Supreme Court of South Africa, submit the question as to whether or not a particular matter gives rise to a maritime claim, to the Appellate Division of the Supreme Court of South Africa and may cause that question to be argued before that Division so that it may decide the question for future guidance.

- Arrests. 8. (1) Where property has been attached to found or to confirm jurisdiction at common law, that property may nevertheless be arrested in connection with a maritime claim, subject to such directions as the court thinks fit.
- (2) Where property has been attached to found or to confirm jurisdiction relating to a maritime claim, sections 9, 10 and 11 of this Act shall apply as if the property had been arrested in an action *in rem*, whether or not the property has been arrested in terms of this Act. 5
- Sale of arrested property. 9. A court may in the exercise of its admiralty jurisdiction at any time order that any property which has been arrested in terms of this Act be sold and the proceeds thereof be held as a fund in the court or otherwise dealt with. 10
- Vesting of property in trustee, liquidator or judicial manager excluded in certain cases. 10. Any property arrested in respect of a maritime claim or any security given in respect of any property, or the proceeds of any property sold in execution or under an order of a court in the exercise of its admiralty jurisdiction, shall not, except as provided in section 11 (10), vest in a trustee in insolvency and shall not form part of the assets to be administered by a liquidator or judicial manager of the owner of the property or of any other person who might otherwise be entitled to such property, security or proceeds, and no proceedings in respect of such property, security or proceeds, or the claim in respect of which that property was arrested, shall be stayed by or by reason of any sequestration, winding-up or judicial management with respect to that owner or person. 25
- Ranking of claims. 11. (1) Claims with regard to a fund in a court in terms of this Act or security given in respect of property in connection with a maritime claim or the proceeds of property sold pursuant to an order or in the execution of a judgment of a court in terms of this Act shall be paid in the following order: 30
- (a) Claims in respect of costs and expenses incurred to preserve the property or to procure its sale, and in respect of the distribution of the proceeds of the sale;
 - (b) claims to a preference based on possession, whether by way of a right of retention or otherwise; 35
 - (c) claims which arose within one year before the commencement of the proceedings, in respect of—
 - (i) wages and other sums due to or payable in respect of the master, officers and other members of the ship's complement, in connection with their employment on the ship; 40
 - (ii) port, canal and other waterways dues and pilotage dues;
 - (iii) loss of life or personal injury, whether occurring on land or on water, directly connected with the employment of the ship; 45
 - (iv) loss of or damage to property, whether occurring on land or on water, resulting from delict and not capable of being based on contract, directly connected with the operation of the ship; 50
 - (v) the repair of a ship or the supply of goods or the rendering of services to a ship for the employment or maintenance thereof;
 - (vi) salvage, removal of wreck and contribution in respect of a general average act or sacrifice; 55
 - (d) claims in respect of mortgages, hypothecations, rights of retention of, and other charges on, the ship, effected in accordance with the law of the flag of the ship;
 - (e) claims in respect of any maritime lien not falling under any category mentioned in any of the preceding paragraphs; 60
 - (f) all other claims. 65
- (2) The claims referred to in paragraphs (b) to (f) of subsec-

tion (1) shall rank after any claim referred to in paragraph (a) of that subsection in accordance with the following rules:

- (a) A claim referred to in the said paragraph (b) shall rank before any claim accruing after it, other than a claim referred to in paragraph (c) (vi) of subsection (1); 5
- (b) a claim referred to in paragraph (c) (vi) of that subsection, whether or not arising within the period of one year referred to in that subsection, shall take priority over any claim arising before that claim;
- (c) otherwise claims referred to in any of the subparagraphs of the said paragraph (c) shall rank *pari passu* with claims mentioned in the same subparagraph, irrespective of when such claims arose; 10
- (d) claims referred to in paragraph (d) of subsection (1) shall rank according to the law of the flag of the ship; 15
- (e) claims referred to in paragraph (e) of subsection (1) shall rank among themselves in their priority according to law;
- (f) claims referred to in paragraph (f) of subsection (1) shall rank in the order of preference according to the law of insolvency; 20
- (g) save as otherwise provided in this subsection, claims shall rank in the order set forth in subsection (1).

(3) For the purposes of subsection (2) a claim in connection with salvage or the removal of wreck shall be deemed to have accrued when the salvage operation or the removal of the wreck, as the case may be, terminated, and a claim in connection with contribution in respect of general average, when the general average act was performed. 25

(4) A court may in the exercise of its admiralty jurisdiction, on the application of any interested person, make an order declaring how any claim against the proceeds of any sale of property shall rank. 30

(5) Any person who has at any time paid any claim or any part thereof which, if not paid, would have ranked under subsection (1), shall be entitled to all the rights, privileges and preferences to which the person paid would have been entitled if the claim had not been paid. 35

(6) A judgment or an arbitration award shall rank in accordance with the claim in respect of which it was given or made. 40

(7) Interest on any claim and the costs of enforcing a claim shall for the purposes of this section be deemed to form part of the claim.

(8) Where the fund arises by reason of an action *in rem* against an associated ship, the ranking of claims set out in this section shall, notwithstanding the provisions of section 3 (6), apply with regard to claims in respect of the associated ship, and claims in respect of the ship concerned shall be paid thereafter in the order set out in this section. 45

(9) Notwithstanding the provisions of this section any undertaking or security given with respect to a particular claim shall be applied in the first instance in satisfaction of that claim. 50

(10) Any balance remaining after all claims referred to in paragraphs (a) to (e) of subsection (1) have been paid shall be paid over to the trustee, liquidator or judicial manager who, but for the provisions of section 10, would have been entitled thereto. 55

Appeals.

12. A judgment or order of a court in the exercise of its admiralty jurisdiction shall be subject to appeal as if such judgment or order were that of a provincial or local division of the Supreme Court of South Africa in civil proceedings. 60

Amendment of section 2 of Act 57 of 1951, as amended by section 3 of Act 30 of 1959.

13. Section 2 of the Merchant Shipping Act, 1951 (Act No. 57 of 1951), is hereby amended by the substitution in subsection (2) for the definition of "superior court" of the following definition: 65

Act No. 105, 1983

ADMIRALTY JURISDICTION REGULATION ACT, 1983

section 31 of Act 69 of 1962.
 section 1 of Act 40 of 1963.
 section 1 of Act 13 of 1965.
 section 1 of Act 42 of 1969.
 section 1 of Act 24 of 1974.
 section 1 of Act 5 of 1976
 and section 1 of Act 3 of 1981.

Jurisdiction of magistrates' courts not affected.

Act to bind the State.

Repeal of laws.

Short title and commencement.

“‘superior court’ means a division of the Supreme Court of South Africa, save in sections 43, 45, 89, 292, 330 and 356 (1) (xxxv), where it means a court exercising its admiralty jurisdiction under the Admiralty Jurisdiction Regulation Act, 1983:”

5

14. This Act shall not derogate from the jurisdiction which a magistrate's court has under sections 131, 136 and 151 of the Merchant Shipping Act, 1951.

15. This Act shall bind the State.

16. (1) The laws mentioned in the Schedule are hereby repealed to the extent set out in the third column of the Schedule.

(2) Proceedings instituted before the commencement of this Act shall be proceeded with as if this Act had not been enacted.

(3) For the purposes of subsection (2) proceedings shall be deemed to have commenced upon service of the writ of summons.

17. This Act shall be called the Admiralty Jurisdiction Regulation Act, 1983, and shall come into operation on a date fixed by the State President by proclamation in the *Gazette*.

Schedule

Number and year of law	Title of law	Extent of repeal
UNITED KINGDOM		
Chapter 27, 1890	Colonial Courts of Admiralty Act, 1890	The whole, in so far as it applies in relation to the Republic, except in so far as it relates to prize matters
REPUBLIC OF SOUTH AFRICA		
Act No. 57 of 1951	Merchant Shipping Act, 1951	Sections 51A, 329 and 332
Act No. 5 of 1972	Admiralty Jurisdiction Regulation Act, 1972	The whole

APPENDIX XI

No. R. 2415

21 November 1986

RULES REGULATING THE CONDUCT OF THE ADMIRALTY PROCEEDINGS OF THE SEVERAL PROVINCIAL AND LOCAL DIVISIONS OF THE SUPREME COURT OF SOUTH AFRICA

The Chief Justice of South Africa, after consultation with the judges president of the several divisions of the Supreme Court of South Africa has, in terms of section 43 (2) (a) of the Supreme Court Act, 1959 (Act 59 of 1959), read with section 4 of the Admiralty Jurisdiction Regulation Act, 1983 (Act 105 of 1983), and with the approval of the Minister of Justice, made the rules contained in the Annexure hereto regulating the conduct of the admiralty proceedings of the provincial and local divisions of the Supreme Court of South Africa, with effect from 1 December 1986.

