# RECENT DEVELOPMENTS IN MARITIME LAW

**by Mr. C. W. O'Hare***

I have a standing arrangement with my body. In exchange for my continual abuse I permit my body to contract influenza once a year. It was in that disagreeable state I found myself some three or four weeks ago, languishing in Melbourne's frosty clime. To purge myself of the accursed disease I repaired to my sick bed and prescribed a liberal dosage of Dr. Walker's Scottish elixir. The potion had gently conveyed me into that euphoric isolation where man can sublimate his middle-age fantasies, when abruptly my reverie was shattered by the telephone ringing. If there is a hell on earth it is the diabolical shrill of that instrument.

My instinctive reaction was to let it ring; but that was no good. Its sadistic sound relentlessly invaded every nerve in my system. I therefore uttered the customary invective and resolved to answer it, fully expecting a confrontation with the devil himself or, even worse, the Dean of the Monash Law Faculty. Imagine my relief when, instead, I was greeted by the dulcet tones of our President, Peter Willis. I had been snatched from the grip of the devil and delivered into the arms of the Archangel Gabriel, or is it Saint Peter? Yet, I was to pay a price for my salvation.

Our heavenly host berated me for my irregular attendance at the Association's annual conferences. I recall mumbling feebly how impoverished academics cannot afford exotic conferences. That, apparently, was no excuse. He reminded me that it has been four years since I delivered the opening address to the Association. However, I could atone for my sins by delivering the closing address at this year's conference. And so, I stand before you penitent and contrite — a supplicant for absolution — stripped bare for public flagellation.

Our President warned me, midst the flapping of his wings or the jangling of his keys, that my yoke would be harsh and my burden daunting. Pleasures of the flesh, he said, would entice many delegates away from the closing session. And those attending, he added, would do so only because gastronomic debauchery had immobilised them. "How appropriate," I thought, "to choose the theme 'Some Rough Passages in Maritime Law'!" "Therefore," he imperiously commanded, "be provocative. Above all, be provocative!" Now, I enjoy provocation. I eke out a meagre existence from provocation. But, of the topics familiar to me, I can think of none less provocative than "Recent Developments in Maritime Law". Nevertheless, it was tactless of me to blurt out: "*What* recent developments in maritime law?" My indiscretion was met with a

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stony silence while this cherub searched his venerable mind. "*I* don't know," he replied, "but Ian Dixon surely will." Deliverance was assured. I am grateful to Ian, who was kind enough to supplement my research with his knowledge.

### Maritime Jurisdiction

I shall not comment on the proposals for an Australian Admiralty jurisdiction, for three reasons. First, because they are not so much a recent as a future development. Secondly, because they deserve intensive analysis and not a sweep of the broad brush I wield today. Thirdly, because I have not seen a copy of them. Nevertheless, recent cases prompt me to make some observations about Admiralty jurisdictions generally.

When the United Kingdom renovated the Admiralty jurisdiction in 1956,[1] it did not faithfully reproduce the International Convention relating to the Arrest of Seagoing Ships 1952 and, consequently, discrepancies occur between the Act and the Convention. A case in point bears the romantic name *The Father Thames.*[2] In that case the owners challenged the jurisdiction of the Admiralty Court to hear a collision claim initiated by an action in rem when, at the time of the collision the ship was in the possession and control of the demise charterers. Section 1 of the Act confers jurisdiction over collision claims but the action in rem cannot be used to invoke the jurisdiction unless s. 3 is satisfied. The shipowners contended that the two relevant sub-sections of s. 3 did not apply. Section 3 (4) (which, incidentally, makes actions in rem available against sister ships) makes available the action in rem against a ship if the owner or charterer liable for collision beneficially owns that ship. Unlike the corresponding provision in New Zealand,[3] the British Act did not incorporate Art. 3 (4) of the Convention which expressly authorised the arrest of the ship for a claim against the demise charterer. Relying upon the trial judgment in *The I. Congreso*,[4] which has since been approved on appeal,[5] Sheen J. held that this sub-section could not sustain the action in rem.

That left s. 3 (3) under which the action in rem will invoke jurisdiction to enforce a maritime lien. Did the plaintiff have a maritime lien against a ship under demise to the charterer personally liable for its collision? There can be little doubt since *The Bold Buccleugh*[6] that a maritime lien does attach to the vessel irrespective of personal liability and the court so held.

The judgment is noteworthy because it reviews the nature of the maritime lien and the action in rem and because it gives me the opportunity to ask a provocative, even heretical, question: Why do we need an Admiralty jurisdiction? I suppose the question does suggest that

1. *Administration of Justice Act* 1956 (U.K.).
2. [1979] 2 Lloyd's Rep. 364.
3. *Admiralty Act* 1973 (N.Z.), s. 5 (2) (b).
4. [1978] Q.B. 500.
5. [1980] 1 Lloyd's Rep. 23.
6. *Harmer* v. *Bell* (1851) 7 MooP.C. 267. And see *The Ticonderoga* (1858) Sw. 215; *The Lemington* (1874) 2 Asp. M.L.C. 475; *The Ripon City* [1897] P. 226.



an unlimited common law jurisdiction absorbing all Admiralty causes of action would eliminate the jurisdictional divisions which have plagued Admiralty for 500 years and which, for one reason and another, continue to exist. But before Richard Cooper engages me in open debate, let me focus on one aspect of the question. I seriously doubt that Admiralty would have survived 19th century reorganisation had it not been for the action in rem. Common lawyers recognised the sheer ingenuity of the device but proceeded to distort it beyond historical recognition, to the point where today, except for the maritime lien, it is simply a weapon to secure jurisdiction and execution over the personal defendant. That being so, is there any reason why the common lawyers should not administer the action in rem in the exercise of an ordinary jurisdiction. Given my passion for the historical law merchant, law maritime and the Civilian jurisdiction, it pains me to ask these questions, but my President instructed me to provoke.

To give Richard time to hone his vocal daggers, I will retreat into the relative safety of the United States Admiralty jurisdiction. The federal jurisdiction there continues to evolve judicially from the maritime and admiralty power which is reproduced as s. 76 (iii) of the Australian Constitution. The federal courts have recently entertained actions by shipowners against spanning bridges[7] and an action by a bank to recover freights assigned to the bank as security for a loan.[8] However, they declined jurisdiction over a land-based helicopter crash in United States waters[9] only to assume jurisdiction over an executive jet crash in Canadian waters.[10] Manufacturer's strict product liability has now been accepted in Admiralty as maritime law.[11] More entertaining, though, is the exercise of jurisdiction over the action[12] by a merchant seaman to recover damages for personal injuries sustained in a taxi en route from Cairo to Port Said to join the defendant's ship.[13] On the other hand, the American courts refused to entertain an action against U.S. oil corporations for the death of employed Venezuelan seamen aboard Venezuelan vessels in Venezuelan waters,[14] notwithstanding that the *Moragne* doctrine,[15] which created a general law action for wrongful maritime death, applies extraterritorially.[16]

In contrast with the implied contractual term to exercise due diligence

7. *Amaclio Shipping Co. Ltd.* v. *Southern Pacific Transport* 1979 A.M.C. 225; *In re Gypsum Carrier* 1979 A.M.C. 1311; *Florida East Coast* v. *Revilo* (1979) A.M.C. 1888.
8. *Continental Illinois National Bank* v. *Alltransport Inc.* 1979 A.M.C. 669.
9. *Duvall* v. *Hughes Tool Co.* 1979 A.M.C. 1918.
10. *First & Merchants National Bank* v. *Adams* 1979 A.M.C. 2860.
11. *Nicolaoes* v. *Central of Georgia Railroad* 1979 A.M.C. 1747.
12. Under the Jones Act 46 U.S.C. 688.
13. *Mounteer* v. *Marine Transport Lines* 1979 A.M.C. 313.
14. *De Alvarez* v. *Creole Petroleum Corp.* 1979 A.M.C. 386.
15. *Moragne* v. *State Marine Lines* 398 U.S. 375 (1970); *Sea-Land Services* v. *Gaudet* 414 U.S. 573 (1974); *Alvez* v. *American Export Lines* 1979 A.M.C. 906.
16. *Cormier* v. *Williams Constructors* 1979 A.M.C. 1241; *New York* v. *Angela Compania Naviera* 1979 A.M.C. 106; *Westcott* v. *McAllister Bros.* 1979 A.M.C. 900.

