MODERN MARITIME LAW

VOLUME 1: JURISDICTION AND RISKS

THIRD EDITION

ALEKA MANDARAKA-SHEPPARD

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Aleka Mandaraka-Sheppard

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MODERN MARITIME LAW

THIRD EDITION

Volume 1: Jurisdiction and Risks

ALEKA MANDARAKA-SHEPPARD
Alan Van Praag – Contributor to
Rule B Attachment under US law

informa law
from Routledge

Third edition published 2013
by Informa Law from Routledge
2 Park Square, Milton Park, Abingdon, Oxon OX14 4RN

and by Informa Law from Routledge
711 Third Avenue, New York, NY 10017

Informa Law from Routledge is an imprint of the Taylor & Francis Group, an Informa business

First edition published by Cavendish Publishing Limited 2001

Second edition published by Routledge-Cavendish 2007;
reprinted by Informa Law 2009

Published by permission of the Incorporated Council of Law Reporting for England and Wales, www.iclr.co.uk

Only European Union legislation printed in the paper edition of the *Official Journal of the European Union* is deemed authentic

British Library Cataloguing in Publication Data
A catalogue record for this book is available from the British Library

Library of Congress Cataloging in Publication Data
Mandaraka-Sheppard, Alexandra, 1949–
[Modern maritime law and risk management]
Modern maritime law / Aleka Mandaraka-Sheppard, Alan van Praag contributor to Rule B attachment under US Law. – Third edition.
pages cm. – (Maritime and Transport Law Library)
Revision of the author's Modern maritime law and risk management.
Includes bibliographical references.
1. Admiralty–Great Britain. 2. Risk management–Great Britain. I. Title.
KD1833.M36 2013
343.4109′6–dc23
2013011843

ISBN: 978–0–415–83516–9 hbk
ISBN: 978–0–415–84320–1 set
EISBN: 978–1–31588–705–0 ebk

Typeset in Plantin
by Florence Production Ltd, Stoodleigh, Devon

Knowing the law is the beginning of a battle;
knowing how to apply it is winning the battle;
and knowing how to practise risk management
is winning the war.

To my son Emmanuel-John Sheppard and to the young generation of shipping law and practice

This unique title examines in depth issues of jurisdiction, maritime law and practice from a modern perspective and highlights the importance of risk management with a view to avoiding pitfalls in litigation or arbitration and minimising exposure to liabilities.

The third edition has been fully revised and restructured into two self-contained volumes, the first covering jurisdictional issues and risks and the second exploring the diverse aspects of maritime law, risks and liabilities. The book continues to provide succinct analysis of the key principles and precedents of maritime law, a detailed account of important decisions, and incorporates developments in regulation, Codes of good practice and international Conventions.

This first volume tackles a wealth of complex jurisdictional aspects, ranging from the enforcement of maritime claims to a detailed analysis of the conditions of arrest of ships, including reconsideration of wrongful arrest, beneficial ownership, *forum non-convenience* and limitations upon the jurisdiction of the English courts.

Key features of Volume One:

- expert analysis of the very latest case law, including noteworthy cases in international jurisdictions.

Highlights important recent changes and developments in:

- piercing the corporate veil – State immunity;
- conflict of laws and jurisdictions;
- stay of proceedings for breach of jurisdiction or arbitration agreements;
- issues arising from tiered dispute resolution clauses;
- anti-suit injunctions;
- the EU jurisdiction scheme and the Review of the Brussels I Regulation.

New Chapter on Freezing Injunctions as compared with the US Rule B Attachment.

This book serves as an invaluable reference for lawyers, academics, and a host of shipping and risk management professionals worldwide.

FOREWORD TO THE FIRST EDITION

The Rt Hon. The Lord Mustill of Pateley Bridge

Anyone with knowledge of the boundless enthusiasm and apparently inexhaustible energy displayed by Dr Aleka Mandaraka-Sheppard in the conception and evolution of the London Shipping Law Centre is unlikely to be surprised at her successful achievement of another daunting goal, namely to publish a new and comprehensive work on shipping law.

There is of course nothing radical in itself about the idea of a modern work in this field. As the author rightly acknowledges, several valuable works on individual aspects of the general topic have been published in recent years, but there has long been the need for a comprehensive work from which both the student (at various levels) and the practitioner can gain a general perspective as well as concrete and detailed information. Perhaps the late Professor Cadwallader, to whom the author pays tribute, could if spared have tackled the task, but his former student has produced a volume of which he would have been proud, the more so given the striking expansion in volume of the law relating to ships and the sea that has occurred since his day. Even a glance at the table of contents will show the extent of the author's grasp of contemporary legal issues, and the thoroughness with which they have been explored.

In addition to the general merits of this book, there is one particular theme that calls for particular mention. That is, the emphasis laid on risk management. In recent years this has become a commonplace of business law and practice in many areas, but with a few notable exceptions it has been an absentee from study and practice in the maritime world. Fortunately this is now changing, and Dr Mandaraka-Sheppard's focus on the subject will, it may be hoped, stimulate interest and promote a wider appreciation of its cardinal importance.

Shelves now groan under the weight of legal textbooks, and inches of shelf-room are at a discount, but place must be made for *Modern Maritime Law*, whose dimensions belie its approachability while evidencing its scope. This is a book for the library, the study and the office. I welcome it, and am sure that readers will do the same.

M.J. Mustill
June 2001

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FOREWORD TO THE SECOND EDITION

The Rt Hon. The Lord Clarke of Stone-cum-Ebony

This is by any standards a magnum opus. Seven years have passed since Michael Mustill wrote the foreword to the first edition of *Modern Maritime Law*. He paid tribute to the boundless enthusiasm and apparently inexhaustible energy displayed by Dr Aleka Mandaraka-Sheppard in the preparation of the first edition.

Both the enthusiasm and the energy are evident again in the preparation of the second edition. I cannot pretend that I have read every word of its 1,000 pages. It would have been impossible to do so in the time available. However, those parts that I have been able to absorb have persuaded me, and I am sure will persuade students and practitioners in maritime law in the future, that this is a vital work for everyone interested in shipping law to have on their shelves. It has a breathtaking range. Try as I might, I have not been able to think of anything like it. Having spent some five years as the Admiralty judge and having before that practised for many years at the Admiralty and Commercial Bar, I am delighted that Aleka has had the time and energy to produce a second edition of her great work.

Like Michael Mustill, I am particularly struck by her focus on risk management, especially in the context of the management of ships and the ISM Code. The importance of risk management was brought home to me when I had the privilege of conducting the Thames Safety Inquiry and then the Formal Investigation into the collision between the *Marchioness* and the *Bowbelle* with its consequent loss of life. I hope that this book will help to underline this aspect of the legal responsibilities of ship-owners, managers and charterers alike.

Finally, I especially appreciate the section on Admiralty Jurisdiction and Procedure, because it brings back many happy days in front of the then Admiralty judge, Mr Justice Brandon, in the 1970s, when the likes of the present Admiralty judge, Mr Justice David Steel, and I were kept on our mettle by the intellectual rigour of the judge.

Future practitioners will have the great benefit of Dr Mandaraka-Sheppard's book with which to educate future Admiralty judges.

Sir Anthony Clarke
August 2007

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FOREWORD TO THE THIRD EDITION

The Rt Hon. Sir Bernard Rix

This splendid work has now reached its third edition in only a dozen years, a considerable compliment in itself to the achievement of Dr Aleka Mandaraka-Sheppard in creating what amounts to a modern, comprehensive treatise on the responsibilities of commercial shipowners. It is a personal pleasure to have been asked to follow in the line of Lord Mustill and Lord Clarke of Stone-cum-Ebony as the writer of the foreword to this latest edition.

The author's insight, which represents the distinctive feature of this work, is her understanding that international conventions, regulations and codes of good practice, working together with the developing principles of the commercial common law of England and the lessons to be learned from the science of business risk management, have in the modern world revolutionised the conduct of shipowning. Her analysis of modern maritime law in the light of techniques of risk management is highlighted in the opening chapter of the second volume of this work, and runs like a *leitmotiv* through both its volumes. She seeks to demonstrate that a responsible shipowner needs to approach his business with a holistic assessment of the risks inherent in it. She enumerates those risks as encompassing the corporate structure, the financial model, the operational performance, the human dimension, the trading, and the potential liabilities of the company, be those liabilities in terms of personal injury, damage to property, commercial losses, or criminal offences, or also the large costs inherent in disputes and their resolution. Thus she correctly observes that shipowners, who necessarily use contracts for the allocation of risks, can by means of better draughtsmanship and more perceptive evaluation of those risks seek to avoid the costs and liabilities involved in litigation.

This, then, is a work that goes much wider than the traditional textbook on carriage of goods by sea exemplified by the law of charterparties and bills of lading. Indeed, there are no chapters which are devoted to those subject-matters. I note, however, that a third volume is indicated, which, as I understand it, would apply the technique of risk management analysis to the formulation of contracts and thus to their interpretation. Such a volume would be eagerly awaited. For the present, however, Dr Mandaraka-Sheppard is here primarily concerned with the basic tools and responsibilities of the shipowner, with the purchase, building or financing of his ships, the ownership structure of his business and its management, with the dangers of the seas found in collisions and like accidents and their consequences by way of salvage,

towage and general average, and with the demands of international conventions and maritime authorities. Moreover the first volume of this work contains a comprehensive review of what might be described as the legal shoals and dangers inherent in shipowning – of the admiralty jurisdiction, maritime claims, the law of arrest, conflict of laws, forum shopping and the anti-suit injunction.

Woven into her treatment of all these topics the author finds time for a careful analysis of leading principles and authorities of English and European law. The reader will find here careful and illuminating discussions of modern cases such as *The Front Comor*, *The Achilleas*, and *OBG v Allan*, to name but a few.

Dr Mandaraka-Sheppard is that rare author who is or has been variously an academic, a practitioner, an arbitrator and mediator, and, in her creation of the London Shipping Law Centre, something of an entrepreneur too. Her energy and enthusiasm, of which previous forewords have spoken, are well known. Michael Mustill described this as a book for the library, the study and the office. Anthony Clarke said that practitioners would use it as a tool to educate future Admiralty judges. All that is true. It is also a work which calls on shipowners and those who advise them to find in the law here so helpfully discussed a challenge to achieve that safe and successful operation of maritime commerce which is so important to the development of international peace and prosperity.

Sir Bernard Rix
September 2013

PREFACE TO THE THIRD EDITION

Thinking about – let alone writing – a new edition of a legal textbook is a great burden for any author and takes a considerable span out of the writer's life for not much reward. Yet the zest and drive of any committed writer remains, and the first question is whether a new edition is necessary. Unless the law has changed to a considerable extent, there would be no point in filling up legal libraries with another volume. However, as the readers of *Modern Maritime Law* will witness, the insurmountable amount of new legislation, EU Directives, Regulations and IMO Conventions that have emerged, coupled with the copious case law, since 2009, has made the new edition an absolute necessity.

Thus, the result is that the book is now in two volumes, owing to the increased amount of the included material and because each volume is self-contained, making it easier for readers to manage them.

Apart from the fact that the book provides a cohesive overall view of aspects of maritime law – with a fairly detailed account of important decisions – and brings together the major 'Bibles' written on individual topics, *Modern Maritime Law* has stimulated a great interest in the subject of risk management and promoted its importance among commercial and legal professionals, as Lord Mustill had predicted in the foreword to the first edition. In the last decade or so, industry organisations, shipping companies, insurers, as well as lawyers and their professional organisations, have focused on legal, regulatory and other risk issues in a more systematic way for corporate strategies, as well as for loss prevention and dispute avoidance. Commercial people take more care to express their intention in contracts as to the allocation of risks between themselves, and the judges often try to decipher the parties' intention in terms of allocation of risks when they interpret contracts in the context of the factual matrix.

It is made clear in this and in the previous editions that the price for failing to recognise and address proactively how to keep up with compliance with regulations and minimise the hazards that can lead to accidents, or disputes, could be high in terms of financial or reputational losses, business disruption and damage to commercial or client relationships.

Thus, the title of this book reflects its modern perspective, and the subtitles of each volume are about, first, the risks of litigation (first volume) and, second, how to manage risks and liabilities (second volume). A third volume will follow in due course to complete the series.

VOLUME 1: 'JURISDICTION AND RISKS'

Since the second edition (2007), considerable case law and significant developments have taken place in jurisdictional matters and conflict of laws, including, but not limited to, the redraft of the Brussels I Regulation, which poses new thinking with regard to choice of forum agreements, arbitration and other issues (applicable from 2015).

The chapters have been substantially overhauled, and a new chapter on freezing injunctions and the US Rule B Attachment has been included (8 chapters in this volume); the Rule B attachment is contributed by Alan Van Praag, a New York lawyer.

Aside from the introductory parts on the jurisdiction of the English courts and the principles of the arrest of ships, there have been new court decisions in the areas of: sovereign immunity, stay of proceedings for breach of jurisdiction or arbitration agreements, *forum non-conveniens*, anti-suit injunctions, anti-arbitration injunctions, damages for breach of arbitration agreements, appeals against arbitration awards, tiered dispute resolution clauses, freezing injunctions and the US Rule B attachment, beneficial ownership and the piercing of the corporate veil, including how the law of associated ship arrest in South Africa has developed. A critical analysis of the law in relation to wrongful arrest of ships is made, and reform of the present law is proposed. Foreign case law is referred to when it is necessary to show how the law develops, in particular areas, in the other common law jurisdictions.

Conflict of jurisdictions under both common law and the EU jurisdiction regime, including an interpretation of the new provisions of the EU recast Regulation 2012 and a forecast about its possible effect from 2015 upon the English jurisdiction and arbitration should be of particular interest to legal practitioners.

VOLUME 2: 'MANAGING RISKS AND LIABILITIES'

The substantive parts of maritime law are dealt with in the second volume, consisting of 16 chapters. It appeared to me necessary to reorganise this volume in order to explain aspects of risk management, with particular emphasis on risks and liabilities in the light of new regulations and codes. All the chapters have been substantially reviewed and include basic principles of the law of contract, tort, economic torts, causation and remoteness of damages.

Part I: 'Overarching Aspects of Risk Management'

A general overview of managing risks in the twenty-first century in the light of new technological developments is given in Chapter 1, which places in context what follows in this volume but also reflects on risks in connection with dispute resolution and jurisdictional aspects, which are dealt with in Volume 1. The risks to which the owners and managers are exposed are highlighted.

The EU's unflagging energy in issuing new directives and regulations for the promotion of quality shipping has created a 'no-escape net' for non-compliant companies. Any non-compliance will be caught up by inspections and audits. So Chapter 2 includes all new safety at sea legislation and codes of good practice affecting ship operators, ports, flag administrations, classification societies and other

stakeholders. Parallel developments at the IMO level follow, which include the adoption of new International Conventions. This has resulted in a plethora of enacting regulations in the UK. An analysis of the ship-source pollution Directive, the old and the new, is also included in Chapter 2.

It was felt essential to separate the provisions of the ISM Code, which was amended in 2010, and deal with them in Chapter 3, which is followed by an explanation of the 'Rules of Attribution of Liability' and the effect of the ISM Code upon liabilities in terms of the ship's seaworthiness for the carriage of goods, marine insurance contracts, limitation of liability and criminal liabilities, in Chapter 4 of Part I.

Part II: 'Ownership Aspects and Management of Risks'

In addition, there are new BIMCO standard terms of contracts, such as the new SHIPMAN and CREWMAN, the NEWBUILDCON and the new Sale Form. These are dealt with in this part, which includes new court decisions on: mortgagees' risks, wrongful inducement of breach of contract, ship-management disputes and the meaning of 'best endeavours', fiduciary duties and agency principles, who is the employer of the crew; refund guarantees per se versus performance bonds under shipbuilding contracts, the construction of contracts, comparison between the NEWBUILDCON and the SAJ, risks connected to the expiration of refund guarantees, options, and price escalation; ship sale and purchase (including the meaning of 'as is, where is' or 'as she was'), the effect of total exclusion from liability clauses, good faith issues, caveat emptor, best endeavours to negotiate, new developments with regard to misrepresentation as well as damages for breach of contract and mitigation, and the role of classification societies.

Part III: 'Ship and Port Risks and Liabilities'

This part includes: issues concerning safety at sea regulations to avoid collisions, liability of employers for wrongful acts of employees, apportionment of liability, new trends on the measure of damages and loss of a chance versus loss of profit/earnings; developments in the law of salvage (including the feasibility of 'environmental salvage'), meaning of 'best endeavours' by salvors, and the 'disparity' principle; the new BIMCO TOWCON and TOWHIRE and off-shore contracts (including the knock-for-knock allocation of risks); general average issues and piracy risks (including new cases on disobeying charterers' orders to avoid high-risk of piracy); and risks assessment for port authorities, a new perspective on their risks and liabilities, including liability for pilots' negligence.

Part IV: 'Compensation for Liabilities and Limitation under International Conventions'

Finally, this part deals with the actual limits of liability of ship-owners or managers and the new developments in the increase of the limits by the adoption of Protocols to the Conventions or the adoption of new Conventions, including liability and compensation under the Athens Convention and the pollution legislation. New cases on criminal liabilities of classification societies and charterers in connection with pollution damage are included.

RISK MANAGEMENT IN PERSPECTIVE

The undercurrent theme of the book has been to raise awareness of the importance of looking at ship-owning, trading, maritime law and practice in terms of 'risks', with the view to minimising or preventing the risk of liabilities, as well as avoiding pitfalls in litigation or arbitration.

Since the first and second editions of this book, it is pleasing to witness that most shipping companies have implemented risk management systems for the analysis and evaluation of risks in relation to operational safety and regulatory compliance. The pressures upon shipping companies to implement safety management systems – emanating not only from regulators but also commercial partners, insurers and the industry in general – have had an impact on the promotion of a safety culture. It is no coincidence that there have been fewer major accidents, particularly of the kind experienced in the 1980s, 1990s and early 2000s.

The safety and quality systems, coupled with industry best practice and standards, including the new developments by the Code of Safe Working Practices for Merchant Seamen and the revolution in technology, which has led to the forthcoming implementation of ECDIS, provide the benchmark for compliance by shipping operators. One cannot divorce the law from the broader picture of risk management, and that includes the management of risks during the dispute resolution process, choice of jurisdiction and the avoidance of incurrence of wasted legal costs. The risk management era has now filtered through all industries and professions, including law firms, and it is imposed by regulators.

Specific reference to risk management issues is made in some parts in the text, when it appears especially necessary to draw attention to it, whereas, in other parts, it should be obvious what lessons can be learnt from the detailed analysis of decisions.

Risk management, in the context of this book, briefly means focusing the mind of corporate leaders on: corporate decision making, developing the corporate structure in a legitimate way, choosing staff and contracting partners with due diligence, considering risks at the stages of contracting and the drafting of contracts (much litigation arises from ambiguous or clumsy drafting), minimising operational risks, complying with regulation and international Conventions to prevent Port State Control detentions, performing their obligations under contracts and choosing the right legal teams when it comes to dispute resolution process.

'Human element' factors play a great role in all areas of business. It is evident from the numerous court decisions what can go wrong and, in hindsight, what could have been avoided at the stages of corporate decision making through to the performance of contracts and up to, and including, the stage of dispute resolution.

There has been a phenomenal increase in cases of deceit, fraudulent transactions and conspiracy in commercial engagements that have reached the English courts. English judges are commercially aware of the pressures upon decision making in the business world and very astute in detecting sham transactions that would require further investigation by lifting, or piercing, the corporate veil. The law, however, cannot always help those who enter into bad bargains or contract with dubious partners.

Dr Aleka Mandaraka-Sheppard (LLB, LLM, PhD, Dip.IArb) is a dually qualified lawyer (Greece and England) and was a practising solicitor in the City of London, Head of the Shipping Law Unit, University College London and Professor of Maritime Law. She is the Founder and Chairman of the London Shipping Law Centre (LSLC) – Maritime Business Forum and practises as a Maritime Arbitrator and Mediator. Her passion has been in promoting risk management education and 'quality shipping' since 1998 through the LSLC and privately by conducting in-house seminars for shipping companies. This book was inspired by her teaching and practice in maritime law and by her students. Her other writing includes articles in various aspects of shipping law, charter parties, bills of lading, marine insurance, the right of election in contract law, damages, shipbuilding/termination, wrongful arrest of ships/need for reform, case law commentaries, book reviews, and regulation.

In her early years of studies in the UK, apart from her interest in shipping, she carried out research for her PhD into organisational behaviour and published *The Dynamics of Aggression in Women's Prisons* (1986), which gave her insights into causes of conflict, ways of resolving difficult conflict situations and the effect of regulations on deterring or aggravating misbehaviour. Her knowledge in this area has provided the backbone to her practice as a lawyer, educator, writer, risk management advisor, arbitrator and, in particular, as a mediator.

She is a supporting member of the LMAA and a member of the Baltic, the Chartered Institute of Arbitrators and the London Court of International Arbitration. She is promoting mediation and she is an accredited mediator by the ADR Group and the School of Psychotherapy and Counselling of Regent's College London.

ACKNOWLEDGEMENTS

It remains for me to express my thanks to those who have played a role in the third edition of this book. In particular, I am grateful to: my research assistants Karolina Harvey, John Almpanoudis and Serhan Hardani for their assistance and diligence at various stages; the publishers for providing a research fund for this purpose and for the staunch support of the editors, Faye Mousley, and Alexia Sutton; copyeditor, Louise Smith and project manager, James Sowden; Alan Van Praag for his unique contribution to this edition with his authoritative writing about the Rule B Attachment; Måns Jacobsson for his invaluable comments and suggestions made on the chapter on Pollution Damage and Compensation, which I have restructured and rewritten; (for the second edition, the pollution chapter had been written by Elizabeth Blackburn QC, to whom I am still grateful, for she provided the backbone of the chapter); Professor John Hare for confirming my correct understanding of the function of 'associated ship arrest' in the piercing of corporate veil under South African law; Michael Howard QC for his valuable and thoughtful comments on 'wrongful arrest of ships' and on 'environmental salvage'; Nick and George Tsavliris for providing me with material about developments in salvage; and Andrew Mitchell of Global Marine Consultants for his valuable comments on technical matters and the ISM. Of course, it goes without saying that my thanks are due to my family and friends for their patience waiting to see me emerge free from the writing of this edition and, in particular, to my husband Colin for providing me with good nutrition, particularly during the intensive time of writing. Exchanges of views in some areas of the law with him and our son, Emmanuel, were of particular encouragement.

Furthermore, I am particularly grateful to Sir Bernard Rix for his generosity in writing the Foreword to this edition.

Although every effort has been made to avoid mistakes and correct inescapable and irritating typographical errors, responsibility for any, if they exist, and for the views expressed in the text remains with me, but, in this litigious era, I should add that no responsibility is accepted to any person who relies on any statements contained in this book; for their own risk management, they should seek the advice of their lawyers.

The law is intended to be that as it stood on 15 March 2013 with regard to the first volume and on 15 May 2013 with regard to the second volume, but some important decisions published after these dates were considered at the proofs stage and are mentioned as much as space could permit.

Dr Aleka Mandaraka-Sheppard
Practising Maritime Arbitrator and Mediator
London Shipping Law Centre – Maritime Business Forum

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LIST OF ABBREVIATIONS

AA	Arbitration Act
ACA	Admiralty Court Act
AJA	Administration of Justice Act
CA	Companies Act
CA	Court of Appeal
CJEU	Court of Justice of the European Union
CJJA	Civil Jurisdiction and Judgments Act
CPR	Civil Procedure Rules
EC	European Community
ECJ	European Court of Justice
EFTs	electronic funds transfers
EFTA	European Free Trade Association
EL(DE)A	Employers' Liability (Defective Equipment) Act
FAAs	Fatal Accidents Acts
GCA	Gold Clause Agreement
HDPCA	Harbours, Docks and Piers Clauses Act
HVR	Hague–Visby Rules
JA	Judicature Acts
LA	Limitation Act
LDA	Latent Damage Act
LOF	Lloyd's Open Form
LSLC	London Shipping Law Centre
MCA	Maritime Conventions Act
MSA	Merchant Shipping Act
NYPE	New York Produce Exchange
PC	Privy Council
PD	Practice Directions
PDA	Probate, Divorce and Admiralty
P&I	protection and indemnity
RSC	Rules of the Supreme Court
SCA	Senior Courts Act
SCA	Supreme Court Act
SCJ(Con)A	Supreme Court of Judicature (Consolidation) Act

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CHAPTER 1

THE JURISDICTION OF THE ADMIRALTY COURT

1 HISTORICAL OVERVIEW

1.1 ORIGINS[1]

The High Court of Admiralty, presently located at the Rolls Building, was an instrument of the Lord High Admiral and had jurisdiction to administer justice in respect of piracy or spoil and other offences committed upon the sea.[2] The judge of the court was a deputy of the Lord High Admiral, and civilian Admiralty practitioners practising civil law, as derived from Roman law, ran the court. Therefore, the practice and procedure of the court were founded upon civil law concepts, and its jurisdiction was separate from that of the common law courts. However, apart from possessing criminal jurisdiction, the Admiral began, gradually, to hear disputes also in all civil matters connected with the sea. The court asserted the highest and fullest jurisdiction over everything that might happen upon the high seas. This resulted in its usurping the jurisdiction of the common law courts in matters arising in inland tidal waters and gave rise to a conflict between the Admiralty and the common law courts.[3]

1 Whether or not the Admiralty jurisdiction in England originated from Saxon times, or from the times of Henry I, the authority of the Crown to administer justice in respect of piracy or spoil and other offences committed upon the seas was undisputed by the reign of Edward III; see *Halsbury's Laws* Vol 93 (2008) 5th edn, para 80; *The Zeta* [1982] P 285 at 300, CA per Lord Esher MR.

2 Ibid, *Halsbury's Laws*, para 80.

3 In consequence of which two statutes were passed in the reign of Richard II confining the jurisdiction of the admirals and their deputies to things done upon the sea and in the main streams of great rivers to the seaward side of the bridges, ibid, para 80; and *The Goring* [1988] AC 831.

1.2 CONFLICT BETWEEN THE ADMIRALTY AND THE COMMON LAW COURTS

The encroachment of the Admiral's jurisdiction upon the common law courts' jurisdiction caused indignation and became intolerable to common law lawyers in the thirteenth and fourteenth centuries. The authority of the Admiral to determine disputes involving seizure at sea was denied by the Common Pleas in 1296.[4] Later, a statutory restriction of the Admiral's jurisdiction was obtained by the Admiralty Jurisdiction Act 1389,[5] in the reign of Richard II. In addition, by the subsequent statute, the Admiralty Jurisdiction Act 1391,[6] matters of contracts, pleas and quarrels, which arose within the body of a county, whether on land or water, were removed from the jurisdiction of the Lord Admiral and were only triable in common law courts.[7]

In the years that followed, common law lawyers still employed devices to enable them to adjudicate maritime matters, which were actually within the jurisdiction of the Admiralty Court. Attempts by the Lord High Admiral to proceed in the Admiralty Court, either by arresting the person of the defendant, or seizing his goods, within the jurisdiction (known as the 'maritime attachment') in order to compel the defendant to appear, were thwarted by common law writs of prohibition.[8] The last known instance of Admiralty jurisdiction by the arrest of the person was in 1780.[9]

The long conflict between the Admirals and the superior common law courts led to the decline of the Admiralty Court. Eventually, at the end of the reign of William IV in the 1830s, the jurisdiction of the Admiralty Court was retained in matters such as droits of Admiralty (wrecks at sea, which were the Admiral's property rights), collisions, salvage, possession of ships, bottomry and seamen's wages.[10]

1.3 THE ADMIRALTY COURT ACTS SINCE 1840[11]

During this time, Dr Lushington, who was also a Member of Parliament, succeeded Sir John Nicholas as judge of the High Court of Admiralty in 1838. He promulgated the passing of the Admiralty Court Act (ACA) 1840. This Act effectively abolished the restrictions imposed upon the Admiralty Court by the Acts of Richard II and

4 Marsden, RG, *The Selden Society's Select Pleas of the Court of Admiralty, AD 1390–1602 (1892–1897)*, Vol 1.

5 This Act was finally repealed in 1879.

6 The criminal jurisdiction of the Admiralty Court continued, as adjusted by these statues, until 1537, when it was to a great extent transferred to commissioners of oyer and terminer under the Great Seal, of whom one was the judge of the High Court of Admiralty. All proceedings on indictment for offences within the jurisdiction of the Admiralty of England are now to be brought before the Crown Court, see *Halsbury's Laws*, op. cit. fn 1.

7 See details of this background in Wiswall, FL (Jr), *Development of Admiralty Jurisdiction Since 1800*, 1970, CUP; also see Roscoe's *Admiralty Jurisdiction and Practice*, 5th edn, for a general overview in the introduction.

8 Ibid, p 5.

9 See *The Clara* (1855) Swa 1 (arrest of a person for civil liability was considered out of order; perhaps the prohibition of such arrest marked the beginning of protection of human rights and liberties).

10 Op. cit., *Halsbury's Laws*, fn 1.

11 The advent of statutory Admiralty jurisdiction, ibid, para 81.

extended the court's general jurisdiction, but it did not restore it to jurisdiction enjoyed in the ancient times in questions of contract, freight and charter parties.

The new jurisdiction conferred by the ACA 1840 included cognisance of mortgages on ships, questions of legal title and the division of proceeds of sale on suits of possession, and any claims in the nature of salvage services, provision of necessaries to a ship, as well as claims for towage. It was made clear, however, that none of this jurisdiction was exclusive, but concurrent with that of the courts of law and equity.[12]

The jurisdiction was extended, in certain cases as specified in s 6 of the ACA 1840 (3 & 4 Vict c 65), so as to enable the court to adjudicate upon claims where the ship was within a body of a county. There was, however, no remedy *in personam* until 1854, by s 13 of the ACA 1854 (17 & 18 Vict c 78). The 1854 Act revived the obsolete proceedings *in personam*, and the Admiralty Court had power to proceed by way of monition. However, the effect of these two Acts was only to enable the jurisdiction to be exercised in the body of a county and did not give any greater jurisdiction than the court had before.

By s 7 of the subsequent ACA 1861 (24 Vict c 10), jurisdiction was given over any claim for damage done by any ship. The effect of s 35 of this Act, which gave the Admiralty Court jurisdiction either by proceedings *in rem* or *in personam*, was to enable proceedings *in personam* to be taken where the case was an Admiralty suit, so that proceedings *in rem* would have lain against the ship, or against the owners or persons identified to have an interest in the ship.

Dr Lushington was inclined to give the full literal meaning to the Acts of Parliament and thought that anything done at sea, or anything done anywhere by a ship, was to be considered as within the Admiralty jurisdiction. Sir Robert Phillimore was more imbued with the idea that the Admiralty Court had the entire jurisdiction that it ever had, which was extended over every tort committed on the high seas.[13]

By 1868, the Admiralty jurisdiction was considered to be of a double character. There was the original jurisdiction, which existed in the ancient court of Admiralty (the jurisdiction of the Lord High Admiral), and the enlarged jurisdiction given by the aforesaid statutes. These statutes professed to enlarge and did enlarge the jurisdiction of the Admiralty Court. For the first time, the statutes gave Admiralty jurisdiction within the body of a county as, for example, when a collision occurred between an object on the high seas and a ship. There was an undoubted jurisdiction of the Lord High Admiral over everything that happened upon the high seas, and there was no prohibition about it to be found in the books.[14]

Thus, the Admiralty jurisdiction, as expanded by the Acts of 1840 and 1861, enjoyed exclusively the advantage of the proceeding *in rem*. Maritime law developed in a separate court, but it derived from law expounded in other courts.

12 Op. cit., Wiswall, fn 7, pp 40–41. The author also explains, p 42, how Dr Lushington lost his seat in Parliament, which was the price he had to pay for the passing of the 1840 Act. An opponent of Dr Lushington insisted that a clause was inserted in the Act disqualifying the Admiralty judge from sitting in Parliament.

13 Per Esher LJ in *The Zeta* [1892] P 285, pp 297–299.

14 Ibid, per Fry LJ, at pp 300–301.

1.4 THE NEED FOR CONSOLIDATION OF ALL COURTS

At the time of Sir Robert Phillimore's judgeship, the Royal Commission, which inquired into the structure of the court, reported in 1869 that the root cause of the need to extend the Admiralty jurisdiction was the imperfection of the procedures of the common law system. The recommendations of the Royal Commission were enacted by Parliament by the first Supreme Court of Judicature Act 1873, which consolidated all courts, including the High Court of Admiralty, into the Supreme Court of Judicature.

This court was divided into Her Majesty's High Court of Justice and Her Majesty's Court of Appeal to exercise appellate jurisdiction. The High Court was subdivided into five divisions: Queen's Bench, Common Pleas, Exchequer, Chancery, and Probate, Divorce and Admiralty (PDA or Admiralty Division).[15] By 1875, any imperfections of the Act were corrected, and the long struggle between the Lord Admiral's jurisdiction and the common law courts ended. The main reason for the consolidation was to foster the development of common concepts between these divisions of courts.

The development of Admiralty law has continued to be influenced by changes in concepts of common law and vice versa. The reform of the judicature system transformed the attitude of common law lawyers. The Admiralty jurisdiction was as readily extended, as it was in the early days when it was in the hands of the civilian Admiralty judges. There were frequently transfers of actions, which were not triable at common law, from the Queen's Bench Division to the Admiralty Court.[16]

Subsequent enactments modified the Judicature Acts, and this led to the consolidation of all statutes by the Supreme Court of Judicature (Consolidation) Act 1925. In addition to the basic jurisdiction of the Admiralty Court, claims for necessaries supplied to any foreign ship anywhere and questions of title arising in suits of necessaries, claims for damage done by any ship (inclusive of personal injury and death), claims for salvage services (including life salvage) rendered anywhere and claims in the nature of towage were added.[17]

Two subsequent Acts affected the Admiralty jurisdiction: the Crown Proceedings Act 1947 (concerned with limitation of liability and immunity from suit *in rem* of Crown vessels and aircraft) and the Civil Aviation Act 1949 (concerned with claims for salvage of or by an aircraft).

The Administration of Justice Act 1956 gave an opportunity for further judicial expansion of the Admiralty jurisdiction. This Act confirmed the jurisdiction the court already possessed and incorporated some provisions of the International Convention for the Arrest of Sea-going Ships 1952 (ratified in this country in 1959, but not all of its provisions were introduced into English law).

15 Op. cit., Wiswall, fn 7, pp 100–102.
16 Op. cit., Wiswall, fn 7, p 128.
17 Supreme Court of Judicature (Consolidation) Act 1925, ss 18 and 22.

2 ADMIRALTY JURISDICTION AT THE PRESENT TIME

2.1 THE SOURCES

The sources of Admiralty jurisdiction can be found in statutes,[18] Conventions, rules of court and judicial doctrines. The present statute is the Supreme Court Act (SCA) 1981, which was renamed in 2009 as the 'Senior Courts Act' 1981, following the replacement of the Judicial Committee of the House of Lords by the 'Supreme Court'. The provisions of this Act, which shall be referred to in this book for convenience as the SCA 1981, will be examined in detail later. The Admiralty Court is part of the Queen's Bench Division (s 6(1)(b)) of SCA 1981, and the judges of the court are puisne judges of the High Court, nominated from time to time to be Admiralty judges (s 6(2)); there is one Admiralty judge appointed to this court. Conventions,[19] as enacted by various Acts of Parliament, play a major part in the expansion or restriction of Admiralty jurisdiction. The rules of court for Admiralty procedures can be found in Part 61 (Admiralty claims)[20] of the Civil Procedure Rules (CPR) 1998,[21] as amended, and Practice Directions (PD 61.1.1). The Admiralty and Commercial Court Guide to procedure, issued regularly, supplements these Rules.

2.2 TERMINOLOGICAL CHANGES

The Latin terms are regrettably eliminated. Only the phrases '*in rem*' and '*in personam*' are maintained, but the latter is now referred to as 'other claims'.[22] The word 'writ' has been replaced with 'claim form', and 'action' with 'claim'. So the well-known '*in rem* action' is chaged to '*in rem* claim'. The old 'summons' or 'motion' is now 'application'. 'Plaintiff' has changed to 'claimant', 'pleading' has become 'statement of case', 'discovery of documents' has become 'disclosure', 'Mareva injunction' is now called 'freezing injunction', and 'Anton Piller order' is a 'search order'. 'Leave of the court' is substituted by 'permission'. 'Third party action', 'contribution proceedings'

18 The first statute was the ACA 1840, which gave statutory rights of arrest (*in rem* jurisdiction); the Supreme Court of Judicature Acts 1873 and 1875, as consolidated in the Supreme Court of Judicature Act 1925, expanded this *in rem* jurisdiction. The Administration of Justice Act 1956 was passed mainly to give effect to two International Conventions: the Convention for the Arrest of Sea-going Ships 1952 and the Convention for the Prevention of Collisions at Sea 1952. The 1956 Act was amended and superseded by the present statute, the SCA 1981.

19 These include: the Arrest Convention 1952, the Convention for the Prevention of Collisions 1952, the International Salvage Convention 1989 (the Salvage Convention), Foreign Immunity 1978, the European Civil Jurisdiction and Judgments Conventions 1968 and 1988, the Athens Convention on Carriage of Passengers and their Luggage by Sea 1974, the Limitation of Liability Convention 1976 (International Convention relating to the Limitation of Liability of Owners and Others of Sea-going Ships), the Convention and Protocol for the Prevention of Pollution Damage 1992.

20 There is no longer any jurisdiction in the county court in Admiralty matters: see the Civil Courts (Amendment) (No 2) Order 1999, I 1999/1011, all Admiralty proceedings must be commenced in the High Court.

21 These are the result of the Woolf Reform of Civil Justice. Prior to 1999, the Court Rules were embodied in the so-called 'White Book' for the practice in the High Court and in the 'Green Book' for the county courts' practice.

22 Op. cit., fn 1, *Halsbury's Laws*, paras 79, 84.

and a 'counterclaim against a new party' are now known as 'Part 20 claims'. 'Summary judgment under Order 14' is now found under Part 24.

The old terms are used here in the discussion of cases decided before the CPR 1998 were implemented.