ANNEXURE
INDEX

Rule

- 1—Definitions
 - 2—Summons
 - 3—Arrest in action *in rem*
 - 4—Attachment to found or confirm jurisdiction
 - 5—Service
 - 6—Notice of intention to defend
 - 7—General rules as to pleadings
 - 8—Claim in reconvention
 - 9—Third parties
 - 10—Close of pleadings
 - 11—Request for further particulars
 - 12—Preliminary procedures
 - 13—Discovery of documents
 - 14—Pre-trial procedure
 - 15—Trial
 - 16—Applications
 - 17—Variation of periods of time and non-compliance
 - 18—Vexatious or irregular proceedings
 - 19—Property arrested or attached
 - 20—Filing, delivery and preparation of papers
 - 21—Representative actions and limitations of liability
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 - 23—Directions by the court
 - 24—Repeal of rules
- FIRST SCHEDULE — FORMS
- 1—Summons
 - 2—Warrant of arrest

RULE 1

DEFINITIONS

1. (1) In these rules, unless the context otherwise indicates—
- “Act” means the Admiralty Jurisdiction Regulation Act, 1983 (Act 105 of 1983);
 - “admiralty proceedings” means proceedings before the court;
 - “court” means a court exercising admiralty jurisdiction under the Act;
 - “summons” includes edictal citation;
 - “Uniform Rules” means the rules made under section 43 of the Supreme Court Act, 1959 (Act 59 of 1959), regulating the conduct of the proceedings of the several provincial and local divisions of the Supreme Court of South Africa;
 - “pleading” includes particulars of claim, plea, claim in reconvention, third party notice and pleadings consequent upon the foregoing, but excludes a request for particulars or answer thereto;
 - “warrant” means a warrant of arrest.
- (2) In the computation of any period of time expressed in days, whether prescribed by these rules, fixed by any order of court or otherwise determined, only court days shall be included.
- (3) The definitions in rule 1 of the Uniform Rules shall apply to any word or expression not defined in this rule.

RULE 2

SUMMONS

2. (1) A summons shall be in a form corresponding to Form 1 of the First Schedule and shall contain a statement of the nature of the claim and of the relief or remedy required and of the amount claimed, if any.

(2) Subject to the provisions of subrule (3), the summons shall set forth the matters referred to in rule 17 (4) of the Uniform Rules.

(3) (a) The owner of a ship, cargo or other property in respect of which a maritime claim is made may sue or be sued as such.

(b) Parties may sue or be sued jointly and may, in that event, be described as the owners of a named ship or of the cargo in or formerly in a named ship, or as the owners, master and crew of a ship, or otherwise in like manner, and in any such case the parties need not be further named or described in the pleadings.

(4) In the case of an action *in rem* the property in respect of which the claim lies, as set forth in section 3 (5) of the Act, shall be described as the defendant.

(5) Where proceedings are taken in respect of a maritime claim referred to in paragraph (u) of the definition of "maritime claim" in section 1 (1) of the Act for the distribution of any fund, or where property is deemed to have been arrested or attached in terms of section 3 (10) of the Act, the fund or the security or the property in respect of which an undertaking is given may be described as the defendant.

RULE 3

ARREST IN ACTION *IN REM*

3. (1) An arrest in an action *in rem* shall be effected by the service of a warrant in accordance with these rules.

(2) (a) A warrant shall be issued by the registrar and shall be in a form corresponding to Form 2 of the First Schedule.

(b) The registrar may refer to a judge the question of whether a warrant should be issued.

(c) Any such question shall be so referred if it appears from a certificate contemplated in rule 3 (3), or if the registrar otherwise has knowledge, that security or an undertaking has been given in terms of section 3 (10) (a) of the Act to prevent arrest or attachment of the property in question.

(d) If a question has been so referred to a judge, the judge may authorise the registrar to issue a warrant, or may give such directions as he thinks fit to cause the question of whether a warrant should be issued to be argued.

(e) If a question has been so referred to a judge, no warrant shall be issued unless the judge has authorised the registrar to issue the warrant.

(3) Save where the court has ordered the arrest of property, the registrar shall issue a warrant only if summons in the action has been issued and a certificate signed by the party causing the warrant to be issued is submitted to him stating—

(a) that the claim is a maritime claim and that the claim is, or that on the effecting of the arrest the claim will be, one in respect of which the court has or will have jurisdiction;

(b) that the property sought to be arrested is property in respect of which the claim lies or, where the arrest is sought in terms of section 3 (6) of the Act, that the ship is an associated ship which may be arrested in terms of the said section;

(c) whether any security or undertaking has been given in respect of the claim of the party concerned, or to procure the release, or prevent the arrest or attachment of the property sought to be arrested and, if so, what security or undertaking has been given and the grounds for seeking arrest notwithstanding that any such security or undertaking has been given; and

(d) that the contents of the certificate are true and correct to the best of the knowledge, information and belief of the signatory and what the source of any such knowledge and information is.

(4) Before any ship, other than a South African ship, is arrested in respect of any maritime claim referred to in paragraph (n) of the definition of "maritime claim" in section 1 (1) of the Act, notice of the intention so to arrest the ship shall be given to the consular representative, if any, of the country where the ship is registered at the port where the ship is to be arrested or, if there is no such representative at the port in question, to the chief representative of that country in the Republic and in the certificate contemplated in subrule (3) it shall be stated that the said notice has been given and when and to what person such notice was given.

(5) (a) Subject to the provisions of this rule, any person desiring to obtain the release of any property from arrest may obtain such release with the consent of the person who caused the said arrest to be effected, or on giving security in a sum representing the amount of the value of the relevant property or the amount of the plaintiff's claim, whichever amount is the lower, which amount shall be deposited as security with the registrar and be dealt with in terms of rule 19.

(b) Any person who intends to institute an action *in rem* against any property which has been arrested or attached may file with the registrar and serve, in accordance with the provisions of rule 5 (2), a notice of the said intention.

(c) When any such notice has been filed, the property shall not be released from arrest or attachment unless the person desiring to obtain the release of the property has given notice to the person who has filed any such notice that he so desires to obtain the said release.

(d) Where any notice under paragraph (b) has been given and the person concerned has not consented to the release of the property or, in any other case, if the person who has procured the arrest of the property has not consented to the release of the property, the property shall not be released unless the court so orders.

(e) Where a dispute arises as to the value of any property or as to its release, the court shall give such directions as may be appropriate for the resolution of the dispute.

(6) Any person giving security or an undertaking in terms of section 3 (10) of the Act to prevent the arrest or attachment of property, shall give an address contemplated in rule 19 (3) of the Uniform Rules at which any summons or warrant in an action *in rem* against the property may be served.

RULE 4

ATTACHMENT TO FOUND OR CONFIRM JURISDICTION

4. (1) An application for the attachment of property to found or confirm jurisdiction may be made *ex parte*, unless the court otherwise orders

(2) The applicant shall, in addition to any other requirement for such an application, satisfy the court with regard *mutatis mutandis* to the facts and matters referred to in paragraphs (a) and (c) of rule 3 (3).

(3) The order of a court on an application contemplated in subrule (1), which shall be served in the manner set forth in the order, shall order the attachment of the property in question and shall further call upon all interested persons to show cause on a date stated in the order why the order for attachment should not be confirmed.

(4) (a) A person desiring to obtain the release of property which has been attached to found or confirm jurisdiction may, subject to rule 3 (5) (c) and any order made in terms of section 5 (2) of the Act, obtain such release on giving security for the claim of the person causing the said property to be attached.

(b) The provisions of rule 19 shall *mutatis mutandis* apply in respect of security given in terms of paragraph (a).

RULE 5

SERVICE

5. (1) Save with the leave of the court, no summons or warrant shall be served if more than one year has expired since the date when it was issued.

(2) A summons in an action *in rem* shall be served on the property in respect of which the action is brought in the same manner in which a warrant is served in accordance with this rule.

(3) A summons in an action *in personam* shall be served in the manner provided for the service of a summons in the Uniform Rules, or as may be ordered by the court.