under s. 59 of the *Navigation Act* 1912 (Cth),[17] one of the most interesting concepts in American Admiralty is the shipowner's strict liability for injury to or death of a seaman caused by the unseaworthiness of the ship. In *Claborn* v. *Star Fish and Oyster Co. Inc.*,[18] the widow of a deckhand recovered compensation from the shipowner when the deckhand was stabbed to death in an unprovoked assault by a fellow crew member. The Court of Appeals found that the assailant's behaviour pattern demonstrated that he was not "equal in disposition to the ordinary seaman".[19] The Court held that the assailant was an inferior crew member, that the ship was therefore unseaworthy and that the shipowner was liable for the deckhand's death. In the same context, in *Calcagni* v. *Hudson Waterways Corp.*[20] a ship was rendered unseaworthy because an officer, when attacking a member of the crew, used a wrench rather than his fists. And, in *Reyes* v. *Vantage Steamship Co.*[21] a widow recovered compensation when her husband drowned while swimming with a blood alcohol content of .185 per cent. The uncontrolled sale of liquor aboard the ship, described by the Court of Appeals as a "floating dramship", rendered the ship unseaworthy and the owner liable.

The Anglo-Australian legal system is not so adept as the American at creating judicial policy. Rather, our skill lies in the ability to run such issues as injury redress through an obstacle course of jurisdictional hurdles and contractual snares. In Australia we ask if the ship was a noxious instrument,[22] whether the sailor died on a merchant or naval vessel[23] and whether the ship was exposed to the open sea.[24] From *The Titanic* disaster the only reported litigation concerns the exemption clause printed on the back of a passenger's ticket![25] And nearly seventy years later the courts are still trying to penetrate the web of exemption clauses. In *The Dragon,*[26] the plaintiff may have been denied her $40,000 compensation for injuries if the defendant had erected a $40 sign in his office warning her husband of the hazardous exemption clause appearing on the back of the ticket. Brandon J. manoeuvred the action through the exemption clause by holding that the contract for passenger carriage had concluded before the ticket issued. Contrast this result with the High Court's solution to escape stamp duty in *MacRobertson Airlines*[27] where the contract was held to form after the ticket had issued.

From exemption clauses to *forum non conveniens* and the American preoccupation with citizenship. Until 1947, American courts would not

17. See also 59B.
18. 1979 A.M.C. 636.
19. Compare *Robinson* v. *S.S. Atlantic Starling* 369 F. 2d 69 (1967) and *Clevenger* v. *Star Fish & Oyster Co.* 325 F. 2d 397 (1964).
20. 1979 A.M.C. 1728.
21. 558 F. 2d 238 (1977).
22. *Nagrint* v. *The Regis* (1939) 61 C.L.R. 688.
23. *Parker* v. *Commonwealth* (1965) 112 C.L.R. 295.
24. *Union S.S. Co. of New Zealand* v. *Ferguson* (1969) 119 C.L.R. 191.
25. *Ryan* v. *Oceanic Steam Navigation* [1914] 3 Q.B. 731.
26. *Daly* v. *General Steam Navigation Co. Ltd.* [1979] 1 Lloyd's Rep. 257.
27. *MacRobertson Miller Airline Services* v. *Comm. State Taxation W.A.* (1975) 50 A.L.J.R. 348.



exercise the doctrine of forum non conveniens to deprive an American citizen of jurisdiction. In that year the Supreme Court in *Gilbert's* case[28] was thought to remove the plaintiff's status from consideration and apply the doctrine on the merits of the case. However, in *Alcoa Steamship Co.* v. *M.V. Nordic Regent*[29] the Court of Appeals recently restored the status quo. Alcoa brought an action in New York to recover compensation for damage caused when the Italian crew of the Liberian ship collided with Alcoa's pier in Trinidad. On the defendant's motion, the trial court held that the United States was not a convenient forum and dismissed the action. On appeal a majority ruled that, as a principle of law, an American citizen could not be dislodged from an American court by forum non conveniens unless his proceedings are vexatious, oppressive or harassing.

Whether this approach to tortious actions will set a trend for contractual actions remains to be seen. United States courts were traditionally indifferent to choice of forum clauses until the 1972 announcement by the Supreme Court in *Zapata's* case[30] to observe the parties' selection of forum, if freely negotiated and unaffected by superior bargaining power. In the meantime, the English leaning towards the contractual jurisdiction has produced mixed results. Despite the heavy onus on the plaintiff to justify the retention of an English forum, contrary to the choice of forum clause,[31] jurisdiction was not relinquished to the U.S.S.R. in *The Fehmarn*[32] nor to Poland in *The Adolf Warski.*[33] But, accusations of communist prejudice were dispelled in *The Kislovodsk*[34] recently when Sheen J. stayed English proceedings in favour of the U.S.S.R. Non-English plaintiffs had sued under a bill of lading which nominated the principal place of business of the Leningrad carrier as the place of dispute resolution. Yet, the same judge declined to stay English proceedings in *The Vishva Prabha*[35] notwithstanding that the bill of lading elected Bombay as the seat of judgment.

No longer shackled by "absolute" sovereign immunity, the courts in England,[36] as in the United Kingdom,[37] are enjoying the relative freedom of the "restricted" doctrine of sovereign immunity. As Lord Denning M.R. observed:[38]

> ". . . when a sovereign chooses to go into the markets of the world so as to let out his vessel for hire or to carry goods for freight —

28. *Gulf Oil Corp.* v. *Gilbert* 330 U.S. 501 (1947).
29. 1979 A.M.C. 1.
30. *Bremen und Unterweser Reederie* v. *Zapata Off-Shore Co.* 407 U.S. 1 (1972).
31. *The Eleftheria* [1970] P. 94.
32. [1957] 2 Lloyd's Rep. 551.
33. [1976] 1 Lloyd's Rep. 107; [1976] 2 Lloyd's Rep. 241.
34. [1980] 1 Lloyd's Rep. 183.
35. [1979] 2 Lloyd's Rep. 286.
36. *State Immunity Act* 1978 (U.K.); *The Philippine Admiral* [1977] A.C. 373; *Trendtex Trading Corp.* v. *Central Bank of Nigeria* [1977] 1 Q.B. 529; *Uganda Co. (Holdings) Ltd.* v. *Uganda* [1979] 1 Lloyd's Rep. 481.
37. *Foreign Sovereign Immunities Act* 1976 (U.S.); *Republic of Mexico* v. *Hoffman* 324 U.S. 30 (1945).
38. See fn. 39.

> just like an ordinary private shipowner for commercial purposes — then he clothes himself in the dress of an ordinary ship's captain.... He cannot renounce the jurisdiction by a plea of sovereign immunity."

However, in that case, *The I Congreso Del Partido*,[39] the plea was successful before a two-member bench of the Court of Appeal. The Chilean plaintiffs arrested the Cuban ship when it emerged from the shipbuilder's yards, claiming damages for the failure of her two sister ships to deliver sugar to Chile after the coup d'état in 1973. Although the sister ships were owned by a trading instrumentality of Cuba, Waller L.J. ruled that the breach was an act of government and accepted the sovereign immunity defence. Lord Denning M.R., on the other hand, took the view that the defence was not available because the incident was commercial in nature. Leave was granted to appeal to the House of Lords.