2.3 THE ADMIRALTY COURT

The Administration of Justice Act 1970 (s 2(1)) abolished the Probate, Divorce and Admiralty division of the High Court and provided for the constitution of the Admiralty Court of the Queen's Bench Division of the High Court. Section 6 of the SCA 1981 replaced this and further provided, by sub-s(2), that the judges are puisne judges of the High Court, nominated by the Lord Chancellor.[23] The Admiralty Marshal performs the arrest, appraisement and sale of a ship or property – being the subject of the *in rem* claim. The Admiralty Registrar carries out the functions of the Queen's Bench Master. The nautical assessors, known as Elder Brethren of Trinity House, who express their opinion in nautical matters, may assist the judge in technical cases. Their expert evidence is admissible in all courts on all issues of fact about seamanship.[24] The nautical assessor is not to be confused with the expert witness; he is not subjected to cross-examination, but the judge has discretion to choose between the opinion of differing nautical assessors.[25]

The SCA 1981 governs the jurisdiction of the Admiralty Court, ss 20–24. This refers to other statutes, such as the jurisdiction of the court under the Merchant Shipping Act 1995. The *in rem* jurisdiction of the county courts was abolished in 1999.

The old Ord 75 of the Rules of the Supreme Court (RSC), relating to procedure in Admiralty cases, has been replaced with CPR Pt 61 and Practice Direction 61 (PD 61), which were brought into force pursuant to Civil Procedure (Amendment No 5) Rules 2001 (SI 2001/4015). CPR Pt 58 and Practice Direction 58 (PD 58) govern *in personam* claims.

2.4 SUBJECT MATTER JURISDICTION

The Admiralty Court hears any admiralty claims as prescribed by ss 20–24 of the SCA 1981. These are set out in Chapter 2. Any disputes arising out of charter parties are invariably agreed by the parties to the contract to be referred to arbitration. Any other claims, which are not within s 20 of the SCA 1981, or otherwise within the inherent jurisdiction of the Admiralty Court, or claims that arise in relation to bills of lading which do not incorporate an arbitration agreement, may be brought before the Commercial Court provided the English courts are to have jurisdiction.

23 SCA 1981, s 6(1)(b), (2).
24 *The Clan Lamont* (1946) LlL Rep 522.
25 *The Australia* (1926) LlL Rep 142.

3 FOREIGN ASPECTS AND EXTENT OF THE ADMIRALTY JURISDICTION

3.1 INTERNATIONAL AMBIT

Admiralty law has developed from sources common to many maritime nations. Thus, through the ratification of International Conventions, the internal municipal laws of different countries show greater similarity to one another.

The jurisdiction extends to all ships, hovercrafts[26] or aircraft,[27] British or foreign, wherever the residence or domicile of the owners[28] may be,[29] but it is limited by Crown and foreign sovereign immunity rules.[30] It applies to all maritime claims whenever arising.[31] Its extent is also subject to rules governing the mode of exercise of such jurisdiction, and, in the case of collisions, the jurisdiction is restricted where the action is *in personam*.[32]

3.2 LIMITATIONS

In certain circumstances, the court may have to stay or decline its jurisdiction upon application of other rules and doctrines.[33] On the other hand, the expertise that exists in England in maritime matters encourages parties to choose English jurisdiction in their contracts or submit to English jurisdiction. Even so, however, English jurisdiction can be challenged if a claimant, in breach of a jurisdiction agreement, initiates proceedings in a court of a State of the European Union and that court is seized first in accordance with the rules applicable by the Brussels I Regulation 44/2001, as amended in 2012.[34] These issues are examined in detail in Chapters 6–8 of this volume.

26 Hovercraft Act 1968, s 2(1).

27 Where legislation provides; see *Glider Standard Austria* [1965] 2 Lloyd's Rep 189.

28 Provided the jurisdiction does not conflict with the provisions of the Council Regulation 44/2001 (Brussels I Regulation) on civil jurisdiction and judgments, see Chapter 7 below, or the owners of the relevant property are not the Crown or a foreign State using the ship or cargo for public purposes.

29 SCA 1981, s 20(7)(a).

30 As apply by the Crown Proceedings Act 1947 and the State Immunity Act 1978.

31 SCA 1981, s 20(7)(b).

32 SCA 1981, ss 21 and 22.

33 See Ch 6, below.

34 The Brussels Convention 1968, as amended, and the Lugano Convention 1988, enacted by the Civil Jurisdiction and Judgments Acts 1982 and 1991, respectively (the European Civil Jurisdiction Conventions). On 1 March 2002, amending Council Regulation (EC) 44/2001 (the Brussels I Regulation) came into force which replaced the Brussels Convention 1968. Case law applying the 1968 Brussels Convention, as amended, will continue to be good law where the corresponding wording of the Regulation is the same or similar; see Chapter 7, below, in which reference is made to the Brussels Convention where the case in question was decided before the Regulation was implemented.

4 THE CIVIL LAW AND COMMON LAW APPROACHES

4.1 CIVIL LAW APPROACH

In civil law systems, there are three distinct rules provided in civil procedure codes, namely: (a) rules for a provisional pre-trial remedy, such as conservatory measures to obtain security for a claim; (b) rules relating to establishing jurisdiction on the merits, which may be based on a substantive link between the claim and the particular jurisdiction; and (c) rules relating to the status of some claims as preferred claims over unsecured creditors' claims.

4.2 COMMON LAW APPROACH

By contrast, in the common law jurisdictions, the commencement of the *in rem* claim coupled with the arrest of the ship merges the three distinct functions set out above. Namely, it has the following consequence:

(a) obtaining security for the claim;
(b) establishing jurisdiction on the merits[35] (even if there is no substantive link between the claim and the jurisdiction other than the presence of the arrested ship in the jurisdiction); and
(c) securing the position of statutory maritime claimants as preferred creditors over unsecured ones by the issue of the proceedings *in rem*.

The SCA 1981 provides the means of enforcing those maritime claims specifically mentioned in s 20(2). They are statutory rights *in rem*. The prerequisite is, however, that there must be a substantive cause of action.

4.3 THE ARREST CONVENTION 1952

Art 7 of the Arrest Convention 1952 adopted a middle position between common law and civil law, in that the court where the arrest is made should have jurisdiction on the merits, if its own domestic law permits it, but allows the parties to agree another jurisdiction.

35 Subject to there being (a) no other court claiming to have exclusive jurisdiction, or (b) no Rules of the Brussels I Regulation apply, or (c) no prior agreement between the parties to a dispute to refer their dispute to arbitration or to a foreign court. See Chapters 6 and 7.

5 UNIQUE ASPECTS OF THE ADMIRALTY JURISDICTION

5.1 THE ACTION *IN REM*

The action *in rem*, as renamed the '*in rem* claim' by the CPR, is the most unique aspect of the Admiralty jurisdiction of common law countries.

Historically, a claimant had to secure an entry in the action book kept in the Admiralty Registry stating his name and giving a description of the ship to be sued and the amount of the claim. Shortly thereafter, he had to execute an affidavit to lead a warrant of arrest against the ship. The entry of the action in the Admiralty Registry, developed since 1801, is maintained and has been a useful procedure for purchasers of second-hand ships, because all the *in rem* actions are registered in the Admiralty Registry from the date of their issue.

5.1.1 Foundation

Originally, a suit in Admiralty was commenced by the arrest either of the person of the defendant or of his goods, whether or not the ship or goods in question constituted the subject matter of the offence, the purpose being to make the defendant put up bail or provide a fund for securing compliance with the judgment when it was obtained. This procedure ended as a result of the conflict between the Admiralty and the common law courts, but the Admiralty succeeded in establishing a procedure for the arrest of the property that was the subject matter of the claim.[36]

The 'action *in rem*', originally founded on the notion of maritime liens, was confined to the right to enforce a maritime lien against the ship by which the damage was caused, or in relation to which the maritime lien arose. A maritime lien attaches to the property from the moment of its creation, for example the incident of damage (see, further, Ch 2, para 2.2). Therefore, a judgment obtained, with regard to claims for which a maritime lien attaches, is allowed against that ship regardless of change of ownership or whether or not its owner is a bona fide purchaser not being liable personally for the claim.[37] Thus the *in rem* proceeding was granted the name of '*action in rem*',[38] and the claims for which a proprietary right on the ship attaches are known as 'truly *in rem*'.

After the conflict between the Admiralty and the common law courts ended, the jurisdiction of the Admiralty Court was extended by the Admiralty Court Acts to other maritime claims as provided by the statutes, regardless of whether or not the claims gave rise to maritime liens. By this expansion, all maritime claims (including maritime liens) became enforceable pursuant to the statutes and became known as statutory rights *in rem*.

36 Op. cit., fn1, *Halsbury's Laws*, para 83, and *The Banco* [1971] P 137 at 150, *The Monica S* [1968] P 741 at 749–750 per Brandon J.

37 *The Ripon City* [1892] P 226, pp 241–242.

38 Op. cit., *Halsbury's Laws*, fn 1.

5.1.2 Truly *in rem* versus non-truly *in rem* claims

A distinction between these two types of maritime claim is based on their respective origin, namely the truly *in rem*, or *in rem* per se, is a right against the ship regardless of statute, whereas the non-truly *in rem* claim[39] is granted the right against the relevant ship by statute. The distinction is kept for procedural purposes. For example, different preconditions apply to truly *in rem* claims from those that apply to non-truly *in rem* claims for the arrest of the ship, as will be seen in Chapter 4.

Only for this reason is the truly *in rem* claim distinguished from those maritime claims that do not give rise to a proprietary right in the ship, but they have been made statutory rights *in rem* by the Admiralty Court Acts.

5.1.3 Ship personification versus procedure

The distinguishing feature of the action *in rem* has always been the right of the maritime claimant to proceed directly against the ship, being traditionally regarded as the defendant. The exercise of this right has been particularly useful when the owner, or the person interested in the ship, does not appear to defend the case but lets the ship be sold by the court. Hence, the personification theory arose for the purpose of explaining the nature of the *in rem* action. If the person interested in the ship and in defending the claim appears in the proceeding, or acknowledges service of the *in rem proceeding*, the action becomes, also, an action against the person. This step in the action and its effect have given rise to the procedural theory as an explanation of the *in rem* action, which is regarded merely as the necessary procedural step, the function of which is to bring the person liable for the claim in the proceedings.

Although the distinction between the personification and the procedural theories may be academic, it will be seen later, in Chapter 4, how the procedural theory evolved. In fact, since the House of Lords' decision in *The Indian Grace*,[40] the procedural theory has been accepted as the correct theory in interpreting the *nature* of the action *in rem* (para 3.5, Ch 4).

5.1.4 Effect of issuing the *in rem* proceeding

The procedural step of issuing the *in rem* claim has the effect of crystallising the claim on the ship as a statutory lien *in rem*, with regard to claims that do not attract a maritime lien (as will be seen in Chapter 4, para 3.2.1). This is very important as a form of security in case the ship is, in the meantime, sold. A sale after the issue of the *in rem* proceeding would not affect the crystallisation of the claim even if the ship were sold to a bona fide purchaser. The recording of the issue of the *in rem* claim in the Admiralty Registry has the effect of notice to the world, and potential purchasers can do a search in the Registry to check whether or not there are *in rem* claims against the ship.

39 Other writers use the term '*quasi in rem*', but this term was more appropriate in relation to the old maritime attachment (see 1.2, above, and 5.2.1, below) which involved an action *in personam* whereby the person liable, or his property not being the subject matter of the debt, was arrested in order to compel the person to appear in court. Since such procedure caused indignation to common law lawyers, it was prohibited.

40 *Republic of India v India Steamship Co Ltd (No 2)* [1994] 3 WLR 818 (HL).

5.1.5 Effect of service of the *in rem* proceeding

The *in rem* claim is brought into full effect by service on, or arrest of, the relevant ship when she comes within the jurisdiction of the English court. When a claim attracts a maritime lien, such as that arising from successful salvage services, the property to be arrested includes the cargo and bunkers on board the particular ship and the freight accrued in relation to the voyage performed by the ship that is arrested.

5.1.6 The fundamental value of the *in rem* proceeding

The *in rem* proceeding is a strong weapon for the claimant as it can be used to obtain security for the claim and also found jurisdiction. The issue of the *in rem* claim, or the threat of arrest, invariably functions to open negotiations for the provision of security by the bank or the protection and indemnity insurer (the P&I club) of the putative defendant. Security can be obtained also for claims referred to arbitration, or for claims for which a court, other than the Admiralty Court, has jurisdiction on the merits.[41]

5.2 THE ACTION *IN PERSONAM*

5.2.1 The old action *in personam* (maritime attachment or '*quasi in rem*')

As mentioned earlier, apart from proceedings against the ship, the person who would be liable, or any of his property, could be arrested. Such arrest was known as the *maritime attachment*. Wiswall[42] explains that the procedure of maritime attachment was similar in outline to that of the action *in rem*, because it could involve seizure of property as well. For this reason, it was often referred to as a proceeding *quasi in rem*. He further states that such *maritime attachment*, or *quasi in rem* proceeding, should not be confused with the action *in rem* per se, because the former was a device designed to compel the appearance of the defendant in an action *in personam* and it was by no means an action *in rem*.

The common law courts vehemently disapproved of the proceeding to arrest the person and caused it to become obsolete. As a result, the power of arrest was only retained in relation to property provided it was the subject matter of the dispute.[43]

5.2.2 Action *in personam* under the MS Acts

The procedure *in personam* was founded by the Merchant Shipping Act 1854 and was paralleled to a suit *in rem*, in which the defendant appeared collaterally to defend the *res*. The High Court of Admiralty was empowered to entertain proceedings commenced by personal service upon the owners of the property, which was the subject matter of the dispute. It was particularly useful when the property, such as the ship, had been lost. Subsequently, s 35 of the ACA 1861 confirmed both the *in rem* and *in personam* jurisdiction of the Admiralty Court.

41 *The Bazias* [1993] 1 Lloyd's Rep 101.
42 Op. cit., fn 7, p 165.
43 Op. cit., fn 7, pp 12–17.

5.2.3 Rules for service

With regard to actions *in personam*,[44] jurisdiction is established by the service of the proceeding upon the person within the jurisdiction. However, in maritime or commercial claims, when, in most cases, the defendant is a company registered abroad, other rules have developed to serve upon the defendant out of the jurisdiction, provided the claim comes within certain defined categories.[45]

6 LIMITS TO INVOKING ADMIRALTY JURISDICTION

6.1 SHIPS OF THE CROWN

An *in rem* claim is not allowed to be brought against ships of the Crown nor against those owned by foreign States. Section 38 of the Crown Immunity Act 1947 states that 'His Majesty's ships' means ships of which the beneficial interest is vested in His Majesty, or ships which are registered as Government ships, or which are, for the time being, demised or sub-demised to or in the exclusive possession of the Crown; except that, the said expression does not include any ship in which His/Her Majesty is interested, otherwise, than in the right of His/Her Government. By s 29 of the same Act, no proceedings *in rem* shall be brought, in respect of any claim, against the property of the Crown whether a ship, cargo or aircraft. Section 24(2) of the SCA 1981 preserves that position. The jurisdiction may be exercised *in personam* against the Crown in accordance with the provisions of the Crown Immunity Act 1947.

6.2 FOREIGN SOVEREIGN

Similarly, under s 10(1)–(3) of the State Immunity Act 1978, a foreign sovereign is immune[46] from actions *in rem* brought against a ship or a sister ship belonging to the State or actions *in personam* brought to enforce a claim which arose in connection with such a ship unless, when the cause of action arose, the ship was (or, in a case of a sister ship, both ships were) 'in use, or intended for use, for commercial purposes'. As regards claims *in rem* brought against cargo belonging to a foreign State, the immunity will apply, unless both ship and cargo, carried on board, were in use, or intended for use, for commercial purposes (s 10(4)(a)). An action *in personam* will be allowed in respect of claims against the cargo belonging to the State, if the ship carrying it was used, or intended for use, for commercial purposes (s 10(4)(b)).

The Supreme Court, recently, clarified in ***SerVaas Inc v Rafidain Bank***[47] that the expression 'in use for commercial purposes' was to be given its ordinary and natural meaning having regard to its context. Parliament had not intended a retrospective

44 For the advantages of the action *in rem* over the action *in personam*, see Chapter 4, below.

45 See Chapter 6, below.

46 *I Congreso del Partido* [1978] 2 QB 500, pp 537–538: Goff J on the point of State Immunity (approved by the HL [1983] AC 244); see also *Kuwait Airways Corp v Iraq Airways Co* [1995] 2 Lloyd's Rep 317 (HL). As regards waiving sovereign immunity, see *Sabah Shipyard (Pakistan) Ltd v Islamic Republic of Pakistan* [2002] EWCA Civ 1643, where the Republic of Pakistan had granted a guarantee to the shipyard guaranteeing liabilities of a State-owned corporation.

47 [2012] UKSC 40, at paras 16, 17.

analysis of all the circumstances that gave rise to property, but an assessment of the use to which the State had chosen to put it. Property was only subject to enforcement where it was currently 'in use, or intended for use', for a commercial transaction. It was not sufficient that it related to, or was connected with, a commercial transaction, and that was consistent with the different treatment of the two categories of immunity in the Act.

Furthermore, the Privy Council (PC), in ***La Générale Des Carrières et Des Mines Sarl v Hemisphere Associates LLC (Jersey)***,[48] thoroughly reviewed the principles of State immunity, referring to previous leading authorities, and also dealt with the issue when the corporate veil can be lifted[49] to ascertain whether or not a separate corporation from the State was the organ of the State.

Hemisphere, a Delaware corporation, purchased the assignment of two arbitration awards issued by the International Chamber of Commerce against the Democratic Republic of Congo (DRC). The awards concerned disputes in relation to the supply and finance of contracts entered into by the DRC with the then Yugoslavian Hydroelectric Company, Energoinvest (YHCE). Hemisphere sought to enforce those awards against the assets of Gécamines, alleged to be a DRC State-owned corporation. The assets consisted of Gécamines' shareholding in a Jersey joint venture company (GTL), and the income flow due from GTL to Gécamines under a Slag Sales Contract.

The Commissioner of the Royal Court of Jersey upheld Hemisphere's claim, on the basis that Gécamines was at all material times an organ of, and so to be equated with, the DRC. On appeal, the Jersey Court of Appeal, by a majority, affirmed the judgment. Gécamines appealed to the PC.

The PC (Lord Hope, Lord Walker, Lord Mance (delivered the main judgment), Lord Wilson and Lord Carnwath) held that:

(a) The common law had shifted from an 'all or nothing' view of sovereign immunity to a restrictive principle that excluded ordinary commercial dealings from the ambit of sovereign immunity. Whether an act constituted an ordinary commercial dealing depended upon its nature, rather than its purpose. The restrictive principle of immunity[50] had been confirmed by the State Immunity Act 1978.[51]
(b) The distinction between a State organ and a separate or distinct entity was not concluded by determining whether the separate entity had separate legal personality. The 1978 Act made this clear by providing that a separate entity had to be 'distinct from the executive organs of the government of the State' as well as 'be capable of suing or being sued'. A body might in the present context fall to be regarded as an organ of the State, rather than a separate or distinct entity, even though it had a separate juridical personality.[52]

48 [2012] 1 Lloyd's Law Rep Plus 69; [2012] 2 Lloyd's Rep 448.

49 See Ch 4, below, para 5.11.

50 The same restrictive immunity approach is applied in Hong Kong: *FG Hemisphere Ass LLC v Democratic Republic of the Congo* – HK CA (2011) 821 LMLN 1.

51 Op. cit., fn 48, at paras 7, 8 and 14; *Trendtex Trading Corporation v Central Bank of Nigeria* [1977] 1 Lloyd's Rep 581; [1977] QB 529, *The I Congreso del Partido* [1981] 2 Lloyd's Rep 367; [1983] AC 244, *Kuwait Airways Corporation v Iraqi Airways Co* [1995] 1 WLR 1147, considered.

52 Op. cit., fn 48, at paras 16 and 25; *Baccus Srl v Servicio Nacional del Trigo* [1957] 1 QB 438, *Mellenger v New Brunswick Development Corporation* [1971] 1 WLR 604, *Trendtex Trading Corporation v Central Bank of Nigeria* [1977] 1 Lloyd's Rep 581; [1977] QB 529, referred to.

(c) The distinction between an organ of the State and a separate legal entity was relevant not only to questions of immunity but also to questions of substantive liability and enforcement.[53]

(d) Separate juridical status was not conclusive. An entity's constitution, control and functions remained relevant. But constitutional and factual control and the exercise of sovereign functions did not, without more, convert a separate entity into an organ of the State. Especially where a separate juridical entity was formed by the State for what were on the face of it commercial or industrial purposes, with its own management and budget, the strong presumption was that its separate corporate status should be respected. It would take quite extreme circumstances to displace this presumption, although the presumption would be displaced if in fact the entity had, despite its juridical personality, no effective separate existence. But for the two to be assimilated generally, an examination of the relevant constitutional arrangements, as applied in practice, as well as of the State's control exercised over the entity and of the entity's activities and functions, would have to justify the conclusion that the affairs of the entity and the State were so closely intertwined and confused that the entity could not properly be regarded for any significant purpose as distinct from the State and vice versa.[54]

(e) There might also be particular circumstances in which the State had so interfered with or behaved towards a State-owned entity that it would be appropriate to look through or past the entity to the State, lifting the veil of incorporation. But any remedy should in that event be tailored to meet the particular circumstances and need. Merely because a State's conduct made it appropriate to lift the corporate veil to enable a third party or creditor of a State-owned corporation to look to the State, did not automatically entitle a creditor of the State to look to the State-owned corporation. Lifting the veil might mean that a corporation was treated as part of the State for some purposes, but not others.[55]

(f) The primary question in relation to Gécamines was whether the circumstances showed that its juridical personality and its apparently separate commercial assets and business were so far lacking in substance and reality as to justify assimilating Gécamines and the State for all purposes. The conclusion of the lower courts that Gécamines could not and should not be regarded as a separate entity from the State, for the purposes of enabling a third party to hold it responsible for the DRC's debts and to enforce these against its assets, was not justified. It was common ground that Gécamines was not a sham entity. It was a real and functioning corporate entity, having substantial assets and a substantial business including interests in over 30 joint ventures with outside concerns. It had its own budget and accounting, its own borrowings, its own debts and tax and other

53 Op. cit., fn 48, at para 28.

54 Op. cit., fn 48, at para 29; see further *Kensington International Ltd v Democratic Republic of Congo* [2005] EWHC 2684 (Comm); *Walker International Holdings Ltd v Republique Populaire du Congo* [2005] EWHC 2813 (Comm); *Ministry of Trade of the Republic of Iraq v Tsavliris Salvage (International) Ltd* [2008] 2 Lloyd's Rep 90; *Wilhelm Finance Inc v Ente Administrador del Astillero Rio Santiago* [2009] EWHC 1074 (Comm); *First National City Bank v Banco para el Comercio Exterior de Cuba* 462 US 611 (1983); *Roxford Enterprises SA v Cuba* 2003 FCT 763; *Banco de Mocambique v Inter-Science Research and Development Services (Pty) Ltd* 1982 (3) SA 330 (T); *Shipping Corporation of India Ltd v Evdomon Corporation* 1994 1 (SA) 550 (AD).

55 Ibid, at para 30.

liabilities and its own differences with government departments. At least one such department (the Revenue) went from time to time to the lengths of enforcing tax claims by execution against Gécamines' assets. Further, Gécamines was not in any sense by reason of its functions or activities a core department of, or on that score inseparable from, the State. It was an entity clearly distinct from the executive organs of the government of the State.[56]

7 THE SUBJECT MATTER OF *IN REM* PROCEEDINGS – THE SHIP

7.1 IMPORTANCE OF DEFINITION

Defining a ship is important in many areas of shipping law, marine insurance and International Maritime Conventions, in order to determine which provisions of various statutes, which are intended to apply to ships, are applicable to structures other than those which are obviously a ship. A decision whether a particular structure is a ship or not will determine the basis of liability. For example, if a collision occurs between a floating beacon[57] and a ship, the provisions of the Merchant Shipping Act (MSA) 1995 in relation to apportionment of liability (the Admiralty law rule) will not apply, because they only apply if there is a collision between two or more ships. Common law principles will apply. Unlike the Admiralty law rule of division of loss in accordance with the degree of blame, the common law did not allow for apportionment of blame between two wrongdoers, prior to the Law Reform (Contributory Negligence) Act 1945. It was, therefore, very important to determine whether a collision between a skiff with oars and a rowing boat involved a collision between two ships.[58] A rowing boat, or sculling boat, is a ship for the purpose of the Collision Regulations.[59]

Whether a subject matter will be referred to the jurisdiction of the Admiralty Court will depend on whether a ship was involved in the incident that gave rise to the cause of action. Limitation of liability will also depend on whether the 'thing' that gave rise to liability was a ship within the meaning of the MSA 1995. For the purpose of salvage, the Salvage Convention 1989 has extended the subject matter that can be subject to salvage.[60] There are many other Conventions in which a 'ship' or 'vessel' has to be defined.

7.2 WHAT IS A SHIP?

One might expect that the answer to this question is simply easy and possibly take the position of the gentleman who could not define an elephant but he knew what it

56 Ibid, at paras 64, 70 and 71.

57 It has been held that this is not a ship: *The Gas Float Whitton* [1897] AC 337 (HL).

58 See *Edwards v Quikenden and Forester* [1939] P 261.

59 See recent case of a collision on the River Thames (the non-tidal part) between a rowing boat and *The Snow Bunting* [2012] 2 Lloyd's Rep 647, in which The Thames Navigation General Bylaws 1993, reflecting the spirit of the Collision Regulations 1976, applied; see also Ch 9, Vol 2 of this book.

60 See Chapter 10, Part III, Vol 2 of this book.

was when he saw one.[61] In terms of gender, the ship is known as 'she', denoting the need to handle her with gentle care!

7.2.1 Problematic definition

The issue of defining a vessel or ship has caused controversy over many years and the problem stemmed from the old definition under the Merchant Shipping Act 1894, s 742, (now obsolete) which seemed to have a circular definition, thus:

> 'vessel' includes any ship or boat, or any other description of vessel used in navigation; 'ship' includes every description of vessel used in navigation not propelled by oars.

This definition comprises three elements: first, physical appearance; second, not to be propelled by oars;[62] third, a determined purpose, namely, used in navigation (the second requirement is now abolished).

7.2.2 Old authorities

While it is desirable to have a uniform definition of a ship or vessel, it would be important to look at the purpose behind the definition in each particular case. However, the definition is not supposed to be limiting or exhaustive. The origin of the word 'vessel' comes from Latin *vascellum* meaning a 'vas', and connotes something hollow, a kind of container.

An interesting explanation of the definition of a ship had been given by Blackburn J in ***Ex p* Ferguson**,[63] which is worth quoting because it is useful even today (save for the reference to oars).

This case involved a collision between a steamer and a fishing coble, which had oars, but, when fully loaded with fish and wet nets, it did not use the oars at that time. In deciding whether or not the fishing coble was a ship (under s 2 of the MSA 1854), Blackburn J said: Where it is stated in a statute that certain words shall include a certain thing, the proposition that the words must apply exclusively to that which they are to include is not correct. He further stated:

> the definition given of a 'ship' is in order that 'ship' may have a more extensive meaning. Whether a ship is propelled by oars or not, it is still a ship, unless the words 'not propelled by oars' exclude all vessels which are ever propelled by oars. Most small vessels rig out something to propel them, and it would be monstrous to say that they are not ships. What, then, is the meaning of the word 'ship' in this Act? It is this, that every vessel that substantially goes to sea is a 'ship'. I do not mean to say that a little boat going out for a mile or two to sea would be a ship; but where it is its business really and substantially to go to sea (emphasis added), if it is not propelled by oars, it shall be considered a ship for the purpose of the Act. Whenever the vessel does go to sea, whether it be decked or not decked, or whether it goes to sea for the purpose of fishing or anything else, it would be a ship.

The fishing coble was, therefore, a ship.

61 Per Scrutton LJ in *Merchant Marine Insurance Co Ltd v North of England P&I Assoc* (1926) 26 LlL Rep 201 (CA), p 203.

62 Such a requirement has now been eliminated from all relevant statutes that define a 'ship'.

63 (1871) LR 6 QB 280, p 291.

In many old cases, there had been extensive discussion about the method of propulsion (which is no longer relevant), and the purpose or use of the structure, or even the area where she was used (which are still relevant criteria today under the present statutes).

In ***The Gas Float Whitton (No 2)***, a boat-shaped gas float, moored in tidal waters to give light, was held not to be a ship for the purpose of salvage.[64] Lord Herschell said:[65]

> It was not constructed for the purpose of being navigated or of conveying cargo or passengers. It was, in truth, a lighted buoy or beacon. The suggestion that the gas stored in the float can be regarded as cargo carried by it is more ingenious than sound.

7.2.3 Modern definitions

The *Concise Oxford English Dictionary* defines vessel as: 'a hollow receptacle, especially for liquid, a ship or boat', while the *Collins English Dictionary* gives a broader definition: 'any object used as a container, especially for a liquid, or passengers or freight-carrying ship, boat, etc.' Both refer to its Latin origin. The *Oxford English Dictionary* gives a conventional broad definition of 'vessel' as 'a craft or ship of any kind now usually one larger than a rowing boat and often restricted to sea-going craft or those plying on the larger rivers or lakes'; it defines a 'ship' as 'a large sea-going vessel (as opposed to a boat)'.

When the conventional appearance and use of an object lead the mind to perceive that the object is a ship, there is no need for a definition, as Scrutton LJ put it so lucidly.[66]

Section 313(1) of the MSA 1995 defines a ship to include every description of vessel used in navigation.[67] The same definition is given by s 24(1) of the SCA 1981, which also includes a hovercraft in the definition. The purpose of being 'used in navigation' is important, and these words have been carried forward from the old definition. Thus, only two elements are now considered in the definition of an object as a ship: its physical appearance and its use in navigation.

7.2.3.1 Physical appearance

Sheen J explained physical appearance in ***Steedman v Scofield***,[68] when he was considering whether a jet ski,[69] which was involved in a collision with a speed boat, was a ship for the purpose of the collision regulations; he stated:

> To my mind the word 'boat' conveys the concept of a structure, whether it be made of wood, steel or fibreglass, which by reason of its concave shape provides buoyancy for the carriage of

64 Under Art 1 of the Salvage Convention 1989, a gas float like this will be subject to salvage coming within the wide definition of vessel or property and being in any waters whatsoever (see Ch 10, Part III, Vol 2 of this book and Brice, G, *Maritime Law of Salvage*, 5th edn, 2012, Sweet & Maxwell). See also, for old decisions, Meeson, N. and Kimbell, J. on *Admiralty Jurisdiction and Practice*, 4th edn, 2011, Informa.

65 [1897] AC 337, p 343.

66 In *Merchant Marine Insurance Co Ltd v North of England P&I Assoc* (1926) 26 LlL Rep 201 (CA).

67 The requirement in the old statutes of 'not being propelled by oars' was excluded by the Merchant Shipping (Registration) Act 1993, which was consolidated by the present MSA 1995.

68 [1992] 2 Lloyd's Rep 163, pp 165, 166.

69 See further confirmation in *R v Goodwin* [2006] 1 Lloyd's Rep 432.

persons or goods. Thus, a lifeboat differs from a liferaft in that the boat derives its buoyancy from its shape, whereas a raft obtains its buoyancy from some method of utilizing air receptacles. The jet ski cannot be boarded until it has reached a speed – at which it is stable enough for a rider to pull himself aboard out of the water. A person cannot sit in a jet ski, which is stopped in the water, as he can in a boat. The manufacturers do not describe it as a boat, but as 'personal watercraft'. Giving the word 'boat' its ordinary and natural meaning, I do not think it encompasses a jet ski.

He referred to *Dependable Marine Co Ltd v Customs and Excise Commissioners*,[70] in which it had to be decided whether a ski craft was exempt from purchase tax, being 'a boat or other vessel large enough to carry human beings'; Roskill J propounded, thus:

Whether this craft was a boat or vessel depended on first impressions. The clear primary purpose was to tow skiers and to enable them to have the benefit of a craft to move them without having to use a conventional motorboat together with some person to drive it. It was true that it was physically capable of carrying a human being, who could control the engine. But it had no navigation aids – no rudder, and the only method of changing direction was for the skier or passenger to shift his weight. The phrase 'boats and other vessels' conveyed an element of carriage ability – ability to carry either passengers or goods. Those words conveyed something different from the mere physical ability of a craft to support a passenger. It is doubtful whether the average person would have said that this was a boat or vessel capable of carrying passengers in the normal sense of that phrase. Further, it was doubtful if the craft could be said to be a boat or vessel since it was designed to tow skiers and the ability to carry passengers was merely incidental to that primary function. Accordingly, this craft was not a boat or vessel.

Sheen J in *Steedman v Scofield* defined a 'vessel' as being usually a hollow receptacle for carrying goods or people. In common parlance, he said, 'vessel' is a word used to refer to craft larger than rowing boats, and it includes every description of watercraft used or capable of being used as a means of transportation on water.

However, the Court of Appeal in ***Perks v Clark***[71] held that transportation, or conveying persons and cargo from place to place, was not an essential characteristic, so long as 'navigation' was a significant part of the function of the structure in question; the mere fact that 'navigation' was incidental to some more specialised function such as dredging or the provision of accommodation did not take it outside the definition. For example, oil rigs were capable of and used for navigation (see 7.2.4, below).

A more encompassing definition is used under the Wreck Removal Convention 2007:

'Ship' means a seagoing vessel of any type whatsoever and includes hydrofoil boats, air-cushion vehicles, submersibles, floating craft and floating platforms, except when such platforms are on location engaged in the exploration, exploitation or production of seabed mineral resources.

The word 'seagoing' – if that is a requirement for wreck removal purposes – may be problematic in practice, unless it is meant to refer to a structure that was capable of navigation prior to becoming a wreck.

70 [1965] 1 Lloyd's Rep 550, p 553.
71 *Perks v Clark* [2001] 2 Lloyd's Rep 431 (CA).

7.2.3.2 Used in navigation

The phrase 'used in navigation' requires that the navigation occurs in navigable waters. If navigation occurs within an enclosed sheet of water, it will not normally be held to be navigable waters. A small artificial lake was held not to be navigable in *Southport Corp v Morris*,[72] whereas a non-enclosed canal that communicated via locks to the sea with vessels passing up and down was held to be navigable waters in *Weeks v Ross*.[73]

The question whether a reservoir was 'navigable waters' and could be used by dinghies for navigation depended on whether vessels were proceeding from an originating place A to a terminus B for the purpose of discharging people or cargo at the destination point, in which case there was navigation, save that transportation of people or goods is no longer a required characteristic since *Perks v Clark* (above).

In ***Curtis v* Wild**,[74] it was held that sailing dinghies used in a reservoir were not within the meaning of 'used in navigation' and, in particular, that 'navigable waters' meant waters used by vessels going from point A to point B, not simply for pleasure purposes, even though this involved steering. This is consistent with some old cases.[75]

As seen earlier, in ***Steedman v Scofield***, Sheen J[76] held that it might be possible to navigate a jet ski but it is not a vessel used in navigation and further considered *what is meant by 'used in navigation'?*:[77]

> Navigation is the nautical art or science of conducting a ship from one place to another. The navigator must be able (1) to determine the ship's position and (2) to determine the future course or courses to be steered to reach the intended destination. The word 'navigation' is also used to describe the action of navigating or ordered movement of ships on water. Hence 'navigable waters' means waters on which ships can be navigated. To my mind the phrase 'used in navigation' conveys the concept of transporting persons or property by water to an intended destination. A fishing vessel may go to sea and return to the harbour from which she sailed, but that vessel will nevertheless be navigated to her fishing grounds and back again. 'Navigation' is not synonymous with movement on water. Navigation is planned or ordered movement from one place to another. A jet ski is capable of movement on water at very high speed under its own power, but its purpose is not to go from one place to another.

The phrase 'used in navigation' connotes that, irrespective of the actual current use, the ship is actually or potentially capable of being used for navigation. A ship remains 'used in navigation' although rendered incapable of navigation, provided there is a reasonable expectation that it would regain its capacity to navigate. By contrast, the phrase 'used for navigation' implies that the actual current use of the ship is for navigation.

This was confirmed in ***The Winnie Rigg***,[78] in which the judge applied principles derived from old decisions. The case concerned a moored yacht used for recreational purposes and as a holiday home, which was taken for repairs after having been moored in a harbour for 15 years. The port authority levied distrain on the ship claiming

72 [1893] 1 QB 359.
73 [1913] 2 KB 229.
74 [1991] 4 All ER 172.
75 *The Mac* (1882) 7 PD 126; *The Mudlark* [1911] P 116.
76 [1992] 2 Lloyd's Rep 163.
77 Conversely, the Court of Appeal in Florida held that a jet ski is a pleasure craft that meets the definition of 'vessel' under the Limitation Act, 55 F Supp 2d 1367 (SD Fla) 1999.
78 [1998] 2 Lloyd's Rep 675; see also *The Sea Eagle* [2012] 2 Lloyd's Rep 37.

outstanding mooring charges and relied on powers based on harbour statutes. One of the issues was whether the yacht was, in those circumstances, a ship so as to be the subject of distrain under the statute for such a claim. It was held that she was a ship, but the port authority had no right of distrain because the mooring charges did not constitute ship dues, as provided by the statute.

By contrast, ***Von Rocks***[79] was a type of maritime dredger called a 'backhoe dredger', which was primarily used in harbours, channels or estuaries to deepen the waters at such location. When not in operation it was a floating platform comprising 10 individual pontoons bolted together. When in use, it was held in position on the sea-bed by three spud legs, which were capable of being hydraulically lowered and raised. A backhoe dredger had no bow, no stern, no anchors, no rudder or any means of steering and no keel or skeg. It had no means of self-propulsion, mechanical or otherwise, and it had no wheelhouse. The Supreme Court of Ireland held that the *Von Rocks* was not a ship in this case, but it disagreed with the restrictive definition given by Sheen J, in *Steedman v Scofield*, above, that is, his emphasis on a 'planned voyage from A to B' and commented as follows:[80]

> The finding in that case that a jet ski was not a 'ship' within the meaning of the Merchant Shipping Acts is hardly surprising, but questionable, with respect, whether, to come within the category of a 'ship' the purpose of a craft must be 'to go from one place to another'. In the case of non-commercial craft, it seems somewhat unreal to regard their purpose as being a journey from one point to a specific destination. Yachts which take part in the America's Cup are designed and constructed with a view to testing the excellence of their technology and the seamanship of their crews rather than transporting people from one place to another. On a less exalted level, people will for long continue to derive enjoyment from being on the sea, not because they are accomplishing a journey to an intended destination but simply for the pleasure of – in the well worn phrase from The Wind in the Willows – 'messing about in boats'. It must, in any event, be pointed out again that the definition of 'ship' in the Arrest Convention is non-exhaustive and that, accordingly, a craft which might not be regarded as 'used in navigation' in the conventional sense might none the less be appropriately categorised as a 'ship'.