(4) A warrant in an action *in rem* shall be served—

- (a) in the case of such an action against a ship, her equipment, furniture, stores or bunkers, by affixing a copy of the warrant to any mast, or on the outside, or to any suitable part of the superstructure, of the ship and by handing a further copy to the master or other person in charge of the ship;
- (b) in the case of such an action against cargo, by handing a copy of the warrant to the person in charge of the cargo and, unless the said person will not permit access to the cargo, or the cargo has not been landed, or it is not practicable so to do, by affixing a further copy to the cargo;
- (c) in the case of such an action against freight, by handing a copy of the warrant to the person by whom the freight is payable;
- (d) in the case of such an action against property deemed to have been arrested in terms of section 3 (10) (a) of the Act, by serving the warrant upon the address for the service given in terms of rule 3 (6); or
- (e) in any other manner ordered by the court.

(5) If property has been sold, service shall be effected on the person having custody of the proceeds.

(6) The deputy sheriff shall forthwith notify a port captain of any arrest or attachment of any property within the port of which he is port captain and the registrar shall forthwith notify the port captain of any release of any such property from arrest or attachment.

RULE 6

NOTICE OF INTENTION TO DEFEND

6. (1) The provisions of rule 19 of the Uniform Rules, other than the proviso to rule 19 (1) of the Uniform Rules, shall, subject to rule 20, *mutatis mutandis* apply to a notice of intention to defend an action in admiralty proceedings.

(2) Where summons has been issued in an action *in rem*, any person having an interest in the property concerned may, at any time before the expiry of 10 days from the service of the summons, give notice of intention to defend and may defend the said action.

(3) A person giving notice of intention to defend an action *in rem* shall not merely by reason thereof incur any liability and shall, in particular, not become liable *in personam*, save as to costs, merely by reason of having given such notice and having defended the action *in rem*.

(4) Notice of intention to defend may be given when a summons has been issued, notwithstanding that the summons has not been served upon the person giving notice of intention to defend, or any other person.

RULE 7

GENERAL RULES AS TO PLEADINGS

7. (1) No pleading shall be required in an action unless notice of intention to defend is delivered therein.

(2) (a) In every action in which notice of intention to defend has been delivered, the plaintiff shall within 10 days thereafter deliver particulars of claim.

(b) The defendant shall within 10 days after delivery of the particulars of claim deliver a plea.

(c) A party may, consequent upon a pleading filed by another party to the action, deliver any further pleading within 10 days after the delivery of the preceding pleading: Provided that no replication or subsequent pleading which would be a mere joinder of issue or bare denial of allegations in the previous pleading shall be necessary.

(3) (a) Every pleading shall contain a clear and concise statement of the material facts upon which the party relies for his claim, defence or answer as therein set forth, with sufficient particularity to enable the opposite party to reply thereto.

(b) Every plea and subsequent pleading shall either admit, or deny, or confess and avoid all the material facts alleged in the pleading preceding it, or state which facts are not admitted and to what extent.

(c) It shall not be an objection to any further pleading after a plea, that it raises new matter, or that it constitutes a departure from a previous allegation made by the same party and any such departure shall be deemed to be in the alternative to any such previous allegation.

(4) Where damages are claimed, it shall not be necessary to state particulars of damage: Provided that—

- (a) the amount and nature of the damages claimed shall be stated; and
- (b) the amount of any consequential loss claimed and the alleged basis therefor shall be stated.

(5) (a) No further particulars may be requested for the purposes of pleading and no exception may be taken to any pleading on the ground that it is vague and embarrassing.

(b) (i) Where any pleading lacks averments which are necessary to sustain an action or defence, the opposing party may within 10 days after receipt of the pleading deliver an exception thereto and may cause it to be set down for hearing.

(ii) The notice of exception shall clearly and concisely specify the grounds upon which the exception is founded.

(6) A party who, despite due enquiry and endeavour, is unable to provide the requisite particularity in a pleading shall be entitled to state that fact in the pleading: Provided that—

(a) the party shall in the pleading specify the respect in which he is unable to furnish such particularity;

(b) the party shall by way of an addendum to the pleading provide such particularity as soon as it comes to his knowledge, but in any case not later than six weeks before the date of the trial; and

(c) a party who improperly claims in a pleading that he is unable to furnish such particularity shall be liable for costs to the extent which the court may order.

(7) The provisions of this rule shall not affect the powers of a court in terms of rule 18.

(8) A court may in its discretion order, or the parties concerned may agree, that any action be tried without pleadings: Provided that the issues shall be defined in any such order or agreement.

RULE 8

CLAIM IN RECONVENTION

8. A defendant may claim in reconvention against the plaintiff, either alone or with any other person.

RULE 9

THIRD PARTIES

9. (1) If a party alleges that he is entitled to claim a contribution or indemnification against any other person not a party (hereinafter called a "third party") or that any issue or question in the proceedings to which he is a party has arisen or will arise between him and the third party and should be determined in the proceedings, he may cause a third party notice to be issued and served upon the third party.

(2) In any third party notice the said question or issue and, if any relief is claimed against the third party, the grounds upon which such relief is claimed shall be stated in the same manner as such grounds would be stated in particulars of claim.

(3) A third party notice may, after the close of pleadings, or where the claim against or the issue or question with regard to the third party is not a maritime claim, or the third party is not otherwise amenable to the jurisdiction of the court, be issued only with the leave of the court.

(4) A third party notice shall be accompanied by copies of all the pleadings issued to date, but the pleadings shall not be annexed to the third party notice.

(5) (a) A third party shall be deemed to be a defendant to any claim in the third party notice and may deliver any pleadings accordingly.

(b) A third party may in any such pleadings raise any plea with regard to the claim of the plaintiff in the action.

(c) Unless a third party in his pleadings expressly states the contrary, he shall be deemed to have agreed to be bound by any admission, agreement or compromise made by the defendant with regard to the claim of the plaintiff against the defendant.

(6) A third party or a defendant in reconvention may in like manner bring in further parties to be appropriately described as, for instance, a fourth party or third party in reconvention and for the purposes of the proceedings any such further party shall be deemed to be a third party.

RULE 10

CLOSE OF PLEADINGS

10. Pleadings shall be closed when the time has expired for the delivery of any further pleading and no such pleading has been delivered, or when a pleading has been filed joining issue without the addition of any further pleading.

RULE 11

REQUEST FOR FURTHER PARTICULARS

11. (1) At any time after the close of pleadings a party may deliver a request for further particulars with regard to the pleading of any other party to the action for the purpose of enabling the party delivering the request to prepare for trial.

(2) (a) Particulars may be requested of a denial or with regard to any matter deemed to have been put in issue.

(b) It shall not be an objection to any such request that the purpose of the request is to obtain an admission of a matter placed in issue.

(3) Any answer to a request for further particulars shall bind the party giving the answer as against all parties to the action and not only as against the party requesting the particulars.

RULE 12

PRELIMINARY PROCEDURES

12. (1) A court may at any time, whether before or after the issue of summons—

(a) make an order under section 5 (5) of the Act;

(b) make an order for the taking of the evidence of any person named or otherwise identified (whether by description or otherwise) in the order, with regard to any matter which may be relevant in any action contemplated or pending and may in the said order define the issues on which such evidence may be given and prescribe the procedure for the giving of such evidence.

(2) (a) (i) A plaintiff or a defendant, whether in convention or reconvention, or any third party may, after being served with a summons or giving or receiving notice of intention to defend, or receiving a claim in reconvention or a third party notice, request the party issuing or delivering such document and any other opposite party to attend a conference in terms of this rule.

(ii) For the purposes of this rule, any plaintiff, any defendant who has given notice of intention to defend or any third party who has delivered any pleading shall be deemed to be an opposite party.

(b) At the said conference—

(i) the party requiring the conference may require any opposite party to disclose and make available all documents and give such particulars as the opposite party is then able to make available or give as to the claim or defence upon which the opposite party relies;

- (ii) any opposite party may in like manner require the party requiring the conference and any other opposite party present at the conference to disclose and make available all documents and give such particulars as he is then able to make available or give concerning his claim or defence;
- (iii) any party may require any other party to disclose and make available any documents and give any information available which might be relevant to a submission of the matter in dispute to arbitration.

(3) If any party fails to attend a conference pursuant to a notice given in terms of subrule (2), any other party may apply to court for an order that the said party attend such conference.