### Commercial Regulation

Only this year the Congress of the United States appropriated to the Department of Commerce a sum of $440 million for maritime activities in the 1980 fiscal year, including a sum of $31 million for maritime education and training expenses.[40] Figures of that magnitude could lead a man to avarice, but none of the budget was specifically appropriated to education in maritime law. Congress also appropriated to the Department of Energy a sum of $85 million to conserve, explore and develop petroleum and oil shale reserves.[41] The oil-shale programme is managed by commissioned officers of the United States Navy on active service. Can you imagine the Australian Navy operating the Rundle oil-shale reserves? I can just see Don Brooker and Paul Willee wielding pick and shovel. Quite a striking contrast — I usually picture them at the Court-Martial defending the mutineers of the U.S.S. Caine, mercilessly cross-examining Humphrey Bogart as he sits playing with his balls.

In recent years the United States has been concerned to preserve its open-liner conference policy yet arrest the penetration of foreign carriers, particularly those of the Soviet Union. In 1972, the United States and the U.S.S.R. entered into an agreement which opened 40 ports to the carriers of both nations. The agreement was re-negotiated in 1975 and expires at the end of 1981. However, the United States discovered that in a five-year period, the Russian merchant marine managed an eight-fold increase in liner-cargo tonnage and a forty-five-fold increase in cargo value, representing a growth of $1.7 billion. In 1976, the Soviet fleet earned $340 million from American trade and, according to a recent report,[42] will have captured 6.6 per cent of the U.S. liner-cargo market by 1986. This has been achieved by under-cutting American conference lines by an average of 25-30 per cent (in coin-operated machines — 60 per cent; safety book matches — 40 per cent) and skimming the cream from high-rate cargo.

39. [1980] 1 Lloyd's Rep. 23, 29.
40. 93 Stat. 847.
41. 93 Stat. 1061; U.S. Code, *Congress and Administrative News* (1980) P. 4296.
42. U.S. Code, *Congress and Administrative News* (1978) 3536.



The American concern is directed at all state-controlled vessels whose operating costs are government funded (fuel in Russian ports is 25 per cent cheaper than Western prices) and who are not motivated by profit-earning objectives. Rather, their sole objective being to maximise hard Western currency, they can afford to discount their rates to the detriment of American commercial interests and national security. So disturbing was this trend that a Bill colloquially known as the "Third Flag Bill" was introduced into Congress but was suspended when U.S.-U.S.S.R. negotiations in 1976 agreed to closer co-operation in formulating rate policies. The United States attempted to control under-cutting by the *Shipping Act* 1916[43] which empowers the Federal Maritime Commission to disapprove of rates so unreasonably high or so unreasonably low as to be detrimental to American commerce. However, the complainant or the FMC bears the onus of proving the case and apparently foreign carriers have refused to produce documents and disclose information which is outside the United States and which, they argue, is therefore outside the jurisdiction of the FMC.

Accordingly, Congress passed the *Ocean Shipping Act* 1978[44] to strengthen the existing legislation. The recent legislation imposes the burden of proof on the "cross-trader" to prove that his rates are just and reasonable and not below a level at which a commercially motivated carrier would not compete for a sustained period of time. The Act applies only to controlled carriers which are directly or indirectly owned or controlled by the government of its flag. The most obvious loophole in the legislation enables foreign carriers to register under a flag of convenience, but still the United States refuses to trace ownership behind the flag registration. The amending legislation is intended to control carriers bearing flags of the U.S.S.R., Singapore and Malaysia, among others, unless the trade is serviced exclusively by controlled carriers. However, legislators designed it so that it would not apply to flag-carrying ships of Australia, Japan, U.K. and Liberia for reason that their membership of the OECD Invisibles Code pledges them to free and *fair* competition. To American thinking anything less than an open conference system cannot be fair.

Little wonder that the United Nations Code of Conduct for Liner Conferences 1974 received such little support.

### Carriage of Cargo

I invite you to sail with me on a voyage to a distant city, to stroll with me down cobbled streets and to enter with me the portals of a centre of learning. Wafting above the hushed stillness of erudition we can hear the hum of voices, as scholars in quaint garb and resplendent finery (scarlet robes and black bonnets adorning some) jabber in language the stranger does not know. It could be the opening of the new High Court building.

43. 46 U.S.C. 801.
44. 92 Stat. 1607.

One even espies the occasional jabot, not the drip-dry variety trimmed with Anglaise, but nonetheless functional for catching dribblets from a voracious lunch. No we are not in Canberra; we are in London. It is not the High Court of Australia, but the High Court of Admiralty. The year is not 1980, but 1590.

We stand in the shadow of St. Paul's, in Montjoy House, soon to be destroyed by the Great Fire of London, where the College of Advocates houses the Civilian court. The distinguished Italian jurist Dr. Julius Caesar has just delivered sentence in *Lucas* v. *Bona In Manibus Carie*,[45] condemning the private goods of Captain Pearse for his part in stealing the cargo of the libellants. In 1590, the plaintiff could arrest the defendant's goods without talk of maritime liens and sister ships, in fact without their being involved in the maritime complaint. Mind you, Captain Pearse had committed piracy by seizing 13 butts of Spanish wine en route to England.

### *Multimodal Transport*

Dr. Caesar could not have visualised the year 1980. He could not have foretold the transportation of cargo in the sarcophagus we call a container. Nor could he have comprehended multimodal documentation. Yet, 390 years later he would still recognise the theft of two containers carrying 694 cases of Beefeater gin before they reached their destination. In *Quebec Liquor Corp.* v. *Dart Europe*[46] the Federal Court of Canada was asked to decide the appropriate limitation of liability for the "daring, ingenious and highly sophisticated" theft of cargo from a Montreal container terminal, having survived the sea voyage from Southampton and the rail journey from Halifax. The multimodal carrier had made provision in the contract to limit his liability on the land leg to $10,000 (which was appropriate to a rail leg) or $252 per package (which was appropriate to the sea leg) whichever was the lesser. Although the theft occurred on land, the carrier claimed a limitation ceiling of $252 per container. Applying United States authorities on the meaning of "package",[47] the Canadian Court held that the individual cases of gin were sufficiently itemised in the bill of lading for each to constitute a separate package. Accordingly, the limitation sought under this formula would amount to 694 x $292, which exceeded the alternative ceiling of $10,000.

The United Nations Convention on International Multimodal Transport of Goods was signed on 24 May last. For the benefit of those who were not present for my address to the Attorney-General's International Trade Law Seminar last week-end I will outline the impact of the Convention. In deference to those who were present, I shall be extremely brief.

45. R. G. Marsden, *Select Pleas in the Court of Admiralty* (S.S.) Vol. II, 172.
46. 1979 A.M.C. 2382.
47. *Leather's Best* v. *S.S. Mormaclynx* 451 F. 2d 800 (1971); *Royal Typewriter* v. *M.V. Kulmerland* 1972 A.M.C. 1995; *Rosenbruch* v. *American Isbrandtsen Lines* 1973 A.M.C. 1160.



A contract to carry cargo internationally by two or more modes of transport (excluding pick-up and delivery) will invoke the Convention and the multimodal transport operator (MTO) must acknowledge receipt of the cargo by the issue of a multimodal transport document (MTD) which, at the option of the consignor, may be negotiable or non-negotiable. The MTO's responsibility commences when he takes charge of the cargo and continues until delivery. He is liable for loss, damage or delay caused by his negligence or the negligence of any sub-contractors and the MTO bears the onus of disproving negligence. The limitation of his liability is set at 920 IMF-SDR per package or shipping unit or 2.75 IMF-SDR per kilo unless no sea-leg is contracted for, in which case the limitation is 8.33 IMF-SDR per kilo. If, however, the leg on which the loss or damage occurred can be identified, the unimodal limitation is applied, if higher.