A compromise about Sheen J's definition was reached by two Court of Appeal decisions. In ***R v Goodwin***[81] it was affirmed that a vessel used in navigation was confined to a vessel that was used to make ordered progression over the water from one place to another. However, the Lord Justices agreed with the decision of the Court of Appeal in *Perks v Clark* that it was not necessary for the purpose of the definition that the vessel transports persons or property by water to an intended destination. Craft that were simply used for having fun on the water without the object of going anywhere, such as a jet ski, were not 'used in navigation' and were accordingly excluded from the definition of 'ship or vessel'. In considering the effect of the authorities, the court emphasised that one must not lose sight of the context in which the issue of the meaning of a 'ship' arises.

Thus, some degree of flexibility is allowed when examining the characteristics of a ship. It could, therefore, be argued that a general predetermined requirement of a 'planned destination' from A to B is unnecessarily restrictive for the purpose of

79 *The Von Rocks* [1998] 2 Lloyds Law Rep 198.
80 Ibid, at pp 207–208.
81 *R v Goodwin* [2006] 1 Lloyd's Rep 432.

deciding that a ship is 'used for navigation' in a particular case. The interpretation given to the phrase by the Supreme Court of Ireland in *Von Rocks* (above) is attractive particularly with regard to non-commercial craft.[82]

7.2.4 Are drilling units within the definition?

Whether or not a drilling unit could be embraced under the aforesaid meaning is more difficult to answer. The relevant words in the definition of 'ship' and 'vessel' in the MSA 1995, 'used in navigation', relate to the actual use and not to the purpose, or main purpose, of the builders, as some authorities seemed to suggest.[83] However, in so far as drilling units have to cross the water and, thus, be navigable, and are intended to do their work on the seas, even though at one place at a time, should be included in the definition. Although a definite answer depends on the facts of a particular case, it would seem quite possible that the definition of a ship would apply to drilling vessels, meaning those not attached to the seabed.[84]

In a Scottish case, ***Global Marine Drilling & Co. v Triton Holdings Ltd (The Sovereign Explorer)***,[85] a mobile offshore drilling unit was arrested for the purpose of obtaining security in relation to a dispute under a sub-charter party, which was referred to arbitration. An application by the defendant to set aside the arrest on the ground that *The Sovereign Explorer* was not a ship was refused by Lord Marnoch. There was an appeal to the Scottish Court of Session regarding the adequacy of the security offered for her release from arrest, and this issue was not questioned.

In ***Perks v Clark***,[86] Longmore LJ pointed out that watertight definitions do not exist even for ships and, although it is true that some of the authorities regard the function and purpose of the structure as important, the critical question is whether the structure is used in navigation. Drilling ships and drilling barges must be ships. Semi-submersible oil rigs in which drilling operations are carried out while the rig is in a floating condition, submersible oil rigs in which drilling is carried out when the rig is resting on the sea bed, and jack-up drilling rigs are all different forms of structure. It could be said that, as the jack-up rigs cannot perform their main function without their legs being on the sea bed, they should be singled out and should not be regarded as ships. It would, however, be unsatisfactory if some forms of oil rig were ships and others were not.

7.3 CONCLUSION

It can be concluded that, when an object has the shape of a vessel and is used in navigation in navigable waters, in the sense discussed, it will be a ship for the purpose of the MSA 1995 and for the purpose of jurisdiction of the Admiralty Court.

82 See further Rainey, S 'What is a ship under the 1952 Arrest Convention' [2013] LMCLQ 50, at 79–80, who considers that the gloss put over the phrase 'used in navigation' by Sheen J and the affirmation of this by the Court of Appeal in *R v Goodwin* render the test imprecise.

83 *Merchant Marine Insurance Co., Ltd v North of England P&I Assoc* (1926) 25 LlL Rep 446 (where it was said that the floating pontoon was designed and adapted to float and to lift and not to navigate, so it was not a ship); similar words were used in *The Gas Float Whitton* [1897] AC 337 (HL).

84 See Chs 9, 10 of Vol 2.

85 [2001] 1 Lloyd's Rep 60, SCS (Outer House).

86 [2001] 2 Lloyd's Rep 431, p 441.

Old cases that do not fit within this interpretation are not good law any longer, but, if a pontoon is used in navigation,[87] it may be a ship, provided it is not just a floating crane.[88]

A vessel or ship does not include the property carried on board, unless the bunkers belong to the owner of the ship and not to the charterer. This is important at the time of arrest of a ship, where considerations of who is liable *in personam* for the claim is taken into account, as will be seen in Chapters 4 and 5, below.

87 Dumb barges have been held to be ships: *The Mudlark* [1911] P 116; *The Harlow* [1922] P 175; barges with small sails intended to be towed from port to port with captain and crew, steering gear and anchors, are held to be ships: *St John Pilot Commissioners v Cumberland Rly & Coal Co* [1910] AC 208; even a 'blower boat' shaped like a ship, but having a flat bottom and flat ends, with the purpose of having barges to lay alongside and only being towed from time to time, was a ship: *Cook v Dredging and Construction Co Ltd* [1958] 1 Lloyd's Rep 334.

88 *Marine Craft Constructions Ltd v Erland Blomquist (Engineers) Ltd* [1953] 1 Lloyd's Rep 514.

CHAPTER 2

ENFORCEMENT OF MARITIME CLAIMS

1 INTRODUCTION

A list of maritime claims that are within the jurisdiction of the Admiralty Court are found in s 20 of the Senior Courts Act (SCA) 1981. Had the Arrest Convention 1999 been enacted by the UK,[1] it would have enlarged the list of claims and maritime liens that could be enforced in the Admiralty Court.

1.1 THE STATUTE AS A TOOL FOR ENFORCEMENT

The SCA 1981 provides only the means of enforcement of maritime claims against the relevant ship. A claimant must first be able to rely on an actionable substantive cause of action, which he may then seek to enforce in the Admiralty Court through the provisions of the SCA. The SCA provides a link between that cause of action and the *in rem* jurisdiction of the court. For example, in a case of a collision caused by the fault of a ship, the cause of action is breach of the common law duty of care. Apart from cases of breach of contract, there are occasions where the cause of action may lie in statutes.

Section 20 of the SCA outlines the extent of the court's jurisdiction to entertain such claims on their merits. Section 21 specifies the mode of bringing a maritime claim in the Admiralty Court by commencing a claim either *in personam* (s 21(1)) or *in rem* (s 21(2)–(8)). These provisions are supplemented by the procedural rules as provided in Part 61 of the Civil Procedure Rules (CPR) 1998.

1 Gaskell, N and Shaw, R 'The Arrest Convention 1999' [1999] LMCLQ 470, pp 470–490.

1.2 THE SUBJECT MATTER JURISDICTION

There are four jurisdictional heads under s 20(1) the SCA 1981, namely:

(a) jurisdiction to hear and determine any of the questions and claims mentioned in sub-s (2);
(b) jurisdiction in relation to any of the proceedings mentioned in sub-s (3);
(c) any other Admiralty jurisdiction that the court had immediately before the commencement of the Act; and
(e) any jurisdiction connected with ships or aircraft that is vested in the High Court apart from this section and is, for the time being, by rules of court made or coming into force after the commencement of this Act, assigned to the Queen's Bench Division and directed by the rules to be exercised by the Admiralty Court.

Section 20(1)(a) refers to s 20(2), which sets out the main heads of claims that are brought in the Admiralty Court. These are analysed under paragraph 3 below, with examples of decided cases. The lettered sub-paragraphs of the sub-section are followed. Most of these are straightforward. It is essential to draw attention to the construction of the words used in the statute by the courts for an understanding of the nature of the Admiralty jurisdiction.

Section 20(1)(b) refers to s 20(3), which sets out other proceedings that are also subject to the Admiralty jurisdiction; these are:

(a) any application to the High Court under the Merchant Shipping Acts;
(b) any action to enforce a claim for damages, loss of life or personal injury arising out of
    (i) a collision between ships; or
    (ii) the carrying out of or omission to carry out a manoeuvre in the case of one or more or two or more ships; or
    (iii) non-compliance, on the part of one or more or two or more ships, with the collision regulations;
(c) any action by the ship-owner or other person under the Merchant Shipping Act 1995 for the limitation of the amount of their liability in connection with a ship or other property.

Section 20(1)(c) has preserved any other Admiralty jurisdiction that the court had immediately before the commencement of this Act, otherwise known as the 'sweeping up' provision, encompassing the court's inherent jurisdiction and such jurisdiction as the court had under the old Admiralty Court Acts (ACAs) 1840 and 1861. Examples of the court's inherent jurisdiction include jurisdiction over acts done on the high seas and power to award interest, which is now also statutory by virtue of s 35A of the SCA 1981.

Section 20 paras (4)(5)(6) elaborate on some heads of claims, such as under sub-para (4) the power of the court to settle any account outstanding and unsettled between the parties in relation to the ship, and to direct that the ship, or any share thereof, shall be sold, and to make such order as the court thinks fit; sub-para (5) deals with the jurisdiction of the court under the Oil Pollution legislation; and sub-para (6) explains what is included in salvage services.

Section 20(7) states that the preceding provisions of section 20 apply:

(a) in relation to all ships or aircraft, whether British or not and whether registered or not and wherever the residence or domicile of their owner may be;
(b) in relation to all claims, wherever arising (including, in the case of cargo or wreck salvage, claims in respect of cargo or wreck found on land); and
(c) so far as they relate to mortgages and charges, to all mortgages or charges, whether registered or not and whether legal or equitable, including mortgages and charges created under foreign law.

Before the individual heads of claims are set out, it is important to refer briefly to the nature of maritime liens and how they differ from other statutory rights *in rem*.

2 STATUTORY RIGHTS *IN REM* AND MARITIME LIENS

2.1 STATUTORY RIGHTS *IN REM* OR STATUTORY LIENS

Statutory rights *in rem* embrace all claims that can be enforced in the Admiralty Court by virtue of the ACAs as succeeded by the SCA 1981. Some of the statutory rights *in rem* that are listed in the Act are maritime liens. However, maritime liens are not just statutory rights. The substantive right of a maritime lien arises upon the incident of the mischief done by a ship. It exists irrespective of an action *in rem*, but it needs to be enforced by the proceeding *in rem*, otherwise it may die by lack of endorsement.

By contrast, the other statutory rights *in rem*, which are not maritime liens, crystallise on the ship upon commencement of the proceeding *in rem*,[2] in a sense that they become secure by the issue of the proceeding and, even if the ship is sold after that date, they can still be enforced against that ship (see further in Chapter 4). They are also known as statutory liens because they have been created by the Admiralty Court statutes.

2.2 MARITIME LIENS

2.2.1 Nature

A maritime lien is a privileged charge on maritime property and arises by operation of law. It does not depend on possession of the property or on agreement. It accrues from the moment of the event that gives rise to a cause of action, and travels with the property. Thus, it is a 'truly *in rem*' right or claim, as explained in Chapter 1. A maritime lien is invisible because it is not subject to any scheme of registration. It survives into the hands of a bona fide purchaser for value without notice, and is enforceable by an *in rem* claim.

2 See *The Monica S* [1967] 2 Lloyd's Rep 113 (Ch 4, para 3.2.1, below).

This concept was first defined by Sir John Jervis in ***The Bold Buccleugh***,[3] in which it was said that:

a maritime lien is well defined . . . to mean a claim or privilege upon a thing to be carried into effect by legal process . . . that process to be a proceeding *in rem* . . . This claim or privilege travels with the thing 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.

A detailed illustration about the nature and security element of maritime liens was given by Scott LJ in ***The Tolten***,[4] by referring to older authorities:

The maritime lien is one of the first principles of the law of the sea, and very far-reaching in its effects. In *The Bold Buccleugh*, Sir John Jervis delivering the judgment of the Privy Council, said this: 'Having its origin in this rule of the civil law, a maritime lien is well defined by Lord Tenterden, to mean a claim or privilege upon a thing to be carried into effect by legal process; and Mr. Justice Story . . . explains that process to be a proceeding *in rem*, and adds, that wherever a lien or claim is given upon the thing, then the Admiralty enforces it by a proceeding *in rem*, and indeed is the only court competent to enforce it. A maritime lien is the foundation of the proceeding *in rem*, a process to make perfect a right inchoate from the moment the lien attaches . . .

In *The Sara*, Lord Macnaghten stated: 'A "maritime lien", as was observed in *The Two Ellens* . . . must be something which adheres to the ship from the time that the facts happened which gave the maritime lien, and then continues binding on the ship until it is discharged . . . It commences and there it continues binding on the ship until it comes to an end.'

The history and characteristics of the maritime lien were reviewed by Gorell Barnes J in *The Ripon City*; in a nutshell, as reflected by previous authorities, it was restated that: a maritime lien 'is a privileged claim upon a thing in respect of service done to it or injury caused by it, to be carried into effect by legal process'.

Scott LJ in *The Tolten* continued:

The result of my examination of these principles and authorities is as follows: the law now recognizes maritime liens in certain classes of claims, the principal being bottomry, salvage, wages, masters' wages, disbursements and liabilities, and damage. According to the definition above given, such a lien is a privileged claim upon a vessel in respect of service done to it, or injury caused by it, to be carried into effect by legal process. It is a right acquired by one over a thing belonging to another – a *jus in re aliena*. It is, so to speak, a subtraction from the absolute property of the owner in the thing . . .

In my opinion, it is right in principle and only reasonable, in order to secure prudent navigation, that third persons whose property is damaged by negligence in the navigation of a vessel by those in charge of her should not be deprived of the security of the vessel . . .

In most actions *in rem* for damage, the ship is released on bail, but cases may occur where the liens or rights *in rem* against the ship are so heavy as to exceed the ship's value to her owners, who, in such case, will probably not enter an appearance and obtain the ship's release on bail. The lien consists in the substantive right of putting into operation the Admiralty Court's executive function of arresting and selling the ship, so as to give a clear title to the purchaser and, thereby, enforcing distribution of the proceeds amongst the lien creditors in accordance with their several priorities, and subject thereto rateably. I call that function of the court 'executive' because, once the lien is admitted, or is established by evidence of the right to

3 [1851] 7 Moo PC 267, p 284.
4 [1946] P 135 (CA), pp 144–146.

compensation for damage suffered through the defendant ship's negligence, there is then no further judicial function for the court to perform, save that in the registry where priorities, quantum and distribution are dealt with.

2.2.2 Maritime lien compared to a mortgage on a ship

Although a maritime lien is similar to a mortgage, in that both are charges on the ship and can be enforced against the owner and any subsequent purchaser, it is quite distinct from it for the following reasons: first, unlike a maritime lien, a mortgage is created by an agreement in a form prescribed by statute; second, a mortgage needs registration, which functions as a notice to third parties, and the date of registration determines its priority over subsequent registered mortgages; third, whereas a mortgage has priority over other statutory rights *in rem*, a maritime lien has priority over all other maritime claims; fourth, a maritime lien travels with the ship from the moment of its creation, even when the ship is transferred to a bona fide purchaser without notice.

2.2.3 Maritime lien and possessory lien

A maritime lien is further distinguishable from the common law possessory lien, which is a right to retain possession of a chattel pending payment of an outstanding obligation for services rendered. Once possession is released, the right to lien is lost. This right is available to ship-repairers and, if possession is retained, it can take priority over later created liens or mortgages.[5] It is also different from the statutory lien of a port authority, which is granted by statute and depends on possession as well.

2.2.4 Equitable liens

An 'equitable lien' is created by implication of law and does not depend on possession of the thing. It can, however, be lost by a sale of the thing to a bona fide purchaser for value without notice.

2.2.5 What claims attract a maritime lien

Under English law, the claims recognised as giving rise to maritime liens are:

(a) damage done by a ship;
(b) salvage services;
(c) seamen's wages;
(d) master's wages and disbursements;
(e) bottomry bond (which is no longer in use).

With regard to priorities of claims and liens when the proceeds of sale of the ship are distributed by the court, see Chapter 5, below.

5 See Ch 5, below; see further about liens and priorities in Chapters 17–23, Jackson, D. *Enforcement of Maritime Claims*, 4th edn (2005) Informa; Thomas, R. on Maritime Liens (1980) Stevens.

2.2.6 Means of enforcement

Maritime liens can be enforced, as all other maritime claims, by an *in rem* claim brought in accordance with the provisions of the SCA 1981, which is dealt with in Chapter 4. Priorities of maritime claims and conflict of laws issues in the enforcement of maritime claims, when a maritime lien is created under foreign law, are discussed in Chapter 5.[6]

2.2.7 Advantage of maritime liens over other statutory rights *in rem*

A maritime lien has an advantage over the other statutory rights *in rem* in that the latter depend on the issue of the *in rem* claim form to crystallise on the property (thus, conveniently referred to in this book as 'non-truly *in rem*' claim), whereas a maritime lien does not depend on the legal process for its attachment, although the legal process will bring it into effect. This was illustrated in ***The Tolten***:[7]

> The essence of the privilege was, and still is, whether in continental or English law, that it comes into existence automatically, without any antecedent formality, and simultaneously with the cause of action, and confers a true charge on the ship and freight of a proprietary kind in favour of the privileged creditor. The charge goes with the ship everywhere, even in the hands of a purchaser for value without notice, and has a certain ranking with other maritime liens, all of which take precedence over mortgages.

3 MARITIME CLAIMS ENFORCEABLE UNDER S 20(2) OF THE SCA 1981

These are outlined in the statute and are in line of presentation, namely for:

3.1 ANY CLAIM TO THE POSSESSION OR OWNERSHIP OF A SHIP OR TO THE OWNERSHIP OF A SHARE THEREIN (S 20(2)(a))[8]

3.1.1 Statutory and inherent power of the court

The power of the court to determine questions of title in the ship, ownership or possession is inherent and was conferred to the Admiralty Court for the first time by statute in the ACA 1840, s 4. The same provision was carried forward in the subsequent Acts, but it was slightly restricted by the Administration of Justice Act (AJA) 1956, and this was followed in s 20(2)(a) of the SCA 1981. Any omissions are dealt with by the sweeping up provision, s 20(1)(c), which refers to the inherent jurisdiction of the court existing prior to statute.

6 See also Ch 6, Part II, Vol 2 (on mortgages).
7 [1946] 2 All ER 372, p 379.
8 *The Glider Standard Austria* [1965] P 463: no application to aircraft.

3.1.2 Ownership or possession

The extent of this power was exemplified in ***The Bineta***,[9] in which the court had jurisdiction to make a declaration as to which party was entitled to be registered as the legal owner of a ship. The registered owner of *The Bineta* sold her to G, who was then registered as owner, but the seller retained possession pending payment of the purchase price. Following the failure of G to pay the purchase price to the seller, the latter exercised his statutory lien of retention and resold *The Bineta* to X. A declaration by the court was necessary to allow X, as claimant, to obtain registration in place of the first purchaser, G, which the court granted.

Questions of possession or ownership, both legal and equitable, regardless of the nationality or domicile or residence of the person who claims to be the owner of the ship – of which the ownership or possession is disputed – are within the Admiralty jurisdiction of the court, unless the claim involves the immunity of a foreign sovereign State, as seen in Chapter 1, above.

In ***The Jupiter (No 2)***,[10] the Court of Appeal held that there was no established rule that the Admiralty Court would not entertain possession suits in respect of foreign vessels, except at the request of the parties or with the consent of the accredited representative of the country to which the vessel belongs. The matter is one for the discretion of the court.

The vessel was originally owned by a Russian company, but the Soviet Government asserted ownership by a decree of nationalisation. The Russian company, having moved its business to France, sought possession of the vessel by an action *in rem* when the vessel was purported to be sold, pursuant to a contract made in London, to an Italian company by an English company representing the Soviet Government.

Atkin LJ stated,[11] in particular, that:

> It appears to me now reasonably plain that there is jurisdiction in the court to entertain such a claim. I think there was jurisdiction before the Admiralty Act of 1840, and in my opinion there is statutory jurisdiction given by that Act.
>
> The only question that is left is whether or not there is a discretion in the court to decline to exercise jurisdiction in such cases, and, if so, whether that jurisdiction ought to be so exercised in this case. As to that the law seems to me still to obtain that the court in such a case has a discretion . . . in cases where the parties both belonging to a foreign State have merely taken the occasion of the ship being temporarily here to get a question of title, which depends on the municipal laws of another country, determined by the courts of this country, the court may in the exercise of its discretion decline to do so. But, on the facts of this case, there seems to me to be no reason why the court should not exercise its discretion and entertain the suit. The vessel has been in this country for a period of years and the question arises in respect of her disposition by a contract entered into in this country by a limited company of this country, the Arcos Shipping Company, Ltd, and although questions may arise as to the right of title of the vendors to the defendants, yet it appears to me to be a case which can properly be tried in this country, and I see no reason for interfering with the discretion of the learned President in that respect.

9 [1966] 3 All ER 1007, [1966] 1 WLR 121; see also *The Cape Don* [2000] 1 Lloyd's Rep 388, in which the Australian Federal Court construed the equivalent provision of the Australian Admiralty Act 1988 as including a dispute concerning whether or not a sale contract about a ship had been concluded.

10 [1925] P 69.

11 *The Jupiter (No 2)* [1925] P 69, p 77.

The foreign sovereign was not impleaded in this case, as the Soviet Government had sold the vessel.[12]

The English courts, in some cases, may regard another forum as being more appropriate for the particular dispute, as it did in *The Lakhta*,[13] in which the case was in every way connected with Russia (see Ch 6).

3.1.3 Jurisdiction to prohibit dealing with a ship

The court has always had power under s 30 of the Merchant Shipping Act (MSA) 1894, now para 6 of Sched 1 to the MSA 1995, to order an injunction prohibiting the dealings with a ship on the application of an interested party made under s 20(2)(a), when there is a dispute. Schedule 1, para 6(1) provides:

> The High Court or in Scotland the Court of Session may, if they think fit (without prejudice to the exercise of any other power), on the application of any interested person, make an order prohibiting for a specified time any dealing with a registered ship or share in a registered ship.

This is a substantive right, not a procedural right, but it is linked to questions of ownership or possession of a ship. The right can be enforced in the Admiralty Court under s 20(2)(a) SCA 1981. An 'interested person' extends only to a person with a proprietary interest in the ship, or at least to a person having a claim against the ship leading to a proprietary right.[14] It does not include personal, non-secured creditors. This was made clear in ***The Mikado***,[15] in which a financial institution, having lent money for the construction of a yacht without obtaining a mortgage, was not considered to be an interested person under this provision for the purposes of preventing further dealings with the ship.

3.2 ANY CLAIM ARISING BETWEEN THE CO-OWNERS OF A SHIP AS TO POSSESSION, EMPLOYMENT OR EARNINGS OF THAT SHIP (S 20(2)(b))

The purpose of this provision is to curb the obstinacy of some part-owners from damaging the rights and interests of their co-owners. It derived from s 8 of the ACA 1861.

It includes the power of the court to settle any accounts outstanding between the parties in relation to the ship and to direct that the ship, or any share therein, be sold, or to make any order the court thinks fit (s 20(4)).

In practice today, the relations between part-owners will normally be regulated by an agreement. In ***The Vanessa Ann***,[16] the minority shareholders were granted an equitable mortgage in return for the release of the ship from arrest. Once security is

12 In an earlier decision of the Court of Appeal, *The Jupiter (No 1)* [1924] P 236, concerning a writ *in rem* against the same ship by a French company claiming possession rights, it was held, on the application of the Soviet Government, that the State was impleaded by the action *in rem*, and the court decided not to exercise its jurisdiction.

13 [1992] 2 Lloyd's Rep 269.

14 *The Siben* [1994] 2 Lloyd's Rep 420.

15 [1992] 1 Lloyd's Rep 163.

16 [1985] 1 Lloyd's Rep 549.

provided, the ship is released to perform the voyage at the risk, expense and profit of the majority owners.

In the reverse situation, where the minority are in possession and wish to send the ship to sea against the wishes of the majority, the latter may enforce their rights by bringing an action for possession.

The court also has power to exercise its discretion and order the sale of the ship when there is a co-ownership dispute. In ***The Nelly Schneider***,[17] the minority applied to the court for sale of the ship, to recover damages from the majority and settle outstanding accounts, which was opposed by the majority owners. Considering the interests of both parties, the court confirmed it would exercise its power with caution and would order appraisal and sale of the ship in the event that the majority did not buy the minority's interest within a time limit.

However, the court may order the sale in exceptional circumstances, for example, when part-owners are unable to agree as to what is to be done with their common property, and there appears to be no way of preventing the sacrifice of the property except by a sale (*The Hereward*).[18]

3.3 ANY CLAIM IN RESPECT OF A MORTGAGE OF OR A CHARGE ON A SHIP OR ANY SHARE THEREIN (S 20(2)(c))

This provision covers all mortgages and charges, notwithstanding whether they are registered or not, legal or equitable, including those created by foreign law (s 20(2)(c) and (7)(c) of the SCA 1981).

3.3.1 Mortgagee's protection

The law of mortgages is examined in Chapter 6, Part II, Vol 2 of this book. Briefly, under English law, a mortgage is a statutory charge on a registered British ship for the security of a debt and must be in a statutory form, as provided by the MSA 1995 and regulations issued pursuant to the Act. When a mortgage is not in the required statutory form, or not registered, it is an equitable mortgage, which does not enjoy the protection of the statute, but it is, nevertheless, protected by equitable principles.

Most ships, nowadays, are registered abroad under the laws of a particular State, carrying the flag of that State. Other than the Commonwealth States and former British colonies, foreign systems of law do not recognise the concept of equitable mortgages. So, if the mortgage is unregistered under the system of the law in the State in which the ship is registered, such a mortgage cannot be enforced by an *in rem* claim against the ship, although the mortgagee will be able to sue the borrower (mortgagor) *in personam* and enforce his claim against any insurance proceeds of the ship, provided he has obtained an effective assignment of the proceeds of the insurance policy of the ship. A very good example of this situation is ***The Angel Bell***:[19]

17 (1878) 3 PD 152.
18 [1895] P 284, 285.
19 [1979] 2 Lloyd's Rep 491.

It concerned a Panamanian ship and mortgage. The substantive law governing the mortgage was the law of the flag of the ship, Panamanian. The mortgagee omitted to register his mortgage within six months after the provisional registration as was required by statute. Thus the mortgage did not become a legal mortgage under the statute. Unlike English law, Panamanian law does not recognise equitable mortgages. As a result of the failure to register the mortgage, the mortgagee was unable to enforce his claim by an *in rem* action against the ship, because under the law of the flag of the ship he was not a registered mortgagee. However, he had obtained assignments of the hull and machinery insurance policies including a 'loss payable' clause. When the ship sank, he was able to proceed against the insurance proceeds.

3.3.2 Is a mere charge on a ship protected?

A charge in the context of this section means a charge in the nature of a mortgage. It does not cover a charge in its wider sense, nor a lien for wages.[20] The word did not exist in the old statutes, but it was added in the AJA 1956. It was, perhaps, included for two reasons: (a) to ensure that those who have security on the ship by way of hypothecation,[21] under foreign law, which is a charge in the nature of a mortgage, can enforce their claim under this head; and (b) to ensure that equitable mortgages are within this provision.

3.3.3 *Lex fori* or *lex loci contractus*

Which law should apply is relevant to enforcement of priorities of claims, of which there is discussion in Chapter 5. Matters of procedure, remedy and priorities are governed by the *lex fori*[22] (the law of the place where the matter has been submitted for adjudication), whereas questions of validity of a mortgage or charge are determined by the *lex loci contractus* (the law of the place in which the contract was made).

3.4 ANY CLAIM FOR DAMAGE RECEIVED BY A SHIP (S 20(2)(d))

This sub-paragraph is carried forward from the previous Acts to the SCA by mistake. When damage is received by a ship, there is no guilty ship to arrest. Therefore, the Admiralty jurisdiction of the court cannot be invoked by an *in rem* claim form simply because the ship that receives the damage would, theoretically, be the claimant[23]. For this reason, this ground of claim is omitted from s 21 of the SCA 1981, which defines the mode of enforcement of maritime claims against ships.

20 *The Acrux* [1965] 1 Lloyd's Rep 565.
21 Reference to it is made in the Arrest Convention 1952.
22 See, further, conflict of laws and priorities of maritime claims in Ch 5.

3.5 ANY CLAIM FOR DAMAGE DONE BY A SHIP (S 20(2)(e))

A claim for damage done by a ship gives rise to a maritime lien[24] and it can be enforced as such under s 21(3) of the SCA 1981. The ship causing the damage is liable; the cargo on board the ship, even if it is the property of the owner of the ship, is not liable for the damage and, if it is detained, it will be released with costs and damages for its improper detention.[25] The only occasion when the cargo on board will be subject to arrest is when a maritime lien is attached for salvage services rendered to save both ship and cargo (see Chapter 4, at 4.2.6).

3.5.1 Is 'damage' limited to property damage only?

The cause of action for damage done by a ship claims is based on the tort of negligence. Originally, and independently of statute, the court of Admiralty exercised jurisdiction over all torts on the high seas and in harbours within the ebb and flow of the tide.[26] The first ACA in 1840 did not distinguish between damage done and damage received by a ship. The ACA 1861, by s 7, specifically enacted that the court shall have jurisdiction over any claim for damage done by any ship and that the jurisdiction of the court may be exercised either by proceedings *in rem* or *in personam* (s 35).

An interpretation of the words used in the statute indicate that jurisdiction upon the Admiralty Court is conferred to entertain all claims in respect of damage done by a ship, whatever the nature of the damage may be, whether to person or to property; there is nothing in the context of the section to suggest that the word 'damage' should be limited. Thus, a wide construction was placed on the words 'damage done by a ship' by several old decisions.[27]

However, the House of Lords in ***The Vera Cruz***[28] did not give as wide a construction as to cover damage causing loss of life. It therefore refused the enforcement *in rem* of a claim by the relatives of a deceased who had a cause of action by virtue of the old Lord Campbell's Act (Fatal Accidents Act 1846) for pecuniary loss. It was thought that Lord Campbell's Act granted such a cause of action to be brought before the common law courts against the liable person, not against the ship *in rem* before the Admiralty Court. Claims for personal injury, however, that did not cause death were viewed as being included within the word 'damage', although it was not decided in this case.

Subsequent to this decision, and in view of the doubt as to whether or not a wide interpretation should be given to the word 'damage', the Maritime Conventions Act (MCA) 1911, by s 5, expressly extended the ambit of 'damage' to include personal injury and loss of life. Thus, on this issue, it reversed the effect of *The Vera Cruz*

23 *The Eschersheim* [1976] 2 Lloyd's Rep 1, p 9.

24 The nature of maritime liens, para 2, above.

25 *The Victor* (1860) Lush. 72.

26 See *The Volent* (1842) 1 Wm Rob 383; *The Hercules* (1819) 2 Dod 353; *The Ruckers* (1801) 4 C Rob 73; *The Lagan & Mimax* (1838) 3 Hagg Adm 418.

27 As referred to in *The Vera Cruz* (1884) 10 App Cas 59 (HL).

28 *The Vera Cruz*, ibid, personal claims were and are admissible against the limitation fund established in the limitation of liability action pursuant to the Merchant Shipping Acts.

decision. The Supreme Court of Judicature (Consolidation) Act (SCJ(Con)A) 1925 replaced s 5 of the MCA with s 22.

Claims arising from personal injury or death can today be enforced *in rem* under the SCA 1981, s 20(2)(f), which is discussed later, under para 3.6.

3.5.2 Is physical contact necessary to cause the damage?

How the damage must have occurred was explained by Lord Diplock in ***The Eschersheim***:[29]

> The figurative phrase 'damage done by a ship' is a term of art in maritime law whose meaning is well established by authority: *The Vera Cruz* (1884) 9 PD 96 [(1884) 10 App Cas 59 (HL)]; The *Currie v M'Knight* [1897] AC 97. To fall within 'damage done by a ship' not only must the damage be the direct result or natural consequence of something done by those engaged in the navigation of the ship, but the ship itself must be the actual instrument by which the damage was done. But physical contact between the ship and whatever object sustains the damage is not essential, a ship may negligently cause a wash by which some other vessel or . . . property on shore is damaged.

A collision took place off the coast of Spain between a Sudanese ship, *The Erkowit*, and a German ship, *The Dortmund*, as a result of which the engine room of *The Erkowit* was holed and became flooded. The tug, *Rotesand*, went to her aid, and a salvage agreement on the Lloyd's Open Form (LOF) was signed. However, owing to salvors' negligence in beaching *The Erkowit*, she was delivered in a sinking condition and became a total loss. Most of her cargo and the crew's personal effects were lost or damaged. Some of her cargo was insecticide in drums, and they were washed away, causing pollution along the Spanish coast with consequential interference with fishing in that area. Various actions commenced: first, the owners of *The Erkowit*, her crew and the owners of the cargo on board commenced proceedings against the German ship. The respective lawyers of the above claimants had the foresight to protect the time limit for commencing an action against the salvors in the event they could not establish a cause of action for the damages suffered against the colliding ship. The claimants arrested two sister ships of the tug *Rotesand*, *The Jade* and *The Eschersheim*. Indeed, the proceedings against the German ship failed because the chain of causation of the damage suffered had been broken by the subsequent negligence of the salvors.

Various issues arose that will be examined later under each sub-paragraph of the statute in which they fell.[30] The issue under this head was whether the claims against the salvors came within the Admiralty jurisdiction, or should be referred to arbitration by virtue of the terms of the salvage agreement. The House of Lords decided that:

> The act of casting off *The Erkowit* in such a way as to beach her upon an exposed shore was something done by those engaged in the navigation of *The Rotesand*, as a result of which *The Erkowit* and her cargo were left exposed to the risk of being damaged by wind and wave if the weather worsened before she could be removed to a more sheltered position.[31]

29 [1976] 1 WLR 430 (HL), p 438.

30 At the time of these actions, the claims were enforced in the Admiralty Court under the previous statute (the AJA 1956), therefore, the claim for damage done by a ship was numbered under the letter (d).

31 [1976] 2 Lloyd's Rep 1, p 8.

The damage caused by the salvors was obviously not done by physical contact between the tug and the ship that the salvors attempted to salve. The claims of both the ship-owners and cargo-owners fell under this sub-para (e), although they were regarded to be a borderline case, being more appropriate for the one under (h) (arising out of an agreement – see below, para 3.8).

3.5.3 Pollution damage included

With regard to the claimants who sued for the pollution damage in the case above, it was also held that a claim for pollution damage caused through escaping oil following the negligent beaching of the ship while being salved can be enforced under sub-para (e).

This provision (damage done by a ship) is now extended by virtue of s 20(5)(a) and (b) to cover any claim in respect of liability incurred under the Oil Pollution legislation.[32]

3.5.4 The act must be an act of navigation

As seen above, the damage may be done by a ship regardless of direct physical contact, such as a collision; it can also be done by transmitted physical force, such as a wash of waves. The important criterion is that there must be an act of navigation.

Currie v M'Knight[33]

A heavy gale was raging when vessels D and E were lying alongside one another in the port. In an attempt to put D out to sea, her crew cut off the ropes of E, so that the latter drifted ashore and was damaged. The question for the court was whether the wrongful act of D's crew was sufficient to create a maritime lien for the damage caused to E.

Lord Halsbury stated:

> the phrase that 'it must be the fault of the ship itself' is not a mere figurative expression, but it imports, in my opinion, that the ship against which a maritime lien for damages is claimed is the instrument of mischief, and that, in order to establish the liability of the ship itself to the maritime lien claimed, some act of navigation of the ship itself should either mediately or immediately be the cause of the damage.[34]

It was held that the act of casting off the ropes of vessel E was a wrongful act, albeit that it was for self-preservation, but was not an act of navigation, even though other ships were damaged. The section requires the act not just to be an act of the crew, but one in the course of their navigation. This act was done for the purpose of removing an obstacle, which prevented D from starting her voyage. The doctrine of maritime liens could not be extended to cover such a case.

32 The MSA 1995, Part VI, Chapter IV deals with pollution compensation. Part VI of the Act enacted the International Convention on Oil Pollution (CLC 1992) and the Fund Protocol 1992 on Oil Pollution, as amended by the International Supplementary Fund Protocol 2003, which in turn was enacted by the MS Pollution Act 2006; see Ch 16 of Vol 2, of this book.

33 [1897] AC 97.

34 Ibid, p 101.

3.5.5 Can a claim for economic loss be enforced under this head?

This question arose in ***The Dagmara and The Ama Antixine***.[35]

The act of navigation can involve an act that deprives the victim from using a particular area for fishing when a wrongdoer ship drives it out from the area. The defendants' vessel A was being dangerously navigated around vessel D belonging to the claimants, in a deliberate attempt to drive the D away from the fishing grounds. For fear of their safety, the master and crew of ship D left the fishing grounds. The owners of D claimed in tort for damages in respect of damage suffered in the form of financial loss. It was held by Sheen J that they had a valid cause of action in tort to be enforced under this head. The financial loss[36] suffered was consequential to their boat being driven away from the fishing area by the wrongful act of the defendant, as if physical damage had been inflicted on the fishing boat.

3.6 ANY CLAIM FOR LOSS OF LIFE, OR PERSONAL INJURY . . . (S 20(2)(f))

This paragraph further provides:

Any claim for loss of life or personal injury sustained in consequence of any defect in a ship, her apparel or equipment, or in consequence of the wrongful act, neglect or default of:

(i) owners, charterers or persons in possession or control of a ship; or
(ii) the master[37] or crew of a ship, or any other persons whose wrongful acts, neglects or defaults the owners, charterers or persons in possession or control of a ship are responsible,

being an act, or default, in the navigation or management of a ship in the loading, carriage or discharge of goods on, in or from the ship, or in the embarkation of persons on, in or from the ship.