(4) At the said conference the parties shall disclose and make available all the said documents and give the said information.

RULE 13

DISCOVERY OF DOCUMENTS

13. (1) A party shall make discovery of documents—

- (a) if any other party in an action so requires it after the close of pleadings; or
- (b) if so ordered by a court in an application or an action, whether before or after the close of pleadings in the action.

(2) Any such notice or order—

- (a) may specify the document or category or type of document to be disclosed;
- (b) may limit the disclosure required thereby to documents of a class stated therein or relating to issues stated therein.

(3) Discovery of documents shall be made by the service on the parties of an affidavit describing with such particularity as may be necessary to identify the documents which are relevant to the matters in issue then or which previously were in the possession of the party making discovery or his agent.

(4) Documents may be described as being contained in a bundle referred to therein, in which case the pages of the bundle shall be numbered consecutively and the number of pages stated as part of the description.

(5) After receiving a discovery affidavit, a party may likewise require further and better discovery to be made in accordance with this rule.

(6) Any document discovered may be inspected and copied by any party to the action.

RULE 14

PRE-TRIAL PROCEDURE

14. (1) A court may from time to time on the application of any party make an order or orders with regard to any one or more of the following matters and may give directions for the more effectual carrying out of its order:

- (a) Requiring any person to answer any question on oath either before a person to be nominated in the order, or on affidavit, or otherwise as the court may order—
 - (i) arising from the failure to answer, the inadequacy of any answer to any request for further particulars, or the failure to make any admission requested in such a request, or for the purpose of amplifying any such answer;

(ii) arising from any dispute as to the adequacy of any discovery of documents:

- (b) ordering any person who is not a party to the action produce any document relating to any question which may arise in the action which may be in his possession and to permit the same to be copied;
- (c) the admission of evidence in terms of section 6 (3) of the Act;
- (d) the taking of evidence on commission;
- (e) the reference of any matter to arbitration or to a referee in terms of section 5 (2) (e) of the Act;
- (f) the holding of any conference in accordance, subject to any modifications set out in the order or agreement with rule 37 of the Uniform Rules, in connection with any matters set out in the said rule or in the order or the agreement of the parties;
- (g) the restating or clarification of the issues; and
- (h) the papers to be placed before the court for the purpose of the hearing.

(2) The parties may without any order agree on any matter referred to in paragraph (a), (c), (f), (g) or (h) of subrule (1).

(3) Any answer in terms of subrule (1) (a) (i) shall be admissible against, but not in favour of the party giving it unless the court at any time orders otherwise.

(4) An order with regard to any matter referred to in paragraph (a), (d) or (f) of subrule (1) shall be made only after the close of pleadings, unless the court in its discretion is of the opinion that an order should be made before the close of pleadings.

(5) Any agreement in terms of this rule and the proceedings of any conference held in terms of rule 12 shall be recorded in writing and signed by the parties.

RULE 15

TRIAL

15. The procedure in respect of setting down and hearing of any trial shall be in accordance with the procedure regulated in the Uniform Rules and any rules regulating the conduct of proceedings in the division in respect of which the court is constituted, or as ordered by the court, save that the registrar, if he thinks fit, or with the authority of a judge in chambers, may assign fixed dates for any trial.

RULE 16

APPLICATIONS

16. (1) Subject to the provisions of this rule, the provisions of rule 6 of the Uniform Rules shall apply to applications.

(2) A notice of motion in an application on notice shall state—

- (a) the time within which the respondent shall deliver any affidavits;
- (b) the date for the hearing of the application.

(3) Unless otherwise stated in any rule *inisi*, the affidavit of any respondent or person called on to show cause shall be filed at least 10 days before the return date and any affidavit of the applicant shall be filed at least five days before the return date.

RULE 17
VARIATION OF PERIODS OF TIME AND
NON-COMPLIANCE

17. (1) On the application of any person the court may abridge or extend any period of time and may advance or postpone any date in respect of any matter for which a time or date is laid down in these rules, the Uniform Rules as applicable to admiralty proceedings, any notice, order of court or otherwise.

(2) If any person has not complied with a notice given in terms of these rules or the Uniform Rules, any interested party may apply for an order that there be compliance with the notice.

(3) (a) If any party has not complied with an order of court, any interested party may apply for an order that the claim or defence or participation in the action of any person not so complying be set aside and struck out and that the said person be dealt with as being in default.

(b) On any such application the court may so order, or make such other order as to the court seems meet.

RULE 18

VEXATIOUS OR IRREGULAR PROCEEDINGS

18. (1) The court may strike out any proceedings which are vexatious or an abuse of the process of the court.

(2) If it appears to the court on application that there have been any irregular proceedings by any party or a non-compliance with the rules or any order of court, the court may make such order as appears to it to be just with regard to the said proceedings or non-compliance, including an order that any such party be deemed to be in default, or that judgment be given against any such party.

RULE 19

PROPERTY ARRESTED OR ATTACHED

19. (1) Any property arrested or attached shall be kept in the custody of the sheriff or his deputy, who may take all such steps as the court may order or as appear to him to be appropriate for the custody and preservation of the property, including the removal and storage of any cargo and the removal, disposal and storage of perishable goods which have been arrested or attached, or which are on board any ship which has been arrested or attached.

(2) In acting under subrule (1), the sheriff or his deputy shall consult any person or persons who have procured the arrest or attachment of the property and shall act in accordance with any relevant order of court.

(3) (a) The deputy-sheriff shall be entitled to reasonable remuneration for effecting any arrest or attachment to found or confirm jurisdiction and for any act done by him in terms of this rule.

(b) Any such remuneration may be less or greater than the corresponding remuneration in any tariff prescribed in the Uniform Rules or elsewhere.

(4) Any property sold in terms of section 9 of the Act shall be sold by such persons and on such terms and in such manner as the court may order.

(5) The proceeds of any sale and any amount paid as security or otherwise into court shall be invested in such manner as the parties may agree or as the court may order, which order may be made notwithstanding the fact that the parties have agreed otherwise.

(6) (a) Any such proceeds or amounts shall be paid out in such manner as the court may order.

(b) The court shall make such order as to it seems meet with regard to parties and procedure: Provided that any such proceeds or amounts shall be paid out in accordance with the priorities provided in the Act.

(c) Any person who has filed with the registrar a notice that he desires to be heard on an application for the paying out of such proceeds shall be entitled to notice of any application relating to any such payment.

RULE 20

FILING, DELIVERY AND PREPARATION OF PAPERS

20. (1) The registrar shall cause records to be kept in a convenient form showing, separately from any records relating to any other proceedings in the division of which he is registrar:

- (a) Summonses and warrants issued in and applications which are, or are made with regard to, admiralty proceedings;
- (b) orders made in admiralty proceedings;
- (c) any security or undertaking given in terms of section 3 (10) of the Act;
- (d) any notice under rule 3 (5) (c);
- (e) any notice under rule 19 (6) (c);
- (f) generally, the records of proceedings pending or proceeding before the court.

(2) (a) The attorney for a party obtaining the issue of a summons, warrant of arrest or third party notice, or giving notice of intention to defend, shall file a power of attorney only if notice is given by any party requiring that such a power be filed.

(b) The filing of any written or telex authority shall be a sufficient compliance with such notice, but a formal power of attorney shall be filed within 30 days of the filing of any such authority.

(3) Every summons, third party notice and warrant—

- (a) shall be signed by the attorney for the party causing it to be issued or, if the party is not represented by an attorney and is a natural person, by the party and thereafter be signed and issued by the registrar;
- (b) shall contain an address of the attorney or party such as is referred to in rule 17 (3) of the Uniform Rules.

(4) (a) If the parties are described as set forth in rule 2 (3) or if notice of intention to defend is given in an action *in rem*, the power of attorney may describe the parties as they are described in the action, but in that event there shall be filed with the power of attorney an undertaking by the attorney to pay any costs awarded against the party represented by him and any damages awarded against the said party under section 5 (4) of the Act, which shall be enforceable by the other parties to the action.

(b) (i) If any party is described as set forth in rule 2 (3), any other party may, by notice, require the plaintiff or any defendant or third party who has given notice of intention to defend, to give particulars of the identity of the party or parties so described.

(ii) The party receiving the said notice shall within 15 days of the receipt thereof give particulars of the parties so described by him, or of his identity if he is the party so described, but, subject to any order of the court, the action shall proceed notwithstanding the fact that the notice has not been complied with.