### *Bailee's Liability*

It would be remiss of me to omit a recent decision of the Privy Council even though it has no startling impact, save that it does succinctly articulate the principles governing bailee's liability. In *The Sansei Maru*,[48] 93 cases of pharmaceutical goods were shipped to Malaysia, unloaded, stored and tallied. Ten days later only 29 cases remained. Sixty-four cases weighing over 5 tons had disappeared! The Judicial Committee confirmed that the onus is on the bailee to prove that the loss of bailed goods was not caused by the fault of the bailee, his servants or any person to whom he entrusted the goods for safe-keeping. In contrast, the United States Court of Appeals recently ruled[49] that no presumption arises against the bailee if his possession of the goods is shared with the bailor. The Court was referring to the liability of a wharfinger who allowed a vessel to be moored at his wharf for repairs by the bailor. There being no evidence to explain how the vessel was lost in a storm, the plaintiff failed to discharge the burden of proof.

### *Hague Rules*

While researching the history, function and deficiency of the Hague Rules, in preparation for debates about the Hamburg Rules, I began to doubt the need for any legislative regulation. I constantly asked myself whether commercial conditions had so changed and the common law had so developed that there was any longer a need to proscribe the dreaded exemption clause and the choice of forum law clauses which precipitated the move for reform in the 20th century. The question did not trouble me — it is a very proper question to ask. But I began to lose confidence in the answers I was giving. Now that I read the most recent reports of cargo disputes I recognise that the commercial climate and legal issues have not changed much at all.

48. *Port Swettenham Authority* v. *Wu and Co.* [1979] 1 Lloyd's Rep. 11.
49. *United States of America* v. *Mowbray's Floating Equipment Exchange* 1979 A.M.C. 1530.

Consider *Captain* v. *Far Eastern Steamship Co.*[50] in which the plaintiff's household goods were damaged by rain in Singapore while awaiting transhipment to the second leg of a voyage from Madras to Vancouver under a bill of lading which incorporated the Hague Rules. The Supreme Court of British Columbia held that the Hague Rules do not protect the cargo during the transit stage between ships. To escape common law liability as bailee, the carrier relied upon exemption clauses in the bill of lading. The Court, however, so construed the exemption clauses as not to apply to the fundamental breach of contract constituted by storing the cargo without protective covering.

### *Their Commencement*

In contrast with the "tackle to tackle" approach taken by the Hague Rules toward break-bulk cargo, the Hamburg Rules advance the carrier's responsibility to the time when he takes charge of the cargo. In this context two recent American cases are of interest. In *Agrico Chemical Company* v. *S.S. Atlantic Forest*[51] the plaintiff sued in the District Court to recover damages for the carrier's short delivery of a quantity of urea which had been delivered to the carrier in Rotterdam for shipment to New Orleans. Pursuant to the bill of lading which issued, the carrier elected to ship the cargo aboard the defendant vessel via LASH barge. The cargo was loaded aboard a LASH barge moored to a pontoon preparatory to its towage to the mother vessel by a sub-contractor. While attempting to manoeuvre a three-barge tow, the sub-contractor's tug caused a collision with the moored barge and some of the plaintiff's cargo escaped in solution. The remainder was eventually loaded on board and delivered to the plaintiff.

First the defendant pleaded immunity under Art. IV-2 (a) of the Hague Rules alleging neglect in the navigation or management of the ship. The parties did not contest that the Hague Rules applied, yet I find it the most educationally intriguing aspect of the case to ask when the Rules come into play over LASH and RO/RO methods of carriage. Having answered that the Rules apply from the commencement of the loading process, the next issue confronting the defendant (for he bears the onus of proof) is what is meant by "the ship" in Art. IV-2 (a). The carrier argued that it applied to the three-barge tow which was engaged in loading operations, the Court held that it referred to the carrying barge and for my part I would have thought it was confined to the mother ship, because of the definition of "ship" in Art. I (e). There being no error in the navigation or management of the material "ship", this defence failed.

The carrier then sought refuge in Art. IV-2 (q) which excuses damage caused without the fault or neglect of the carrier's agents or servants. The damage was caused by the negligent navigation of the three-barge tow under the control of the sub-contractor. Was he the carrier's agent?

50. [1979] 1 Lloyd's Rep. 595.
51. 1979 A.M.C. 801.



I must say I strongly object to the use of the word "agent" in the Hague Rules and the Hamburg Rules to denote independent contractors. They are not agents, they perform a contract of service. Yet it is important that the carrier bears responsibility for the conduct of a person enlisted to perform the carrier's contractual obligations and the Court held that the sub-contractor came within the meaning of "agent". The carrier was therefore liable under Art. III-2.

The carrier then sought to limit his liability under the limitations statute[52] to the value of the LASH barge. The Court, however, took the view that the LASH barge was an integral component of the single venture with the mother ship and could not be divorced from it for limitation purposes. Accordingly, the carrier's ceiling of liability was the cumulative value of the mother vessel, the carrying barge and all other barges assigned to the voyage. Although I think the decision correct I find the reasoning inconsistent if the carrying barge is the ship for COGSA purposes yet the mother ship is included in the limitation formula.[53]

The second case of pre-loading loss in *American Express Co.* v. *United States Line.*[54] Before the state Supreme Court of New York, the plaintiff sued to recover the value of two cases stolen by armed robbery from the carrier's premises on the pier. On the dock receipt the cargo was described as two cases of financial papers worth $668. In fact they contained travellers' cheques worth nearly $500,000. The dock receipt incorporated the Hague Rules limitation of $500 per package unless the actual value was declared. The plaintiff argued that the limitation contravened the *Harter Act*[55] which renders void any attempt to exclude the carrier's liability for negligence before loading and after discharge. The Court ruled that the clause did not purport to absolve the carrier from negligence but simply limited the quantum of liability. The plaintiff could recover no more than $500 per case.

### *Limitation*

Before leaving the limitation provisions of the Hague Rules, two other American decisions may be of interest. In *General Electric Co.* v. *M.V. Lay Sophie*[56] the parties had incorporated the Hague Rules into their contract to govern the shipment of deck cargo. The cargo comprised valuable machinery whose value had not been declared to the carrier. The District Court refused to limit the carrier's liability to the $500 per package ceiling on the grounds that the "unless clause" in Art. IV-5 ("unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading") required the carrier to give the shipper an opportunity to

52. 46 U.S.C. 181.
53. See *Wirth Ltd.* v. *S.S. Acadia Forest* 1976 A.M.C. 2178.
54. 1979 A.M.C. 218.
55. 46 U.S.C. 190.
56. 1979 A.M.C. 724. For subsequent proceedings, see 1979 A.M.C. 2554.

declare a higher value and pay a higher freight rate.[57] The Court held that the carrier could not rely upon the limitation, there being nothing in the contract to alert the shipper to the need to declare the higher value and the consequence of the limitation. The shipper was General Electric no less. It will be interesting to see if American courts maintain this policy when the Hamburg Rules come into force. Article 6-4 removes the "unless" clause although Art. 15-1 (o) requires increased limits to be set out in the bill of lading.

In *Spartus Corp.* v. *S.S. Yafo*[58] a container load of clock movements were shipped from Israel to New Orleans. Before she reached her destination the Israeli government ordered the ship to unload her cargo in Texas and take on military supplies. The carrier complied and arranged for the cargo to be transported by land during the course of which it was damaged. A District Court held that the COGSA limitation of $500 per package applied but that each of the cartons packed in the container constituted a package. Thus the total limitation was in excess of the damage. The carrier appealed only to learn that the Court of Appeals thought his liability unlimited. The Appellate Court construed the transhipment as an unreasonable deviation which, before[59] and since the introduction of the Hague Rules,[60] disentitled the carrier from any limitation. To complete the summary I should add that the United States COGSA does contain a proviso to Art. IV-4 which is not present in the Australian SCOGA version of the Hague Rules. It reads: ". . . if the deviation is for the purpose of loading or unloading cargo or passengers it shall, prima facie, be regarded as unreasonable."