3.6.1 Origins of this provision

This sub-paragraph is very wide. The AJA 1956 borrowed the same provision from the Arrest Convention 1952. *In personam* jurisdiction for such claims existed even before the ACA 1861. Section 7 of the 1861 Act provided that there should be jurisdiction 'over any claim for damage done by any ship' and this included, at least originally, claims for personal injury and later, since 1911, claims for loss of life. Under the present Act, SCA 1981, the provision has been separated from 'damage done by a ship' and has been expanded in order to include jurisdiction for incidents other than just those occurring by negligent navigation. Consistently with all other maritime claims, such jurisdiction is statutory for the purpose of enforcement of those claims.

35 [1988] 1 Lloyd's Rep 431.
36 For pure economic loss, see Ch 9, Part III, Vol 2 of this book.
37 Under SCA 1981, s 24(1), master includes every person, except the pilot, having command of the ship.

3.6.2 Wrongful act, neglect or default in the navigation or management of a ship

The reason why this sub-paragraph is separate from the provision of 'damage done by a ship' under para (e) is that it includes negligence, not only in the navigation, but also in the management of the ship and any defect in the ship, her apparel or equipment, which may cause loss of life or personal injury, whether on board the ship or outside. It was the 1981 statute that extended it to defects of a ship and defaults of certain persons. The Arrest Convention 1952 covers such claims only if caused by any ship or by her operation, which is much narrower than the SCA 1981; but neither the Convention nor the Act precludes loss occurring outside the ship.

3.6.3 Incidents that occur on board another ship

The Radiant and *The Maid of Kent* are good examples of how the courts have approached such situations. The cases involved defective equipment of the guilty ship, other than the one on which the person who suffered the injury was carried.

The Radiant[38]

Personal injury was sustained by the skipper of a motor fishing vessel, *The Radiant*, owned by the employer of the skipper. The skipper's feet were amputated by a tow rope, which wrapped around the skipper's legs when the tow rope was thrown out by a sister ship, *The Margaret Hamilton*, in an attempt to tow *The Radiant* after grounding. She had grounded owing to the negligence of the sister ship. It was found that the cause of the accident was the grounding and the defective ropes in *The Margaret Hamilton*. It was held that defective equipment of one vessel, in such circumstances, could give rise to a cause of action at the suit of a person on board the other vessel. There was no proof of contributory negligence on the part of the skipper.

The Maid of Kent[39]

A pilot was about to climb a ladder from the pilot launch to board the port side of the ship '*DS*'. At the time, *The Maid of Kent* passed the *DS* too near and too fast, causing a wash, which struck the launch and caused her to roll violently against the *DS*. The pilot was crushed between the port side of the *DS* and the launch as a result. He fell into the sea and died. The administrator of his estate claimed under the Fatal Accidents Acts (FAAs) that the owners of *The Maid of Kent* were liable for damages. Although the claim was dismissed at first instance, the Court of Appeal held that those in charge of *The Maid of Kent* were negligent, in that they failed to see the effect which the wash from their ship might have had on a small craft. The accident was foreseeable. The claim could be enforced under this statutory provision (s 20(2)(f) of the SCA 1981), as the words 'wrongful act or neglect or default' are very broad to cover such claims arising in connection with a ship.

38 [1958] 2 Lloyd's Rep 596, p 608.
39 [1974] 1 Lloyd's Rep 434.

3.6.4 Defect in a ship, her apparel or equipment

Whether or not a ship is 'equipment' for the purpose of the application of the Employers' Liability (Defective Equipment) Act (EL(DE)A) 1969, upon which the claimant was basing his cause of action, was decided in ***The Derbyshire***.[40]

The relevant provisions of the Act, for present purposes, are contained in sub-ss (1) and (3) of s 1 and are as follows:

(1) Where after the commencement of this Act – (a) an employee suffers personal injury in the course of his employment in consequence of a defect in equipment provided by his employer for the purposes of the employer's business; and (b) the defect is attributable wholly or partly to the fault of a third party (whether identified or not), the injury shall be deemed to be also attributable to negligence on the part of the employer (whether or not he is liable in respect of the injury apart from this sub-section), but without prejudice to the law relating to contributory negligence and to any remedy by way of contribution or in contract or otherwise which is available to the employer in respect of the injury . . .

(3) In this section – 'business' includes the activities carried on by any public body; 'employee' means a person who is employed by another person under a contract of service or apprenticeship and is so employed for the purposes of a business carried on by that other person, and 'employer' shall be construed accordingly; 'equipment' includes any plant and machinery, vehicle, aircraft and clothing; 'fault' means negligence, breach of statutory duty or other act or omission which gives rise to liability in tort in England and Wales or which is wrongful and gives rise to liability in damages in Scotland; and 'personal injury' includes loss of life, any impairment of a person's physical or mental condition and any disease.

This section provides for strict liability of the employer covering the occasion in which liability for the defective equipment is attributable to a third party, such as a manufacturer.

The *Derbyshire* sank with all her crew on board. The action was brought by the personal representatives of the deceased (third engineer) to recover damages on behalf of his estate and for the benefit of his widow and daughter, who were dependent on him. It was argued that his death was caused by a defect in equipment provided by the employer in the course of his business and that such equipment was the ship, regardless that the defect was attributable to a third party, the shipbuilder who, as was argued, constructed a defective ship. The issue was whether the vessel constituted 'equipment' within the meaning to be given to that word in the EL(DE)A 1969. The House of Lords answered the question in the affirmative (reversing the decision of the Court of Appeal). Lord Oliver explained[41] the origins of this provision, thus:

My Lords, it is common ground that the 1969 Act was introduced with a view to rectifying what was felt to be the possible hardship to an employee resulting from the decision of this House in *Davie v New Merton Board Mills Ltd* ([1959] 2 Lloyd's Rep 587; [1959] AC 604). In that case, an employee was injured by a defective drift supplied to him by his employers for the purpose of his work. The defect resulted from a fault in manufacture but the article had been purchased by the employers without knowledge of the defect from a reputable supplier and without any negligence on their part. It was held that the employers' duty was only to take reasonable care to provide a reasonably safe tool and that that duty had been discharged by purchasing from a reputable source an article whose latent defect they had no means of discovering. Thus, the action against them failed, although judgment was recovered against the manufacturer. Clearly, this opened the door to the possibility that an employee required

40 [1988] 1 Lloyd's Rep 109.
41 [1988] 1 Lloyd's Rep 109, pp 111–115.

to work with, on or in equipment furnished by his employer and injured as a result of some negligent failure in design or manufacture might find himself without remedy in a case where the manufacture and the employer were, to use the words of Viscount Simonds, 'divided in time and space by decades and continents' so that the person actually responsible was no longer traceable or, perhaps, was insolvent or had ceased to carry on business. Parliament, accordingly, met this by imposing on employers a vicarious liability and providing, in a case where injury was due to a defect caused by the fault of the third party, that the employer should, regardless of his own conduct, be liable to his employee as if he had been responsible for the defect, leaving it to him to pursue against the third party such remedies as he might have whether original or by way of contribution . . .

The purpose of the Act, as set out in the long title, is:

. . . to make further provision with respect to the liability of an employer for injury to his employee which is attributable to any defect in equipment provided by the employer for the purposes of the employer's business; and for purposes connected with the matter aforesaid.

Lord Oliver continued:

My Lords, if sub-s (1) stood alone without such assistance as provided by sub-s (3), I would not, for my part, have encountered any difficulty in concluding that, in the context of this Act, a ship was part of the 'equipment' of the business of a shipowner. In the Court of Appeal, O'Connor LJ, expressed the view that the word in its natural meaning denoted something ancillary to something else and an echo of this is to be found in the judgment of Glidewell LJ. Thus, both Lords Justices would, I think, regard machinery attached to a ship as 'equipment', because it would be ancillary to the main object, the vessel, but both regarded the word as inappropriate to describe the vessel itself. I do not doubt that the word is frequently and quite properly used to describe the appurtenances of some larger entity, but I can see no reason either in logic or as a matter of language why its use should be so confined. Indeed, there is nothing in the entry in the *Oxford English Dictionary* quoted by O'Connor LJ which necessarily imports that 'equipment' is restricted to parts of a larger whole. The meaning is given as:

. . . anything used in equipping; furniture; outfit; warlike apparatus; necessaries for an expedition or voyage.

Moreover, your Lordships are concerned not with the meaning of 'equipment' *simpliciter* but of the composite phrase, 'equipment provided by his employer for the purposes of the employer's business'. Speaking for myself, I can think of no more essential equipment for the setting up and carrying on of the business of a shipowner than the ship or ships with which the business is carried on. This involves, in my judgment, no misuse of language . . .

In my judgment, a shipowner's fleet of ships is properly described as the equipment of his business. They are, in truth, the tools of his trade and I can see no ground for treating the word 'equipment' in sub-s (1)(a) – leaving aside for the moment the more difficult questions posed by sub-s (3) – as excluding this particular type of chattel as opposed to other articles, of whatever size or construction, employed by a trader in carrying on his trade.

With regard to sub-s (3), Lord Oliver had some difficulty in its construction, but he came to the same conclusion as the dissenting Lloyd LJ of the court below, that the wording of the sub-section intended to be clarifying rather than limiting the application of the section only to any plant and aircraft, but not ships.

Lord Goff added:[42]

The real difficulty in the case, as it seems to me, arises from the fact that the word 'equipment' is defined in s 1(3) of the Act, and that the definition expressly includes any vehicle and aircraft, but makes no mention of ships or vessels . . . it seems to me that, in the case of ships, the

42 [1988] 1 Lloyd's Rep 109, p 115.

distinction between the equipment on the ship and the structure of the ship is not only very difficult to draw in practice, but is artificial in the extreme. In any event, the duty of care imposed under the Occupiers' Liability Act 1957 may apply not only in respect of vessels, but also in respect of vehicles and aircraft. I have therefore come to the conclusion in agreement with my noble and learned friend, and with Lloyd LJ in the Court of Appeal, that the definition of equipment in s 1(3) of the Act of 1969 must have been included in the Act for the purpose of clarification only, and that the mere fact that ships and vessels were not expressly included in the definition cannot have been intended to have the effect of cutting down the ordinary meaning of the word 'equipment' by excluding ships or vessels from that word.

3.6.5 Claims by foreigners against a foreign ship for a tort committed on the high seas

When a collision occurs between foreign ships in international waters resulting in damage to property, loss of life or personal injury, the tort of negligence is committed outside the territorial waters of the United Kingdom. Claimants would be restricted from suing the defendant *in personam* in the English High Court, unless the conditions of s 22(2) of the SCA 1981 were satisfied. These conditions are:

(a) the defendant has his habitual residence or a place of business within England or Wales; or
(b) the cause of action arose within inland waters of England or Wales; or
(c) an action arising out of the same incident, or series of incidents, is proceeding in the court or has been heard and determined in the court.

If none of these conditions applied, the claimants would be advised, in any event, to proceed *in rem* by issuing a claim form *in rem* and wait until the ship came within the English jurisdiction to arrest her by a warrant of arrest. Unlike the *in personam* claim, there would be no need for a substantive link between the jurisdiction and the claim other than the presence of the ship within the jurisdiction.

There have been numerous cases where the collision damage occurred on the high seas and the parties involved were foreigners. So, when the relevant ship was arrested in this jurisdiction, the courts had to consider whether the ambit of the English Admiralty jurisdiction was extra-territorial in such cases. There was no problem in answering this question because such jurisdiction had been extended to adjudicate cases concerning any matters that occurred on the high seas, provided the relevant ship, which provides the link, was arrested in this jurisdiction.

However, when foreign dependants of a foreign deceased (who died owing to a collision between foreign ships on the high seas) arrested a ship in this jurisdiction, the issue confronting the courts was whether the FAAs applied to foreigners.

Although there had been several decisions decided on points of jurisdiction, the first case on this point was ***The Esso Malaysia***.[43]

A collision occurred on the high seas between a trawler, registered in Latvia, and *The Esso Honduras*, registered in Panama, owned by a Panamanian company. Twenty-four Russian seamen lost their lives. The administrator of the estates of the Russian seamen brought an action against *The Esso Malaysia*, a sister ship of *The Esso Honduras*, under the FAAs 1846 to 1959, for the benefit of the dependants of the deceased

43 [1975] QB 198, pp 205–206.

seamen. It was argued by the defendants that, on a true construction of the FAAs, a right of action was not conferred on a foreigner against a foreigner in respect of death occurring on the high seas, and there was a presumption that the statute did not have extra-territorial effect.

After careful consideration of the issues, it was held by Brandon J that the plaintiff, as personal representative of the deceased seamen, had a good cause of action against the owners of the Panamanian ship for damages under the FAAs 1846 to 1959. He agreed with the comments made by the Divisional Court in ***Davidson v Hill***[44] in which Kennedy J had held:

> It seems to me that the Fatal Accidents Acts which are under our consideration in the present case embody legislation which is of a very different character. The basis of the claim to which they give statutory authority is negligence causing injury, and that is a wrong which I believe the law of every civilized country treats as an actionable wrong. They create, no doubt, a new cause of action . . . for previously the relatives of the deceased could not in England sue the wrong-doer. The measure of damages is not the same as in an action by the injured man, as the death is an essential constituent of the right of action. None the less, as I venture to think, is it true to say that in substance the purpose and effect of the legislation is to extend the area of reparation for a wrong which civilized nations treat as an actionable wrong . . . It appears to me, under all the circumstances and looking at the subject-matter, more reasonable to hold that Parliament did intend to confer the benefit of this legislation upon foreigners as well as upon subjects.

Although the point was *obiter* in this case, the decision had not been disturbed by higher authority for 75 years, and Brandon J in *The Esso Malaysia* agreed with the opinion of Kennedy J. It seems that, as the issue has not been challenged in subsequent decisions, it can be concluded that it has been settled.

Such a claim or right can be enforced by an *in rem claim* by virtue of sub-para (f) or, if any of the conditions of s 22(2) of the SCA 1981 is satisfied, by a claim *in personam*.

It should be noted, in this context, that the master of the ship on which a seaman has been injured, or died, owing to the master's breach of duty, can also be sued *in personam*, if he is within the jurisdiction, by the injured seaman in tort, and by the executrix of the estate of a deceased seaman under the FAA 1976.[45]

3.6.6 Do claims for personal injury or loss of life attract a maritime lien?

This issue is contested. Claims that result from damage done by a ship are among the list of maritime liens.[46] A question has arisen whether claims for personal injury or loss of life attract a maritime lien, or are only creatures of statute, therefore, statutory rights *in rem*.

There has been no authority on the issue. So far as loss of life cases are concerned, the dependants of a deceased sue the owner of the wrongdoing ship for pecuniary loss suffered by reason of being deprived of financial assistance which they would

44 [1901] 2 KB 606, pp 613–615 (here, the collision was between a Norwegian and a British ship; the Divisional Court decided in favour of personal representatives and expressed the view *obiter* that the result would have been the same even if all the ships were foreign).

45 See *Booth v Phillips and Others (The Maysora)* [2004] 2 Lloyd's Rep 457, in which interesting issues of jurisdiction and *forum non-conveniens* arose.

46 *The Bold Buccleugh* (1851) 7 Moo PC 267.

have received had it not been for the death of the person who supported them. The damage is caused to them indirectly by the negligent navigation of the ship which caused the death. The FAAs give statutory authority to their claim, the incident of which is the negligence causing the death. The Act covers foreign claimants too, as seen under para 3.6.5, above.

Jackson,[47] in *The Enforcement of Maritime Claims*, proposes that, if claims for loss of life or personal injury are regarded as an extension of the 'damage lien', it may be argued that the maritime lien attracted to 'damage done by a ship' is extended by analogy to the statutory extension of jurisdiction with respect to these claims. But, if the jurisdiction is seen as a novel jurisdiction, or that a new action is created, such claims will suffer the fate of other novel claims created by statute and will be relegated to a statutory lien.

Thomas,[48] in Maritime Liens, has no doubt that there is a maritime lien for personal injury claimants, but not with regard to claimants who claim under the FAA 1976[49] in respect of loss of life of a relative, as the jurisdiction is solely statutory. In other words, a new action has been created by statute.[50]

The present author is inclined to agree with the first hypothesis of Jackson (above). Since the incident that gives rise to such claims is negligent navigation, the basis of the claim to which the FAA gave statutory authority is negligence causing injury or death (see *Davidson v Hill*). There could, arguably, be an extension, by analogy of the damage lien, unless policy considerations would rule against such a reasoning.

The Arrest Convention 1999, which includes claims for loss of life or personal injury occurring, whether on land or on water, in direct connection with the operation of the ship, expressly states in Art 9 that nothing in this Convention shall be construed as creating a maritime lien.

The International Convention for Maritime Liens and Mortgages 1993 classifies both types of claim for loss of life and personal injury among maritime liens, but the Convention is not yet in force. In US, claims for personal injury and death are classified within the tort (damage) lien (see Chapter 5 at 6.1).

3.7 ANY CLAIM FOR LOSS OF OR DAMAGE TO GOODS CARRIED ON A SHIP (S 20(2)(g))[51]

Sub-paragraph (g) permits the arrest only of the ship in which the goods (lost or damaged) were carried, or her sister ship, or any other ship beneficially owned by the person (the carrier) who would be liable for the claim *in personam*.[52] If the cargo-owner chooses to arrest the non-carrying ship, which might have caused the damage, he must rely on another sub-paragraph of s 20(2). So it was decided in *The Eschersheim* (see para 3.5.1, above), in which the cargo-owners arrested the sister ship of the tug,

47 Jackson, op. cit., fn 5.

48 Thomas, op. cit, fn 5.

49 The successor to FAA 1846, as amended by the AJA 1982.

50 See an explanation of its origin given by Brandon J in *The Esso Malaysia* [1975] QB 198.

51 The Singaporean High Court in *The Mezan* (2006) 693 LMLN 2(2), on the issue whether or not the seismic equipment carried on board a ship for sub-sea seismic exploration was cargo carried on the ship, or was part of the ship for the purpose of exploration, decided that it was not 'cargo carried on the ship' for this subsection to apply.

52 See conditions of arrest, in Ch 4, below.

claiming loss of their cargo carried on board the ship being salved, which was lost by the negligence of the salvors.

The claim against the carrying ship will be subject to exclusion or limitation of liability under the contract of carriage, where the carriage by sea Conventions apply.[53] With regard to damage resulting from collision due to negligent navigation, cargo-owners may enforce their claim against the non-carrying ship under sub-para (e): damage done by a ship. The liability of the colliding ships is apportioned on the basis of their respective faults and includes liability incurred to third parties. The limitation of liability provisions applicable by the International Convention 1976 will affect the amount recoverable.[54]

3.8 ANY CLAIM ARISING OUT OF AN AGREEMENT RELATING TO THE CARRIAGE OF GOODS[55] ON A SHIP OR TO THE USE OR HIRE OF A SHIP (S 20(2)(h))

Paragraph (h) is wide enough to encompass claims in contract and tort arising out of any agreement relating to the carriage of goods on a ship or just the use or hire of a ship. It also includes claims arising from fraud or the tort of deceit generally and, in particular, claims relating to ante-dated bills of lading.

3.8.1 Claims in tort

There have been a number of cases in relation to negligence by the master of a ship in issuing bills of lading with inaccurate information. It suffices to mention two of them here to illustrate the point of jurisdiction.

The St Elefterio[56]

The claimants were the charterers of the vessel and holders of the bill of lading (endorsed in blank by the shipper). They resold the cargo to P and, on presentation of the bill of lading, P rejected the goods on the ground that the bill was wrongly dated. Consequently, the claimants brought an action *in rem* against the ship, based on s 20(2) sub-para (h) of the then Act, AJA 1956, for the loss they would sustain if P was entitled to reject the goods under the sale contract. The defendants contended that the court had no jurisdiction to entertain the action and, in particular, Willmer J held that the words used in the Act under this paragraph are wide enough to cover claims whether in contract or in tort arising out of any agreement relating to the carriage of goods.

In ***The Sennar***,[57] the contract between the claimant and a Swiss company was about the purchase of groundnuts and provided that the cargo was to be shipped not later than August 1973. Although the shipping documents presented to the master showed August as a shipment date, the goods were, in fact, shipped in September, but the master wrongly dated the bill of lading with an August date. By a London

53 Hague Rules, Hague-Visby Rules or Hamburg Rules.

54 See Ch 14, Vol 2, of this book.

55 A cif (cost, insurance, freight) contract for the sale of goods was not a contract relating to the carriage of goods on a ship: *The Maersk Nimrod* [1991] 1 Lloyd's Rep 269.

56 [1957] PD 179.

57 [1983] 1 Lloyd's Rep 295.

arbitration award, the claimants were ordered to make payment to the purchasers of the cargo in the chain but were unable to get their money back from the Swiss company, which had gone bankrupt. The claimants issued a writ *in rem* against *The Sennar* and other ships belonging to the defendants for a claim of indemnity, or damages for fraud, breach of duty, or negligence, in connection with the shipment of the cargo. The vessel was arrested. It was held that, in the ordinary meaning of the words in sub-para (h), the claim here did arise out of an agreement relating to the carriage of goods in a ship.

3.8.2 Claims arising out of an agreement for the use or hire of a ship

It is not necessary for the claim in question to be directly connected with the agreement of the kind referred to in this sub-section, or that it be the agreement made between the two parties to the action themselves. The phrase 'arising out of' does not mean 'arising under' an agreement and it has been given a broad meaning that can be equivalent to the phrase 'connected with' it.

A very wide interpretation of this sub-section was given by both the Court of Appeal and the House of Lords in ***The Antonios P Lemos*** (APL):[58]

The disponent owners of APL chartered the ship to Sammisa (head charterers) for one year; in turn, the ship was let to the claimant, Samick Lines (sub-charterers), for one time chartered trip. The vessel loaded corn at Houston for carriage to Alexandria. On arrival, she was unable to berth because her draught exceeded 32 feet, and some of the cargo had to be discharged into lighters. The operation caused delay and involved additional expense in respect of which the claimants claimed damages from the disponent owners of the vessel, the defendants. They contended that the master of the ship was negligent in allowing the loading to exceed the vessel's draught on arrival. As there was no contract between the claimants (sub-charterers) and the defendants (disponent owners), the claim was based on the tort of negligence, and the ship was arrested.

The defendants sought to set aside the writ and warrant of arrest on the ground that the High Court had no Admiralty jurisdiction in respect of the claim because, as they alleged, it did not fall within s 20(2) of the SCA 1981. The main issue was whether the 'agreement' in question should be between the claimant and the defendants for the claim to fall under sub-para (h).The judge held that the claim did not fall within s 20(2)(h), but Parker LJ in the Court of Appeal interpreted this sub-paragraph broadly and held:

> Section 20(2)(h) contains no words of limitation restricting the agreements mentioned to agreements between the plaintiff and the defendant. It would have been simple so to limit them if any such limitation had been intended. The Convention contains no words of limitation either. I am unable to find any sufficient reason for importing such words, and would only do so if compelled by authority. In the absence of such authority, I would accordingly hold that, if the plaintiff can establish that his claim arises out of an agreement of the relevant kind, that is, an agreement relating to the carriage of goods in a ship or to the use or hire of a ship, then even if such agreement is not one between himself and the defendant, that claim falls within para (h).[59]

58 [1985] AC 711 (HL).
59 [1985] AC 711, pp 717, 719, quoting Parker LJ.

The defendants appealed. Lord Brandon in the House of Lords, agreeing with the construction given by the Court of Appeal, said further:

> I would readily accept that in certain contexts the expression 'arising out of' may, on the ordinary and natural meaning of the words used, be equivalent of the expression 'arising under' and not that of the wider expression 'connected with'. In my view, however, the expression 'arising out of' is, on the ordinary and natural meaning of the words used, capable, in other contexts, of being the equivalent of the wider expression 'connected with'. Whether the expression 'arising out of' has the narrower or the wider meaning in any particular case must depend on the context in which it is used.[60]

Sub-paragraph (h) also covers claims arising out of agreements relating to the use of boats for the mooring of vessels as well as the use of tugs for the assistance of vessels in distress (*The Queen of the South*[61]).

3.8.3 Use or hire of a ship – which ship?

Following *The Queen of the South* case and *The Eschersheim*, use or hire of a ship under sub-para (h) can include any ship used or hired.

The Eschersheim[62]

During salvage operations, the salvors caused damage to the salved ship and its cargo on board. Both the owners of the salved vessel and of the cargo sued the salvors and arrested one of their tugs claiming damages caused by the salvors' negligence. The question for the court was whether their claims could be enforced under sub-para (h). It was held by Lord Diplock[63] that, in deciding whether or not there was an '*agreement relating to the use of a ship'*, the courts should look at the substance of the matter. There was an agreement by which *The Rotesand* (tug) was to tow *The Erkowit* to a place of safety. This was considered to be an agreement for the use of a ship (that is, the tug) in the ordinary and natural meaning; thus, the claims were within this sub-paragraph. The salvage agreement was entered into by the master of *The Erkowit* on behalf of the cargo-owners as well as the shipowners. The primary contractual obligation of the salvor under the agreement in Lloyd's Open Form is to use his best endeavours to bring the vessel and her cargo to a place of safety providing, at his own risk, all proper steam and other assistance and labour. The only possible way in which the salvors could perform their contract was by taking *The Erkowit* in tow and using the tug, *The Rotesand*, that had been sent to the scene of the casualty for that very purpose.

While, in this case, it was accepted that the agreement was for the use of the tug, the judge's interpretation of 'use or hire of a ship' in the following case does not accord with the width of the interpretation given by the House of Lords.

The Tesaba[64]

The vessel, with a cargo of steel coils and general cargo, ran aground shortly after setting sail, and her owners entered into an agreement with the plaintiffs, well-known

60 Ibid, p 727.
61 [1968] P 449.
62 [1976] 2 Lloyd's Rep 1.
63 Ibid, p 7.
64 [1982] 1 Lloyd's Rep 397.

salvors, to salve the vessel and her cargo. The agreement was on the standard terms of Lloyd's form of salvage agreement, containing the usual clause that 'the owners of the vessel shall use their best endeavours to ensure that security is provided by the cargo interests before the discharge of the cargo from the ship'. The salvors were successful in refloating the vessel. At the end of the services, they made demands for security from the owners of the ship and the cargo. The owners provided security for the amount due for the salvage of the ship, but they failed to ensure that the cargo owners provided security before their cargo was discharged at Istanbul. The salvors issued proceedings in the Admiralty Court claiming damages from the defendants (ship-owners) on the ground of breach of their obligation under the salvage agreement. The defendants applied to set aside the writ on the basis that the claim did not fall within any of the paragraphs under this sub-section of the 1956 Act, and they succeeded.

Sheen J held that there was no reason for not giving the words in sub-para (h) their ordinary wide meaning. However, the plaintiffs' claims arose out of a breach by the defendants of the terms of the salvage agreement, which was an agreement to salve *The Tesaba* and her cargo. The agreement was not in relation to the carriage of goods in *The Tesaba* nor was it an agreement for the use or hire of *The Tesaba*, but for the use or hire of the tugs.

This decision seems to contradict the decision of Brandon J in *The Queen of the South*, in which the claim of watermen for the costs of mooring and unmooring the defendants' ship with the assistance of the watermen's boats was held to be within 'an agreement for the use or hire of a ship', here the boats.

In both cases, a ship, or boat, was hired and used to provide the services under an agreement. In both cases there was a breach of contract. The only difference between the two was that the claim of the watermen was for a debt in relation to the services provided by their boats, whereas the claim of the salvors in *The Tesaba* was in damages for breach of the agreement in relation to the use of their tug.

The decision in *The Tesaba* also contradicts the decision in *The Eschersheim*, and it is difficult to find a valid point of distinction between the two cases. In both cases, there was use or hire of a tug for the purpose of salvage. The respective claims in both cases were based on a breach of obligations under the salvage agreement. The only difference was that, in the *Eschersheim*, the claim was by the owner of the salved ship against the salvor, whereas, in the *Tesaba*, it was the other way round. The judge's interpretation of the provision is not only contrary to higher authorities but also restrictive.

However, such a claim should come within sub-paragraph (j); see 3.9, below.

By contrast to the interpretation given by Sheen J in *The Tesaba*, Brandon J, in the following case, which was concerned with towage, preferred a wide interpretation of sub-para (h).

The Conoco Britannia[65]

The plaintiff (P) supplied the defendant (D), under a towage contract, a tug owned by a third party. Due to a collision with D's ship, the tug sank with loss of life among her crew. P proceeded *in rem* against another ship of D claiming indemnity as

65 [1972] QB 543, [1972] 1 Lloyd's Rep 342.

provided by the towage contract for liability incurred by him to the tug owners, or specific performance for payment direct to the tug owners, or damages for failure to indemnify. The claim was brought under the provision of the old statute, the 1956 Act, being equivalent to the present sub-para (h). D applied to set aside the writ on the grounds that the court had no jurisdiction *in rem*.

Brandon J held that the words relating to the use or hire of a ship were wide enough to cover hire of the tug under a towage contract. The spirit of the Act and history of jurisdiction was to widen the Admiralty jurisdiction of the court, which must give all legal and equitable relief properly available. D's argument that the claim contained an equitable remedy *in personam* was rejected.

3.8.4 Any other claims

The ambit of para (h) is wide enough so as to include a claim involving loss arising out of the exercise of the right of lien on the cargo carried on the ship, which is a contractual entitlement of the carrier for unpaid freight or hire. Such a claim can be enforced under this paragraph, if it is alleged that the lien or detention of goods was wrongful, as decided in ***The Gina***.[66]

In this case, forwarding agents arranged for P a shipment of three containers of aerosols and they engaged the defendants' vessel for this purpose. At destination, however, only two containers were presented to the receivers, and the latter refused to obtain delivery – withholding payment of the freight. The defendants exercised lien upon the goods for freight. P arrested *The Gina* for wrongful detention of his goods, contending that it was the defendants' fault that only two containers reached destination. It was held that the vessel was properly arrested under sub-para (h) and P was entitled to use the procedures of an Admiralty action *in rem* in order to obtain security for their claim.

3.8.5 Excluded claims from sub-para (h)

3.8.5.1 Claims for insurance premiums

By contrast to the wide construction given to the words 'agreement relating to the use or hire of a ship' in para (h), the House of Lords in *The Sandrina* (below) chose a narrow construction of the words 'an agreement relating to the carriage of goods in a ship' in so far as claims for insurance premiums, or brokerage, are concerned.

Gatoil International Inc v Arkwright-Boston Manufacturers Mutual Insurance Co (The Sandrina)[67]

Insurance premiums and brokerage in relation to the insurance of the cargo on board the ship were unpaid. Six insurance companies and the broker arrested the *Sandrina* in Scotland to obtain security for their claim.

66 [1980] 1 Lloyd's Rep 398.
67 [1985] AC 255 (HL), or [1985] 1 Lloyd's Rep 181.

The issue was whether the claim came within s 47(2)(e) of the AJA 1956, which applied in Scotland and was equivalent provision to that under the English AJA 1956, para (e) (presently para (h) of s 20(2) SCA), which provided: 'any agreement relating to the carriage of goods in a ship whether by charterparty or otherwise'.

The issue for interpretation was whether or not the words in the statute covered an agreement to pay premiums on a policy of insurance for war risks in respect of the cargo. If so, the arrest of the ship would be valid; if not, the arrest should be lifted. The matter reached the House of Lords.

After reviewing the relevant authorities, the House of Lords held that, for an agreement to come within that provision, it must have a reasonably direct connection with the carriage of goods in a ship and not merely a remote connection. A contract of insurance was not connected with the carriage of goods in a sufficiently direct sense to be capable of falling within that paragraph. The 1956 Act was passed in order to enable the UK to ratify and comply with the provisions of the 1952 Arrest Convention. In particular, Lord Wilberforce referred to the conference that led to the 1952 Convention. In that conference, the Netherlands had proposed the addition of insurance premiums claims in the list of those for which the arrest of a ship would be permitted. However, the conference expressly refused to include such claims among the maritime claims. Therefore, the legislative intention behind the 1952 Arrest Convention must be treated as being the same as that for the 1956 Act, which adopted the provisions of the Arrest Convention.

It was accepted, however, by Lord Wilberforce that the words were ambiguous and he raised the following questions:

> Must the agreement be directly 'for' the carriage of goods in a ship, or is it enough that it involves carriage of goods directly or indirectly, or that the parties contemplated that there would be such carriage as a consequence of the agreement? Furthermore, how close must the relationship be between the agreement and the carriage? Would any connection of a factual character between the agreement and some carriage in a ship be sufficient? If not, what is the test of relevant connection?

These questions may give scope for further consideration of the provision in individual cases.

Lord Keith referred to the only previous decision on this issue, *The Aifanourios* 1980 SC 346, which had been decided in Scotland, in which Lord Wylie had held that a claim arising out of an insurance contract did not come within the provision and, in particular, the insurance of a vessel was a matter directed to the convenience or protection of the owner; it was not essential for the operation of the vessel as such. Therefore, a more restricted construction of the provision was called for.

Lord Keith then continued:

> It is necessary to attribute due significance to the circumstance that the words of the relevant paragraphs speak of an agreement 'in relation to' not 'for' the carriage of goods in a ship and the use or hire of a ship. The meaning must be wider than would be conveyed by the particle 'for'. It would, on the other hand, be unreasonable to infer from the expression actually used, 'in relation to', that it is intended to be sufficient that the agreement in issue should be in some way connected, however remotely, with the carriage of goods in a ship or with the use or hire of a ship, and I think there is much force in the view expressed by Lord Wylie, in The Aifanourios. . . . There must, in my opinion, be some reasonably direct connection with such

activities. An agreement for the cancellation of a contract for the carriage of goods in a ship or for the use or hire of a ship would, I think, show a sufficiently direct connection. It is unnecessary to speculate what other cases might be covered. Each case would require to be decided on its own facts. As regards the contract of insurance . . . in the instant appeal, I am of the opinion that it is not connected with the carriage of goods in a ship in a sufficiently direct sense to be capable of coming within para (e).[68]

It should be noted that the Arrest Convention 1999 has included claims for unpaid insurance premiums and brokerage, claims by P&I clubs for unpaid calls, in the list of maritime claims. Such claims will qualify for an arrest of a ship to be made if the UK accedes to the Convention, which has been in force since 14 September 2011, or adopts it into its national law.

3.8.5.2 Claims for container hire or damage to containers

This has been the subject of interesting decisions. Unless containers in relation to which a claim arises were supplied to a particular ship for carriage, the claim cannot be enforced by *in rem* proceedings under the SCA 1981. In practice, containers are supplied to ship-owners under a long lease agreement. The container supplier is usually not aware of which particular ship will carry his containers, unless a specific mention is made in the agreement. When a dispute arises under the lease agreement, either for outstanding payment of hire, or for damage to containers, the container supplier may sue the ship-owner *in personam*, but he will not be able to arrest a ship. The phrase 'arising out of any agreement relating to the carriage of goods in a ship' has been construed to mean that the containers must have been supplied to a particular ship.

In ***The Lloyd Pacifico***[69] Clarke J (as he then was) followed the previous authorities and Lord Keith's reasoning in *The Sandrina* (above). The containers must be provided to a particular ship, as they were in *The Hamburg Star*,[70] in which containers with goods were shipped on this ship and some were lost. Whether or not such claims can be enforced under sub-para (m) *The River Rima* decision is discussed under 3.12.1, below. The restrictive interpretation of the words 'in relation to', particularly as it was accepted that the words are wider than 'for' the carriage of goods in a ship, seems to be unnecessary.

Naturally, the containers, as any other cargo, will be loaded on a ship whether or not the shipowner or the supplier chooses the particular ship. The words in the relevant provision are ambiguous. By contrast, certainty is introduced in the Arrest Convention 1999 by the replacement of the indefinite article 'a' with 'the'; it provides in the list of maritime claims that containers are supplied to the ship.

68 Ibid, at pp. 187–188.
69 [1995] 1 Lloyd's Rep 54.
70 [1994] 1 Lloyd's Rep 399, p 406.

3.8.5.3 Claims for enforcement of an arbitration award or judgment

On proper construction of s 20(2)(h), an action for the enforcement of an arbitration award was held in ***The Bumbesti***[71] not to be within the wording of para (h), namely 'an agreement in relation to the use or hire of a ship', and the court had no jurisdiction to consider the *in rem* claim.[72]

The claimant had detained two ships of the defendant in Constantza by order of the court for the enforcement of two awards obtained with regard to a repudiation of a charter-party. Later, he arrested in England *The Bumbesti*, belonging to the defendant, for the enforcement of the awards in case the value of the other two ships was not sufficient. The *in rem* proceeding was based on s 20(2)(h) of the SCA 1981, and the issue was whether or not the claim came within the wording of this paragraph. It was held that:

> The claim in this case was the action on the awards and clearly arose out of the agreement to refer to arbitration the disputes that had arisen under the bareboat charter; but that agreement to refer disputes was not, itself, an agreement in relation to the use or hire of a ship since the arbitration agreement to refer was a contract that was distinct from the principal contract, that is, the bareboat charter.

It was further explained that the arbitration agreement was not sufficiently and directly related to the 'use or hire of a ship' but, at least, one step removed from the 'use or hire' of a ship. The breach of contract relied upon, namely a breach of an implied term to fulfil any award made pursuant to the agreement to refer disputes to arbitration, did not have a reasonably direct connection with the use or hire of the ship that was necessary to found jurisdiction.

It should be noted, however, that security for enforcement of an arbitration award can be obtained under s 26 of the Civil Jurisdiction and Judgments Act (CJJA) 1982 and s 11 of the Arbitration Act (AA) 1996 (see Chapter 4).

3.8.5.4 Enforcement of judgment relating to payment under an FFA

Following this line of authorities, it is interesting to note that the US District Court held, in ***D'Amico Dry Ltd v Primera Maritime (Hellas) Ltd***,[73] that it did not have Admiralty jurisdiction to enforce a judgment of the English commercial court obtained in relation to a claim for money owed under an FFA. The court held that an FFA, like a contract for marine insurance, was not sufficiently related to the carriage of goods or the use or hire of a ship. Therefore, it dismissed the motion brought to enforce the English judgment by proceeding *in rem* for lack of subject matter jurisdiction.

71 [1999] 2 Lloyd's Rep 481.
72 The judge applied *The Beldis* (1936) 53 LlL Rep 255.
73 26 March 2011, Lloyd's Maritime Newsletter 13 May 2011.