(c) The court may at any time order that security be given

(5) The title of the proceedings shall consist of a heading indicating the nature of the document, the name of the division of the Supreme Court of South Africa concerned, the number assigned thereto by the registrar, the name of the ship and the names of the parties and, if the proceedings are or are in connection with an action, shall state whether the action is an action *in rem* or *in personam* or *in rem* and *in personam*.

(6) All documents filed shall bear the title of the proceedings and shall be filed with a filing sheet stating the nature of the document filed.

(7) Any pleading and any request for further particulars and any reply thereto shall be signed by the party (if a natural person) or an attorney and shall, if signed by an attorney, also be signed by an advocate.

(8) (a) When any document is filed as part of the pleadings, or as a request for particulars or reply thereto, in an action or as part of the affidavits and papers in an application, it shall be accompanied by an index and the papers delivered shall be numbered in accordance with the index.

(b) When a previous index has been filed in the proceeding, the person responsible for the delivery of the documents shall continue the index as a running index in connection with the documents delivered by him, so that all papers filed and delivered shall, at all times, constitute a pagged and indexed series of documents.

(9) When any amendment is deemed to have been agreed to, or has been ordered to be made by the court in terms of rule 28 of the Uniform Rules, the pleadings shall forthwith be deemed to have been so amended notwithstanding the fact that the amended page has not been delivered in terms of rule 28 (9) of the said Rules.

(10) (a) Subject to the provisions of this rule, pleadings, affidavits and a response to any notice shall be delivered or made within 10 days after the pleading, affidavit or notice to which they are an answer or response or, in the case of a plea, after the giving of notice of intention to defend.

(b) The said time may be extended or abridged by agreement or by an order of the court.

(c) Any party unreasonably refusing to agree to an extension of time shall be liable to pay the costs occasioned by any application arising out of any such refusal.

(d) A pleading or affidavit delivered out of time shall not merely on that account be refused by the registrar or any other party unless the court orders it to be struck out.

RULE 21

REPRESENTATIVE ACTIONS AND LIMITATIONS OF LIABILITY

21. (1) For the avoidance of a multiplicity of actions the court may, as to it seems meet, make an order that any action pending before it be regarded as a test action and that any other action to which one or more of the parties to the action so pending are parties and in which the same questions would arise, abide the result of the test action and may make any order as to the procedure and representation in the said action as to the court seems meet.

(2) Where any person claims to be entitled to a limitation of liability referred to in paragraph (t) of the definition of "maritime claim" in section 1 (1) of the Act, the court may

give such directions as to it seems meet with regard to procedure in any such claim, the staying of any other proceedings and the conditions for the consideration of such claim, which may include a condition that an amount as the court may order be paid to abide the result of the consideration of the said claim, or that the claimant be required to admit liability for all or any claims made against him, or any other condition as to the court may seem meet.

RULE 22

EXCLUSION OF CERTAIN OF THE UNIFORM RULES

22. Rules 8, 9, 13, 17, 18, 20-23, 25, 26, 29, 30, 32, 43-46 and 50-57 of the Uniform Rules shall, subject to the provisions of these rules, not apply to admiralty proceedings.

RULE 23

DIRECTIONS BY THE COURT

23. (1) The court may in any admiralty proceedings *motu* or on the application of any party or other person having a sufficient interest give any directions which it appears proper for the disposal of any matter before it.

(2) Any such direction may deviate from or supplement any provision of these rules, or of the Uniform Rules, or any other rule relating to the division in question.

RULE 24

REPEAL OF RULES

24. (1) The rules made in terms of the Vice-Admiral Courts Act, 1863, and in force in terms of the Colonial Courts of Admiralty Act, 1890, read with section 4 (2) of the Act, are hereby repealed.

(2) These rules and the Uniform Rules shall apply to admiralty proceedings to the exclusion, but subject to the provisions of these rules, of any other rule of court, and the conduct after the commencement of these rules of proceedings started before such commencement.

FIRST SCHEDULE—FORMS

FORM 1

SUMMONS

IN THE SUPREME COURT OF SOUTH AFRICA

FORM 2

WARRANT OF ARREST

A P P E N D I X X I I

MERCHANT SHIPPING ACT

s 131 (Right of suing on allotment notes)

(1) The person in whose favour an allotment not under this Act has been made may, unless the seaman has forfeited or ceased to be entitled to the wages out of which the allotment is to be paid, recover the sums allotted when and as the same are made payable, with costs, from the owner of the ship in respect of which the seaman was engaged or from any agent of the owner who has authorized the allotment, and the provisions of section one hundred and thirty-six shall, mutatis mutandis, apply to any proceedings for such recovery: Provided that the wife of a seaman, if she deserts her children or so misconducts herself as to be undeserving of support from her husband shall forfeit all rights to further payments under any allotment made in her favour.

(2) In any proceedings mentioned in sub-section (1) it shall be sufficient for the claimant to prove that he is the person mentioned in the allotment note and that the note was given by the owner or by the master or the authorized agent of the owner or master, and the seaman shall be presumed to be duly earning his wages unless the contrary is shown to the satisfaction of the Court-

- (a) in the case of a seaman serving on a foreign-going ship, by the official statement of the change in the crew by the seaman's absence, made and signed by the master in terms of section one hundred and four; or
- (b) by a certified copy of some entry in the official log-book, or by a letter from the master, to the effect that the seaman has left the ship; or
- (c) by such other evidence as the Court in its discretion considers sufficient to show that the seaman has ceased to be entitled to the wages out of which the allotment is to be paid.

s 136 (Proceedings for wages)

(1) A seaman or apprentice-officer, or a person duly authorized by him, may as soon as wages due to him by reason of his engagement in a South African ship become payable sue for the same before any magistrate's court within whose area of jurisdiction the place at which his service has been terminated is situated, or which by reason of any other fact has jurisdiction in the matter; and no appeal shall lie from any judgment given or order made by the court in the matter.

(2) Nothing in sub-section (1) contained shall increase the jurisdiction of any magistrate's court as regards the amount which may be claimed in any proceeding tried by the court.

s 151

(Property of deceased seaman may be recovered as wages)

The provisions of section one hundred and thirty-six shall apply, mutatis mutandis, in respect of the property of a deceased seaman or apprentice-officer.

s 261

(When owner not liable for whole damage)

(1) The owner of a ship, whether registered in the Republic of South Africa or not, shall not, if any loss of life or personal injury to any person, or any loss of or damage to any property or rights of any kind, whether movable or immovable, is caused without his actual fault or privity-

- (a) if no claim for damages in respect of loss or damage to property or rights arises, be liable for damages in respect of loss of life or personal injury to an aggregate amount exceeding an amount equivalent to two thousand six hundred and thirty-five gold franc for each ton of the ship's tonnage; or
- (b) if no claim for damages in respect of loss of life or personal injury arises, be liable for damages in respect of loss of or damage to property or rights to an aggregate amount exceeding an amount equivalent to eight hundred and fifty gold francs for each ton of a ship's tonnage; or
- (c) if claims for damages in respect of loss of life or personal injury and also claims for damages in respect of loss of or damage to property or rights arise, be liable for damages to an aggregate amount exceeding an amount equivalent to two thousand six hundred and thirty-five gold franc for each ton of a ship's tonnage: Provided that in such a case claims for damages in respect of loss of life or personal injury shall, to the extent of an aggregate amount equivalent to one thousand seven hundred and eighty-five gold francs for each ton of the ship's tonnage, have priority over claims for damages in respect of loss of or damage to property or rights, and, as regards the balance of the aggregate amount equivalent to two thousand six hundred and thirty-five gold francs for each ton of the ship's tonnage, the unsatisfied portion of the first-mentioned claims shall rank pari passu with the last-mentioned claims.

(2) The provisions of this section shall extend and apply to the owners, builders or other persons interested in any ship built at any port or place in the Republic, from and including the launching of such ship until the registration thereof under the provisions of this Act.

(3) The provisions of this section shall apply in respect of claims for damages in respect of loss of life, personal injury and loss of or damage to property or rights arising on a single occasion, and in the application of the said provisions claims for damages in respect of loss, injury or damage arising out of two or more distinct occasions shall not be combined.

(4) For the purpose of this section a gold franc shall be taken to be a unit consisting of sixty-five and a half milligrams of gold of millesimal fineness nine hundred.