### *Plaintiff's Burden*

From the North American continent a number of cases were reported last year affirming that the plaintiff's production of a clean bill of lading is sufficient to shift the burden of proof to the carrier,[61] with one possible exception. In two cases from the United States, the courts recognised the exception that if cargo is perishable by nature and the defendant pleads Art. IV-2 (m) "inherent defect, quality or vice of goods" the plaintiff must adduce further evidence that, upon loading, the cargo was fit to endure the voyage. This result follows because the evidentiary capacity of the bill of lading is confined to the *apparent* good order and condition of the cargo. And so the rule was applied to a cargo of

57. See *Ansaldo San Giorgio* v. *Rheinstrom Bros.* 294 U.S. 494 (1935); *Sommer Corp.* v. *Panama Canal Co.* 475 F. 2d 292 (1973).
58. 1979 A.M.C. 2294.
59. See *Sheldon* v. *Hamburg* 28 F. 2d 249 (1928); *St. Johns N.F. Shipping* v. *S.A. Companhia General* 263 U.S. 119 (1923); *Wildomino* v. *Citro Chemical Co.* 272 U.S. 718 (1927).
60. See *Jones* v. *Flying Clipper* 1954 A.M.C. 259; *Rosenbruch* v. *American Isbrandtsen Line* 543 F. 2d 967 (1976); *Mitsubishi* v. *S.S. Glyfada Spirit* 1978 A.M.C. 480; compare *Atlantic Mutual* v. *Poseiden* 313 F. 2d 872 (1963).
61. *Travelers Indemnity* v. *Kiso Maru* 1979 A.M.C. 1856; *C. Itoh & Co.* v. *Hellenic Lines Ltd.* 1979 A.M.C. 1923.
62. *Midwest Nut & Seed Co.* v. *S.S. Great Republic* 1979 A.M.C. 379.



pistachio nuts[62] and a cargo of ginger.[63] Yet the Canadian Federal Court seems to have been willing to thrust the burden onto the carrier to prove the inherent defect. It transpired that the plaintiff did adduce ample evidence of the fitness of the cargo of apples to withstand the 45-day sea voyage from Argentina to Vancouver. In *The Hoyanger*[64] the Court said:

> "As to onus of proof, the plaintiffs must establish that the goods were loaded in good order and condition. . . . Normally a clean bill of lading will be conclusive. But in the case of perishables such as apples, it is still open to a defendant to establish that the damage was an inherent defect, quality or vice of the fruit and not to any lack of care on his part. The onus of establishing it rests of course on the person who raises such a defence."

### *Defendant's Burden*

Once the plaintiff proves a prima facie case that the cargo was lost or damaged in the custody of the carrier, the burden shifts to the carrier to absolve himself from liability under one of the catalogue of exceptions in Art. IV-2. This the carrier attempted to do when *The Bulknes*[65] encountered heavy weather at sea and water entered through a forward access hatch into the hold, damaging the cargo of cement. The carrier alleged that the opening of the hatch was the result of crew neglect in the management of the ship, within the immunity conferred by Art. III-2 (a). The carrier failed to discharge the onus of proof. The evidence he adduced was the testimony of the master and the chief officer. The master thought it likely that crew had opened the access hatch to hide drugs in the forecastle and the chief officer testified that he saw crew members smoking cannabis. Sounds more like an Australian university than a British ship.

More than any other field of litigation which comes to mind, is the cargo dispute governed by the metronome syndrome — the lawyer's pathological compulsion to see the burden of proof oscillate between cargo and carrier like a rebounding ping-pong ball. I think I accurately summarise the American law[66] by saying:

(1) The initial burden is on the plaintiff to prove the carrier's bailment, the good order and condition of the cargo when received by the carrier and its damaged condition upon delivery or its non-delivery. The first two components he can satisfy by the evidence of a clean bill of lading unless inherent defect, etc., is alleged.

(2) The burden then shifts to the carrier to prove that the proximate cause of loss or damage:

63. *Gutierrez* v. *Sea-Land Service* 1979 A.M.C. 2277.
64. *Westcoast Food Brokers Ltd.* v. *The Hoyager* [1979] 2 Lloyd's Rep. 79.
65. [1979] 2 Lloyd's Rep. 39.
66. See *Schnell* v. *Vallescura* 293 U.S. 296; *Vana Trading Co.* v. *S.S. Mette Skou* 556 F. 2d 100 (1977); *General Foods Corp.* v. *Troubador* 1951 A.M.C. 662; *Lekas & Drivas* v. *Goulandris* 306 F. 2d 426 (1962); *General Electric* v. *Lady Sophie* 1979 A.M.C. 2554.

either, (i) is expected under Art. IV-2 (a) to (p);

or, (ii) was not due to the fault or the carrier, his servants or "agents" under Art. IV-2 (q).

(3) Thereupon, the burden reverts to the cargo to prove a concurrent proximate cause due to the fault of the carrier, his servants or "agents" under Art. III-2.

(4) Alternatively or additionally, the cargo may prove that a proximate cause was the unseaworthiness of the ship at the commencement of the voyage under Art. III-1.

(5) Whereupon the burden returns to the carrier to prove that he exercised due diligence under Art. IV-1. If he is unable to discharge the burden the carrier is liable irrespective of his success under 2 (i) or (ii) above.

There had not been a comparable judicial analysis in Australia until the New South Wales Court of Appeal analysed the problem and, as in the United States, continued to apply the pre-Hague Rules common law technique. The obstacle in its path was the opening phrase in Art. III-2 which renders the carrier's negligence "subject to" the Art. IV-2 catalogue of exceptions. By contrast, the United States COGSA (which converts the Hague Rules into the format of an Act) omits this phrase. Using the framework above we see that the relevance of the phrase is confined to situations ((3) above) where the cargo seeks to prove a concurrent proximate cause. If the phrase in question subjugates Art. III-2 negligence to Art. IV-2 immunity, the cargo cannot succeed and the rejoinder (3) above would be disqualified from the ping-pong game. In *Gamlen Chemical Co. (A/asia) Pty. Ltd.* v. *Shipping Corporation of India Ltd.*,[67] the trial court removed it from the game only to find it re-emerge carrying the Court of Appeal's paddle.

You will recall that the cargo broke adrift from its rope lashings in heavy weather and at trial, Yeldham J. found two concurrent causes: the perils of the sea (an immunity in Art. IV-2 (c)) and the carrier's negligent stowage (a liability in Art. III-2). His Honour held that the immunity took precedence over the liability. The Court of Appeal reversed the order of priorities. To do so, the appellate court had to plough through what has been described as conflicting and confusing[68] English authorities to adopt the interpretation which has been described as Wright's heresy.[69] I do not propose to review the *Gamlen* judgment or the English authorities. I confess that while the phrase "subject to" remains in Art. III-2 I have misgivings about the decision, misgivings which should evaporate when the Hamburg Rules come into play. As a provocative contribution dare I suggest that damages be apportioned

67. [1978] 2 N.S.W.L.R. 12.
68. *Blackwood Hodge (India) Private Ltd.* v. *Ellerman Lines Ltd.* [1963] 1 Ll. L.R. 454, 456.
69. R. Colinvaux, *Carver's Carriage By Sea* (1971) Vol. 1, P. 233.



between the concurrent causes? This will occur under the Hamburg Rules Art. 5-7.

A similar situation recently confronted an American court in *Paul Marsh Inc* v. *S.S. Johan Blumenthal.*[70] The case differed from the New South Wales decision in that, although the plaintiff proved the carrier's negligent stowage, he failed to satisfy the court that it was a proximate cause. The plaintiff sought damages for the loss of "63 cartons of hog bristles" washed overboard in the North Atlantic when a 10 metre-high wave demolished the aluminium container in which they were packed. The District Court found that the stowage of the aluminium container on the top tier at the forward outboard position was negligent although it would not have been negligent to stow a steel container there. Nevertheless, the Court found that the force of the wave would have seriously damaged a steel container in the same position and therefore concluded that the proximate cause of damage was not the negligent stowage but the peril of the sea.[71] There are two comments I would like to make about this decision. First, I would have thought it open to argue that if any container was likely to be damaged, whatever its construction, then it was negligent to stow any container in that position. Secondly, it puzzles me how one hog could singularly produce 63 cartons of bristles.