3.8.5.5 Claims brought in rem against a guarantor

The High Court of Singapore, following the line of the above English authorities, held in ***The Catur Samudra***[74] that an agreement which in itself was not an agreement intrinsically related to the use or hire of a vessel could not be transformed into such an agreement simply by characterising it as a condition precedent to the charter-party. This would have the effect of altering the 'direct connection' test into a 'but for' test. The plaintiffs' claim for unpaid hire by the bareboat charterer (Heritage) under a bareboat charter had been guaranteed by the defendant, guarantor, whose ship, the *Catur Samudra*, was arrested in Singapore, under the equivalent provision of sub-para (h), to enforce an arbitration award obtained in London Arbitration. The judge, setting aside the arrest, held that the guarantee was not an agreement which in itself related to the use or hire of the ship, *Mahakam*, in relation to which the hire was owed. The sole purpose of the guarantee was to provide financial protection to the plaintiff against the risk of default by Heritage (bareboat charterer) under the bareboat charter. Accordingly, the claim did not fall within s 3(1)(h) of the Singaporean Admiralty Act.

3.9 ANY CLAIM FOR SALVAGE SERVICES (S 20(2)(j))

Claims for salvage give rise to a maritime lien.

Any claim (i) under the Salvage Convention 1989,[75] or (ii) under any contract for or in relation to salvage services;[76] or (iii) in the nature of salvage not falling within (i) or (ii) above, or any corresponding claim in connection with an aircraft.[77]

The predecessor to this paragraph referred only to 'claims in the nature of salvage', and so it did not cover a claim against salvors for negligence, which was covered under sub-para (h) above (see *The Eschersheim*). It did not cover a claim for breach by a ship-owner of his undertaking under salvage agreements to use his best endeavours to ensure that security is provided by the cargo interests in favour of the salvor prior to the discharge of the cargo from the ship. Now, apart from the considerable extension of this paragraph, there are explanatory provisions in s 20(6) of the Act that specifically refer to the inclusion of any claims whether or not arising during the provision of salvage services.

The Arrest Convention 1999 has also widened the scope of salvage claims that will be enforced by an action *in rem* by including any claims arising from a salvage agreement and claims for special compensation arising under Art 14 of the Salvage Convention 1989. Damage to the environment is also included as a ground for arrest, as are claims for wreck and cargo recoveries.

74 [2010] SGHC 18, [2010] 1 Lloyd's Law Rep 305.

75 See Ch 10, Part III, Vol 2, on salvage for its definition and elements.

76 The reference to salvage services includes services rendered in saving life from a ship and the reference to any claim under any contract for or in relation to salvage services includes any claim arising out of such a contract whether or not arising during the provision of the services: s 20(6)(b) of the SCA 1981, as amended.

77 The reference to a corresponding claim in connection with an aircraft is a reference to any claim mentioned in sub-para (i) or (ii) of para (j) which is available under Civil Aviation Act 1982, s 87: SCA 1981, s 20(6)(c).

3.10 ANY CLAIM IN THE NATURE OF TOWAGE IN RESPECT OF A SHIP OR AIRCRAFT (S 20(2)(k))

This is straightforward, but it should be noted that only when the aircraft is waterborne does its towage come within this provision.

Unlike salvage, towage does not give rise to a maritime lien.[78]

3.11 ANY CLAIM IN THE NATURE OF PILOTAGE IN RESPECT OF A SHIP OR AN AIRCRAFT (S 20(2)(l))

Pilotage charges or dues are claims for which an arrest of a ship can be made, but such claims do not give rise to a maritime lien.

Again, an aircraft must be waterborne when pilotage service is rendered for such a claim to be within this provision.

3.12 ANY CLAIMS IN RESPECT OF GOODS OR MATERIALS SUPPLIED TO A SHIP FOR HER OPERATIONS OR MAINTENANCE (S 20(2)(m))

This head of maritime claims encompasses a variety of incidents of supplies to a ship required for her operation or maintenance, such as supplies of bunkers, any equipment, remotely operated vehicle,[79] containers, claims by the ship's agents regarding supplies to a ship, provided the supplies or services are for the operational benefit of a specific ship; see for example, ***The Edinburgh Castle***,[80] in which the judge held that the provision of food, drink and other consumables, supplied for use by the officers and crew and the provision of a wide range of equipment plainly came within this sub-paragraph. The words 'in respect of' in s 20(2)(m) were wide words that should not be unduly restricted.

78 See details of towage in Ch 11, Part III, Vol 2 of this book.

79 *The Sarah* [2010] CSOH 161, [2011] 1 Lloyd's Law Rep 546: the vessel was rightly arrested – the agreement between the parties was for the supply of marine equipment (ROV) and services for the operational benefit of a specific vessel and not generally for the owner of *The Sarah* (the off-shore intervention vessel); on the information available to the court, the vessel was the only vessel remotely connected with the parties' agreement, she was the point of delivery of all of the equipment and services to which the contract related, and at least some of the performance of the contract involved interface engineering between the vessel herself and the equipment and systems supplied. The contract was, in those various respects, vessel-specific, and it would not be unreasonable to describe the relevant supplies as having been made 'to' the vessel, and for her operation. Unlike the hired containers in *The River Rima*, which were merely a form of cargo, the installation, maintenance and operation of the ROV equipment and associated systems on board the instant vessel could properly be viewed as enhancing her operational capabilities, *The River Rima* distinguished.Where the vessel was an intervention vessel it would always be deployed with ROV equipment, and, without the agreement, the vessel would have had to be equipped therewith from elsewhere. In all the circumstances, s 47(2)(k) and (l) of the Scottish Act had been met.

80 [1999] 2 Lloyd's Rep 362.

3.12.1 Claims in respect of containers

The River Rima[81]

It was not in dispute that (i) containers are 'goods' and are within the meaning of sub-para (m); (ii) the word 'supplied', in this paragraph, includes supply by way of hire as well as sale; (iii) assuming that containers are supplied to a ship, they would be unlikely to be for her maintenance within the meaning of (m). The only question for decision by the House of Lords in this case was whether or not the containers supplied to the ship were for the operation of the ship within the meaning of sub-para (m) in order for the action *in rem* to be entertained in respect of the claims made by the container supplier. To answer this question, it was necessary to determine whether the containers were supplied to the particular ship in question.

The case involved a vessel owned by the Nigerian National Shipping Line (NNSL). NNSL had a number of contracts whereby they leased containers from their owners, including the plaintiffs, at a daily rate. The plaintiffs claimed conversion of certain containers and breach of an obligation by NNSL under the contract to maintain the containers in good condition and repair. They issued a writ *in rem* and arrested *The Riva Rima* belonging to NNSL.

It was decided that, unless the containers were supplied to a particular ship, any claim arising from a lease agreement with respect to containers supplied to a shipowner would not be enforceable by *in rem* proceedings.

The House of Lords made a distinction between the kind of contract that expressly provides that the containers are required for the operation of a particular ship, identified, or to be identified, when the contract comes to be performed, and the kind of contract that makes no reference to a particular ship, leaving the ship-owner to make his choice later. Claims arising under the first category of contract are enforceable under this paragraph. The crucial words are 'supplied to a ship', which are interpreted to require identification of the ship on which the containers will be placed. The reason behind this interpretation was that, upon a historical analysis, the jurisdiction of the court regarding this provision derived from the court's jurisdiction in relation to necessaries supplied to a ship (s 1(1) of the AJA 1956), for which the identity of a ship was an essential ingredient.

It should be noted that the Arrest Convention 1999 includes such claims in Art 1(1) (l) and expressly states that the goods, materials, provisions, bunkers, equipment (including containers) are supplied to the ship for its operation, management, preservation or maintenance.

3.12.2 Ship agents' claims

Sub-para (m) includes claims by ship's agents arising in relation to providing supplies to a ship for its operation or maintenance. Whether a claim by a ship agent who has a general account with a ship-owner to provide necessaries and other supplies

81 [1988] 2 Lloyd's Rep 193.

to his ships, whether directly or through a sub-agent, can be enforced in the Admiralty jurisdiction (under s 20(2)(m)) was raised in ***The Kommunar (No 1)***.[82]

A head ship agent, who had contracted with the ship-owner, paid the expenses incurred for necessaries supplied to the fleet by his sub-agent and sought to recover them from the ship-owner under their long-term agreement; he brought the action under s 20(2)(m) and (p) of the SCA 81.

The ship-owner argued that the court had no jurisdiction because, under the agreement, the agent's obligation was the provision of finance to him and, as he was merely a financier, was not entitled to bring the claim *in rem* under s 20(2) of the Act. The court rejected this argument and held that the fact that the claim was on a general account did not, by itself, lead to the conclusion that the claim was not a claim in respect of goods or materials supplied to a ship. Clarke J stated:

> in my judgment, they were not simply acting as bankers, they were not advancing moneys to the shipowner for the shipowner to purchase supplies. By the terms of the contract, it was their responsibility to pay for necessaries supplied by the supplier of the necessaries. I can see no reason why it should not be held that the claim to recover those moneys is in respect of the goods and materials supplied to the ship for her operation or maintenance.[83]

Assuming the sub-agent was not paid by the head agent with whom he had a contract, and the head-agent became insolvent, would he be able to bring a claim *in rem* against a ship of the ship-owner's fleet? Para (m) does not appear to limit the provision to claims that arise only owing to breach of contract. There is no authority on this point but, in any event, a claim by the sub-agent would most likely be enforceable under para (p), below.

This paragraph also covers advances made by a ship's chandler for payment of crews' wages, the supply of bunkers[84] and the provision of officers and crew.[85]

No maritime lien attaches under this head.

3.13 ANY CLAIM IN RESPECT OF THE CONSTRUCTION, REPAIR OR EQUIPMENT OF A SHIP OR DOCK CHARGES OR DUES (S 20(2)(n))

Claims by shipbuilders and ship-repairers, port dues and charges are within this paragraph. No maritime lien attaches to these claims, but the ship-repairer will have a right to detain the ship in his yard until payment of his charges is made. This is a common law right, known as 'possessory lien', which is different from the nature of the maritime lien. It depends on possession of the ship.

Fuel, or bunkers supplied to a ship, is not within the term 'equipment' of this paragraph, but it is covered under para (m), as shown in ***The D'Vora***.[86]

82 [1997] 1 Lloyd's Rep 1.
83 Ibid, p 7.
84 *The Fairport (No 4)* [1967] 1 Lloyd's Rep 602.
85 The *Nore Challenger* and *Nore Commander* [2001] 2 All ER (Comm) 667.
86 [1952] 2 Lloyd's Rep 404.

The claimants, fuel suppliers, contended that equipping under para (n) meant 'making the ship ready to sail', which included supply of fuel. Willmer J rejected this contention and stated:

> In my judgment, there is an important difference between 'equip' and 'supply', 'supply' being a word which is appropriate for use in connection with consumable stores, such as fuel oil, whereas 'equip', to my mind, connotes something of a more permanent nature than consumable stores. I can well understand that anchors, cables, hawsers, sails, ropes and such things may be said to be part of a ship's equipment, and that, nonetheless, although they may have to be renewed from time to time; but such things as fuel, coal, boiler water and food-consumable stores – seem to me to be quite a different category.[87]

3.14 ANY CLAIM BY MASTER OR CREW OF A SHIP FOR WAGES (S 20(2)(o))

Various questions about seamen's wages had been brought before the courts in the past and concerned mainly what the term 'wages' included, because they attract a maritime lien and affect the priority of payment out of the proceeds of sale of a ship when there are many claimants (see Chapter 4). The seamen's and master's lien for wages arises independently of contract for services rendered to a ship, provided the seaman was, at the relevant time, a member of the crew (*The Ever Success*).[88]

3.14.1 The extent of seamen's wages

In ***The Halcyon Skies***,[89] a British Merchant Navy officer was employed by Court Line on board this ship. His contract provided that Court Line would pay employers' contributions to the Merchant Navy pension fund. Such contributions had not been paid when a petition to the Companies' Court was made for the winding up of Court Line, and a liquidator was appointed. By an action *in rem*, brought by the second mortgagee of the ship, the ship was appraised and sold by the order of the Admiralty Marshal. The officer brought an action – with the leave of the Companies' Court – against the proceeds of sale, claiming priority over the mortgagee on the basis of a maritime lien attached to the ship in respect of the outstanding contributions.

The following issues arose for decision before the main question could be answered:

(a) Was the right to such payments part of the seaman's contract for wages or arose from a special contract for contributions to be paid to a special fund?
(b) Were the claims in debt or in damages, and if it was the latter, could they still be part of wages so as to come within the Admiralty jurisdiction?
(c) Did the claims attract a maritime lien?

Brandon J distinguished employees' from employers' contributions and considered first the issue of employees' contributions.[90] In his view, such a claim would be in debt and would arise under his contract of employment by which he gave authority

87 Ibid, p 405.
88 [1999] 1 Lloyd's Rep 824.
89 [1976] 1 Lloyd's Rep 461.
90 Ibid, p 463.

to his employer to deduct such contributions from his pay. Court Line deducted the sums but failed to pay them to the fund. There was no doubt that the sums, having been so deducted, were part of wages and enforceable under this head of statutory jurisdiction. The judge also held that a maritime lien was attracted to this claim.

As regards the employers' contributions, Brandon J examined the history of the court's jurisdiction and previous authorities about seamen's wages. He explained that, even before and indeed after the 1861 Act, the court had jurisdiction for unpaid wages as claims in debt and as claims in damages for wrongful dismissal. Summarising the relevant previous authorities, he highlighted that:

> There were other extensions of the wages concept. The claims covered by it were held to include emoluments other than wages in the strict sense, which were payable direct to the seaman, such as victualling allowances and bonuses: *The Tergeste* [1903] P 26; *The Elmville (No 2)* [1904] P 422 . . .
>
> . . . the jurisdiction in wages extended to claims for damages for breach of a seaman's contract of employment during its subsistence, *The Justitia* (1887) 12 PD 145. That was a strange case, in which seamen recovered, in an Admiralty action *in personam* for wages, general damages for hardship suffered and risks run when they were obliged to remain on board a ship while she was being used, contrary to the articles on which they had been engaged, as an armed cruiser in support of insurgents.
>
> It is to be observed that, when the Admiralty jurisdiction over claims for wages was redefined by Parliament in 1956, the requirement that wages should have been 'earned on board ship' was removed. This was in accordance with the description of the corresponding 'maritime claim' in para (1)(m) of Art 1 of the 1952 Brussels Ship Arrest Convention, which refers simply to claims arising out of 'wages of Masters, Officers, or crew'.
>
> In *The Arosa Star* [1959] 2 Lloyd's Rep 396, the Supreme Court of Bermuda (Chief Justice Worley) held that a foreign seaman could recover, in an Admiralty action *in rem* for wages and with the priority accorded by a maritime lien, full pay during sick leave and employer's contributions for social insurance, as being emoluments in the nature of wages to which he was entitled under his contract of employment.
>
> In *The Arosa Kulm (No 2)* [1960] 1 Lloyd's Rep 97, Hewson J held that a foreign master and crew could recover, in an Admiralty action *in rem* for wages, social benefit contributions said to be similar to National Insurance contributions, which were payable by the shipowners under their contracts of employment.
>
> In *The Fairport* [1965] 2 Lloyd's Rep 183, Hewson J held that a foreign master could recover, in an Admiralty action *in rem* for disbursements, notional deductions from unpaid seamen's wages in respect of insurance and pension contributions payable under their contracts of employment. He further expressed the opinion that the seamen themselves, who had already recovered their wages net of such contributions in an earlier action, would have been entitled to include the amounts of such contributions in their own wages claim.
>
> In *The Fairport (No 3)* [1966] 2 Lloyd's Rep 253, the question arose whether the master's maritime lien for disbursements extended to the amounts recovered by him in respect of insurance and pension contributions under the judgment in the preceding case. Karminski J held that his lien did so extend, on the ground that such contributions formed part of the seamen's wages.
>
> In *The Westport (No 4)* [1968] 2 Lloyd's Rep 559, Karminski J held that a foreign master could recover, in an Admiralty action *in rem* for disbursements, firstly, sums which he was bound to pay in respect of deductions from seamen's wages for insurance, pension, provident and union contributions; and, secondly, sums which he was bound to pay jointly with the owners in respect of owners' own insurance and other contributions. The ground of the decision seems to have been that all the contributions concerned were emoluments of the seamen under their contracts of employment or according to their national law.[91]

91 Ibid, pp 464, 465, 467.

Then, Brandon J examined whether the claim in this case was in debt or in damages, and continued:

> It was argued for the defendants that the plaintiff's only cause of action was in damages for breach of contract. It was argued for the plaintiff, on the other hand, that he had a cause of action in debt, on the basis that it was an implied term of his contract of employment that, if Court Line did not pay the employer's contributions to the fund, they would pay them to him instead. In my opinion it is not necessary to imply the term contended for in order to give business efficacy to the contract and it would not therefore be right to do so. The true view, I think, is that the failure of Court Line to pay the employer's contributions was a breach of contract for which the plaintiff is entitled to recover damages at law. It follows that his cause of action in respect of such contributions is in damages and not in debt. It seems that, if damages were not an adequate remedy, the plaintiff could seek the alternative equitable remedy of specific performance: *Beswick v Beswick* [1968] AC 58.
>
> Does it make any difference that the plaintiff's claim is not, if I am right in my answer . . . above, a claim in debt for the contributions themselves, but a claim in damages for breach of contract in failing to pay them? In my judgment, it does not, because the Admiralty jurisdiction in wages has long extended, as I explained earlier, to claims founded in damages as well as debt. Further, that extended jurisdiction has not only been exercised regularly in respect of claims for damages after termination of the contract of employment by wrongful dismissal, but also, at least, once prior to 1951 in respect of a claim for damages for breach of such contract during its subsistence. Indeed, it may well be that the reason why the judges, who decided the group of further cases from 1951 to 1968 referred to above, did not pause to analyse the precise cause of action on which the claims in respect of employer's contributions succeeded was that they did not think it mattered, so far as the seaman's right to recover was concerned, whether such cause of action was in debt or in damages.

Since the answer to the second issue was affirmative, it followed that his answer to the third issue, namely whether these claims attracted a maritime lien, was also affirmative.

In ***The Turiddu***,[92] a crewing agent, having a contract with the owner of the ship for sourcing the crew, recruited the crew members for service on the vessel. The crewing contract provided that 70 per cent of the crew wages would be paid to the agent who would pay the crew, and the ship-owner would pay the 30 per cent of the wages directly to the crew. The mortgagee obtained a judgment against the ship-owner and a court order for the sale of the ship, which was sold. The crew obtained the 30 per cent of their wages and were repatriated. They claimed the balance of the unpaid wages and the bank intervened, disputing the crew's claims to protect its priority over the balance of the proceeds of sale retained by the Admiralty Marshal. The issue for decision was whether the crew members in these circumstances had a claim for wages, which should be paid out of the proceeds in priority to the claim of the bank.

It was held that payment of wages to a ship agent on account of the crew under a contract of employment, which had been agreed to be paid to the agent with the consent of the crew as wages for their services, was not for the account of the agent, but it was properly agreed as wages for the crew. Therefore, they had priority over the bank's claim as mortgagee because the claim attracted a maritime lien.

92 [1998] 2 Lloyd's Rep 278; whether a ship agent or a volunteer who paid crew wages is able to claim maritime lien on the sum paid, see voluntary payments of wages by third parties, and assignment of the wages claim in Ch 5, para 7.2.

3.14.2 Treatment of severance payments (redundancy pay) and pensions

The Court of Appeal in ***The Tacoma City***[93] considered such payments in detail.

The ship-owners announced that they were ceasing trade. The first mortgagees (the bank) arrested the vessel, which was sold by order of the court. There were further claims by the second mortgagee, ranking immediately behind the bank, and by 20 crew members who had served aboard the ship. The crew claimed maritime liens for severance payments and wages in lieu of notice against the proceeds of sale of the ship, in priority to the claim of the second mortgagee. The question was whether severance payment agreements could fairly be regarded as special contracts.

Sheen J, in support of his conclusion that this type of claim was not within wages, gave a number of reasons which included: (a) a severance payment was not payable 'for service to the ship'; (b) a severance payment was 'compensation' for losing employment and is not part of the emoluments of employment; (c) it was not payable for services rendered; and (d) the essence of a severance payment was a reward for long service payable as compensation for having had the service cut short.

At the Court of Appeal, Gibson LJ did not think that it was possible to formulate a principle based upon any of those reasons and to demonstrate that it is supported by any particular authority, and stated:[94]

> The cases show a development of the concept of 'wages' based upon a liberal approach and a determination to do what is fair and just in order to secure to the seaman what he has earned by service to and in the ship . . .
>
> Further, I do not find anything conclusive in the fact that a severance payment is 'compensation for losing employment' or that it is paid 'because services are no longer required'. Damages for wrongful dismissal are paid because employment has been lost and wages during sick leave are paid because services cannot be rendered . . .
>
> Mr Justice Sheen viewed with concern the fact that, if the plaintiffs' claims to maritime liens were held to be good, the security provided by a mortgage on the ship would be greatly diminished, because those serving in the ship would have contingent rights to large sums of money by way of severance payments which would become due if the officers became surplus to the requirements of the owners at the end of service in the ship. Miss Bucknall has submitted that that is an irrelevant consideration. I accept that it is of no real weight. Those who lend money on ships are, no doubt, aware of the priority of a maritime lien for wages and can either require information as to the maximum risk for wages and for the payments and limit their lending accordingly or require the provision of sufficient security, by insurance or otherwise, against the risk. I am, however, quite unable to accept the full extent of Miss Bucknall's argument, namely that any sum is 'wages' and gives rise to a maritime lien if it is promised to be paid in consideration of services in a ship.

If, for example, Gibson LJ said the payment of a pension upon retirement age was promised by a ship-owner and was incorporated in a crew agreement to be taken as a lump sum or as future periodical payments, he did not regard that lump sum, or the value of the pension, or even the sums that have fallen due at the time of the termination of employment in the ship, would fall within the concept of 'wages', for which the law would give a lien. Such claims would not, in his judgment, be 'wages', even though the immediate consideration for the promised pay was service by the seaman in the ship coupled with prior service to the shipping company or its

93 [1991] 1 Lloyd's Rep 330.
94 [1991] 1 Lloyd's Rep 330, pp 344–345.

subsidiaries. All the additions to wages, payable under special contracts, 'which the mariner can fairly be said to have earned by his services' (per Worley CJ in *The Arosa Star*, p 403), which have been accepted as giving rise to liens, have been claims that can be regarded as items in the quantification of the value of the current service in the ship by the seafarer. Pension, as contrasted with contributions towards a pension fund, is not part of the agreed value of the current service but, in substance, is the reward for past service.

Leggatt LJ agreed and stated:[95]

> Since wages include 'emoluments', they are not confined to periodic payments. In its natural meaning of severance payment it does not constitute remuneration, because it is not paid for services rendered or for services that would have been rendered . . . It is paid when a seaman who has been continuously employed for at least two years is dismissed by his employer. In other words, it is a payment made not for services to a ship, but to compensate the seaman for the termination of his employment after a reasonably long period of service to the same employer. It is not paid for past service, even though the amount of the payment is calculated by reference to the length of it. In my judgment severance pay does not constitute wages.

Dillon LJ added:[96]

> the severance pay is to be calculated by reference to the whole of his service with the company or group in question. It is not paid as extra remuneration, or deferred remuneration on a contingency, for his services merely during the voyage in his last ship when he becomes surplus to requirements. Indeed, it is not paid as remuneration for his services at all; it is paid as compensation for the loss of the expectation he would otherwise have had that because of his long service he would have been offered further employment by the company or group after the end of what was in the event his final voyage in his last ship for the company or group.

It was held, therefore, that the appellants' claim for severance pay was not the subject of a maritime lien and, in any event, none of them possessed the minimum two years' company service required by the agreement to entitle them to severance payment.

The distinction made between damages for wrongful dismissal, on the one hand, and compensation to the seaman for being made redundant, on the other hand, was that the former is for services rendered or to be rendered under the seaman's contract, whereas the latter is for loss of expectation of further work, because he had already served the minimum of two years' employment. Similarly, as Gibson LJ explained, a lump sum of pension or future periodic payments upon retirement for old age does not fall within the concept of wages.

3.15 ANY CLAIM BY A MASTER, SHIPPER, CHARTERER OR AGENT IN RESPECT OF DISBURSEMENTS ON ACCOUNT OF A SHIP (S 20(2)(p))

This head seems to be wide enough to cover claims for disbursements provided to a ship pursuant to a contract with the ship-owner or a contract with an agent of the owner.

95 [1991] 1 Lloyd's Rep 330, p 346.
96 Ibid, p 348.

In ***The Sea Friends***[97] it was held that the disbursement must be something, which would ordinarily be regarded as a master's disbursement, whether that disbursement be incurred by the master himself or by the shippers or the charterers or the agents.

Insurance premiums are not ordinarily included within the description of masters' disbursements.

On the facts of this case, it was necessary to consider whether the insurance brokers (plaintiffs) could be regarded as 'agents' of the owner for the purpose of this sub-section. Both the Admiralty Registrar and the trial judge held that the plaintiffs were not entitled to arrest the vessel under s 20(2)(p). On appeal to the Court of Appeal, it was reminded that the House of Lords in *The Sandrina*[98] had clearly shown that the legislative intention behind both the 1956 and the 1981 Acts was to exclude claims for insurance premiums from the list of maritime claims. They could, therefore, not be included under sub-para (p). According to Lloyd LJ:

> Put in simple and non-technical language, bunkers are, to take just one example, a disbursement within (p) because bunkers are needed to keep the ship going. But insurance is not needed to keep the ship going. Insurance is needed to reimburse the shipowners in case a ship is lost or damaged. The ship could very well sail uninsured, although, of course, it never, in fact, does. The disbursement in this case is, in my view, no more a disbursement on account of the ship than it would have been if the premium were in respect of insurance on freight.[99]

At common law, no maritime lien was attached to masters' disbursements incurred on account of the ship (*The Castlegate*).[100] A statutory maritime lien was, however, given by statute (MSA 1970, s 18) which is now found in s 41 of the MSA 1995 and states:

> the master of the ship shall have the same lien for his remuneration and all disbursements or liabilities properly incurred by him on account of the ship, as a seaman has for his wages.

Such a maritime lien does not extend to others who incur expenses on account of the ship (shippers, charterers, ships' agents). Like all other maritime claimants, they can secure their position by issuing *in rem* proceedings pursuant to their statutory rights *in rem* under the SCA 1981, whereupon they become secured creditors irrespective of the subsequent winding up of the defendant company by petition to the Companies' Court.

This point was illustrated in ***The Zafiro***.[101]

The plaintiffs paid necessary disbursements on account of two vessels, *The Oro* and *The Zafiro*, both of which were owned by the defendant, who subsequently went into voluntary winding up. They issued a writ *in rem* against *The Zafiro* claiming disbursements on account of the ship and arrested that vessel. The creditors of the company passed a resolution that the company should be wound up and appointed a liquidator. *The Zafiro* was sold, and the proceeds were paid into court. The plaintiffs applied for a judgment in default of defence against the defendant and/or the proceeds of sale claiming payment of the sum due to them. The defendant sought an order

97 [1991] 2 Lloyd's Rep 322.
98 [1985] AC 255.
99 [1991] 2 Lloyd's Rep 322, p 324.
100 [1893] AC 38 (HL).
101 [1960] P 1.

that the action be stayed on the ground that, since the issue of the writ, the resolution for the voluntary winding up of the defendant's company had been passed and that, before the issue of the writ, the plaintiffs had been given notice of the meeting at which such resolution was to be proposed. He further sought an order that the proceeds of sale of *The Zafiro* be paid out to him after the satisfaction of a claim by the owners of another vessel, who had previously obtained judgment against *The Zafiro* in a collision action.

It was held that the arrest of a vessel was not an 'execution' within the meaning of s 326 of the Companies Act 1948 (which was then applicable) and, accordingly, the plaintiffs were entitled to the benefit of the arrest of *The Zafiro* as against the liquidator, in spite of the prior notice of the meeting at which a resolution for the winding up of the defendant company was to be proposed. By arresting *The Zafiro*, the plaintiffs had become secured creditors.

The general practice of the court was to stay all actions against the company after the commencement of the voluntary winding up of the company, save in special circumstances. This was an action for necessary disbursements, in which the writ had been issued prior to the commencement of the winding up.[102]

3.16 ANY CLAIM ARISING OUT OF AN ACT WHICH IS CLAIMED TO BE A GENERAL AVERAGE ACT (S 20(2)(q))

The elements of a general average act derive from s 66(2) of the Marine Insurance Act 1906 and the York–Antwerp Rules 1974, as amended in 1994 and 2002. Briefly, for general average to qualify as such, there must be some intentional or voluntary sacrifice or expenditure reasonably made with regard to the ship or cargo in time of peril or danger for the common safety of the adventure (see Ch 12). There is no maritime lien for general average claims. The ship-owner has a possessory lien over the cargo for its proportionate contribution to general average, enforceable against the consignee of the cargo, notwithstanding that – at the time of the general average act – he may not yet be the owner of the cargo.[103]

3.17 ANY CLAIM ARISING OUT OF BOTTOMRY (S 20(2)(r))

Bottomry bonds were contracts in the nature of a mortgage of a ship where the owner borrowed money while the ship was at sea to enable him to fit her as needed. He had to pledge the keel or the bottom of the ship as security for repayment. Such bonds are no longer in use today, but they gave rise to a maritime lien when used.[104] The Arrest Convention (1999) has deleted bottomry bonds from the list of maritime claims.

102 See further *The Aro Co Ltd* [1980] Ch. 196 (CA); *The Bolivia* [1995] BCC 666.
103 *Castle Insurance v Hong Kong Island Shipping* [1984] AC 226 (HL).
104 The last reported case was *The Conet* [1965] 1 Lloyd's Rep 195.

3.18 ANY CLAIM FOR THE FORFEITURE OR CONDEMNATION OF A SHIP OR FOR THE RESTORATION OF A SHIP OR GOODS AFTER SEIZURE OR FOR DROITS OF ADMIRALTY (S 20(2)(s))

The old MSA 1894 and the current 1995 Act have provided for occasions of forfeiture of a ship in case of contravention of the Acts by her owner or master. Some grounds of forfeiture are mentioned as examples below, where:

(a) a false declaration is made as to qualification to ownership of a British vessel, under s 3(1) of the MSA 1995, except where the false declaration is made for the purpose of escaping capture by an enemy of war (MSA 1995, s 3(2));
(b) the British character of the ship is concealed (MSA 1995, s 3(4) and (5));
(c) dangerous goods are shipped without marks or without notification (MSA 1995, s 87(1)); or
(d) there is contravention of Customs and Excise requirements.[105] Examples of contravention include: exporting stores contrary to a prohibition or restriction; shipping coastwise contrary to regulations; concealing goods; jettison or destruction of cargo to prevent seizure; and inability of the master of a ship to account for missing cargo.

Droits of Admiralty are abandoned property at sea that can be claimed by the Crown. Historically, this right of the Crown existed in the old MSA 1894 and now in the 1995 Act. Such property includes: jetsam, flotsam, lagan and derelict found at sea, which are not claimed by their owner 'in due time' (within a year and a day). It also includes goods and ships taken from pirates (but, apparently not property in the possession of pirates and belonging to others).

Presently, ss 241–244 of the MSA 1995 provide that Her Majesty is entitled to all unclaimed wrecks found in territorial waters in any part of Her Majesty's dominion. However, in ***The Lusitania***[106] – found just outside the territorial sea – the salvors had a good claim in the salvaged items from the wreck and they had a good title to them.

The Lusitania, outward bound for New York, was sunk by a German submarine on 7 May 1915 off Kinsale in Eire, outside UK territorial waters. She was abandoned, and the owners were compensated by their insurers for her loss; the ship and its contents became the property of the insurers. In 1982, the vessel was located, and the claimants salvaged items from the sea bed and brought them into the UK. The Crown asserted a droit of Admiralty and title to these items. The claimants sought a declaration that they had a good title to the items, which were part of the cargo and the passengers' personal property, in the absence of the true owner.

Granting the declaration, the court held that the ship, being derelict, was a 'wreck' within the Merchant Shipping Act 1894 s 510, and therefore Part IX of that Act applied to the retrieval of the contents as being wreck (*The Thetis*, 166 ER 390 and *The Tubantia* 1924 p 75 applied). By s 523 of the Merchant Shipping Act 1894, the

105 *The Skylark* [1965] 3 All ER 380.
106 [1986] QB 384.

Crown's right to claim a droit of Admiralty was limited to an unclaimed wreck found in UK territorial waters. Although s 518 had been extended by s 72 of the Merchant Shipping Act 1906, so that where a wreck lying outside UK territorial waters was found and brought within the UK the finder had a duty to deliver the wreck to the receiver of wrecks, the Act of 1906 had not altered or extended the Crown's right over wrecks. There was therefore no droit of Admiralty over the wreck, and the claimants had good title in the absence of the true owners.

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CHAPTER 3

FREEZING INJUNCTIONS AND THE US RULE B ATTACHMENT

As the US Rule B attachment has extensively been used in recent years to obtain security regarding maritime claims, it is thought important to compare it with the English freezing order. The part on Rule B is contributed by Alan Van Praag of Eaton & Van Winkle LLP, NY.

I – FREEZING INJUNCTION

1 INTRODUCTION

The jurisdiction of the court to grant a freezing injunction, or order, is amenable for the purpose of preventing the risk of dissipation[1] of the defendant's assets, which could be used to satisfy a claim, whether maritime or not, upon obtaining a judgment or an arbitration award. The word 'jurisdiction' is potentially ambiguous; in the strict sense, 'jurisdiction' is a reference to the court's power to grant the relevant relief and

1 *Cherney v Neuman* [2009] EWHC 1743 (Ch): It was inappropriate for the court to grant freezing injunctions as a delay in seeking the relief until eight months after the commencement of proceedings was indicative that there was no real risk that a defendant would dissipate assets or act so as to render any judgment nugatory.

the word is used to describe the settled practice governing the exercise of the power.[2] The court's power is derived from the pre-Supreme Court of Judicature Act 1873 powers of the Chancery courts (equitable jurisdiction). The purpose of the jurisdiction is sometimes referred to as the prevention of the 'dissipation of assets',[3] but the freezing injunction is not security for a claim in the same way as the security obtained by an arrest of a ship. It is important, therefore, to explain the origin of the injunction and its basic principles and compare it with the arrest of ships, as well as the Rule B attachment in Part II below.

1.1 ORIGINS OF THE POWER TO GRANT INJUNCTIONS

The equitable jurisdiction and, hence, the court's power was confirmed by statute, the Judicature Act 1873, s 25(8), which was re-enacted by s 45 of the Supreme Court of Judicature (Consolidation) Act (SCJ(Con)A) 1925. An injunction would be granted when the court thought it was just or convenient. Presently, s 37(1) of the Senior Courts Act (SCA) 1981 applies, which replaced s 45 of the 1925 Act.

However, the general rule until 1975 was that a claimant, as a mere putative judgment creditor, could not obtain an injunctive order to prevent a defendant dealing with his own assets before judgment was obtained[4] (unless the assets belonged to the claimant, whereupon he would have a tracing or proprietary claim).

Lord Denning MR, in 1975, sitting in the Court of Appeal, innovated an injunction – relying on s 45 of the SCJ(Con)A 1925 – upon an ex parte application by a ship-owner to restrain a charterer from disposing or removing his assets from the jurisdiction before a judgment for unpaid hire was obtained.[5] Again, in the same year, Lord Denning MR (sitting in the Court of Appeal) granted the same type of injunction to ship-owners in *Mareva Compania Naviera v International Bulkcarriers*,[6] hence the name of this injunction became known as the 'Mareva' injunction. Under the Civil Procedure Rules 1998, the injunction was renamed and is now known as a 'freezing' injunction or order (CPR Pt 25 and PD 25A).

Thus, the injunction is used to cover both proprietary claims (based on the claimant's ownership of the relevant asset) as well as to restrain a defendant from disposing or dealing with his own assets, over which the claimant asserts no proprietary claim, so that those assets are preserved and are available to satisfy a money judgment.

1.2 NATURE, SCOPE AND OBJECTIVE

A freezing injunction is an interim order to restrain a party (putative defendant) from removing its assets located within or outside the jurisdiction, and from dealing with its assets subject to the exception of paying ordinary business or living expenses (see at 1.3, below). The sum will not normally exceed the value of the claim. The

2 *Fourie v Le Roux* [2007] UKHL 1 (per Lord Scott of Foscote).
3 *TTMI Ltd of England v ASM Shipping Ltd of India* [2006] 1 Lloyd's Rep 401.
4 *Lister v Stubbs* (1890) 45 Ch D 1.
5 *Nippon Yusen Kaisha v G&J Karageorgis* [1975] 2 Lloyd's Rep 137 (CA).
6 [1975] 2 Lloyd's Rep 509.

injunction does not amount to security for the claim and is not a statutory remedy.[7] Breach of the injunction will be contempt of court, which can result in the seizure of the assets of the defendant by the court or in the imprisonment of the defendant.

The principal objective of a freezing order made under s 37(1) is to ensure that the defendant's assets are not dissipated and that there is a fund to meet a judgment, or arbitration award, obtained by a claimant in the English courts, or arbitration (s 44 of the Arbitration Act 1996). For a free-standing injunction in relation to foreign court or arbitration proceedings see 3.2, below.

It is an ancillary and discretionary remedy, which can be used ex parte, being an exception to the general rule that the court will only make an order against someone if the applicant has given notice to the respondent and the latter had an opportunity to be heard.

Because it is an exceptional procedure under the Civil Procedure Rules (CPR) for interim applications, CPR r 25.1 (1)(f), the court has wide discretion to impose terms and conditions to the injunction, if granted, as the court thinks fit where it appears 'just and convenient' to do so (s 37(1) SCA 1981). It is set out in s 37(3) of the SCA 1981 thus:

> The power of the High Court . . . to grant an interlocutory injunction restraining a party to any proceedings from removing from the jurisdiction of the High Court, or otherwise dealing with assets located within that jurisdiction shall be exercisable in cases where that party is, as well as in cases where he is not, domiciled, resident or present within that jurisdiction.

In 2001, Colman J in ***Gangway Ltd v Caledonian Park Investments (Jersey) Ltd***[8] restated that the purpose of the jurisdiction is not to provide a claimant with security for its claim but to restrain a defendant from evading justice by disposing of assets otherwise than in the ordinary course of business[9] so as to make itself judgment proof with the result that any judgment or award in favour of the claimant goes unsatisfied. What has to be shown is, absent an injunction, 'a real risk that a judgment or award in favour of the claimant would go unsatisfied'.