(5) The Director-General may from time to time by notice in the Gazette specify the amounts which for the purposes of this section shall be taken as equivalent to two thousand six hundred and thirty-five and eight hundred and fifty gold francs, respectively.

s 262

(Tonnage how calculated)

(1) For the purpose of section two hundred and sixty-one the tonnage of a ship shall be her gross register tonnage.

(2) There shall not be included in such tonnage any space occupied by seaman or apprentice-officers and appropriated to their use which has been certified by a surveyor to comply in all respects with the requirements of this Act.

(3) The measurement of such tonnage shall be-

(a) in the case of a South African ship, according to the law of the Republic;

(b) in the case of a treaty ship registered elsewhere than in the Republic, according to the law of the treaty country where the ship is registered;

(c) in the case of a foreign ship, according to the law of the Republic, if capable of being measured.

(4) In the case of any foreign ship, which is incapable of being measured under the law of the Republic, the Minister shall, after consideration of the available evidence concerning the dimensions of the ship, give a certificate under his hand stating what would, in his opinion, have been the tonnage of the ship if she had been duly measured according to the law of the Republic; and the tonnage so stated in such certificate shall, for the purpose of section two hundred and sixty-one, be deemed to be the tonnage of the ship.

s 263

(Application of this Part to persons other than the owners)

(1) Any obligation imposed by this Part upon any owner of a ship shall be imposed also upon any person (other than the owner) who is responsible for the fault of the ship; and in any case where, by virtue of any charter or lease, or for any other reason, the owner is not responsible for the navigation and management of the ship, this Part shall be construed to impose any such obligation upon the charterer or other person for the time being so responsible, and not upon the owner.

(2) For the purpose of section 261 the word "owner" in relation to a ship shall include any charterer, any person interested in or in possession of such ship, and a manager or operator of such ship.

S U M M O N S

IN THE SUPREME COURT OF SOUTH AFRICA
.....DIVISION
EXERCISING ITS ADMIRALTY JURISDICTION

CASE NO:

NAME OF SHIP:

IN THE MATTER BETWEEN:

PLAINTIFF

AND

DEFENDANT

Admiralty action *in rem/in personam/in rem and in personam*

To the above-named defendant:

TAKE NOTICE that the plaintiff claims against the defendant:

(Concise terms of the cause of action of the plaintiff)

.....
.....
.....
.....

If you wish to defend the action, you must withindays give notice of your intention so to defend. That notice must be served on the registrar and on the plaintiff's attorney and must contain an address in accordance with rule 19 of the Uniform Rules.

If you do not give that notice within the time set out, or within any extended time which the court may allow if you make application for an extension of time, or if you do not thereafter deliver your plea or a claim in reconvention as provided by the rules regulating the conduct of the admiralty proceedings, proceedings may continue and judgment may be given against you without further reference to you.

DATED atthis day of
19.....

(Address in terms of Rule 17(3) of the Uniform Rules)

.....
Plaintiff's attorney

To the sheriff or his deputy :

You are to effect service of this summons and return the original to the registrar with your return of service.

.....
Registrar

(In case of edictal citation the note to the sheriff or his deputy should be omitted and the registrar's signature should follow immediately on that of the plaintiff's attorney).

W A R R A N T O F A R R E S T
IN THE SUPREME COURT OF SOUTH AFRICA
.....DIVISION
EXERCISING ITS ADMIRALTY JURISDICTION

CASE NO:
NAME OF SHIP:
IN THE MATTER BETWEEN:

PLAINTIFF

AND

DEFENDANT

Admiralty action *in rem/in personam/in rem and in personam*

To the above-named defendant:

TAKE NOTICE that summons has been issued in the above-named action, and that by the service of this warrant the

.....
.....
.....
.....

(here set out property - section 3(5) of the Admiralty Jurisdiction Regulation Act, 1983)

is arrested and is to be kept in the custody of the sheriff or his deputy in terms of rule 19 of the rules regulating the conduct of the admiralty proceedings.

If you wish to obtain the release of the property from arrest, you may do so by giving satisfactory security for the amount of the claim or the value of the

property arrested, whichever is the lesser. In the event of a dispute as to the security, you may make application to court for the resolving of that dispute. You are also entitled to ask that the court impose conditions with regard to the arrest.

.....

Plaintiff's attorney

To the sheriff or his deputy :

You are authorised by the warrant of arrest to arrest and keep under arrest the property named herein and you are hereby required duly to serve this warrant and return the original to the registrar with your return of service.

.....

Registrar

A P P E N D I X XIII/ 3

IN THE SUPREME COURT OF SOUTH AFRICA
..... DIVISION
EXERCISING ITS ADMIRALTY JURISDICTION

CASE NO:

NAME OF THE SHIP:

In the matter between:

PLAINTIFF

and

m.v.

DEFENDANT

Admiralty action in rem

CERTIFICATE IN TERMS OF RULE 3 (3)

I, the undersigned,, an attorney of the Supreme Court of South Africa,Division, practicing as such under the name of(Full name and address of plaintiffs attorney), the Plaintiff's attorney of record herein, do hereby certify that:

1. To the best of my knowledge, information and belief, the contents of this certificate are true and correct. The source of my knowledge arises from instructions which I have received from (for example the Plaintiff).

2. The Plaintiff's claim is a maritime claim in terms of Section 1 (1) (ii) () of the Admiralty Jurisdiction Regulation Act No 105 of 1983.

3. The property sought to be arrested is the MV, the property in respect of which the claim lies.

4. The Plaintiff has not been able to obtain any security or undertaking from the Defendant in respect of the claim.

5. This Honourable Court has Jurisdiction by virtue of Section 2 (1) of the Admiralty Jurisdiction Regulation Act No 105 of 1983 read with Section 1 (1) (ii) ().

DATED at this day of 19...

.....

(Plaintiff's Attorney)

A P P E N D I X XIII/ 4

IN THE SUPREME COURT OF SOUTH AFRICA
..... DIVISION
EXERCISING ITS ADMIRALTY JURISDICTION

CASE NO:

In the matter between:

APPLICANT

and

RESPONDENT

In the matter of an Application
for the attachment of the mv
..... to found and confirm
jurisdiction in an action in
personam.

NOTICE OF MOTION

TO: THE REGISTRAR OF THE ABOVE HONOURABLE COURT

BE PLEASED TO TAKE NOTICE that on the day of 19.., the above
named Applicant will move the above Honourable Court for an Order in terms of
the Order Prayed annexed hereto.

KINDLY PLACE the matter on the Roll for hearing accordingly.

DATED at this day of19...

Full name and address

of Applicant's Attorney

APPLICANT'S ATTORNEYS

A P P E N D I X XIII/ 5

IN THE SUPREME COURT OF SOUTH AFRICA
DURBAN AND COSTAL LOCAL DIVISION
(EXERCISING ITS ADMIRALTY JURISDICTION)

CASE NO.: _____

NAME OF SHIP: MV _____

In the matter between:

Applicant

and

INC.

Respondent

In the matter of an application for an
attachment to found jurisdiction and
other relief

ORDER

1.

The Deputy Sheriff of this Court is authorized and directed
to attach all the interest of _____ INC. in the

vessel MV _____ at present lying in Durban Harbour, the interest of _____ INC. in any charter in favour of _____ INC. of the said vessel, the bunkers and shipping documents on the said vessel, any freight payable to _____ INC. within the jurisdiction of this Court, and any other property of _____ INC. within the jurisdiction of this Court, the said attachment being to found jurisdiction in an action by the Applicant against the Respondent in which the Applicant claims payment of the total amount of Lit. _____, interest and costs.

2.

All interested persons are called upon to show cause, if any, before this Court on the _____ day of _____, 19____ at 09h30 why the order for the attachment should not be confirmed.

3.

In terms of Section 5(2)(c) of the Admiralty Jurisdiction Regulation Act No. 105 of 1983 it is directed that any attachment effected in terms of this order will be subject to the condition that the property attached be released from the said attachment if security in a form approved by the Registrar be given for an amount of Lit. _____ together with interest thereon at the legal rate and costs.

4.

(a) Leave is hereby granted to the Applicant to sue

the Respondent by way of edictal citation for the said amount of Lit. ——— together with interest and costs.