The reference to hog does remind me of a member of this Association. I once invited him to dine with me. His only response was to recite the well-known doggerel:

"One evening in October,
When I was far from sober,
And dragging home a load with manly pride,
My feet began to stutter
So I laid down in the gutter
And a pig came up and parked right by my side.
Then I warbled, 'It's fair weather
When good fellows get together',
Till a lady passing by was heard to say:
'You can tell a man who boozes
By the company he chooses!'
Then the pig got up and slowly walked away."

I took it that my invitation had been refused.

## Oil Pollution

In 1978 Congress passed the *National Ocean Pollution Research and Development and Monitoring Planning Act*[72] to set up a five year programme for research into the effect on marine environment of the 6 million metric tons of petroleum hydrocarbons entering the oceans each year.[73] A significant contributor to that figure was the *Amoco*

70. 1979 A.M.C. 240.
71. See *Clark* v. *Barnwell* 53 U.S. 272, 280 (1851); *Vana Trading Co.* v. *S.S. Mette Skou* 556 F. 2d 100, 105 (1977); *The Giulia* 218 F. 744, 746 (1914).
72. 92 Stat. 228; 33 U.S.C. 1701.
73. U.S. Code, *Congress and Administrative News* (1978) P. 678.

*Cadiz*, the 334 metre V.L.C.C. of 110,000 tons gross, which spilled her full load of Iranian crude oil when she grounded on the coastline of Brittany on 16 March, 1978 and broke in two. I have not seen the outcome of the French proceedings[74] nor the final report of the Liberian Marine Board of Investigation but the interim report was published last year.[75] If maritime lawyers are to acquaint themselves with current problems of maritime navigation it is highly desirable that such reports be published in standard case report series, as this was.

The Liberian Board, under the chairmanship of Sir Gordon Willmer, commended the efforts of the tug *Pacific* as she unsuccessfully attempted to control the disabled tanker in the prevailing gale. The scenario of a German tugmaster negotiating a salvage contract with the Italian tanker master in the English language would be quite amusing if it were not for the seriousness of the occasion. Indeed it is quite distressing to read, all too frequently, how mariners are compelled to haggle over salvage agreements when danger threatens life and property. It is ironic, though, that a ship should lose thousands of tons of oil through the loss of 20 litres of oil from the hydraulic steering system.

Three cases arising from the incident have been reported in the United States. In one,[76] the District Court declined to exercise federal jurisdiction over common law claims which did not invoke federal legislation or international conventions. In a second,[77] consolidated claims were directed to be tried in Illinois. In the third,[78] claimants moved to dismiss three defendants from the protection of the limitation statute. The *Limitation of Liability Act*[79] entitles the owner and charterer to limit liability to the value of the owner's interest in the vessel. Judicial authorities have liberally interpreted the meaning of "owner and charterer" to embrace shareholders and others who have the possession, management and operational control over the vessel.[80] In fact, the time charterer and mother company of the *Torrey Canyon's* owner attempted to take advantage of the limitation after that disaster.[81] And so did an executive officer and the parent companies of the corporate owner of the *Amoco Cadiz*. Notwithstanding an inter-company agreement by which one of the parent companies was appointed consultant, adviser and agent, the court refused to extend the limitation beyond the shipowner.

Oil pollution has become one of the most active fields of maritime law in the United States. In *Puerto Rico* v. *S.S. Zoe Colocotroni*,[82] the

74. See B. A. Dubais "Some Legal Aspects of the Amoco Cadiz Incident" [1979] L.M.C.L.Q. 292.
75. 1979 A.M.C. 245.
76. *Chapalian Compagnie* v. *Standard Oil Co.* 1979 A.M.C. 615.
77. *In re Amoco Cadiz* 1979 A.M.C. 1811.
78. *In re Amoco Transport* 1979 A.M.C. 1017.
79. 46 U.S.C. 181.
80. *Flink* v. *Paladini* 279 U.S. 59 (1929); *The Milwaukee* 48 F. 2d 842 (1931); *In re the Pelition of the U.S.* 259 Fd 2d 608 (1958).
81. *In re Barracuda Tanker Corp.* 409 F. 2d 1013 (1969).
82. 1979 A.M.C. 21.



Greek-owned and Panamanian-registered tanker was shipping oil from Venezuela to Puerto Rico when she became hopelessly lost and stranded off the coast of Puerto Rico. To lighten the ship, the master dumped some 5,000 tons. The District Court found a casual connection between the stranding and the failure by the owners to provide adequate navigational equipment and the failure by the master to post a lookout. The Commonwealth of Puerto Rico recovered $6m compensation for environmental damage to natural resources and the United States recovered the clean-up costs of $677,000 plus interest and civil penalties amounting to $7,500.

The current legislative code in the United States governing marine oil pollution[83] includes the *Federal Water Pollution Control Act* 1972 (FWPCA)[84] which renders the owner or operator[85] of a vessel strictly liable for the cost of removing oil discharged from his vessel, unless caused by act of God or the intervention of a third party. From inception, the Act placed a limitation on liability of $100 per gross ton or $14m whichever is the less, unless the discharge were the result of wilful negligence or wilful misconduct.[86] Following an oil spill which occurred along the St. Lawrence Seaway a claim by New York State was dismissed[87] but the United States government pursued an action to recover the clean-up costs of $9m and compensation of $3m for damage to natural resources and wildlife. The claim for clean-up costs was based on four causes of action — under the *Rivers and Harbours Act* 1899,[88] for public nuisance, for maritime tort (each of which would impose unlimited liability on the defendant) and under the FWPCA (which would allow the defendant to limit his liability). The apparent limitation conflict was tested obliquely by the District Court *In the Matter of Oswego Barge Corporation.*[89]

Distinguishing conflicting authorities,[90] Munson D.J. reluctantly came to the conclusion that the FWPCA was intended to be a complete code, which supplanted all other causes of action for clean-up costs. However, he added[91] ". . . the FWPCA . . . represents a step backwards from previously existing remedies, particularly in light of its relatively low limits . . .". The same conclusion was reached in *United States* v. *Dixie Carriers Inc.*[92] when the shipowner refused to complete the removal of

83. 33 U.S.C.
84. 33 U.S.C. 1251-1376.
85. But not a local authority which intervens, *Munsell* v. *Islip* 1979 A.M.C. 1034.
86. 33 U.S.C. 1321 (f) (1).
87. *In re Oswego Barge Corp.* 1978 A.M.C. 392.
88. 33 U.S.C. 407.
89. 1979 A.M.C. 333 which was a motion to dismiss these claims from the limitation of liability fund.
90. *United States* v. *Big Sam* 1978 A.M.C. 1341; *In re Steuart Transport Co.* 1978 A.M.C. 1906.
91. 1979 A.M.C. 333, 338.
92. 1979 A.M.C. 326.

his 1¼m gallons of oil from the Mississippi River once his expenditure reached the limitation ceiling. The United States was unable to recoup the remaining $1m clean-up cost.

Since those judgments were delivered, the FWPCA has been amended by the *Clean Water Act* 1977 to remove the $14m ceiling. The Act now implements a maximum limit for inland barges of $125 per gross ton or $125,000 whichever is the greater; on oil tankers of $150 per ton or $250,000 whichever is the greater; and on other vessels $150 per ton. In 1977 there was also introduced in the House of Representatives a bill,[93] dubbed the "Superfund Bill" which would impose a minimum limitation of $250,000 on tankers and create a maximum limitation of $300 per gross ton up to a ceiling of $30m; and for inland barges a minimum floor of $150,000 with unlimited liability.