The jurisdiction of the court to grant such injunctions was reviewed by the House of Lords in ***Fourie v Le Roux & others***:[10]

> Mareva (or freezing) injunctions were from the beginning, and continue to be, granted for an important but limited purpose: to prevent a defendant dissipating his assets with the intention or effect of frustrating enforcement of a prospective judgment. They are not a proprietary remedy. They are not granted to give a claimant advance security for his claim, although they may have that effect. They are not an end in themselves. They are a supplementary remedy, granted to protect the efficacy of court proceedings, domestic or foreign.
>
> In recognition of the severe effect which such an injunction may have on a defendant, the procedure for seeking and making Mareva injunctions has over the last three decades become closely regulated. I regard that regulation as beneficial and would not wish to weaken it in any way. The procedure incorporates important safeguards for the defendant. One of those

7 *Mercedes-Benz AG v Leiduck* [1995] WLR 718 (PC), p 728, per Lord Mustill.

8 [2001] 2 Lloyd's Rep 715.

9 The defendant may, upon application to the court, obtain a variation of the order if he can show that he needs to cover ordinary living expenses, or, if the defendant is a company, allowance may be made to use some of the assets for business expenses: *The Angel Bell* [1981] QB 65; *Devonshire* (1999) 62(4) MLR 539, pp 539–563.

10 [2007] UKHL 1 or [2007] 1 WLR 320.

safeguards, by no means the least important, is that the claimant should identify the prospective judgment whose enforcement the defendant is not to be permitted, by dissipating his assets, to frustrate. The claimant cannot of course guarantee that he will recover judgment, nor what the terms of the judgment will be. But he must at least point to proceedings already brought, or proceedings about to be brought, so as to show where and on what basis he expects to recover judgment against the defendant.[11]

As to the extended scope of the injunction, see para 3, below.

1.3 COMPARISON WITH OTHER SECURITY MEASURES

The applicant for a freezing order is not in the same position as a secured creditor and he has no proprietary claim to the assets that are subject to the injunction. Thus, his position differs significantly from the security obtained by the arrest of a ship, as will be seen in Chapters 4 and 5 below.

A similar power has been given to the court by the old provision, s 30 of the Merchant Shipping Act (MSA) 1894, now para 6 of Sched 1 to the MSA 1995. However, unlike the freezing injunction, which is an ancillary relief, an application made under s 30 has been held to be a substantive right of relief, not being ancillary to any other cause of action.[12]

In principle, there can be no objection to a defendant – being subject to a freezing order – to be allowed by the court to use his assets for the purpose of paying his ordinary business expenses or, where appropriate, to pay living expenses or legal fees, or to seek in good faith to repay loans in the ordinary course of business.[13]

An interesting issue arose recently in ***Mobile Telesystems Finance v Nomihold Securities***[14] in which, at first instance, Steel J had held that it was generally not appropriate to incorporate the ordinary course of business exception in a freezing order made against a judgment debtor. Although in this case, he said, the defendant was not strictly a judgment debtor, because of an outstanding application against enforcement, there was a binding arbitration award against it and an order from the court to enforce it. Prospects of setting aside that order successfully were limited. The Court of Appeal, however, reversed the decision and reinstated the business exception. It held that, pending the final determination of the enforcement of the award, the claimant was a contractual creditor, not a judgment creditor, because the judgment was liable to be set aside. Thus, in the ordinary course of events, a freezing order granted in aid of an order giving permission to enforce an arbitration award ought to contain an ordinary course of business exception.

Freezing orders are looked at again, in Chapter 8, Part II, Vol 2 of this book, relating to the circumstances in which a buyer of a ship can obtain such an order.

11 Ibid, at p 322, per Lord Bingham.

12 See *The Mikado* [1992] 1 Lloyd's Rep 163 and *The Siben* [1994] 2 Lloyd's Rep 420.

13 *The Angel Bell* [1980] 1 Lloyd's Rep 632; *Derby v Weldon (Nos 3 and 4)* [1990] Ch 65 (CA); *The Coral Rose* [1991] 1 Lloyd's Rep 563 (CA).

14 [2011] EWCA Civ 1040.

2 REQUIREMENTS FOR THE INJUNCTION TO BE GRANTED

For the court to exercise its discretion, the applicant must show: (a) the existence of a legal or equitable right in support of which the injunction is sought; (b) a good arguable case[15] of an accrued – not a future – cause of action[16] (which is marginally higher than a serious issue to be tried[17]); (c) the defendant has assets within or without the jurisdiction which are in his legal or beneficial ownership; (d) there is a real risk[18] that his assets will be dissipated[19] before a judgment can be enforced; (e) it must be just and convenient that the order should be granted; (f) he is willing to provide a cross-undertaking to court.

The initial threshold is to show a good arguable case.

The applicant must (a) make a full and frank disclosure of all material facts in his statement of truth;[20] (b) give an undertaking to court to pay damages to the defendant for any loss suffered by reason of the order; (c) give an undertaking to indemnify third parties who might incur liabilities and expenses by reason of complying with the order.

The question of risk of disposal of assets is a question of fact judged from the surrounding circumstances, such as evidence of dishonesty or attempts by the defendant to remove or dissipate assets.[21] Frequently, it is the adequacy of evidence of a risk of dissipation that causes the court most anxiety: see comments of Walker J in ***Mobil Cerro Negro Ltd v Petroleos De Venezuela***[22] where he said:

> The focus is on the conduct of the defendant as regards the defendant's assets and the question is whether a particular course of conduct in relation to assets by the defendant, actual or feared, is conduct which should or may lead the court to conclude that the grant of a freezing order is just and convenient.

15 *Ninemia Maritime Corp v Trave Schiffahrts GmbH & Co KG (The Niedersachsen)* [1983] 1 WLR 1412, in which Mustill J defined 'good arguable case' as: 'a case which is more than barely capable of serious argument, and yet not necessarily one which the judge believes to have a better than 50% chance of success' – (affirmed by the Court of Appeal [1983] 2 Lloyd's Rep 660).

16 *Veracruz Transportation Inc v VC Shipping Co Inc* [1992] 1 Lloyd's Rep 353 (CA), a cause of action based on an anticipatory breach is not sufficient; but something short of an immediately enforceable cause of action was sufficient to found an injunction: *Revenue and Customs Commissioners v All* [2011] EWHC 880 (Ch), followed *Channel Tunnel Group v Balfour Beaty Construction Ltd* [1993] AC 334; *The Capaz Duckling* [2007] EWHC 1630 (Comm); it is interesting to note the decision of Flaux J in *Congentra AG v Sixteen Thirteen Marine SA (The Nicholas M)* [2008] EWHC 1615 (Comm), in which he held that the charterers had a good arguable case that there was a cause of action for wrongful Rule B attachment of their assets by the owners under the applicable US Federal maritime law, and there was no need of prior determination of that issue by the US court. A freezing injunction had been properly obtained and should not be set aside, as there was a real risk of dissipation.

17 *Derby & Co Ltd v Weldon* [1990] Ch 48, at 57–58.

18 *Third Chandris Shipping Corp v Unimarine SA* [1979] QB 645, p 669; *The Capaz Duckling*, ibid: Steel J enumerated some indicators of real risk of dissipation, such as one-ship company, defendant has disposed of the ship, its only asset is the sum of the sale held in escrow account, money is readily transferable.

19 The test for risk of dissipation is objective: *Harrison Partners Construction Pty v Jevena Pty Ltd* (2005) ALR 369; and solid evidence of risk of dissipation must be shown: *Laemthong International v ARTIS* [2005] 1 Lloyd's Rep 100; dishonesty alone is not enough to found a risk of dissipation but sufficient dishonesty to justify an inference of a risk of dissipation is required*: Revenue and Customs Commissioners v All* [2011] EWHC 880 (Ch).

20 *The Giovana* [1999] 1 Lloyd's Rep 867 (concerning a non-sufficient disclosure).

21 Notes 18, 19 and *Aiglon Ltd v Gau Shan Co Ltd* [1993] 1 Lloyd's Rep 164.

22 [2008] EWHC 532, at para 35.

He further said (at paras 40–41) that the risk of dissipation must involve a risk of impairing the claimant's ability to enforce a judgment or award. In the application of this principle it is not necessary for the claimant to prove that enforcement in England and Wales, rather than elsewhere, will be impaired. Nor is it necessary for the claimant to prove that the purpose of the defendant's actual or feared conduct is to frustrate the enforcement of any judgment which is obtained, provided that, objectively, that would be its effect. However, the risk of impairment does not, in every case, mean a freezing injunction should be granted; the conduct relied upon must be unjustifiable by normal and proper commercial considerations.

The Court of Appeal has held in ***Thane Investment Ltd v Tomlinson***[23] that pointing to some dishonesty on the part of the intended respondent to the injunction is insufficient. The court will scrutinise the evidence with care to ascertain whether or not what is alleged to have been the dishonesty of the putative respondent justifies the inference that that person is likely to dissipate his assets unless restrained; for example, a poor credit history, a record of defaulting on other debts, links with other jurisdictions to which he may decamp, lack of openness in response to enquiries about his intentions in relation to assets.

The test is not about a probability of dissipation but a real risk.[24]

In a recent case, ***The Western Moscow***,[25] Clarke J held (at para 101) that he was not persuaded that there was a real risk of the defendants (charterers) making unjustifiable disposals of assets, otherwise than in the ordinary course of business, with the intention of rendering any judgment against them unsatisfied or difficult to enforce. On the contrary, the case seemed to him to be a relatively standard dispute as to what was due, and from whom to whom, at the end of the various charters of the vessel, and whether any liens had been validly exercised and with what effect.

In this connection, it is also interesting to note that the fact that a one-ship company (as the judge held in ***The Moondance II***)[26] was registered in a jurisdiction in which fairly minimal information relating to companies is required to be made publicly available indicated that the way the company was operated would make it difficult for a claimant to enforce his claim and, therefore, justified the issue of the injunction. In this case, the company was registered in the Marshall Islands.

3 EXTENDED JURISDICTION FOR THE INJUNCTION

Since the judicial innovation of the old Mareva order in the late 1970s,[27] the jurisdiction for the freezing injunction has been expanded by case law, practice directions and legislation.

23 [2003] EWCA Civ 1272; see also The *Capaz Duckling*, fns 16, 18, supra.

24 *Caring Together Ltd v Bauson and Ors* [2006] EWHC 2345 (Ch), *Enercon v Enercon* [2012], note 36, below, at 3.2.

25 *Western Bulk Shipowning III A/s v Carbofer Maritime Trading (The Western Moscow)* [2012] 1 Lloyd's Rep Plus, 48, confirming that a lien clause in a series of charters creates an assignment of the claim for sub-freight or sub-hire; it was held that the better view was that the lien clause created an assignment by way of a charge, *Care Shipping Corp v Latin American Shipping Corp (The Cebu)* [1983] QB 1005 and *Welsh Irish Ferries Ltd, Re (The Ugland Trailer)* [1986] Ch 471 applied. The claimant had done all that was required to perfect its lien over the sub-hire.

26 [2013] 1 Lloyd's Rep 269.

27 *Mareva Compania Naviera v International Bulkcarriers* [1975] 2 Lloyd's Rep 509.

3.1 THE PREVIOUS 'SISKINA' BARRIER

Originally, the Mareva injunction was limited to English proceedings in which the claimant was claiming a substantive relief against a foreign-based defendant and the injunction was sought to ensure that the defendant did not remove assets out of the English jurisdiction before judgment. It was also available in aid to arbitration proceedings by s 12(6)(f) and (h) of the Arbitration Act (AA) 1950[28] (this has now been replaced by s 44 of the AA 1996).

An injunction could not be granted when the only factor connecting the case with England was the presence of assets within the jurisdiction because it was ancillary to a pre-existing cause of action triable in England ('the Siskina barrier').[29] Thus, a claimant who was seeking to serve a defendant out of the jurisdiction would need to show that his cause of action fell within the provisions of court rules for service out of the jurisdiction (Ord 11, r 1) in order for the injunction to be granted.[30] There was one exception to this rule after the enactment of the Civil Jurisdiction and Judgments Act 1982, s 25, which permitted this interlocutory remedy, if the substantive proceedings were in a court of a contracting State to the Brussels Convention, and since 2002 the Brussels I Regulation. This section was extended to non-Brussels Convention countries by the Civil Jurisdiction and Judgments Act (CJJA) 1982 (Interim Relief) Order 1997.[31]

3.2 FREE-STANDING INJUNCTION

Thus, since the 1990s, the freezing injunction has been subject to dramatic changes. With regard to proceedings worldwide, the restriction was lifted, as mentioned above, in 1997 by a statutory instrument,[32] which expanded the provision of s 25 of CJJA 1982.[33]

In ***Credit Suisse Fides Trust SA v Cuoghi***,[34] the Court of Appeal held that worldwide relief could be granted in proceedings, whether or not these were domestic or foreign, under s 25 of the CJJA 1982, or in aid of foreign arbitration.

In addition, s 44(2)(e) and (3) of the new AA 1996 allows such an interim relief to be granted by the court to preserve assets for the purpose of, and in relation to, arbitral proceedings anywhere. However, s 44(3) jurisdiction would be invoked, without the permission of the arbitrators, only in cases of urgency. The High Court has limited jurisdiction under s 44(3).[35]

28 *The Rena K* [1979] QB 377.

29 *The Siskina* [1979] AC 210 (HL).

30 The Privy Council had left the matter open as to whether there could be a free-standing injunction in *Mercedes-Benz v Leiduck* [1996] AC 284, while Lord Nicholls' dissenting advice was that 'justice and convenience suggests that the answer to the question is yes'.

31 SI 1997 No 302.

32 Ibid.

33 E.g. *Kensington International v Republic of Congo* [2008] 1 WLR 1144; however, s 25 CJJA 1982, or s 44 AA 1996, will not assist a party to obtain a freezing injunction in aid of an ICSID arbitration because the ICSID Convention and Rules permit provisional measures to be sought only from the tribunal itself: *E.T.I. Euro Telecom International v Bolivia and Empresa Nacional De Telecommunicaciones Entel SA* [2009] 1 WLR 665.

34 [1997] 1 WLR 871.

35 See *Cetelem SA v Roust Holdings Ltd* [2005] 1 WLR 3555.

Eder J held in ***Enercon GmbH v Enercon (India)***,[36] setting aside the freezing injunction, that – assuming the court had jurisdiction under s 44 of AA 1996 and s 37 of the SCA 1981 – there was no urgency and there was no solid evidence of risk of dissipation. The defendant was a substantial and growing company and there was no proper explanation for the delay of two and a half years in applying for a freezing injunction.

The jurisdiction for a freezing order gradually gained much wider scope applying to domestic or foreign proceedings, English or foreign defendants, English or foreign assets and even assets sheltered in offshore companies or trusts (see 3.3, below).[37]

The combination of changes brought by case law,[38] statute[39] and statutory instrument[40] have allowed a free-standing freezing injunction, and the 'Siskina barrier' to the service of originating process out of the jurisdiction seeking a *free-standing* interim relief has been removed.[41]

3.3 WORLDWIDE FREEZING INJUNCTION

Further court decisions during the last two decades have enabled claimants to obtain a *worldwide freezing injunction*. The first step towards this direction was made in 1987 when the question whether the court had jurisdiction to grant an order requiring the disclosure of foreign assets in support of a domestic Mareva injunction was negatively answered.[42] In 1990, however, three Court of Appeal decisions recognised a jurisdiction to grant injunctions against assets outside the jurisdiction, thus permitting it to have extra-territorial effect.[43] The extra-territorial freezing injunction is a holding relief pending an order of the court having jurisdiction at the place where the account is held.

36 [2012] 1 Lloyd's Rep 519.

37 Such developments can be found in the most authoritative book of Gee, S, *Commercial Injunctions* (formerly *Mareva Injunctions and Anton Piller Relief*), Sweet & Maxwell, 6th edn (2012).

38 *Channel Tunnel Group Ltd v Balfour Beatty Constructions Ltd* [1993] AC 334 (HL), in which it was accepted that there was jurisdiction to grant an interlocutory injunction, although the English proceedings were stayed in favour of foreign arbitration.

39 Civil Jurisdiction and Judgments Act 1982, s 25, and AA 1996, s 44, adopted the wording of Art 24 of the Brussels Convention, which was replaced by Art 31 of the Brussels Regulation. A straightforward interpretation of the meaning of provisional or protective measures under the old Art 24 of the Brussels Convention was given by the European Court of Justice in *Mario Reichert and Others v Dresdner Bank AG* (Case C–261/90) (1992): 'In matters within the scope of the Convention, provisional measures are intended to preserve a factual or legal situation so as to safeguard rights, the recognition of which is sought elsewhere, from the court having jurisdiction as to the substance of the matter.' Article 31 of the Regulation expressly provides that a court has jurisdiction under its national law to grant an application for provisional or protective measures, even if it does not have jurisdiction as to the substance of the matter. An order for interim payment of contractual consideration delivered by a court not having jurisdiction under the Brussels Regulation as to the substance of the matter is not a provisional measure capable of being granted under Art 31: *Hans-Hermann Mietz v Intership Yachting Sneek BV* (Case C–99/96) [1999] ECR I–2277 (referring to the old Art 24 of the Brussels Convention).

40 The CJJA 1982 (Interim Relief) Order 1997 (SI 1997/302).

41 RSC Ord 11 (now Section III of CPR Part 6) has been amended.

42 *Ashtiani v Kashi* [1987] 1 QB 888.

43 *Babanaft International Co SA v Bassatne* [1990] 1 Ch 13; *Republic of Haiti v Duvalier* [1990] 1 QB 202; and *Derby v Weldon* [1990] 1 Ch 48.

In 2006, the Court of Appeal laid down the following general guidelines with regard to worldwide freezing injunctions in ***Dadourian Group International Inc v Simms and others***:[44]

> The making of a worldwide freezing order in respect of foreign assets is a serious step which ordinarily requires an undertaking by the claimant not to enforce it without the permission of the English court.
>
> The court has a discretion to grant permission if it considers it just and convenient for the purpose of ensuring the effectiveness of the order and it is not oppressive to the parties to the English proceedings or to third parties who may be joined to the foreign proceedings.
>
> All the relevant circumstances and options need to be considered. In particular, consideration should be given to granting relief on terms, to the proportionality of the steps proposed to be taken abroad, and to the form of any order.
>
> The interests of the applicant should be balanced against the interests of the other parties to the proceedings and any new party likely to be joined to the foreign proceedings.
>
> Permission should not normally be given in terms which would enable the applicant to obtain relief in the foreign proceedings which is superior to the relief given by the worldwide freezing order.
>
> The evidence in support of the application for permission should contain all the information (so far as it can reasonably be obtained in the time available) necessary to enable the judge to reach an informed decision, including evidence as to the applicable law and practice in the foreign court, the nature of the proposed proceedings to be commenced, the assets believed to be located in the jurisdiction of the foreign court, and the names of the parties by whom such assets are held.
>
> The applicant must show that there is a real prospect that such assets are located within the jurisdiction of the foreign court and that there is a risk of their dissipation.
>
> Normally the application should be made on notice to the respondent but, in cases of urgency, where it is just to do so, permission may be given without notice to the party against whom relief will be sought in the foreign proceedings, but that party should have the earliest practicable opportunity of having the matter reconsidered by the court at a hearing of which he is given notice.[45]

Gloster J in ***Royal Bank of Scotland v FAL Oil Co Ltd (The Sea Lion and Sharjah Pride)***[46] allowed the continuation of the world freezing injunction and, referring to previous authorities, she held that: the court had jurisdiction to grant interim relief, including worldwide asset freezing injunctions and disclosure orders, in aid of substantive foreign proceedings under section 25(1) of the 1982 Act. The first consideration was whether the facts would warrant the relief sought, and if so, it had to consider whether the fact that the court had no jurisdiction apart from the section made it 'inexpedient' to grant the relief.

On the authorities,[47] the following principles and guidelines are relevant as to what is expedient, or inexpedient, in such cases:

(a) the court should, in principle, be willing to grant appropriate interim relief in support of substantive proceedings abroad unless the circumstances of the particular case made the grant of such relief inexpedient;

44 [2006] 1 WLR 2499.

45 Ibid, at 2499.

46 [2013] 1 Lloyd's Rep 9.

47 *Refco Inv v ETC* [1999] 1 Lloyd's Rep 159, *Ryan v Friction Dynamics* [2001] CP Rep 75, *Crédit Suisse Fides Trust SA v Cuoghi* [1998] QB 818, *Motorola Credit Corporation v Uzan (No 2)* [2004] 1 WLR 113, *Mobil Cerro Negro Ltd v Petroleos de Venezuela SA* [2008] 1 Lloyd's Rep 684, *Third Chandris Shipping Corporation v UniMarine SA* [1979] 1 QB 645, and *Van Uden Maritime BV v Kommanditgesellschaft In Firma Deco-Line* [1999] 2 WLR 1181 considered.

(b) where a defendant and his assets were located outside the jurisdiction of the court seised of the substantive proceedings, it was most appropriate that protective measures should be granted by those courts best able to make such orders: in relation to orders taking direct effect against the assets, that meant the courts of the State where the assets were located; and, in relation to orders *in personam*, including orders for disclosure, that meant the courts of the State where the person enjoined resided;
(c) where substantive proceedings had been commenced elsewhere, and application was made for ancillary worldwide freezing orders and an associated disclosure order on a worldwide basis, the court had to be extremely cautious in the exercise of its discretion whether to grant relief;
(d) it was a strong thing to restrain a defendant who was not resident within the jurisdiction, or did not have close ties in England, from disposing of his assets outside the jurisdiction; but where the defendant was domiciled within the jurisdiction, such an order could not be regarded as exorbitant or as going beyond what was internationally acceptable;
(e) even where the substantive proceedings were not taking place in a Member State where jurisdiction was controlled by the Brussels I Regulation, very careful consideration had to be given as to whether there was any real connecting link between the subject matter of the interim measures sought and the territorial jurisdiction of the court before which the measures were sought; that included consideration as to the ability and power of the court acting in a 'policing' role to enforce its orders, if disobeyed;
(e) where there was every reason to suppose that an order made against a foreign defendant, with tenuous links to the jurisdiction, would be disobeyed and that, if that should occur, no real sanction would exist to enforce compliance, then it was likely to be inexpedient to make far-reaching worldwide freezing and disclosure orders against such a defendant under section 25;
(f) the fact that the court hearing the substantive proceedings had no jurisdiction or procedural power to make a worldwide freezing order or disclosure orders did not render it inexpedient for the English court, acting in its ancillary capacity, to do so;
(g) there were five particular considerations which the court should bear in mind when considering the question whether it was inexpedient to make an order under section 25, namely (1) whether the making of the order would interfere with the management of the case in the primary court, e.g. where the order was inconsistent with an order in the primary court or overlapped with it; (2) whether it was the policy in the primary jurisdiction not itself to make worldwide freezing/disclosure orders; (3) whether there was a danger that the orders made would give rise to disharmony or confusion and/or risk of conflicting, inconsistent or overlapping orders in other jurisdictions, in particular the courts of the State where the person enjoined resided or where the assets affected were located; if so, then respect for the territorial jurisdiction of that State should discourage the English court from using its unusually wide powers against a foreign defendant; (4) whether at the time the order was sought there was likely to be a potential conflict as to jurisdiction rendering it inappropriate and inexpedient to make a worldwide order; and (5) whether, in a case where jurisdiction was resisted and disobedience to be expected, the court would be making an order which it could not enforce.

Applying those principles to the facts of the present case, Gloster J held that it was clearly expedient and appropriate for the English court to grant a worldwide asset freezing injunction and worldwide disclosure orders against the defendants in aid of the Sharjah proceedings under section 25, as expanded by the SI 1997/302, notwithstanding the absence of assets within the jurisdiction.

Caution was exercised by Walker J in ***Mobil v PDV***[48] in which he discharged the worldwide freezing injunction obtained by Mobil against PDV and emphasised an important consideration which the court would normally take into account when granting an injunction affecting worldwide assets of the respondent:

> The court would only be prepared to exercise discretion to grant an application, in aid of foreign litigation or arbitration, for a freezing order affecting assets not located in England, if the respondent or the dispute had a sufficiently strong link to England or, in cases not covered by the Brussels Convention, where there was some other factor of sufficient strength to justify proceedings in the absence of such a link. The presence of assets in England might in appropriate circumstances demonstrate a relevant link.[49]

The judge further held that, in the absence of substantial assets in England by PDV, considerations of comity would point strongly against the grant of a freezing injunction, as there was no allegation of fraud against PDV. The court set aside a worldwide freezing injunction granted without notice under the AA 1996 s 44 for a further reason, and he said: where the applicant failed to show a real risk of dissipation of assets or that the case was one of urgency and the fact that the seat of the arbitration was abroad made it inappropriate to grant an order. PDV was a Venezuelan company, and it was not surprising that the bulk of its assets were in Venezuela. Venezuela was a party to the New York Convention 1958, an ICC award under the guarantee could be enforced against PDV in Venezuela, and the courts of Venezuela would have power to grant Mobil relief of a similar nature to a freezing order in relation to PDV's assets in Venezuela.

In this connection, it is important to contrast the facts in ***VTB Capital plc v Nutritek International Corp.***[50] The claimant bank VTB applied for a worldwide freezing order against the fourth defendant (D4). VTB had entered into a facility agreement with a Russian company (R) for $225 million to enable it to purchase part of D1's business. D1 was a company incorporated in the British Virgin Islands. D4 was a Russian national and the chairman of D1. D2 and D3 were also associated with the agreement, and were companies incorporated outside the jurisdiction and connected to D4. VTB had issued proceedings eight months earlier against the four defendants (D1, D2, D3 and D4), alleging that the defendants had falsely represented that the transaction with R was at arm's length, when in fact R was connected to them. R defaulted on the loan. When VTB took over the business that R had purchased, its value was found to be only $35 million. VTB obtained permission to

48 *Mobil Cerro Negro Ltd v Petroleos de Venezuela SA* [2008] 1 Lloyd's Rep 684. Concerning the requirement of a connecting link between the subject matter of the measure sought and the territorial jurisdiction of the court see also the Court of Appeal decision in *Banco Nacional De Commercio Exterior SNC v Empresa De Telecommunicaciones De Cuba SA, BT PLC (intervening)* [2007] 2 Lloyd's Law Rep 484.

49 Ibid, *Mobil v PDV* at 684.

50 [2011] EWHC 2526 (Ch).

serve all four defendants outside the jurisdiction,[51] but service had not yet been effected on D4. However, he had been sent copies of the claim form two months before the instant application. VTB submitted that further information had come to light which gave it stronger grounds to believe that there was a real risk of dissipation of assets.

A summary of the judgment of Roth J, below, shows the reasons why in this case the grant of the injunction was necessary. He held: A freezing order was an extreme order, and the court had to be cautious about making it. First, the court had to be satisfied that the claimant had a good arguable case. The instant claim was of a fraudulent conspiracy against VTB bank in connection with a facility agreement. A question arose as to whether the alleged tortious act was committed, or caused damage, in the jurisdiction. The court was satisfied that a good arguable case had been shown in that respect. VTB was in England and the monies advanced under the facility agreement had been paid to R's account in England. Second, in terms of the substantive claim, very full evidence had been put before the court regarding the transactions, and the court was satisfied that the test was fulfilled. The court had to consider next whether VTB had shown a real risk of dissipation of assets. Dissipation covered secretion away of assets in a manner that would render any eventual judgment difficult to enforce.[52] D4 operated business affairs through an extensive web of companies, many in jurisdictions where information regarding the underlying assets was very difficult to obtain, such as Cyprus, the British Virgin Islands and the Cayman Islands. Although D4 appeared to be very wealthy, the way his assets were held was opaque, and the complex structure involving many nominee companies in different jurisdictions could enable assets to be moved out of creditors' reach or in a manner that was difficult to trace. Hearing any application in the absence of the party against whom relief was sought was an exceptional procedure, and should only be permitted on very good grounds. The court had some doubts whether there was sufficient justification in the instant case, given the time that had passed since D4 was informed of the claim. However, it was persuaded that, if the facts would have justified an application without notice at the outset on the basis that D4 could rapidly move assets in a way that was difficult to discover, the same risk could well apply if he was informed of the instant application, and he could be provoked into taking such evasive action. It was therefore appropriate to grant an injunction without notice.

Recent developments show a trend that, unless there is evidence of fraud,[53] the courts, in recent years, have exercised great caution before they can grant a worldwide freezing injunction. However, when there is evidence showing an arguable case of fraud, the court is willing to go even further to make declarations or orders against the person who was subject to a freezing order.[54]

51 A separate set of proceedings concerning issues of setting aside the court order for service out of the jurisdiction, piercing the corporate veil and *forum non conveniens*, which reached the Supreme Court, are discussed in Chs 4 and 6, below.

52 *Cherney v Neuman* [2009] EWHC 1743 (Ch) considered.

53 See an interesting article concerning international fraud and freezing injunctions: 'Ancillary courts in common law freezing order cases' by Trevor Mascarenhas J.I.B.L.R. 2012, 27(11), 443–446.

54 *JSC BTA Bank v Ablyazov*, 18 January 2013 (unreported): Flaux J declared that, if Russian enforcement proceedings against a former bank chairman (M) were to conclude that a pledge of shares by him as security in a business transaction had been perfected, then he would be in breach of receivership and freezing orders and should use his best endeavours to intervene in the Russian proceedings. Teare J decided in the same way in *JSC BTA Bank v Ablyazov* [2012] EWHC 2543 (Comm): A defendant who had breached the terms of a freezing injunction by causing his companies to make pledges to Russian

4 EXTENT OF THE JURISDICTION TO THIRD PARTIES

This exceptional jurisdiction of the English court can be used, in exceptional cases, to order non-parties to proceedings to do something. Once there is a cause of action against a defendant, the court has power to order an injunction, or interim relief, against a non-party to the proceedings. The injunction or interim relief against the third party is ancillary to a freezing order for the purpose of obtaining satisfaction on that cause of action or enforcement of judgment.[55]

In 2007, the Court of Appeal in ***Kensington International v Republic of Congo***[56] upheld the restraining order and an order for disclosure granted by the High Court against a third party (Vitol) preventing it from making payments of debt to the Republic of Congo (producer of crude oil), which was a judgment debtor to the claimant, Kensington International Ltd. The Court of Appeal dismissing Vitol's appeal held that, although it was unusual to make an order that prevented a commercial organisation from performing contracts to which it had already become bound, or that effectively prevented it from trading with a particular partner in the future, it could not be said that it was never right to do so. Considering the unusual circumstances of this case and the strong evidence of fraud involved in the commercial transactions between Vitol and Congo, the Court of Appeal upheld all the orders in support of the main proceedings in Geneva.

In a more exceptional decision, ***Phaethon International Co Sa v Ispat Industries limited***[57], the court went as far as to grant a mandatory injunction for the release of the ship from arrest in Mumbai, exercising its discretion under s 44 of AA 1996 (see Chapter 6 at 6.3). The judge stressed, however, that he took this course while maintaining the highest respect for the courts of India. It was an exceptional case in which the Indian court had been misled. Walker J held that jurisdiction for such an order arises under s 44(1)(e) and 44 (3) of the AA 1996 and he considered that it was within his discretion to grant the order particularly because of the unconscionable misleading of the foreign court by having instituted arrest proceedings in Mumbai in contempt of the previous order of the English High Court, which had not been disclosed to the court.

By contrast, on a different set of facts, in ***Linsen International v Humpuss Sea Transport***[58] the court refused to allow the continuation of a freezing injunction that had been obtained against third parties to the charter parties, against whom there

banks was ordered to use his best endeavours to intervene in any enforcement proceedings on the pledges to ensure that the Russian court was informed that the pledges had been made in breach of the injunction.

55 *C Inc v L* [2001] 2 Lloyd's Rep 459; an interesting series of decisions showing the extent of the court's power can be found in *Kensington International Ltd v Republic of Congo* [2006] EWHC 1848, from which the previous decisions on injunctive orders and interim relief can be traced. The case involved fraudulent transactions and, apart from an injunction, a tracing order and interim relief from the English courts, there was also a foreign attachment as well as an undertaking and cross-undertaking for damages. In this particular case, an order was made against a non-party for cross-examination. See also *Masri v Consolidated Contractors International* [2009] UKHL 43: a receivership order requiring judgment debtor to list his assets in Lebanon.

56 [2007] EWCA Civ 1128 [2008] 1 Lloyd's Rep 161.

57 [2010] EWHC 34466 (Comm).

58 [2012] 2 Lloyd's Rep 663.

was no cause of action unless the corporate veil of the group of companies was pierced. The facts are complex but, briefly, the claimant (ship owner) had chartered four of his newly built tankers to the first defendant (D1), the Singaporean shipping arm of the Humpuss group of companies. Ten of the defendants and the 13th were associated companies. The 11th defendant was wholly owned by the 12th defendant, who was the majority shareholder of the ninth defendant. The second defendant (D2) was the guarantor for the chartering liabilities of D1 and wholly owned D1. D1 failed to pay hire under the charters, and the owner accepted the conduct as repudiation and terminated all the charters. After arbitration under the charter party had commenced, there was restructuring within the Humpuss group involving, inter alia, the purported sale of vessels and the transfer of US$60 million of the assets of D1 to D3 which, at the material time, was insolvent. The arbitrators issued their awards, which were converted to judgments but remained unpaid. The owner then issued proceedings in England under the guarantee against D2 and applied for a summary judgment, which was granted. Later they obtained a freezing injunction, without notice, against the 3rd to 13th defendants on the basis that there had been abuse of the corporate structure of the Humpuss group by the 3rd to 13th defendants, such as to entitle the court to pierce the corporate veil and to hold that the 3rd to 13th defendants had become liable under the underlying charter-parties and guarantee. On the return date, the claimants applied for the continuation of the injunction, which the defendants resisted.

Flaux J held the claimants failed to show a good arguable case on the merits such as would justify the continuation of the freezing injunction (at para 142) and, therefore, the injunction that had been granted by Mackie QC on the above basis was not sustainable. Nor were the claimants able to make out an arguable case for joinder of those defendants, who were involved in the colourable transactions, and for the grant of a freezing injunction, on the basis of the *Chabra* jurisdiction, as derived from *TSB Private Bank International v Chabra*.[59]

The *Chabra* jurisdiction is often exercised when there is a good arguable case that a cause-of-action defendant is the beneficial owner of assets in the possession of a non-cause-of-action defendant; it is also available against a non-cause-of-action defendant where a freezing order is ancillary and incidental to the effective enforcement of a prospective judgment because that defendant's assets may become available to satisfy the judgment; this may be so when the non-cause-of-action defendant becomes mixed up in an attempt by the cause-of-action defendant to make himself judgment proof and the assets or their proceeds are not readily identifiable in his hands.[60] The important question is whether there is a good arguable case that the cause-of-action defendant exercises substantive control over the assets in question of the non-cause-of-action defendant.[61]

This case is discussed further in Chapter 4, below, with regard to issues of piercing the corporate veil. It seems strange that, on the facts of this case, a freezing injunction could not be sustainable. An associated ship arrest in South Africa would have been

59 [1992] 1 WLR 231; also see *Algosaibi v Saad Investmetns Co Ltd* of the Cayman Islands CA 15 February 2011 (unreported).

60 See also *Yukong Line Ltd of Korea v Rendsburg Investments Corp* [2001] 2 Lloyd's Rep 113 (CA).

61 See *Dadourian Group International Inc. v Azuri Ltd* [2005] EWHC 1768 (Ch) and an Australian case, *Cardile v Led Builders Pty Ltd* [1999] HCA 18.

successful, had any of the ships in the group traded there (see further Chapter 4). Humpuss was, however, taking precautions in the meantime, to conceal true ownership of the vessels of the group by the purported sham sales!

5 THE DUTY OF THE BANK

The bank, as an innocent third party, had to do all in its power to comply with the order. The injunction might revoke the customer's instructions regarding a specific account, making it unlawful to honour cheques.[62]

5.1 NOT TO BE IN CONTEMPT OF THE COURT ORDER

The dual prerequisites of *mens rea* and *actus reus* are required for common law contempt of court to be committed.

The House of Lords in ***Attorney General v Times Newspapers Ltd and other newspapers***[63] set the principle about the position of a third party to proceedings relating to a restraining injunction and held: Contempt could clearly be found where a party (B), against whom the order was made, is in breach of the order, or in situations where a third party (C), such as the bank, contravenes the injunction to aid or abet B. Where C is acting solely of his own volition, a finding of contempt would not be out of line with the principles enunciated in earlier decisions, where C knowingly impeded or interfered with the administration of justice. In publishing excerpts from the book, *Spycatcher*, which was subject to a restraining injunction for non-publication pending trial, TN brought the material into the public domain and thus nullified, to some extent, the purpose of the proceedings. The public interest in the administration of justice overrode interests in press freedom.

In ***Customs and Excise Commissioners v Barclays Bank Plc***,[64] the House of Lords applied the above principles and held that: Notification of the injunction to the relevant bank (B) imposed a duty on B to respect the order of the court. Having obtained a freezing order and notified B, the Customs, in this case, could expect that any responsible bank would respect the order, but it could not rely on B doing so. It had to rely on the court to ensure that B did not flout the orders and to punish B if it did so.

5.2 NO DUTY OF CARE IS OWED TO THE PERSON WHO OBTAINED THE INJUNCTION

The main issue in the ***Customs and Excise Commissioners v Barclays Bank plc***, above, was whether or not the bank owed a duty of care to the Customs to ensure that the money against which the injunction was imposed was not removed from the

62 *Z Ltd v A-Z* [1982] QB 558 (CA).

63 [1992] 1 AC 191; also *Attorney General v Punch Ltd* [2003] 1 AC 1046 (knowing interference with the administration of justice).

64 [2007] 1 AC 181.

bank. The House of Lords held that the notification of the injunction did not of itself generate a duty of care to the Customs. There was nothing that could be regarded as a voluntary assumption of responsibility by B for the way in which it would go about freezing the companies' accounts and there was nothing that involved B in entering into any kind of relationship with Customs that required it to exercise such care as the circumstances required. B and Customs were as far from being in a relationship 'equivalent to contract' as they could be. In the circumstances, the parties were not in a relationship of proximity and it would not be fair, just and reasonable to hold that B owed a duty of care to Customs.