- (b) The said citation shall be in a form appropriate for an action in personam.
- (c) Service of the said citation shall be effected by or on behalf of the Applicant upon the Respondent by delivering a copy thereof to ——— Limited, ———, ———, ——— and at ——— INC., ———, ———, ———.
- (d) Notice of intention to defend the said action, if any, is to be given within 30 days of such service.
- (e) Thereafter the times for and manner of procedure of the said action is to be governed by the Rules for proceeding with such an action in this Honourable Court.

5.

A copy of this order :-

- (a) Is to be served with a copy of the papers in this application by posting same by registered post to the Respondent at the addresses referred to above; and

(b) Is to be served on the Master of the vessel, MV
———, at the time of the said attachment.

6.

Any person wishing to oppose the confirmation of the attachment and of the Rule Nisi issued in terms of paragraph 2 hereof give notice of opposition at least seven (7) days before the return day of the Rule Nisi and deliver any affidavits in support of the said opposition when giving such notice.

7.

Any person interested may anticipate the return date on delivery of at least 48 hours notice of intention so to anticipate.

8.

The costs of this application are to be costs in cause of the said action.

DATED at DURBAN this — day of ———, 19—.

ACT.ASST.

REGISTRAR OF THE SUPREME COURT

_____ & _____

Rechtsanwaelte

2000 Hamburg _____ . — 1982

Telephon: (040) _____

Telegramm-Adresse: _____

Telex: _____

Telefax: _____

Gerichtskasten: _____

Unser Zeichen _____

Landgericht Hamburg

Kammer 2 fuer Handelssachen

Antrag auf Erlass eines dinglichen Arrests

der Firma

_____ 2000 Hamburg — ,
vertreten durch ihren Vorstandsvorsitzenden
Herrn _____

- Antragstellerin -,

Verfahrensbevollmaechtigte:

Rae _____ ,

g e g e n

die B_____ Company, Monrovia/Liberia,
vertreten durch die _____ Company, Ltd.
_____, Athen/Griechenland,

- Antragsgegnerin -.

Wir zeigen an, dass wir die Antragstellerin vertreten.

Streitwert: US\$ 54.504,26 a DM 2,28 = DM 124.269,71.

I. Arrestantrag

Namens der Antragstellerin beantragen wir - der Eile wegen ohne mündliche Verhandlung und ohne Sicherheitsleistung -, den folgenden Arrestbeschluss zu erlassen:

1. Wegen der Forderung der Antragstellerin von US\$ 54.504,26 nebst 5% Zinsen seit dem 15.4.1981 und der Kosten des Verfahrens wird der dingliche Arrest in das im Ausland befindliche Vermögen der Schuldnerin angeordnet;
2. In Vollziehung dieses Arrestes wird die Pfändung des der Schuldnerin gehörenden MS "A _____", zur Zeit im Hamburger Hafen, Waltershof, Agent _____ GmbH & Co. KG, angeordnet;
3. Die Schuldnerin hat die Kosten dieses Verfahrens zu tragen;
4. Der Arrestbefehl ist der Schuldnerin auf diplomatischem Wege zuzustellen.

II. Arrestanspruch:

1. Unter einer Zeitcharter vom 8. Mai 1981,

A n l a g e 1,

hatte die Antragstellerin das unter griechischer Flagge fahrende MS "A _____" von der Antragstellerin gechartert. Aus dem als

A n l a g e 2

beigefuegten Auszug aus dem "Lloyd's Confidential Index" geht hervor, dass die Antragsgegnerin eine Ein-Schiff-Gesellschaft ist, die von der Firma _____ Company, Ltd., Athen, vertreten wird.

2. Unter der C/P vom 8. Mai 1981 hatte die Antragstellerin das MS "A —
 — " vom 14. Mai bis zum 27. September 1981 gechartert. In der Zeit vom 14. September 1981 bis 31. Maerz 1982 uebermittelte die Antragstellerin der Antragsgegnerin insgesamt 32 Einzelabrechnungen, die als

Anlagenkonvolut 3

ueberreicht werden. Abgesehen von einer Rechnung fuer Bunker handelt es sich dabei um Vorschuesse und Auslagen zugunsten des Schiffseigners.

Unter dem 1. April 1982 schrieb die Antragstellerin die Endabrechnung,

A n l a g e 4,

welche saemtliche Einzelabrechnungen umfasste. Nach dieser Endabrechnung schuldete die Antragsgegnerin unter der C/P vom 8.5.1981 noch US\$ 54.504,26.

Die Antragsgegnerin hat lediglich eine der oben erwaehten 32 Einzelabrechnungen reklamiert. Mir Fernschreiben vom 2. Maerz 1982,

A n l a g e 5,

bat sie die Antragstellerin, den ihr mit Rechnung vom 2. Februar 1982 belasteten Betrag von DM 2.350,-- zu stornieren. Dieses ist wunschgemeass geschehen. Am 4. Maerz 1982 hat die Antragstellerin

eine Gutschrift (Credite Note),

A n l a g e 6,

ueber US\$ 1.037,80 (Gegenwert von DM 2.350,-- plus Kommission) erteilt. In der Endabrechnung vom 1.4. 1982 ist diese Gutschrift ueber US\$ 1.037,80 als letzter Posten vor dem Summenstrich beruecksichtigt.

Nach Erledigung dieser Reklamation steht keiner der berechneten Betraege mehr in Streit. Die in der Endabrechnung vom 1.4.1982 (Anlage 4) zugunsten der Antragstellerin ermittelte Forderung von US\$ 54.504,26 ist also unstreitig. Dazu wird eine entsprechende eidesstattliche Erklaerung des Herrn T. ——— ueberreicht,

A n l a g e 7

der bei der Antragstellerin mit der Bearbeitung der Charter des MS "A ——— " (C/P vom 8.5.1981) befasst war.

3. Nachdem sich bei den Einzelabrechnungen herausgestellt hatte, dass die Antragsgegnerin mit mehr als US\$ 50.000,-- im Soll stand, hatte die Antragstellerin im Marez 1982 ueber eine Akonto-Zahlung von US\$ 50.000,-- gebeten. Diese ist ausgeblieben.

Auch auf die am 5. April 1982 abgesandte Endabrechnung vom 1. April erfolgte keine Reaktion, so dass die Antragstellerin mit Fernschreiben vom 5. Mai 1982,

A n l a g e 8,

die Antragsgegnerin mahnen liess. Die Mahnung blieb bis heute ohne Erfolg.

4. Dieses Verhalten der Antragsgegnerin gibt zu der Besorgnis Anlass, dass der unstreitige Betrag von US\$ 54.504,26 nicht mehr bezahlt werden soll. Diese Befuerchtungen werden durch die folgende Entwicklung bestaerkt:

Das der "Ein-Schiff-Gesellschaft" B _____ Company, Monrovia/Liberia gehoerige (vgl. Lloyd's Confidential Index, Anlage 1) MS "A _____" liegt ausweislich des Taeglichen Hafenberichts vom 14. Mai 1982,

A n l a g e 9,

seit dem 24. April 1982 im Hamburger Hafen. Auf dem Markt wird es inzwischen als MV "A _____" (ex "A _____") fuer den 20./31. Mai als verfuegbar angeboten,

A n l a g e 10.

Offensichtlich steht also ein Verkauf des MS "A _____" und damit die Aufloesung der B _____ Company bevor. Dieses wuerde es der Antragstellerin erschweren, wenn nicht sogar unmoeglich machen, ihre unstreitige Forderung noch durchzusetzen. Zur Sicherung ihrer Ansprueche durch den beantragten Arrest ist daher hoechste Eile geboten.

III. Arrestgrund.

Der Arrestgrund ergibt sich aus Paragraph 917 ZPO. Wegen des bevorstehenden Verkaufs von MS "A _____" und der damit verbundenen Aufloesung der Antragsgegnerin ist zu besorgen, dass ohne Verhaengung des

Arrests die Vollstreckung des Urteils vereitelt wuerde (Paragraph 917 Abs.1 ZPO).

Im uebrigen muesste ein in der Hauptsache ergangenes Urteil im Ausland vollstreckt werden (Paragraph 917 Abs.2 ZPO). Die Antragsgegnerin unterhaelt weder einen Liniendienst zu deutschen Haefen, noch ziehen irgendwelche deutsche Agenten regelmaessig Frachten oder andere Betraege fuer sie ein.