The FWPCA also imposes a civil penalty of up to $5,000 but only in respect of a discharge in harmful quantities.[94] For this purpose, the Act directed the President to determine by regulation the quantities which would be harmful to the public health or welfare of the United States.[95] Pursuant to the Act, the President proclaimed that a discharge of oil which creates "a film or sheen upon or discoloration of the surface of the water" is harmful. In *United States* v. *Chevron Oil Company*,[96] the defendant was prosecuted for a 21 gallon spill which created a sheen over 1,000 sq. ft. area. The Court of Appeals held that the defendant was precluded from showing that a spill which satisfied the regulation did not actually cause harm but he was not precluded from arguing that the spill was not a harmful quantity in that it was de minimis.

### Limitation of Liability

Three questions asked in the special case stated for the Supreme Court of South Australia were removed to the High Court of Australia. They revolved around the applicability of Pt. VIII of the *Merchant Shipping Act* 1894-1900 (Imp) to an Australian State. The High Court in *China Ocean Shipping Co.* v. *South Australia*,[97] by majority, held that imperial legislation could apply to a State after federation as it could to a colony before, by paramount force. On construction, a majority held that the *Merchant Shipping (Liability of Shipowners and Others) Act* 1900 (U.K.) extended to South Australia but did not bind the Crown in right of South Australia. More specifically the High Court held that the owner had right to apply for limitation, the master did not and the agent . . .?

The issues surrounding the limitation questions of this case have been superseded by the repeal by the *Navigation Amendment Act* 1979 (Cth)

93. H.R. 6803 (1977).
94. 33 U.S.C. 1321 (b) (3).
95. 33 U.S.C. 1321 (b) (4).
96. 1979 A.M.C. 602.
97. (1980) 54 A.L.J.R. 57.



(s. 104 (3)) of Pt. VIII of the *Merchant Shipping Act* 1894-1900 (Imp). Farewell old colleague. In the twilight of your years this brash young Commonwealth Act sneaks up on you, humiliates you and kicks your crutches from under you. And let me tell you, old comrade, you deserve every bit of it. How I cherish the many enjoyable hours I spent criticising you. Still, it is unsporting of the federal government not to postpone your demise until your centenary year. The young, I am afraid, show no veneration. You, with limitation rates 118 years old and in your 86th year of statutory life, are attacked and felled by a Convention, a mere 23 years old. I fear I am too old to cope with law reform of that pace. I know I am too old to spar with a spritely young buck like the *Navigation Act*. But, old friend, you may yet rule us from the grave. Your good may have been interred in your bones but your evil is to live on after you. For, old dear, we have inherited your "actual fault or privity" clause in memoriam to your senility.

The amending Act replaces Pt. VIII of the *Navigation Act* with two divisions. The second re-enacts the excluded liability s. 502 of the *Merchant Shipping Act* 1894 with two modifications: by virtue of the new s. 6 (4) it applies to the ship's operator; it does not apply to a foreign ship, though I can find no definition of this phrase for this division.

The first division, by the new s. 333, enacts the International Convention relating to the Limitation of Liability of Owners of Sea-Going Ships 1957[98] with the exception of Art. I-1 (c). Curial jurisdiction is conferred on the Supreme Courts. The limitation ceiling is formulated by reference to ship's tonnage which is computed by the new Pt. XA of the Act and may be supplemented by regulations. The limitation quantum is expressed in Pancaré gold francs which are to be converted to Australian currency.

98. The Convention will itself be replaced when the Convention on Limitation of Liability for Maritime Claims 1976 comes into force. The later Convention formulates the limitation by reference to International Monetary Fund—Special Drawing Rights. 1 SDR = 15 Poincaré francs approx.

## Annexure

## Scope of Part VIII

## NAVIGATION ACT

Unless a law (including the law of a State or the Northern Territory) excludes or limits it, pursuant to an international agreement to which Australia is a party, the Commonwealth limitation applies to:

1. a non sea-going ship:
   (i) if engaged in overseas, inter-state or territorial trade or commerce;
   (ii) belonging to or under the control of the Commonwealth.
2. a non sea-going ship in the course of construction, i.e., launched but not completed and delivered:
   (i) intended for use in overseas, inter-state or territorial trade or commerce;
   (ii) being built by or for the Commonwealth.
3. a sea-going ship belonging to the naval, military or airforces of Australia.
4. other sea-going ship unless:
   (i) proceeding on a voyage:
      (a) between a port and a place (or place and a port) where the port is in Australia and the place in waters above the continental shelf of Australia;
      (b) between a place and a place in waters above the continental shelf of Australia;
      (c) between a port and a port in the same State or Territory; and
   (ii) a law of a State or the Northern Territory applies the Convention to the ship; provided that
   (iii) it is not a non sea-going ship to which 1 (i) or (ii) applies.

Until State legislatures enact the Convention, the Commonwealth Act applies to all sea-going ships (sustained by external affairs power Const., s. 51 (xxix)) and some non sea-going ships (sustained by territories and trade and commerce powers — Const., ss. 422, 51 (i), 98). The Convention will continue to apply through State legislation which captures from the Commonwealth sea-going ships on intra-state voyages, but intra-state non sea-going ships will not be covered by the Convention



unless supplementary State legislation so provides. Specific reference is made in the federal legislation to non sea-going ships under construction. Presumably the term "sea-going ship" is intended to embrace sea-going ships which have been launched but not completed and delivered under the building contract. They would remain within the purview of the federal Act even though intended for intra-state activities because, by definition, they have not travelled on an intra-state voyage.

The jurisdiction of State legislation enacting the Convention is confined to vessels on an intra-state voyage which is defined in the new s. 8 by contra-distinction to the overseas voyage and the inter-state voyage. A vessel retains the classification of its last voyage until it gets underway on its next voyage. It seems to follow that ship which has completed an overseas voyage is deemed to remain on the voyage even though it is docked for repairs or loading for an intra-state voyage. The "voyage definitions" wisely avoid the need to decide where the voyage commences and terminates. Rather, the definitions apply to vessels which *in fact* travel between prescribed ports *in the course* of a voyage. The use of the word "travels" suggests that the leg must be completed in order to classify the status of the voyage. In the absence of the word "travelling", the next intended port of call appears to be irrelevant. For example, a ship which has travelled from Rockhampton to Brisbane and then gets under way for Sydney would, at the time of a collision off the New South Wales coast, be deemed to be on an intra-state voyage. It is of little consequence, if the Convention applies whatever its legislative source.

By virtue of the new s. 6 (4), the Convention applies to owners and operators of ships. Article 6 of the Convention applies the limitation to the ship, the charterer, manager and operator of the ship and their servants when acting in the course of their employment. Moreover, the master and crew members may limit their liability notwithstanding their actual fault or privity. The owner, charterer, manager and operator are deprived of the limitation if the claim resulted from their actual fault or privity. I refrain from commenting on the insidious organic theory of corporate shipowners in order to illustrate the latest decision on actual fault or privity, albeit an American case.

*In the Matter of M.V. Republica de Colombia*[99] the major portion of collision fault was attributed to an overtaking freighter when the failure of electrical mechanism caused her to swing to port and collide with the bow of an overtaken containership. The freighter sought to limit her liability under the United States statute which deprives her of that right if the fault was due to the actual fault or privity of the owners. The court held that the onus is on the owner to explain the cause of loss and its lack of privity to or knowledge of the fault or, if it cannot show precisely how the loss occurred, to exhaust all possibilities and

99. 1979 A.M.C. 156.

show as to each one it was without requisite privity or knowledge. The ship's evidence was that an electrical fault had been repaired by a technician before the voyage. However, because the technician was incompetent to diagnose the cause of the fault, because the chief electrician and port agent were present and reported to the superintendent in charge of maintenance and because the owner did not employ the manufacturer's engineers as the manufacturer's handbook instructed, the owner was held to have actual knowledge of or be privity to the vessel's unseaworthiness.