II – RULE B(1) ATTACHMENT – SECURITY FOR MARITIME CLAIMS IN US

Contributed By Alan Van Praag[65]

1 INTRODUCTION

Rule B of the Supplemental Rules for Admiralty or Maritime Claims of the Federal Rules of Civil Procedure gained notoriety during the 2008–2010 period when economic conditions caused the breach of thousands of long-term shipping contracts. Within this period, Rule B proved to be an effective ex parte security instrument to attach intermediate wire dollar transfers flowing through the New York Federal Reserve system. As a result of this huge proliferation in the filing of Rule B proceedings, the concomitant negative effect upon judges' time in handling the proceedings, and the cost to banks in administering them, the courts in New York were impelled to restrain the use of Rule B. Nonetheless, Rule B continues to be an effective, easy and inexpensive ex parte security device. Its many differences with freezing orders are apparent.

1.1 THE PURPOSE OF RULE B

By way of background, Rule B serves two purposes: (a) it establishes *quasi in rem* jurisdiction over a defendant by seizing the defendant's property;[66] and (b) the property attached provides a fund to secure payment of any damages awarded in an underlying dispute.

1.2 HISTORY

Rule B (or its predecessors) has been in existence for more than 150 years. Its origin reflects the transitory nature of ships. As ships could be here today and gone tomorrow,

65 Partner at Eaton & Van Winkle LLP, NY.

66 *Limonium Maritime, SA v Mizushima Marinera, SA*, 961 F Supp 600, 605 (S.D.N.Y 1997) ('Through attachment of a defendant's property in the district, a maritime or Admiralty Court gains jurisdiction over the defendant's "person," and the plaintiff can gain a judgment against the defendant up to the value of the property attached.')

it was almost impossible to obtain security for maritime claims prior to Rule B. It was designed as a security device, not as an injunction, allowing for the ex parte attachment of assets of the defendant whenever the assets of the defendant were within the court's jurisdiction. (In this respect, it is very similar to arrests of ships (see Chapter 3, below).)

1.3 DISTINCTION FROM OTHER FORMS OF SECURITY

Importantly, it should be noted that Rule B differs from other forms of attachment in that Rule B does not require the applicant to show that the attachment is necessary to satisfy a potential judgment.[67] Other forms of attachment, such as those existing under New York State law, may require more stringent proof, such as the need to show that the amount sought in the attachment exceeds all possible counterclaims that could be made against the plaintiff.[68] A Rule B attachment has no such requirement regarding (a) claims exceeding potential counterclaims, or (b) the plaintiff's actual need for the attachment as a security measure.

2 SUBSTANTIVE REQUIREMENTS OF RULE B ATTACHMENT

There are only four substantive requirements for obtaining a Rule B attachment order: (a) a prima facie valid Admiralty or maritime claim against the defendant; (b) the defendant cannot be found within the district of US jurisdiction; (c) the defendant's property may be found within the district; and (d) there is no statutory or maritime law bar to the attachment.

2.1 ADMIRALTY OR MARITIME CLAIM

As a preliminary matter, the plaintiff in a Rule B action must possess a valid, prima facie, Admiralty or maritime claim.[69] There are many types of such claims. For

67 'Supplemental Rule B does not require a showing that the attachment is necessary to satisfy a potential judgment; rather, a plaintiff can obtain an attachment by showing that it has a valid prima facie Admiralty claim against the defendant, the defendant cannot be found within the district, the defendant's property may be found within the district, and there is no statutory or maritime law bar to the attachment. . . . Unlike attachments under the C.P.L.R.[New York State court rules] in aid of arbitration, no showing of need has been required for Rule B attachments in aid of maritime arbitrations.' *Swift Splash Ltd v Rice Corp.*, Not Reported in F Supp 2d, No 10 Civ 6448(JGK), 2010 WL 3767131 at 3 (S.D.N.Y. 2010). But see, *Brother Unity Maritime SA v Dongkuk Steel Mill Co., Ltd*, Not Reported in F Supp 2d, No 09 Civ 5013(RPP), 2009 WL 1542705 at *1 (S.D.N.Y. 2009) (denying an application for attachment where the 'amount of the attachment requested is not supported by the allegations of the Complaint').

68 *Capital Ventures Intern. v Republic of Argentina*, 443 F.3d 214, 220 (2d Cir. 2006) (under New York law, the existence of a statutory ground for attachment is not sufficient to obtain an order of attachment absent satisfaction of other requirements, including a showing of probability of success on the merits of the claim in excess of all known counterclaims).

69 See, e.g. Robert M. Jarvis, An Introduction to Maritime Attachment Practice Under Rule B, 20 J. MAR. L. & COM. 521, 526 at n 20 [hereinafter Jarvis]. ('Maritime attachment is available whenever the plaintiff has an *in personam* claim against the defendant which is cognizable in Admiralty. . . . In other words, the plaintiff's claim must be one which will support a finding of Admiralty jurisdiction under 28 U.S.C. § 1333.') See also, Fed. R. Civ. P. Supp. R. B(1) advisory committee's note, 1985 Amendment (stating that an 'order will issue when the plaintiff makes a prima facie showing that he has a maritime claim against the defendant').

example, a breach of the terms of a bill of lading or a breach of the terms of a charter party would perforce give rise to a maritime claim. Similarly, a failure to pay for supplies furnished to a vessel or a failure to pay for repairs to a vessel would give rise to a maritime claim.

Indeed, the scope of claims falling within maritime jurisdiction has seen substantial enhancement in recent years in addition to the standard maritime liens and claims inherited from English law. For instance, courts have found the following contracts to be maritime: non-compete and non-disclosure agreements that relate to maritime commerce,[70] forward freight agreements,[71] joint venture agreements involving aspects of maritime commerce, and settlement agreements arising from maritime disputes.[72] Likewise, in certain circumstances, the breach of an agreement for the sale of goods can support the assertion of a maritime claim that enables a plaintiff to obtain an attachment pursuant to Rule B.[73] In such instances, courts will generally evaluate the extent to which the concerned sales contract incorporates maritime terms (such as demurrage obligations between the buyer and the seller of the goods) and whether the underlying dispute arose from the breach of such obligations. Thus, courts have found certain agreements for the sale of grain and other commodities to be within their maritime jurisdiction.[74]

In novel cases, courts may look to whether the claims being asserted arise from a maritime obligation, such as an obligation to pay demurrage, which is severable from the rest of the contract.[75] Additionally, where contracts call for arbitration, courts may look to whether such arbitration is to be held before a maritime organisation such as the London Maritime Arbitrators Association or the Society of Maritime Arbitrators in New York.[76]

70 *Williamson v Recovery Limited Partnership*, 542 F.3d 43, 49 (2d Cir. 2008).

71 *Brave Bulk Transport Ltd v Spot on Shipping Ltd*, 2007 WL 3255823, 2007 A.M.C. 2958 (S.D.N.Y. 2007). See also *Transfield ER Futures Ltd v Deiulemar Shipping SPA*, Slip Copy, 2012 WL 123286 (E.D. Louisiana 2012).

72 See *C. Transport Panamax, Ltd v Kremikovtzi Trade E.O.O.D.*, 2008 WL 2546180, at *3 (S.D.N.Y. 2008) (holding that a settlement agreement which expressly '*includes maritime contract provisions*' was a maritime contract, the court found that the concerned settlement agreement created '*obligations concerning the payment of demurrage on [an] uncompleted charter*').

73 *Stemcor UK Ltd v Sesa Intern. Ltd*, Not Reported in F Supp 2d, No 09 Civ 1155, 2009 WL 1424008, 2009 A.M.C. 1838, 1841–1842 (S.D.N.Y. 2009) (holding that a contract for the sale of steel gave rise to a maritime claim on the basis that the contracts dictated the terms of ocean transport and included an agreement to arbitrate before a maritime tribunal revealed the intent of the parties at the time the contracts were created). But, see *Tradhol Internacional, SA v Colony Sugar Mills Ltd*, 354 Fed.Appx. 463, 465 (2d Cir. 2009) (denying maritime jurisdiction in a mixed contract for sale of a shipment of goods where the maritime claims were not severable from the non-maritime contract claims and could not be brought independently so as to merit maritime jurisdiction over the dispute).

74 *Crossbow Cement SA v Mohamed Ali Saleh Al-Hashedi & Brothers*, No 08 Civ 5074, 2008 WL 5101180, 2009 A.M.C. 1124 (S.D.N.Y. 2008) (concerning a cement sales agreement); *Noble Resources v Yugtranzitservis and Silverstone*, No 08 Civ 3876 (S.D.N.Y. Jul. 23, 2008) (concerning a grain sales agreement); but, see *Exim Grain Trade, B.V. v J.K. Inter. Pty Ltd*, 2008 WL 5191058 (S.D.N.Y. 2008) (grain sale agreement held not to be a maritime contract); and see *Alphamate Commodity GMBH v CHS Europe SA*, 627 F.3d 183 (5th Cir. 2010)(grain merchant failed to establish that its claim against buyer for demurrage charges was severable from its claims for damages arising from buyer's breach of contract, and thus federal district court lacked Admiralty jurisdiction over merchant's application for maritime attachment on shipment of corn bound for buyer pursuant to independent contract).

75 Crossbow Cement SA, 2009 A.M.C. 1124 at *1133 (stating that 'plaintiff's claim arises solely from the demurrage clause, which is severable from the rest of the contract').

76 Ibid, at *1132 (noting that the concerned contract called for arbitration before the London Maritime Arbitrators Association rather than a non-maritime organisation such as the Grain and Feed Trade Association).

2.2 THE DEFENDANT SHALL NOT BE FOUND WITHIN THE DISTRICT

Rule B requires that the defendant cannot be found within the district of the court.[77] Simply stated, Rule B attachment is not available if the defendant can be found within the geographic confines of the court's jurisdiction. However, the meaning of 'found within the district' is not defined by the text of Rule B. The Second Circuit has held that satisfaction of this requirement is subject to, 'a two-pronged inquiry: First, whether [the defendant] can be found within the district in terms of jurisdiction, and second, if so, whether it can be found for service of process'.[78] 'The "key inquiry" with regard to the jurisdictional presence is the defendant's amenability to suit in the district.'[79] Currently, within the Second Circuit, a defendant will be deemed present if the defendant has registered to do business within the State.[80] Even if the jurisdictional requirement is satisfied though, the second prong of the analysis must also be established. Thus, in order to prevent the attachment of its property within a Federal judicial district, a defendant must have an agent clothed with authority to accept service of process within that district.

2.2.1 'Found' within district determined at time of filing

For purposes of Rule B, a defendant's presence in the district is determined as of the time the complaint is filed.[81] In ***Parkroad Corp. v China Worldwide Shipping***,[82] after the plaintiff had filed a Rule B complaint, but before the defendant had been served with the complaint, the defendant filed an answer, thus generally appearing, and its counsel argued that, as his client had generally appeared, it was 'present in' the district, thus precluding the plaintiff from obtaining an order for process of maritime attachment.[83] The court disagreed, finding that whether the defendant is 'present in the district' for purposes of Supplemental Rule B, 'is to be determined as of the date the complaint is filed'.[84] To hold otherwise, the court noted, would permit a defendant to wait until after a plaintiff files suit and then appoint an agent for service of process for the sole purpose of defeating jurisdiction.

77 Fed. R. Civ. P. Supp. R. B(1).

78 *Centauri Shipping Ltd v Western Bulk Carriers KS*, 528 F Supp 2d 186, 190 (S.D.N.Y. 2007) (quoting *Seawind Compania, SA v Crescent Line, Inc.*, 320 F.2d 580, 582 (2d Cir. 1963)).

79 Ibid.

80 *STX Panocean (UK) Co., Ltd v Glory Wealth Shipping Pte Ltd*, 560 F.3d 127, 133 (2d Cir. 2009). See also *Asia Project Services Ltd v Usha Martin Lt.*, 2010 WL 1644891, *3 (S.D.N.Y. April 8, 2010) ('because the Defendants are registered to do business in New York, they are subject to the Court's personal jurisdiction').

81 See *Parkroad Corp. v China Worldwide Shipping Co., Ltd*, 2005 WL 1354034 (S.D.N.Y. June 6, 2005). See also Fed. R. Civ. P. Supp. R. B, advisory committee's note, 2005 Amendment ('The time for determining whether a defendant is "found" in the district is set at the time of filing the verified complaint that prays for attachment and the affidavit required by Rule B(1)(b).').

82 Ibid (citing *Heidmar Inc. v Anomina Ravennate Di Armamento*, 132 F.3d 264, 268 (5 Cir. 1998) ('Testing for presence after the complaint has been filed would permit a defendant to wait until after a plaintiff files a complaint and then appoint an agent for service of process for the sole purpose of defeating attachment.')).

83 Ibid, at *1.

84 Ibid.

2.2.2 General appearance does not end the effects of a valid Rule B attachment

In ***HBC Hamburg Bulk Carriers v Proteinas y Oleicos***,[85] the plaintiff, HBC, applied for and was granted an ex parte order attaching electronic funds transfers (EFTs) (which were, at that time, subject to attachment) directed through New York, payable by third parties to the defendant, Proteinas. Several EFTs were attached, but HBC had not attached the full amount of its claim of approximately $1.6 million by the time that Proteinas made a general appearance to defend the proceeding and argued that EFTs attached *after* its general appearance should be vacated. The court disagreed, stating that:

> given that process in this case was appropriate, the banks' continued actions to attach funds under that order conform with Rule B's language allowing funds to be attached 'up to the amount sued for.' The fact that defendant later filed a notice of appearance does not change the post-levy effects of the properly-served PMAG [process of maritime attachment and garnishment].[86]

Thus, *HBC* held that the filing of a general appearance did not defeat the subsequent attachments by the plaintiff.[87]

In ***Parkroad Corp. v China Worldwide Shipping***,[88] the court agreed with the *HBC* decision, and stated that,

> the right to the attachment is not defeated by the filing of a general appearance. But for the security of an attachment, because there is no real presence here, the appearance will be of no assistance to plaintiff in enforcing its rights, and it is not equivalent to not being found within the district.[89]

HBC was criticized by *Aqua Stoli*,[90] but the criticism came in the context of a subsequent Rule E(4)(f) hearing (see para 5.1, below), not in the context of the effect of a general appearance.

2.3 DEFENDANT'S TANGIBLE OR INTANGIBLE PERSONAL PROPERTY WITHIN JURISDICTION

Defendant's 'tangible or intangible personal property' is the assets of the defendant sought to be seized to provide security for the plaintiff's claim.[91] These assets must be physically present within the jurisdiction of the court[92] and can include bank accounts, bunkers aboard time chartered vessels, credits, debts owed to the defendant by third parties, freight monies, insurance proceeds and vessels. Moreover, Rule B

85 *HBC Hamburg Bulk Carriers v Proteinas y Oleicos*, 2005 AMC 1586 (S.D.N.Y. 2005).
86 Ibid, at *17.
87 Ibid.
88 *Parkroad Corp. v China Worldwide Shipping Co. Ltd*, 2005 WL 1354034 (S.D.N.Y. 2005).
89 Ibid, at *2.
90 *Aqua Stoli Shipping Ltd v Gardner Smith Pty Ltd*, 460 F.3d 434 (2d Cir. 2006), at 446.
91 Fed R. Civ. P. Supp. R. B(1)(a).
92 See, e.g., *Yayasan Sabah Dua Shipping SDN BHD v Scandinavian Liquid Carriers Ltd*, 335 F Supp 2d 441, 447 (S.D.N.Y. 2004) ('A Rule B attachment reaches only property located within the district in which the suit is brought.') (overruled on other grounds).

orders have been issued authorising the attachment of collateral and other assets associated with financial instruments such as bonds and derivatives contracts.

In terms of the latitude of assets covered by this language in Rule B, the Second Circuit has stated that, 'it is difficult to imagine words more broadly inclusive than "tangible or intangible"'.[93] By contrast, a charterer's secured line of credit with a bank is *not* a 'good, chattel, credit or effect', subject to attachment by a vessel owner under Admiralty Rule B, as a line of credit is nothing more than a privilege to incur a debt.[94] Likewise, accounts in foreign branches of a bank are also not subject to attachment.[95]

However, in ***Yayasan Sabah Dua Shipping***,[96] the court carved out a narrow exception to the rule precluding attachment of foreign branch bank accounts. On the specific facts of *Yayasan*, funds in a foreign bank branch in the Cayman Islands were attached, and the defendant's motion to vacate the attachment was denied. The court found that, 'the Cayman Islands branch [appeared to be] a paper bank entirely controlled and managed by [the New York branch]'.[97] Furthermore, the court found that,

> the Caymans branch [had] no physical existence outside of the New York branch [specifically finding that] there was no physical Caymans branch office, there [were] no Caymans employees, and there [were] no tangible [bank] assets or liabilities in the Caymans.[98]

Until late 2009, it was also possible to attach wire transfers held at the intermediary banks in New York that process dollar denominated wire transfers. However, the law on that issue has changed and EFTs 'being processed by intermediary banks are not subject to attachment under Rule B'.[99] Despite this radical change, there continue to be extensive opportunities in the United States to obtain security for maritime claims.

3 PROCEDURAL REQUIREMENTS FOR RULE B ATTACHMENT

Maritime proceedings in the Federal Courts of the United States (for example, the United States District Courts) are governed, in part, by procedural rules known as the 'Supplemental Rules for Admiralty or Maritime Claims'. These rules include Rule A through Rule F. Of interest here is Rule B, the rule governing maritime attachment proceedings. (Rule E is also relevant and is mentioned under paras 5.1 and 6.2, below.) The procedural requirements of Rule B are outlined below:

93 *Winter Storm Shipping, Ltd v TPI*, 310 F.3d 263, 276 (2d Cir. 2002) (overruled on other grounds).

94 See *Oceanfocus Shipping Ltd v Naviera Humbolt, SA*, 962 F Supp 1481 (S.D.Fla.1996). Note that 'good, chattel, credit or effect' was reworded in Rule B in 2000 to read, 'tangible or intangible personal property'. The change was stylistic only, and the Second Circuit has perceived 'no substantive difference between the two versions'. *Winter Storm*, 310 F.3d at 276.

95 See *Yayasan Sabah Dua Shipping SDN BHD*, 335 F Supp 2d at 447 (citing *Det Bergenske Dampskibsselskab v Sabre Shipping*, 341 F.2d 50, 52–53 (2d Cir. 1965) (stating that a writ of attachment is invalid as to bank branches outside the district issuing the writ)).

96 *Yayasan*, 335 F Supp 2d at 449.

97 Ibid.

98 Ibid; see also, *Dolco Invs., Ltd v Moonriver Dev., Ltd*, 486 F Supp 2d 261, 269 (S.D.N.Y. 2004) (citing *Yayasan*).

99 *The Shipping Corporation of India v Jaldhi Overseas Pte Ltd*, 585 F.3d 58, 72 (2d Cir. 2009). See also, *Hawknet, Ltd v Overseas Shipping Agencies*, 590 F.3d 87 (2d Cir. 2009) (holding that decision in *Jaldhi* which held that an EFT was not property attachable under a maritime attachment order in the district courts of New York, applies retroactively).

3.1 *IN PERSONAM* ACTION – FILING A COMPLAINT WITH AFFIDAVIT

If a defendant is not found within the district when a verified complaint praying for attachment and the affidavit required by Rule B(1)(b) are filed, a verified complaint may contain a prayer for process to attach the defendant's tangible or intangible personal property – up to the amount sued for – in the hands of garnishees named in the process.

The affidavit must state that, to the affiant's knowledge, or on information and belief, the defendant cannot be found within the district. The court must review the complaint and affidavit and, if the conditions of this Rule B appear to exist, enter an order so stating and authorising process of attachment and garnishment. The clerk may issue supplemental process enforcing the court's order upon application without further court order.

If the property is a vessel or tangible property on board a vessel, the summons, process, and any supplemental process must be delivered to the marshal for service.

If the property is other tangible or intangible property, the summons, process and any supplemental process must be delivered to a person or organisation authorised to serve it, who may be: (a) a marshal, (b) someone under contract with the United States, (c) someone specially appointed by the court for that purpose.

The plaintiff may invoke State law remedies under Rule 64 for seizure of person or property for the purpose of securing satisfaction of the judgment. (This seems like the old 'maritime attachment' under English law, which was abolished in 1780, as the arrest of a person for civil liability was considered out of order.)[100]

3.2 NOTICE TO DEFENDANT

No default judgment may be entered except upon proof – which may be by affidavit – that:

(a) the complaint, summons, and process of attachment or garnishment have been served on the defendant in a manner authorised by Rule 4;
(b) the plaintiff or the garnishee has mailed to the defendant the complaint, summons, and process of attachment or garnishment, using any form of mail requiring a return receipt; or
(c) the plaintiff or the garnishee has tried diligently to give notice of the action to the defendant but could not do so.

3.3 THE AMOUNT SUED FOR

The claimant, in an attachment proceeding, need not prove its damages with exactitude.[101] The court must be satisfied that the claims are not frivolous.[102] However,

100 *The Clara* (1855) Swa 1 (see Ch 1, above, para 1.2).

101 *Dongbu Express Co., Ltd v Navios Corporation*, 944 F Supp 235 (S.D.N.Y. 1996).

102 See, e.g., *Royal Swan Navigation Co., Ltd v Global Container Lines, Ltd*, 868 F Supp 599 (S.D.N.Y. 1994); *Rolls Royce Industrial Power v M/V FRATZIS M*, 1995 WL 846690 at *3 (S.D.N.Y. July 24, 1995).

the court will otherwise accept reasonable estimates of damages.[103] Such reasonable estimates can include recoverable legal costs as well as interest from the time the claim arose to the anticipated date of recovery (that is, after the conclusion of the arbitration, or litigation, and appeals if any).[104]

3.4 NO BOND REQUIRED

The laws of many countries, and the laws of most states in the United States, see, for example, New York Civil Practice Law and Rules 6212, require the claimant to post a bond in order to obtain an attachment of assets. This type of bond can be very expensive, as the amount of the bond is often determined by the amount of the claim (that is, the larger the claim, the greater the bond required). Unlike the freezing injunction under English law (see above), Rule B requires no bond at all.[105] The lack of a requirement for a bond enables a claimant to move with great speed at very low cost. The attachment procedure permitted by Rule B is, as a result, one that can be utilised on an easy, fast and inexpensive basis. (In that respect, it is very similar to an *in rem* action for the arrest of ships under English law – see Ch 4, below.)

3.5 GARNISHEES NAMED IN THE PROCESS

Rule B requires the garnishees to be named in the process issued by the clerk of the court.[106] Even if potential garnishees are subsequently discovered in a piecemeal fashion, new garnishees can generally be served on an ex parte basis without amending the complaint and without losing the element of surprise.[107]

3.6 ANSWER BY GARNISHEE/DEFENDANT

The garnishee is required by Rule B to answer the process of maritime attachment and garnishment within 20 days after service of the process upon the garnishee.[108] The court, upon the application of the claimant, if the garnishee neglects or refuses to answer, will force the garnishee to answer the process of maritime attachment and garnishment.[109] Interrogatories to the garnishee may be served with the complaint without leave of court. If the garnishee refuses or neglects to answer on oath as to the debts, credits or effects of the defendant in the garnishee's hands, or any interrogatories concerning such debts, credits and effects that may be propounded by the plaintiff, the court may award compulsory process against the garnishee.

103 *Dongbu Express*, 944 F Supp 235.

104 Ibid.

105 See, e.g., *Brown v Pan Oceanica Shipping Corp.*, 182 F Supp 730, 732 (D.C.Md. 1960) ('Seizure of a vessel at the time of the institution of the suit and without requiring the libelant to post a bond or other security is a distinctive Admiralty procedure, not permitted in civil actions').

106 Fed. R. Civ. P. Supp. R. B(1) (as amended in 1985).

107 See ibid, advisory committee's note, 1985 Amendment ('This should solve the problem presented in Filia . . . and eliminate any need for an additional judicial review of the complaint and affidavit when a garnishee is added.').

108 Fed R. Civ. P. Supp. R. B(3)(a).

109 Ibid.

If the garnishee admits any debts, credits or effects, they shall be held in the garnishee's hands or paid into the registry of the court, and shall be held in either case subject to the further order of the court. Rule B permits the garnishee to hold the assets under attachment or to place the assets in the registry of the court. The usual practice is for the garnishee to hold the assets under attachment or, with the consent of the parties, to transfer the assets to an interest-bearing escrow account. The assets, in any case, whether held by the garnishee, placed in an interest-bearing escrow account or placed in the registry of the court, cannot be released except pursuant to further order of the court.

The defendant shall serve an answer within 30 days after process has been executed, whether by attachment of property or service on the garnishee.

3.7 REVIEW BY THE COURT

The attachment papers, absent exigent circumstances, must be reviewed by a judge to ensure that they comply with the requirements of Rule B. Many, but not all, judges are fully familiar with the procedure authorised by Rule B. In connection with their review of the papers, judges will often pose detailed legal and factual questions to the plaintiff's attorney seeking the order authorising the attachment. It is important to understand that the district court judge has great latitude in deciding whether or not to sign a Rule B attachment order. If a judge refuses to sign and counsel cannot convince him otherwise, the remedy of an appeal would take months to be determined and could thwart the purpose of the attachment even if the appeal were successful.

4 PIERCING THE CORPORATE VEIL

One additional issue ought to be considered regarding the requirement that the plaintiff in a Rule B action must have a valid prima facie Admiralty claim. That issue addresses the plaintiff's ability to assert corporate veil piercing claims in order to hold a defendant liable, even though the plaintiff cannot establish contractual privity with the concerned defendant.

4.1 CONDITIONS FOR PIERCING

First, Federal maritime law recognises veil piercing claims.[110] Additionally,

> federal common law allows piercing of the corporate veil where (1) a corporation uses its alter ego to perpetrate a fraud or (2) where it so dominates and disregards its alter ego's corporate form that the alter ego was actually carrying on the controlling corporation's business instead of its own.[111]

110 *Tide Line, Inc. v Eastrade Commodities, Inc.*, 2006 WL 4459297, 2007 A.M.C. 252, 265 (S.D.N.Y. 2006) (stating that '"the prerequisites for piercing the corporate veil are as clear in federal maritime law as in shoreside law"') (quoting *Kirno Hill Corp. v Holt*, 618 F.2d 982, 985 (2d Cir. 1980)).

111 *Tide Line, Inc.*, 2006 WL 4459297, at *265.

Although the first possible basis for veil piercing, use of an alter ego to perpetrate a fraud, is relatively self-explanatory, the second is more conceptual. However, there are recognised factors that make the concept more tangible.

4.2 FACTORS OR INDICATORS OF DOMINATED CORPORATION

The Second Circuit has enumerated 10 factors that are considered indicators that a defendant was a dominated corporation. These factors can be summarised as follows:

1 the absence of corporate formalities;
2 inadequate capitalisation;
3 personal use of corporate funds;
4 overlapping personnel and ownership;
5 common office space, address and telephone numbers of corporate entities;
6 the amount of business discretion displayed by the allegedly dominated corporation;
7 whether the related corporations deal with the dominated corporation at arm's length;
8 whether the corporations are treated as independent profit centres;
9 the payment or guarantee of debts of the dominated corporation by other corporations in the group; and
10 whether the corporation in question had property that was used by other of the corporations as if it were its own.[112]

In order to determine whether a plaintiff has asserted a valid Admiralty claim based upon alter ego allegations, courts within the Southern District of New York will often only consider whether the complaint sets forth allegations that embody the foregoing indicators.[113] It should be noted though that, 'there is no set rule as to how many of these factors must be present to warrant piercing the corporate veil and courts have considered additional factors as well.[114]

4.3 RISKS FACED BY DEFENDANTS

Defendants face a risk that well-drafted allegations can be used to obtain a maritime attachment against parties that never entered into contracts with the plaintiff. However, the Second Circuit has held that, 'superficial compliance with Rule B, while necessary, is not sufficient in determining whether maritime attachment is

112 Ibid, at *266 (quoting *Wm. Passalacqua Builders, Inc. v Resnick Developers South, Inc.*, 933 F.2d 131, 137–139 (2d Cir. 1991)).

113 See ibid, at *274 (vacating an attachment but granting the plaintiff leave to file an amended complaint which contained many of the indicators that a corporation was dominated); see also *National Ability SA v Tinna Oils & Chemicals Ltd*, No 07 Civ 9913 (AKH), Slip Op. (S.D.N.Y. Oct. 7, 2008) (maintaining an attachment based on alter ego allegations where the allegations reflected the defendants' efforts to use 'an assortment of closely related and unilaterally directed corporations . . . to defeat the obligations of [a] charter party').

114 *Williamson*, 542 F.3d at 53.

appropriate'.[115] Moreover, even where pleadings are deemed sufficient, limited discovery regarding alter ego allegations can be ordered.[116]

For example, in 2011, in ***Milestone Shipping, SA v Estech Trading LLC***,[117] the plaintiff had entered into a charter party agreement with the defendant for the carriage of iron ore. As a pre-condition to finalising the charter party, the defendant signed an escrow agreement under which it was to deposit $500,000 into an account held as security for the plaintiff. The funds were deposited not by the defendant but by a third party. When the defendant failed to perform under the charter party, the plaintiff obtained a Rule B attachment of the escrowed funds, which the third party moved to vacate. After finding that the plaintiff had satisfied the four requirements for maritime attachment against the defendant, the court addressed the alter ego issue and explained that:

> Although only [the defendant], and not [the third party], was a party to the Escrow Agreement, the Verified Complaint also advances alter-ego and corporate veil-piercing theories against [the third party]. In particular, [the plaintiff] asserts, among other things, that [the defendant] is an agent or shell corporation dominated by [the third party], that [the third party] agreed to fund the Escrow Account on [the defendant]'s behalf, and that the companies share a contact phone number published in trade journals which rings at [the defendant]'s office.[118]

The court further summarised the standard for evaluating alter ego claims by observing that a primary consideration is whether affiliated defendants 'operated as a single economic entity'.[119] Thus, in light of the foregoing, the court held that the plaintiff had sufficiently alleged its alter ego claims to enable continuation of the attachment.[120]

Interestingly, the court also rejected the defendant's alternative argument that the attachment should be vacated because the plaintiff was purportedly a 'sham corporation' (that is, that the plaintiff itself was an alter ego of a non-party). Thus, while the court confirmed that a Rule B plaintiff may rely upon alter ego allegations to expand the scope of property subject to attachment, the court rejected the defendant's attempt to use alter ego allegations as an equitable defence. Furthermore, the court specifically rejected the third party's arguments for equitable vacatur. (The third party argued that the attachment should be vacated because the plaintiff could have obtained *in personam* jurisdiction over the defendant in a so-called convenient adjacent jurisdiction.)

> [The third party]'s uncorroborated and essentially ad hominem attack on [the plaintiff] as a 'sham corporation with no citizenship of any substance' . . . cannot overcome the deference due to [the plaintiff's] preferred choice of venue – which, notably, conforms with the forum selection clauses in both the Escrow Agreement and the Charter Party.[121]

115 Ibid, at 52.
116 *Hawknet Ltd v Overseas Shipping Agencies*, 2008 WL 1944817 (S.D.N.Y. 2008).
117 *Milestone Shipping SA v Estech Trading LLC*, 764 F Supp 2d 632, 2011 A.M.C. 968 (S.D.N.Y. 2011).
118 Ibid, at 636.
119 Ibid.
120 Ibid, citing *Totalmar Navigation Corp. v ATN Indus., Inc.*, No 08 Civ. 1659, 2008 WL 5111316 (S.D.N.Y. 2008).
121 Ibid, at 637.

5 APPLICATIONS TO VACATE ATTACHMENT

5.1 POST ATTACHMENT HEARINGS – THE *AQUA STOLI*[122] CASE

After the plaintiff successfully attaches the defendant's property pursuant to Rule B's procedures, Rule E(4)(f) provides the defendant an opportunity to appear before the court in order to challenge the attachment. Where a defendant seeks to vacate a maritime attachment, 'the plaintiff bears the burden to show, inter alia, that it has a "valid prima facie Admiralty claim against the defendant"'.[123]

The text of Rule E(4)(f) does not expressly explain under what circumstances the district court should vacate an attachment. However, the Second Circuit's 2006 decision in *Aqua Stoli* has substantially clarified the scope of review and standards for vacatur that should be applied during a Rule E(4)(f) hearing.

The facts at issue in *Aqua Stoli* were as follows: Plaintiff Aqua Stoli chartered its ship, the *M/V Aqua Stoli*, to defendant Gardner Smith to carry a cargo of tallow from Brazil to Pakistan. A dispute arose when the ship arrived in Brazil, because the defendant questioned the ship's seaworthiness and refused to load its cargo for the voyage. The plaintiff, a Liberian company, rejected the defendant's contention that the ship was not seaworthy and began an arbitration proceeding in London, claiming $1.45 million in damages. Meanwhile, the defendant counterclaimed for a similar amount and seized the *M/V Aqua Stoli* in Singapore as security. The plaintiff posted the security needed to release the ship, and then asked the defendant to post security, which request the defendant refused. The plaintiff countered by using the Rule B attachment process in the Southern District of New York and was able to attach several EFTs (which were then subject to attachment) that had been routed through intermediary banks in New York. Some of the transferred funds originated from the defendant and other transfers were made by third parties for which the defendant was the intended beneficiary. The defendant contested the attachment of the EFTs and sought a subsequent hearing under Rule E(4)(f) seeking to have the funds released. The district court vacated the Rule B attachment, but the Second Circuit reversed, finally speaking out on the requirements for post-attachment Rule E(4)(f) hearings.

The district court had granted the defendant's motion to vacate the maritime attachment because, 'plaintiff's ability to collect a prospective judgment is remarkably secure', and because the plaintiff was using maritime attachment for tactical reasons, and, 'tit for tat is not a recognized purpose for maritime attachments'.[124] In the district court's view, it possessed 'equitable authority' to fashion an appropriate test to vacate maritime attachments that were otherwise valid under the technical requirements of Rule B.[125] The court stated that because 'the ease of which a prima facie case for [Rule B] attachment can be made' creates 'a real risk of abusive use of the maritime remedy', subsequent judicial review of the ex parte attachment is appropriate.[126]

The Second Circuit disagreed with the district court's opinion and remanded the case. In so doing, the circuit court first explained that at a Rule E(4)(f) hearing the

122 *Aqua Stoli Shipping Ltd v Gardner Smith Pty Ltd*, 460 F.3d 434 (2d Cir. 2006).
123 Ibid, at 445.
124 Ibid, at 729–730.
125 Ibid, at 729.
126 Ibid.

plaintiff bears the initial burden of showing that the fundamental requirements for issuance of an attachment order were met. Simply, the plaintiff must show that:

> 1) it has a valid prima facie Admiralty claim against the defendant; 2) the defendant cannot be found within the district; 3) the defendant's property may be found within the district; and 4) there is no statutory or maritime law bar to the attachment.[127]

Thereafter, 'once a plaintiff has carried his burden to show that his attachment satisfies the requirements of Supplemental Rule B, a district court may vacate an attachment only [in limited] circumstances.'[128] The Second Circuit then went on to discuss some instances in which a district court might have equitable authority to vacate an otherwise properly obtained maritime attachment. However, the Second Circuit expressly stated that its decision in *Aqua Stoli* did not address 'the exact scope of a district court's vacatur power'.[129] Despite limiting the extent of its holding, the Second Circuit did identify three situations in which equitable vacatur might be warranted. Those situations include instances in which a defendant demonstrates that:

> 1) the defendant is subject to suit in a convenient adjacent jurisdiction; 2) the plaintiff could obtain *in personam* jurisdiction over the defendant in the district where the plaintiff is located; or 3) the plaintiff has already obtained sufficient security for the potential judgment, by attachment or otherwise.[130]

Also in regard to post-attachment hearings, it is generally accepted that district courts should not engage in broad factual inquiries. This is so because Rule B 'specifies the sum total of what must be shown for a valid maritime attachment'.[131] The district courts have closely followed this rule and rejected calls by defendants to go beyond the express requirements of Rule B.[132] Therefore, it is well-established that courts should not determine 'the merits of [the] underlying issues [of the parties' dispute because doing so] would undermine the standard that "a proper Verified Complaint is all that is required"'.[133] That principle is particularly applicable where an arbitral panel will ultimately resolve the dispute.[134]

127 Ibid, at 445. See also, *ProShipLine, Inc. v Aspen Infrastructures Ltd*, 585 F.3d 105, 113 (2d Cir. 2009).

128 Ibid.

129 Ibid.

130 Ibid (noting that the court also believed, despite the fact that Rule B does not expressly allocate the burden of proof for establishing an equitable basis for vacatur, that the burden should be on the defendant).

131 See *Aqua Stoli*, 460 F.3d at 447. However, it should be noted that the Second Circuit's more recent decision, in *Williamson v Recovery Limited Partnership*, 542 F.3d 43 (2d Cir. 2008), indicates that district courts may conduct a somewhat more extensive factual inquiry regarding whether a plaintiff has asserted a prima facie maritime claim. *Williamson*, 542 F.3d at 52. (The appellate court considered whether the district court had 'engaged in an impermissible fact-intensive inquiry' when it decided to vacate, in part, an attachment. The Second Circuit held that the inquiry was not impermissibly fact-intensive because it occurred in connection with the district court's consideration of whether the plaintiff had asserted a valid prima facie maritime claim rather than in connection with the court's consideration of equitable grounds for vacatur.)

132 See *Chiquita International Ltd v MV Bosse*, 518 F Supp 2d 589, 597 (S.D.N.Y. 2007) (citing *Aqua Stoli* for the proposition that a plaintiff need only 'make a prima facie showing and demonstrate that all technical requirements for effective attachment have been met'); *Transportes Navieros y Terrestes, SA de DV v Fairmount Heavy Transport NV*, 2007 WL 1989309, 2007 A.M.C. 1933, 1938 (S.D.N.Y. 2007) (citing *Aqua Stoli* for the rule that 'a fact-intensive inquiry is "improper"' because Rule B provides the sum total of requirements for a maritime attachment).

133 *The Rice Company v Express Sea Transport Corp.*, 2007 WL 4142774, *3 (quoting *Transportes Navieros y Terrestes, SA*, 2007 WL 1989309).