Die Arbitargeklauseel (Klauseel 17, Zeile 104 der Anlage 1) ist auf den geltend gemachten AAnspruch nicht anzuwenden, denn die Schiedsgerichtsklauseel setzt einen "dispute" voraus. Ein solcher "dispute" besteht zwischen den Parteien jedoch nicht. Der Anspruch der Antragstellerin ist unstreitig. Nach englischem Recht, das wegen der vereinbarten Arbitrage London den Vertrag ergaenzt, ist bei unstreitigen Forderungen ein "dispute" nicht gegeben. Dieses ergibt sich aus dem Handbuch ueber die Arbitrage von Gill,

A n l a g e 11.

Selbst wenn man von einem "dispute" ausgehen wollte, hindert die Arbitrage-Klauseel nicht, dass der Arrest erlassen wird. Paragraph 917 Abs.2 ZPO setzt nach seinem Wortlaut nicht voraus, dass ein deutsches Urteil oder ein deutscher Schiedsspruch im Ausland vollstreckt werden muesste. Dies ergibt auch der Sinn der Vorschrift. Bei Absatz 2 des Paragraph 917 darf man nicht auf die Herkunft des Titels abstellen. "Der Zewck der Vorschrift besteht nicht darin, die Autoritaet deutscher Urteile zu wahren, sondern darin, dem Glaeubiger die mit einer

Auslandsvollstreckung verbundenen Schwierigkeiten zu ersparen" (Stein/Jonas/Grunsky, ZPO, 1981, Paragraph 917 Rdnr 17 und LG Bremen, Beschluss vom 19.12.1978, Az.11-T-21/1978). Das muss jedenfalls dann gelten, wenn ein Gericht oder Schiedsgericht eines EWG-Staates in der Hauptsache entscheidet - hier: England.

Die Zuständigkeit des angerufenen Gerichts ergibt sich aus Paragraph 23 ZPO, da sich Vermögen der Schuldnerin, die im Inland keinem Wohnsitz hat, in Hamburg befindet.

Rechtsanwalt



Landgericht Hamburg
-Kammer 2 für Handelssachen-

2000 Hamburg 36, den
Sievekingplatz 1,
Ziviljustizgebäude

Arrestbefehl

In der Sache

der Firma

[REDACTED];

[REDACTED] 2000 Hamburg [REDACTED],

vertreten durch ihren Vorstandsvorsitzenden
Herrn [REDACTED]

-Gläubigerin-

Prozeßbevollmächtigte: Rechtsanwälte [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

g e g e n

die B [REDACTED],

Monrovia/Liberia,

vertreten durch die [REDACTED] Company, Ltd.,

[REDACTED] Athen,

Republik Griechenland,

-Schuldnerin-

- 2 -

Die Gläubigerin hat angeblich eine Forderung in Höhe von US-Dollar 54.504,26 nebst 5 % Zinsen seit dem 15. April 1981 und Kosten aus Vorschüssen, Auslagen und Bunker für die Schuldnerin als Eigentümerin des MS " [REDACTED] ".

Wegen dieser angeblichen Forderung und einer Kostenpauschale von DM 10.000,-- wird der

d i n g l i c h e A r r e s t
zur Höhe von

Deutsche Mark 134.269,71

(in Worten Deutsche Mark einhundertvierund-
dreißigtausendzweihundertneun-
undsechzig 71/100)

in das im Inland befindliche Vermögen der Schuldnerin angeordnet.

Aufgrund dieses Arrestes wird die Pfändung des der Schuldnerin gehörigen Schiffes MS " [REDACTED] ", zur Zeit im Hamburger Hafen, Waltershof, Agent: [REDACTED] GmbH & Co. KG.,

angeordnet, sofern das Schiff in einem Hafen liegt und sich nicht auf der Reise befindet.

Durch Hinterlegung von DM 134.269,71 wird die Vollziehung dieses Arrestes genehmigt und der Schuldner zu dem Antrag auf Aufhebung des vollzogenen Arrestes berechtigt.

Die Schuldnerin hat die Kosten dieses Verfahrens zu tragen.

Der Streitwert wird auf DM 65.000,-- festgesetzt.

Der Vorsitzende

[REDACTED]
Vorsitzender Richter
am Landgericht

A P P E N D I X XIV

P & I Associates (Pty) Ltd

Reg. No.: 57/13509/07



Protecting and Indemnity
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Cape Town Port Elizabeth
East London Richards Bay

Represented in:
Saldanha Bay
Walvis Bay
Maputo and Beira

The Owners of the cargo
shipped on the vessel "
C/o
6 Street
8001 CAPE TOWN

Date	Our ref	Your ref
th October, 1988	/CJG/RB	

Dear Sirs,

L E T T E R O F U N D E R T A K I N G

m.v. " : AT DURBAN : SEPTEMBER, 1988
BILLS OF LADING NOS. /DURBAN M2, M3 AND M5
DATED AT ON 5TH SEPTEMBER, 1988

We refer to the claim which you intend to institute against the owners of the m.v.
" (the owners) as outlined above.

In consideration of your refraining from arresting or attaching the "
in respect of such claim and in further consideration of your refraining from
attaching or arresting, in any jurisdiction, the said vessel or any other vessel or
property in the same or associated ownership or management in connection with
such claim, (other than for purposes of execution after judgment has been obtained
and without prejudice to any rights you may enjoy to apply to court in terms of
Section 5 (2) (d) of Act 105 of 1983) we, P & I ASSOCIATES (PTY) LTD., Durban,
being duly authorised hereto by of
(hereinafter referred to as the CLUB) and the owners and acting for both as agents
only, do hereby:

1. On behalf of the CLUB undertake that it will make payment to you of all sums
being due to you as damages and costs;
 - 1.1 for which the owners may be found liable in respect of the said claim
pursuant to a judgment of THE SUPREME COURT OF SOUTH AFRICA
DURBAN AND COAST LOCAL DIVISION, or if any judgment of the said
Division is taken on appeal pursuant to the judgment of such appeal court;
or

1.2/.....



- 2 -

1.2 which may be agreed by the owners as being due to you in respect of the said claims,

within 21 days of such judgment or agreement;

Provided always that our total liability hereunder shall not exceed the sum of R25 000.00 (TWENTY FIVE THOUSAND RAND) in respect of the capital claim and the sum of R5 000.00 (FIVE THOUSAND RAND) in respect of costs as taxed or agreed.

2. On behalf of the owners;

2.1 Submit to the jurisdiction of THE SUPREME COURT OF SOUTH AFRICA, DURBAN AND COAST LOCAL DIVISION for the hearing and determination of the said claim; and

2.2 Appoint the offices of P & I ASSOCIATES (PTY) LTD., 10th floor Renfreight House, 41 Victoria Embankment, Durban at which they will accept service of any process instituting legal proceedings in respect of such claim.

3. On behalf of the CLUB:

3.1 Submit to the jurisdiction of THE SUPREME COURT OF SOUTH AFRICA, DURBAN AND COAST LOCAL DIVISION, for the purposes of enforcement of this Letter of Undertaking only; and

3.2 For such purposes only, appoint the offices of P & I ASSOCIATES (PTY) LTD., Durban at which they will accept service of any process instituting legal proceedings in respect of such claim for enforcement hereof.

4. This Undertaking:

4.1 Is given in terms of Section 3 (10) (a) of Act 105 of 1983 and shall be governed by South African Law;

4.2 Is not transferable to any third party other than to cargo underwriters under subrogation, nor shall it stand as security for any other claim or claimant, notwithstanding the provisions of Section 11 (9) of Act 105 of 1983;

4.3 Is furnished without admission of liability and without prejudice to the rights and/or defences of the owners in respect of such claims;

4.4/.....



- 3 -

- 4.4 Shall not be construed to deprive owners of any right to claim limitation of liability provided for in any contract, statute or convention, however, owners hereby waive any right to aver that the issuing of this Letter of Undertaking shall not, in itself, interrupt any time bar or prescriptive period which may otherwise have been applicable to the claim;
- 4.5 Shall be returned to us for cancellation against payment hereunder or in the event of your said claim falling away, being withdrawn or being agreed or found, on application of owners, to be invalid; and
- 4.6 Shall not prejudice your rights in terms of Section 5 (2) (d) of Act 105 of 1983 to apply to a competent Court for an increase in the security provided herein upon good cause shown and to arrest the or any other property in pursuance of that right.

DATED AT THIS DAY OF 1988

Yours faithfully,
P & I ASSOCIATES (PTY) LTD

.....

DIRECTOR
As agents only
For and on behalf of of
and
The DEFENDANT

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