### Salvage, General Average and Marine Insurance

There seems to be a proliferation of collision cases in the American law reports. I wonder if there is any correlation with the 1978 Coast Guard Regulation which requires all 1600 ton and over American flag-carrying vessels to instal a marine radar system for surface navigation.[1] Collision cases, with their complex facts, are singularly inappropriate for oral presentation, as are charter disputes which turn on the terms of contract. I thought then I might complete this paper with brief mention of recent salvage, general average and marine insurance cases. I hesitate to do so with experts like Ron Salter in the audience to intimidate me.

Are solicitor-client relations deteriorating? One would hope that *The Anna Maria*[2] is typical. On completion of salvage services in 1965 the salvors' solicitor requested a valuation of the salvaged property. The shipowner's solicitor replied saying he would seek instructions. The solicitor supplied figures four years later. The salvors' solicitor then requested the production of documents in support of the figures. He received them six years later. In the meantime the Committee at Lloyd's had appointed an arbitrator pursuant to the salvage agreement and a date for hearing was fixed after fourteen years. Before the arbitration hearing, the shipowner then applied for an injunction to restrain the salvors from proceeding with the arbitration on the grounds of the salvors' delay! The shipowner submitted that the salvors' delay had repudiated the contract, the shipowner had accepted the repudiation, the contract had been discharged and the court should grant the injunction. Sheen J. held the salvors had not, the shipowner had not, the contract had not and even if they all had, he would not.

The *Unique Mariner* (*No. 2*)[3] is an educationally useful decision to compare general maritime law salvage rights with salvage agreement rights. No doubt you recall that the master signed a Lloyd's No Cure No Pay salvage agreement with a tug in the mistaken belief that the tug had been engaged by the ship's manager. The tug commenced salvage services until dismissed by the master when he learned that another tug had been engaged. The dismissed tug sued for damages or

1. (1978) 33 C.F.R. 164-35.
2. [1980] 1 Lloyd's Rep. 192.
3. [1979] 1 Lolyd's Rep. 37.



salvage reward. The Court explained that if no agreement existed the salvor would have been entitled to a salvage reward for services rendered, irrespective of benefit generated, and compensation for loss of the opportunity to complete the service. As an agreement existed no salvage reward was payable, but the master had breached the implied term of the contract not to prevent the salvor from performing his contractual obligations. The salvor accepted the repudiation, the contract discharged and the salvor was entitled to damages for breach of contract.

Elementary contractual relations were also explained in *The Winson*[4] The ship chartered to the defendant and carrying the defendant's wheat stranded on a reef in the South China Sea. Salvage operations under a Lloyd's Open Form agreement included the removal and storage of the cargo. The cargo owner refused to pay for storage and stevedoring expenses incurred before the shipowner declared the voyage abandoned. Of course the Court held that the salvors were acting for the cargo owner who was responsible for their salvage expenses, irrespective of abandonment.

From America we read of professional salvors recovering from the United States government a salvage reward of $175,000 increased by the decline of the U.S. dollar against the Dutch guilder from the date of the service. In *Bureau Wijsmuller* v. *U.S.A.*[5] a navy anti-submarine escort ship ran aground on a sand bank and signed a Lloyd's Open Form. The tugs were unable to move the naval ship until the 94 tons of water had been pumped from the sonardome under the bow and, in fact, the ship refloated herself. The ship being valued at $23m, the court likened the operation to the salvage of *The Queen Elizabeth.*[6]

The Court of Appeals ruled that a salvage reward paid by shipowners is a general average expenditure. In *Amera da Hess Corp.* v. *Mobil Apex*,[7] sparks ignited the cargo of gasoline and naptha while the ship was loading. Tugs towed the ship away from the lock and extinguished the fire. The ship claimed that the salvage reward should be admitted to general average. The Court held under the York Antwerp Rules 1974, which had been incorporated in the charter, (rr. A and VI) the expenditure was intentionally incurred for the benefit of ship and cargo and therefore qualified for contribution.

To sustain an insurance claim for barratry, the English Court of Appeal in *The Michael*[8] confirmed the onus on the insured to prove the act of barratry, in this case the deliberate scuttling of the ship by an officer, and the absence of the owner's consent. The barratry occurred when the ship became immobilised in heavy weather. The engine room flooded, the generators stopped, the crew abandoned ship and the master then ordered the ship to be abandoned.

4. *China-Pacific S.A.* v. *The Food Corporation of India* [1979] 1 Lolyd's Rep. 167.
5. [1979] A.M.C. 2331.
6. (1949) 82 LL.L.R. 803.
7. [1979] A.M.C. 2406.
8. *Piermay Shipping Co.* v. *Chester* [1979] 2 Lloyd's Rep. 1.

Two recent cases from America discuss the meaning of "external cause" in marine insurance policies.[9] In one, *Contractors Realty Co. Inc.* v. *Insurance Co. of North America*,[10] the insured company purchased a pleasure yacht for $342,270 to entertain business clients with style, grace and comfort. Following problems from peeling paint, leaky windows and toilets malfunctioning, the yacht caught fire and sank, having been checked by a boat yard the day before. The insurer declined the claim under the all risks policy on the ground that a fire in the engine room is not an external cause. The Court held that "external" excludes loss by the act of owner or master, loss from normal wear and tear and loss through decomposition and deterioration. It did not require the peril to originate outside the hull and accordingly the plaintiff succeeded.

On the warranty of seaworthiness in insurance contracts it is hardly surprising that an American court held a barge to be unseaworthy when it sank while loading because of a 3½ foot hole in the bow.[11] And in *D. J. McDuffie Inc.* v. *Old Reliable Fire Ins. Co.*[12] the Court explained the American general law distinction between the implied continuing warranty of seaworthiness which is a condition precedent to the insurer's liability if unseaworthiness which is a condition precedent to the risk commencing irrespective of the subsequent cause of loss.

I have reserved *Michaels* v. *Mutual Marine Office Inc.*[13] for my last report in the confident expectation that Australian underwriters and P. and I. Clubs will not resort to such desperate defences. While unloading steel scrap, huge claw-grab buckets were dropped with such force they inflicted 200 holes and dents onto the ship, occasioning repair costs of $105,000. The charterer claimed against his policy which covered only liability in excess of the $10,000 deductible when arising from "any single loss, accident or disaster". The insurer contended that there were 200 losses, accidents or disasters; that each hole constituted a single loss, accident or disaster and each being under the $10,000 minimum the insurer was not liable. The Court had no difficulty finding that the event or occurrence causing the loss was a continuous process or method of unloading and not a series of unconnected incidents.

## Conclusion

In the short time available to me I have not attempted to be exhaustive, analytical or even develop a theme. I have simply thrown together some snippets of information. Therefore, I cannot legitimately draw a conclusion.

"Some Rough Passages in Maritime Law"? Perhaps: the barometer is falling, the anemometer spinning and the storm clouds are gathering

9. *Goodman* v. *Fireman's Fund Ins. Co.* [1979] A.M.C. 2534.
10. [1979] A.M.C. 1864.
11. *J. M. Corbett Co.* v. *Insurance Co. of North America* [1979] A.M.C. 1510.
12. [1979] A.M.C. 595.
13. [1979] A.M.C. 1673.



low on the horizon. But the Association need not be perturbed. We are a staunch ship under command of a good captain with an able-bodied crew. Our engines are frequently lubricated, our victuals regularly replenished and, I have observed this week-end, we have an enormous fuel capacity. Let the common lawyers tremble; we maritime lawyers are made of sterner stuff.

Might I add that, try as I did, I could never recapture the erotic fantasy which that prophetic 'phone call so violently interrupted. For that I can never forgive Peter. But, for the opportunity he gave me to attend this Conference I will always be grateful, for it has proven to be enjoyable, stimulating and for some members, I suspect, even more erotic than my fantasy.