134 *Chiquita International Ltd*, 518 F Supp 2d at *597 (explaining that the court 'need not, and should not, reach the merits of the [underlying dispute since] that is properly left to the . . . arbitrators to decide');

5.2 *DE NOVO* REVIEW

On appeal, the court will review a decision vacating a maritime attachment for abuse of discretion but will conduct *de novo* review regarding the 'legal determinations on which [such] discretion rests'.[135] Specifically, the appellate courts will apply *de novo* review to determinations holding that contracts are maritime.[136]

That process of *de novo* review will include consideration as to whether courts have correctly followed the process for determining whether a contract is maritime. The United States Supreme Court established in ***Norfolk Southern Railway Company v James N. Kirby Pty, Ltd***,[137] that the process for such determination should be performed in accordance with the following:

> To ascertain whether a contract is a maritime one, we cannot look to whether a ship or other vessel was involved in the dispute, as we would in a putative maritime tort case . . . Nor can we simply look to the place of the contract's formation or performance. Instead, the answer 'depends upon . . . the nature and character of the contract,' and the true criterion is whether it has 'reference to maritime service or maritime transactions'.[138]

5.3 AMENDMENT

In accordance with the Supreme Court's ruling in *Norfolk Southern*, the Second Circuit Court of Appeals (which is the Federal Appellate court with jurisdiction in New York, where most Rule B claims are filed) 'recently amended [its] jurisprudence on maritime contracts'.[139]

Therefore, the Second Circuit now recognizes, 'that the proper inquiry is "whether the principal objective of a contract is maritime commerce"'.[140] Thus, within the Second Circuit, this inquiry is in contrast to one that would consider, 'whether the non-maritime components [of the contract] are properly characterized as more than "incidental" or "merely incidental" to the contract'.[141] Therefore, the Second Circuit looks to determine whether 'the nature and character of the contract' are maritime.[142]

5.4 POST-ATTACHMENT PROCEDURES – SUBSTITUTE SECURITY

Following attachment, defendants will often seek to provide substitute security. Generally, substitute security will be in the form of a surety bond, club letter or letter

Finecom Shipping Ltd v Multi Trade Enterprises AG, 2005 WL 2838611, 2005 A.M.C. 2952 (S.D.N.Y. Oct. 25, 2005) (providing that the 'ability to understand the merits of a dispute at an early stage is limited, and courts should [therefore] be reluctant to prejudge the merits of claims based essentially on the pleadings . . . this is particularly so when the ultimate merits will be decided not by [the] Court, but by an arbitration panel in another country').

135 *Williamson*, 542 F.3d at 48.

136 Ibid.

137 *Norfolk Southern Railway Company v James N. Kirby Pty, Ltd*, 543 US 14 (2004).

138 *Williamson*, 542 F.3d at 48–49 (quoting *Norfolk Southern Railway Company*, 543 US at 23–24).

139 Ibid, at 49.

140 Ibid (quoting *Folksamerica Reinsurance Co. v Clean Water of N.Y., Inc.*, 413 F 3d 307, 315 (2d Cir. 2005)).

141 Ibid.

142 Ibid (affirming a district court decision that non-compete and non-disclosure agreements were maritime where the contracts were 'entered into in connection with [a] maritime commercial venture').

of credit. A plaintiff may freely enter into a stipulation accepting such substitute security.[143] However, within the Southern District of New York, it is generally accepted that courts will not compel a plaintiff to accept substitute security unless the form of security complies with the applicable local procedural rule concerning bonds.[144] In the Southern District of New York, in which there is extensive Rule B practice, that procedure is set forth in Local Rule 65.1.1(b).[145]

6 OTHER CONSIDERATIONS

6.1 AGREEMENT TO ARBITRATE OR LITIGATE IN A PARTICULAR FORUM

Many maritime contracts provide for arbitration or litigation in a particular forum (for example, London or New York). In certain circumstances, an exclusive forum selection clause can preclude the use of Rule B proceedings.[146] However, courts will generally look to see whether the concerned forum selection clause expressly incorporates the parties' intent to exclude the use of ancillary security proceedings outside the selected forum.

The Second Circuit's fairly recent decision in ***Consub Delaware LLC***[147] clearly demonstrates this principle. There, the defendant argued that two separate forum selection clauses from contracts at issue in the underlying dispute expressed 'the intent of the parties that all judicial proceedings, including all prejudgment attachment proceedings, be conducted exclusively in the English Courts'.[148] The Second Circuit

143 See Fed R. Civ. P. Supp. R. E(5) (providing, in pertinent part, that 'whenever process of maritime attachment . . . is issued the execution of such process shall be stayed, or the property released, on the giving of security, to be approved by the court or clerk, or by stipulation of the parties, conditioned to answer the judgment of the court or of any appellate court').

144 *Jaimie Shipping, Inc. v Oman Insurance Company*, 2008 WL 4178861, at *3 (S.D.N.Y. Sept. 8, 2008) (holding, in a case where the defendant sought to compel the plaintiffs to accept substitute security, that the plaintiffs were 'entitled to "insist upon the giving of security in strict conformity with our local rules," and thus cannot be compelled to accept [a] letter of credit from an unauthorized foreign surety'). See also, 29 Moore's Federal Practice, § 704.02[1][e] n.143 (Matthew Bender 3rd edn 1997) (stating that 'although [Club] Letters of Undertaking are widely used and accepted, courts generally will not approve them as substitute security absent agreement of the parties').

145 Local Rule 65.1.1(b) provides as follows:

> Except as otherwise provided by law, every bond, undertaking or stipulation must be secured by: (1) the deposit of cash or government bonds in the amount of the bond, undertaking or stipulation; or (2) the undertaking or guaranty of a corporate surety holding a certificate of authority from the Secretary of the Treasury; or (3) the undertaking or guaranty of two individual residents of the district in which the case is pending, each of whom owns real or personal property within the district worth double the amount of the bond, undertaking or stipulation, over all his or her debts and liabilities, and over all obligations assumed by said surety on other bonds, undertakings or stipulations, and exclusive of all legal exemptions.

146 See *Teyseer Cement Co. v Halla Maritime Corp.*, 583 F Supp 1268 (D.C. Wash. 1984) (bill of lading provided that disputes would be determined in Korea 'to the exclusion of the jurisdiction of the courts of any other country'). See also *Heidmar Trading LLC v Emirates Trading Agency, LLC*, 2011 WL 5827300 (S.D. Texas November 18, 2011).

147 *Consub Delaware LLC v Schahin Engenharia Limitada*, 543 F.3d 104 (2d Cir. 2008).

148 Ibid, at 113 (one clause stated that 'each of the parties hereby submit [sic] to the exclusive jurisdiction of the English Courts in relation to any dispute or claim'; the other clause stated that 'the Agreement shall be considered . . . subject to English law under the exclusive jurisdiction of the courts of England and Wales').

agreed with the district court's rejection of this argument and noted that, 'the primary objective of a court in interpreting a contract is to give effect to the intent of the parties as revealed by the language of their agreement'.[149]

Additionally, the Second Circuit described the lower court's ruling as follows:

> The District Court relied on the Ninth Circuit's decision in *Polar Shipping Ltd v Oriental Shipping Corp.*, 680 F.2d 627, 631 (9th Cir. 1981), which reasoned that a clause providing that, 'any dispute arising under the charter shall be decided by the English Courts,' did not demonstrate an 'inten[t] to limit proceedings to obtain pre-judgment security,' to the English Courts because a Rule B 'attachment does not fit neatly within the word "dispute"'.[150]

Without expressly adopting *Polar Shipping*, the Second Circuit affirmed the district court's judgment which had relied upon *Polar Shipping* when denying the motion to vacate.[151]

6.2 COUNTERCLAIMS AND COUNTERSECURITY

It is always possible that an opponent may have a counterclaim arising out of the same transaction (that is, same contract). If so, the opponent may be able to obtain countersecurity for the counterclaim.

Rule E(7), in pertinent part, provides as follows:

> When a person who has given security for damages in the original action asserts a counterclaim that arises from the transaction or occurrence that is the subject of the original action, a plaintiff for whose benefit the security has been given must give security for damages demanded in the counterclaim unless the court, for cause shown, directs otherwise. Proceedings on the original claim must be stayed until this security is given, unless the court directs otherwise.

Thus, Rule E(7) requires that the counterclaim arises out of the same transaction as the main claim and that the defendant has given security to respond in damages.

These requirements will be met where both parties have claims arising out of the same contract and the claimant has successfully attached assets of the defendant pursuant to the provisions of Rule B. Nevertheless, the court possesses broad discretion in deciding whether to order the posting of countersecurity.[152] The Second Circuit, with regard to this discretion, has stated that two countervailing principles should guide the court in exercising its discretion: (1) '[placing] the parties on an equality

149 Ibid.

150 Ibid.

151 Ibid; see also *Liverpool and London Steamship v Islas Galapagos Turismo Y Vapores*, 1997 WL 900841 (S.D.Fla. 1997) (Rule B attachment not vacated where parties agreed to resolve the merits of any claim in a foreign forum). The parties' agreement in *Liverpool* provided that 'the merits of any other claim shall be determined by the English High Court which shall have exclusive jurisdiction in such matters', *Liverpool*, 1997 WL 900841, at *1. The plaintiff did not dispute that it would be required to bring its claim on the merits in the English High Court, but it successfully argued that 'the forum selection clause does not apply to Supplemental Rule B proceedings since these proceedings do not require the court to rule on the merits of the claim', ibid. The *Liverpool* court emphasised that the parties' contractual language made explicit reference to the 'merits' of the claim, and that 'there is no clear showing that the forum selection provision in the insurance policy at issue here was intended to apply to attachment proceedings', ibid, at 3.

152 See *Result Shipping v Ferruzzi Trading*, 56 F.3d 394 (2d Cir. 1995); *Afram Lines Int'l, Inc. v M/V CAPETAN YIANNIS*, 905 F.2d 347 (11 Cir. 1990); *Titan Navigation, Inc. v Timsco, Inc.*, 808 F.2d 400 (5 Cir. 1987).

as regards security', and (2) 'avoiding the imposition of burdensome costs on a plaintiff that might prevent it from bringing suit'.[153] The court, in actual practice, will almost always award countersecurity on a counterclaim arising out of the same transaction where the defendant's assets have been attached pursuant to the provisions of Rule B (that is, where the defendant has been forced to give security for the main claim).

7 WRONGFUL ATTACHMENT PRINCIPLES AND REMEDIES

Damages for wrongful attachment are difficult to obtain. Damages may be awarded to the defendant only if the attachment resulted from bad faith, malice or gross negligence. (See Chapter 5, para 2.4, below, 'wrongful arrest of ships' principle under English law and common law jurisdictions.)

In ***Dolco Inv., Ltd v Moonriver Development, Ltd***,[154] the court examined a claim for damages in the form of attorney fees for a vacated Rule B attachment. Two parties brought a claim for attorney fees owing to the alleged bad faith that resulted in the Rule B attachment of their assets. The court articulated the high standard of proof necessary for recovery.

> The court does have the power to award attorneys' fees to a successful litigant when his opponent has commenced or conducted an action in bad faith, vexatiously, wantonly, or for oppressive reasons. . . . We have declined to uphold awards under the bad-faith exception absent both clear evidence that the challenged actions are entirely without color and are taken for reasons of harassment or delay or for other improper purposes and a high degree of specificity in the factual findings of the lower courts. Whether a claim is colorable, for purposes of the bad-faith exception, is a matter of whether a reasonable attorney could have concluded that facts supporting the claim might be established, not whether such facts actually had been established. Finally . . . there must be clear evidence of bad faith by a particular party before attorneys' fees may be assessed against him.[155]

The court reasoned that, based on the plaintiff's knowledge, the attachment was not obtained in bad faith because a reasonable attorney could have concluded that he or she might be able to establish the necessary elements, and damages were denied.[156]

8 CONCLUSION

Rule B attachment is a useful tool in international maritime litigation providing a litigant the ability to obtain *in personam* jurisdiction and security over an opposing party from anywhere on the globe, regardless of where the underlying merits of a dispute are being resolved. The four requirements, (detailed under para 2, above), are all that are necessary to make an ex parte motion for attachment, making Rule B a simpler option than State laws might otherwise allow.

153 *Result Shipping v Ferruzzi Trading*, 56 F.3d at 399.

154 *Dolco Inv. Ltd v Moonriver Development Ltd*, 526 F Supp 2d 451 (S.D.N.Y. 2007).

155 Ibid, at 453. In contrast, damages were granted in *Equatorial Marine Fuel Management Services Ptd Ltd v Berhad*, where the court found that the plaintiff had made egregious misrepresentations in their verified complaint stating false allegations which resulted in the attachment. *Equatorial Marine Fuel Management Services Pte Ltd v Berhad*, Slip Copy, 2011 WL 6882941 (9th Cir. 2011). *Dolco Inv. Ltd v Moonriver Development Ltd*, 526 F.Supp.2d 451 (S.D.N.Y. 2007).

156 526 F Supp 2d at 455.

CHAPTER 4

CONDITIONS OF ARREST – BENEFICIAL OWNERSHIP – THE CORPORATE VEIL

1 INTRODUCTION

As seen in Chapter 2, the Admiralty jurisdiction is statutory, with specific heads of subject matter. It has been established since 1840 (Admiralty Court Act (ACA) 1840, s 35) that the jurisdiction of the Admiralty Court could be exercised either *in rem* or *in personam*. The *in rem* claim (the action *in rem*) has a long history. The conflict between the Common Law Courts and the Admiralty Court (Chapter 1 para 1) was settled by permitting the Lord Admiral to determine disputes in matters that concerned exclusively what happened at sea, such as collisions and salvage, as well as matters that involved mortgages on ships, and questions of possession of or title in a ship.

1.1 TRULY *IN REM* AND NON-TRULY *IN REM* CLAIMS

The Lord Admiral was allowed to proceed with a suit only *in rem* against the ship in claims involving maritime liens and proprietary rights on the ship. This marked the genesis of the 'truly *in rem*' causes, in which the defendant was the ship.

The concept that the ship was the defendant in maritime claims was used to extend the jurisdiction of the court. The ACAs 1840 and 1861 extended the Admiralty jurisdiction to other maritime claims, referred to in this book as the 'non-truly *in rem*' (Chapter 1 para 5). The merger of procedure for these additional claims with the procedure for the truly *in rem* claims, coupled with the merger of all courts by the Judicature Acts (JA) 1873–1875, brought a fusion of actions so that actions both *in rem* and *in personam* could be tried in the same courts.

The distinction, however, between truly and non-truly *in rem* claims has always been maintained in the mode of exercise of jurisdiction and can be found in the present statute (as will be seen later) because different criteria for the arrest of a ship apply to each category.

1.2 CONSIDERATIONS FOR ARRESTING A SHIP

Briefly, the truly *in rem* claims can be brought against the relevant ship without considerations of who would be liable *in personam* for the claim, or who is the beneficial owner of the ship to be arrested. The maritime lien is attached to the ship (see Chapter 2 para 2), the mortgage is a legal or equitable right in a ship, claims of ownership or possession of a ship are rights in a ship.

By contrast, considerations of ownership and liability *in personam* are taken into account when a non-truly *in rem* claim is brought against the relevant ship.

Before examining these considerations in detail, it is important to understand, first, the nature and the functions of *in personam* and *in rem* claims, respectively.

2 *IN PERSONAM* PROCEEDINGS

2.1 NATURE AND FUNCTION

As the Latin tag indicates, these are claims against the person who would ultimately be liable, e.g. the owning company, or the demise charterer, or the charterer, or the person in possession or control, of the ship. By s 22(1) of the Senior Courts Act (SCA) 1981, a claim *in personam* may be brought in the High Court in all cases within the Admiralty jurisdiction of that court. The proceedings may be brought, either by a claim form *in personam*, or through an *in rem* claim.

As shipping companies are normally incorporated abroad, personal service of the *in personam* claim form cannot be effected, unless the claim falls within certain categories of claims for which permission of the court can be obtained in accordance with the Rules of Court.[1] An *in personam* claim form may also be served out of the jurisdiction, where the defendant has agreed to submit to this jurisdiction, or the claim is about salvage for services rendered within the jurisdiction.[2]

2.2 RESTRICTIONS

There are certain restrictions imposed on the *in personam* jurisdiction by statutes or Conventions in the event of multiple proceedings, which will be examined in Chapter 6.

In collision cases,[3] commencement of *in personam* proceedings is not allowed by s 22(2) of the SCA 1981 unless the defendant submits to this jurisdiction. This section provides that the High Court shall not entertain such actions unless:

(a) the defendant has his habitual residence or place of business within England or Wales; or

1 See, e.g., *The Manchester Carriage* [1973] 1 Lloyd's Rep 386; *The Craiova* [1976] 1 Lloyd's Rep 356; Ord 11, now in CPR, Pt 6, Section III (rr 6.17–6.31) and PD 6B.

2 PD 58.

3 *The World Harmony* [1969] 1 Lloyd's Rep 350; contrast *The Fagerness* (1927) 28 LlL Rep 261; PD 58.

(b) the cause of action arose within the inland waters of England or Wales or within the limits of a port of England or Wales; or
(c) an action arising out of the same incident or series of incidents is proceeding in the court, or has been heard and determined in the court.

2.3 WEAKNESSES

There are two major weaknesses of the *in personam* proceedings: first, it may be difficult sometimes to obtain permission to serve the defendant out of the jurisdiction; second, unlike the *in rem* claim, the *in personam* does not provide security for the claim, so that a judgment, if obtained, will be an empty shell unless another form of security is obtained for satisfaction of the judgment, by means of a freezing injunction, or a Rule B attachment. However, neither of these secure the claimant in the way in which the arrest of the ship does, because, first, the asset made subject to the injunction, or attachment, may not be sufficient to satisfy the claim, and, second, the defendant can obtain a variation of the injunction, by which the asset may be used for his business expenses, or the Rule B attachment may be vacated (see Chapter 3).

3 *IN REM* PROCEEDINGS

3.1 NATURE

Statutory rights by way of an action *in rem* were first created by the ACA 1840. It is illustrative to use the words of Brandon J in *The Monica S*:[4]

> Such rights were given by s 6 in respect, firstly, of claims for towage, and, secondly, of claims for necessaries supplied to foreign ships, whether within the body of a country or on the high seas. Further rights of the same kind were created by the ACA 1861. Such rights were given by s 4, in respect of claims for building, equipping or repairing a ship, if at the date of institution of the cause the ship or its proceeds were under arrest of the court; by s 5, in respect of claims for necessaries supplied to any ship elsewhere than in the port to which she belonged, unless at the time of institution of the cause any owner or part-owner was domiciled in England or Wales; by s 6, in respect of claims by holders of bills of lading of any goods carried into any port in England or Wales for damage to such goods, subject to the same proviso as to domicile of any owner or part-owner; and by s 10 in respect of masters' claims for disbursements.

Later, the Judicature (Consolidation) Act 1925 expanded the list of claims that could be enforced by an action *in rem*, and further extension was achieved by the Administration of Justice Act (AJA) 1956 and the present statute, the Supreme Court Act (SCA) 1981 (now known as the Senior Courts Act 1981) (as has already been seen in Chapters 1 and 2).

3.2 FUNCTIONS OF THE *IN REM* PROCEEDINGS

At its commencement, the *in rem* action has been regarded as being against the property, such as the relevant ship or cargo or freight, as the case may be (see para

4 [1967] 2 Lloyd's Rep 113, pp 118–119, per Brandon J.

5, below). It requires the relevant ship or property to be within the jurisdiction for it to be arrested, unless the defendant submits to jurisdiction and provides security in lieu of arrest.

The uniqueness of an *in rem* claim under English procedural law lies in its triple function, namely: by the issue of the *in rem* proceeding, the claimant (a) has his right *in rem* crystallised on the property, as regards non-truly *in rem* claims, from the time of issue of the *in rem* claim form;[5] (b) invokes the jurisdiction of the English court on the merits; and (c) obtains security for the claim. Functions (b) and (c) are discussed in Chapter 5.

3.2.1 The crystallisation of non-truly *in rem* claims on the property

It occurs at the time of the issue of the proceeding, not at the time of arrest of the ship or the service of the claim form. This was confirmed in 1967 by the decision of Brandon J, in *The Monica S*. The decision, which has remained unchallenged, has had far-reaching effect upon purchasers of second-hand ships who might have been unaware of the issue of the *in rem* proceeding at the time of purchase, unless they had done a search in the Admiralty Registry. The House of Lords' decision in *The Indian Grace*[6] (to be seen later) clarified the effect of the *in rem* proceeding.

The Monica S[7]

The owners of the cargo carried on board this ship issued a writ *in rem* in respect of alleged damage to the cargo. At the time of the issue of the writ, the ship was named *Monica Smith* and was owned by S. Before the writ was served, *Monica Smith* was transferred to T and was renamed *Monica S*. The writ was subsequently amended, accordingly, to describe the name and the defendants as 'the owners of the ship formerly called *Monica Smith* and now known as *Monica S*' and was served on the ship. T, being the new owner, entered conditional appearance and applied to set aside the writ or the service and then sold the ship to someone else. T claimed, inter alia, a declaration that no lien or charge arose against *Monica S* by reason of the issue of the writ or its service on grounds that (a) T was not the owner of the vessel at the date of issue, or when the cause of action arose; (b) T was not liable *in personam*; (c) the claim gave no rise to a maritime lien or charge on the ship. He further argued that the plaintiff had only a statutory right of action *in rem* under the AJA 1956, which was enforceable against the *res* if (i) the *res* was arrested while still owned by the person liable *in personam*, or (ii) the writ had been served before change of ownership.

Brandon J had to decide the issue whether a change of ownership of the ship, occurring after institution of proceedings but before service of process or arrest, defeated the statutory right of action *in rem*. He reviewed all previous authorities being relevant to the question and held: T was the owner of the vessel at the time of service of writ and had an interest in defending it. As a matter of principle, if creation of a substantive right could occur on arrest then it could occur at date of action brought. There was a preponderance of authority to show that the defendants' contention (that

5 *The Monica S* [1967] 2 Lloyd's Rep 113.
6 [1998] 1 Lloyd's Rep 1.
7 [1967] 2 Lloyd's Rep 113.

under the pre-1956 law a change of ownership after issue of writ, but before service or arrest, defeated a statutory right of action *in rem*) was wrong. There was no reason why, once the plaintiff had properly invoked jurisdiction under the 1956 Act by bringing an action *in rem*, he should not, despite a subsequent change of ownership of the *res*, be able to prosecute it through all its stages, up to judgment against the *res* and payment out of the proceeds.

T's motion was dismissed. Brandon J referred to the following interesting decisions, some of which, he thought, supported his view, although he accepted that none of them was exactly on the point, while others were conflicting. In *The Pacific*,[8] in which there was competition between a claim by a mortgagee and a claim for necessaries supplied to the ship, Dr Lushington, confirming that the claimant for necessaries does not have a maritime lien, stated:

> The material(s) man . . . by the mere fact of his supplying necessaries, in no case obtains the ship as a security until he institutes his suit in this court . . . [he] has not a maritime lien; for a maritime lien accrues from the instant of the circumstances creating it, and not from the date of the intervention of the court.

In *The Princess Charlotte*,[9] in which the sale of the ship took place the day after the institution of the cause and on the same day as the arrest, Dr Lushington again expounded that:

> I am of the opinion that the mere transfer of a foreign ship to a British owner does not bar the remedy . . . and, moreover, in this case, the title (of the new owner) did not commence till after the suit was instituted.[10]

In *The Troubadour*,[11] Dr Lushington repeated his view expressed in his previous decision, *The Pacific*, that the necessary man did not acquire a lien on the ship until institution of suit, so the necessary man, again, came in priority after a mortgagee whose mortgage had been registered before institution of suit.

In *The Two Ellens*,[12] the Privy Council – construing s 5 of the ACA 1861 – approved the decision in *The Pacific* and confirmed that the *res* did not become chargeable with the debt for necessaries until the suit was actually instituted. It was *the institution of suit*, Brandon J explained in *The Monica S*, commenting on another decision of the Privy Council (*The Pieve Superiore*),[13] that gave a claimant the right to arrest and the arrest provided him with security. This case, however, did not absolutely support the judge's point of view, but he gave it a liberal interpretation.

Next he examined *The Aneroid*,[14] in which Sir Robert Phillimore had said that a necessary man would have no cause of action if the sale of the ship preceded *the arrest* of the ship. Brandon J thought that, even if the judge in that case had put his mind to this point, it must have been *obiter*, as it was not relevant to the case, because, on the facts, the sale had already occurred before the institution of the proceedings *in rem*.

8 (1864) 1 Brown 7 Lush 243, p 246.
9 (1864) LJ Adm 188.
10 But, at that time, it had been thought that a claim for necessaries conferred a maritime lien, which view was overruled by the House of Lords in *The Heinrich Bjorn* (1886) 11 App Cas 270 (HL) (see below).
11 (1866) LR A&E 302.
12 (1872) LR 4 PC 161.
13 (1874) LR 3 PC 482.
14 (1877) 2 PD 189.

What persuaded Brandon J most in his judgment was the statement of Lord Watson in *The Heinrich Bjorn*,[15] who had said:

> The position of a creditor who has a proper maritime lien differs from that of a creditor in an unsecured claim in this respect – that the former, unless he has forfeited the right by his own laches, can proceed against the ship, notwithstanding any change in her ownership, whereas the latter cannot have an action *in rem* unless, at the time of its institution, the *res* is the property of his debtor.

In an earlier passage, however, Lord Watson had said that:

> The attachment of the ship by process of the court had the effect of giving the creditor a legal nexus over the proprietary interest of his debtor, as from the date of the attachment.[16]

The plaintiffs in *The Monica S* argued that this passage was directed to the time from which the security, when obtained, took effect, and not to the time when the right to obtain it accrued. This interpretation was not accepted by Brandon J, because (he said) Lord Watson in *The Sara*[17] had approved what Dr Lushington had stated about the effect of institution of suit in *The Pacific*.

In *The Cella*[18] case, at first instance, the judge referred to the correctness of *The Pacific*. At the Court of Appeal, the statements of Esher and Fry LJJ appear ambiguous, but the court was not deciding this point. Having approved the first instance decision, the Lord Justices used the word 'arrest' of the ship as being the critical time offering the greatest security for obtaining substantial justice, but, in that context, it seems they were explaining the effect of the arrest. Esher LJ referred to the alternative time of the service of the writ, but this again seems to have been in the context of explaining when the claimant can be assured of obtaining security. Lopes LJ, said that, from the time of arrest, the ship is held by the court to abide the result of the action, and the rights of the parties must be determined by the institution of the action and cannot be altered by anything that takes place subsequently. Brandon J preferred the words used by Lopes LJ, in that, *it is from the institution of suit that the rights of the parties are determined*.

The Cella concerned the right *in rem* of a ship-repairer, who had issued a caveat against release of the ship (which had previously been arrested by its master) as against the liquidator of the ship-owning company. Brandon thought that, in view of the caveat, neither Esher LJ nor Fry LJ put their mind to the effect of the issue of the writ. In a much later decision, *The Zafiro*[19] (to which Brandon J referred), the court upheld the claim of a necessary man who had issued the writ prior to the winding up of the company and later secured his claim on the ship by arrest against the liquidator of the company.[20]

15 (1886) 11 App Cas 270, p 276.

16 Ibid, p 276.

17 (1889) 14 App Cas 209: this case is now wrong on the point that the master does not have a maritime lien for disbursements on account of the ship.

18 (1888) 13 PD 82.

19 [1960] P 1.

20 However, when maritime creditors are in competition with the creditors of the company, there must have been an arrest of the ship belonging to the company prior to the commencement of the winding-up proceedings for maritime claims, other than maritime liens and mortgages, to be given priority over the company's unsecured creditors. Otherwise the arrest will be void for being equivalent to 'sequestration' under s 128(1) of the Insolvency Act 1986. The discretion of the judge in the Companies Court is very important in this context. Issue of a caveat against release of the ship, which has been arrested by another

Two further decisions, *The James W Elwell*[21] and *The Colorado*,[22] seem to stress the incident of arrest of the ship as having the effect of creating security on the ship for a non-maritime lien claimant. Brandon J commented about these decisions that the point of distinction between issue of writ and arrest of the ship was not in issue.

Finally, Brandon J asserted that Sir Boyd Merriman, in *The Beldis*,[23] supported his view. Sir Boyd was commenting on the contrast being made by the House of Lords' decision, in *The Heinrich Bjorn*, between the security aspect of maritime liens, which does not depend on bringing a suit, and other maritime claims, which need the institution of suit in order to be attached on the ship.

Brandon J concluded that seven of the decisions he reviewed supported or tended to support his view, six were against, and one was neutral. On closer examination, however, it could be argued that six[24] of them seemed to support his view that the institution of suit causes a statutory right *in rem* to accrue on the ship. Three[25] decisions were not clear, or were not deciding the point and seemed to equate arrest with institution of suit. Five[26] referred to the incident of arrest, and one[27] was neutral.

It is important, however, to note that the procedure of the court between 1859 and 1874 (at which time the decisions that supported Brandon J's view were decided) required that a cause was instituted by having the cause written in the book. If the cause was *in rem*, a warrant for the arrest of the *res* was taken out, served and executed. In practice, arrest followed very soon, usually within one or two days of institution, and there was not then any separation between service of process and arrest, both being carried out simultaneously.[28] There should be no surprise, therefore, that, in some of the decisions referred to by Brandon J, the issue of the writ and the arrest seemed to be equated by the judges. However, these authorities had been decided before the AJA 1956, and Brandon J was more concerned with the construction of the 1956 Act than previous authorities.

The judge thought that the passing of the Act made his argument stronger by reason of the statute's express requirements. In particular, s 3(4) provided:

> In the case of any such claim as is mentioned in para (d) to (r) of s 1(1), being a claim arising in connection with a ship, where the person who would be liable on the claim in an action *in personam* was, when the cause of action arose, the owner or charterer of, or in possession or in control of, the ship, the Admiralty jurisdiction of the High Court . . . may be invoked by an action *in rem* against (a) that ship, if at the time *the action is brought*, it is beneficially owned as respects all the shares therein by that person . . . (emphasis added)

maritime claimant, will have the same effect, provided it is issued before the commencement of the winding-up proceedings: *Re Aro Co Ltd* [1980] Ch 196 (CA); for the extent of the discretion of the court, which will depend on the circumstances of each case, see *The Bolivia* [1995] BCC 666.

21 [1921] P 351.

22 [1923] P 102 (CA).

23 [1936] P 51.

24 *The Pacific* (1864) 1 Brown 7 Lush 243; *The Princess Charlotte* (1864) LJ Adm 188; *The Troubadour* (1866) LR A&E 302; *The Two Ellens* (1872) LR 4 PC 161; *The Sara* (1889) 14 App Cas 209; *The Cella* (1888) 13 PD 82: but, in the Court of Appeal the arrest or service was mentioned.

25 *The Pieve Superiore* (1874) LR 3 PC 482; *The Heinrich Bjorn* (1886) 11 App Cas 270 (CA) and (HL); *The Beldis* [1936] P 51 (CA).

26 *The Cella* (1888) 13 PD 82 (CA); *The Aneroid* (1877) 2 PD 189; *The James W Elwell* [1921] P 351; *The Colorado* [1923] P 102 (CA); *The Zafiro* [1960] P 1.

27 *The Igor* [1956] 2 Lloyd's Rep 271.

28 Summary given by Brandon J in *The Monica S* [1967] 2 Lloyd's Rep 113, p 119 (see above).

Thus, the critical time under the Act is when the 'action was brought' against the relevant ship (i.e. the time of the issue of the proceeding), which causes the statutory right of action *in rem*[29] to accrue upon it irrevocably and, hence, be enforced against that ship, even if afterwards the ship is transferred to a bona fide purchaser, who buys the ship for value and without knowledge of the issue of the writ.[30] For example, in *The Afala*,[31] which was decided under the equivalent Scottish statute, Lord Cameron held that the arrest of the ship by the ship agents was inept because the third-party purchaser of the ship demonstrated that, prior to the issue of the proceedings, he had entered into a contract to buy the ship, albeit that at the date of the arrest the delivery of the ship had not been made.

3.2.2 Contingent right of security

In essence, the gist of Brandon J's decision is that, with the institution of suit *in rem*, a contingent right of security is created upon the ship which will be brought into effect by the arrest of the ship, regardless of change of ownership between the issue and the arrest. That was, he thought, the intention of the statute as derived from the words '*action is brought*', and he disregarded arguments by the defendants' counsel about the meaning of previous authorities and the need to protect innocent purchasers. On balance, Brandon J preferred to protect maritime claimants, because a purchaser would be able to rely on the contractual indemnity obtained from the seller, if he did not become insolvent by the time it was discovered that the ship bought was encumbered by maritime liens[32] or other maritime claims giving cause for arrest of the ship. As far as statutory rights *in rem* are concerned, a purchaser can carry out a search in the Admiralty Registry.[33]

3.2.3 'Action is brought' – meaning

The foundation of *The Monica S* would crumble if the words 'action brought'[34] in the statute meant the service of the *in rem* proceedings on the ship, or the arrest of the relevant ship. Brandon J said on this point that:

29 The judge also preferred the expression 'statutory right of action *in rem*' to the expression 'statutory lien', for it seemed to him to be a more accurate description of the right in question. But, he also thought that 'statutory lien' was a convenient expression if it was used to mean no more than an irrevocably accrued statutory right of action *in rem*.

30 It has been the practice of solicitors involved in the sale and purchase of ships to conduct a search in the Admiralty Registry, as part of the due diligence exercise, to see whether there are any outstanding claims *in rem* issued against the ship to be bought. PD 61, para 3.12 provides that any *in rem* form may be searched, whether it has been served or not.

31 [1995] 2 Lloyd's Rep 286, SCS (Outer House).

32 Maritime liens cannot be registered, so there is no means of finding out about them from a public record, unless the purchaser inspects the log books of the ship, in case there are incidents recorded which might have given rise to maritime liens (see further Ch 8, Vol 2).

33 See fn 30.

34 See also 'court is seised' and 'pending proceedings' under the EU jurisdiction regime and the relevant decisions in Ch 7, paras 4.2.3, 4.2.4, below. Furthermore, the construction of these words must be in context; so it was held by Phillips LJ in *Milor Srl and Others v BA plc* [1996] QB 702, in which he construed the words 'brought' used in the Warsaw Convention for the Unification of Certain Rules relating to International Carriage by Air, and he said:

> I accept that, in the appropriate context, the expression 'to bring an action' can naturally mean 'to commence an action'. To find such a context, one need look no further than the next article of the

It seems to me that it would be strange if a statutory right of action *in rem* only became effective, as against a subsequent change of ownership of the *res*, upon arrest of the *res*, and yet, by the same statute, as conferred the right of action, arrest was in many cases prohibited.[35]

Brandon J, who was a very experienced Admiralty judge with an insight into the realities of shipping commercial practices, envisaged that ship-owners would try to shed their liabilities by selling their ship (against which a writ *in rem* had been issued) to avoid the consequences, if the effect of the issue of the writ was not to crystallise the claim on the ship from the time of issue. It seems that policy considerations were very important in his decision, which has remained unchallenged since 1967.[36] He has been vindicated by the House of Lorde in *Canada Trust* (see Chapter 7 at 4.2.3, below).

3.2.4 'Jurisdiction is invoked' – meaning

It should be noted that, shortly after the decision of Brandon J, the phrase 'the jurisdiction may be invoked' of s 3(4) of the 1956 Act (which preceded the words 'when the action is brought') was construed by the Court of Appeal in *The Banco*.[37]

Megaw LJ thought that the jurisdiction was invoked when the writ was served on the one ship chosen, and not at its issue (when more than one ship can be named in the writ). Lord Denning MR, in the same case, said that it was when the writ was served and a warrant of arrest was executed, because it was an action against the very thing itself. (This is now considered to be wrong in the light of related decisions determining when a court is seised under the Brussels jurisdiction regime (see Chapter 7).) Cairns LJ was in the minority and agreed with what Brandon J said in *The Monica S*. Brandon J, in his subsequent decision, *The Berny*,[38] observed that, in the context of s 3 of the AJA 1956, the expressions used, 'when the action is brought' and 'when the jurisdiction is invoked', were not intended to be the same thing. To support this, he drew a prima facie inference from the statute, which used both phrases in different parts of the sub-sections. Relying on older authorities,[39] he said that the jurisdiction of the court was invoked by the service and not by the issue of the writ. (It will be seen that both phrases are now interpreted to mean the 'issue of proceedings' – see Chapter 7, paras 4.2.3 and 4.2.4.)

However, it should be observed that the draftsman of s 21 of the SCA 1981, which replaced s 3 of the 1956 Act, has used the words 'action may be brought'[40] in all sub-sections. To avoid confusion, the words 'jurisdiction may be invoked' have been

Convention. Article 29 provides: 'The right to damages shall be extinguished if an action is not brought within two years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped.' Plainly in Art 29 'brought' means 'instituted or commenced'. The natural meaning of 'brought' will, however, depend upon its context. If a litigant says, 'I brought a successful action', the natural meaning of 'brought' embraces both the initiation and the pursuit of the action. In my judgment, the context of Art 28 is one in which 'brought' naturally has the latter meaning, rather than meaning no more than 'instituted'.

35 *The Monica S* [1967] 2 Lloyd's Rep 113, p 131.

36 The decision was approved by the Court of Appeal in *Re Aro Co Ltd* [1980] 1 Ch 196, where it was held that a plaintiff by commencing an action *in rem* against a ship, even if the writ has not been served or the ship has not been arrested, puts himself in the position of a secured creditor.

37 [1971] P 137.

38 [1977] 2 Lloyd's Rep 533.

39 *Société Générale de Paris v Dreyfus Brothers* (1885) 29 Ch D 239 and *The Hagen* [1908] P 189.

40 In PD 61, para 5.3(2)(c), the word 'issued' instead of 'brought' is used.

eliminated. Therefore, it should follow that the jurisdiction of the court is seised from the time of the issue of the *in rem* proceeding. In line with this, in the context of the Brussels I Regulation, Art 30, or Art 32 of the Recast (see Chapter 7), the court's jurisdiction, whether *in personam* or *in rem*, can only be invoked or be seised by the issue of proceedings. Prior to the amendment of the Regulation, it had been held by the relevant authorities that the jurisdiction of the court was seised from the service of the writ. The House of Lords in *The Indian Grace* (No 2), see under para 3.5, below, followed the same approach, but it should now be inconsistent with the EU new approach (see how this decision might have been affected by subsequent decisions in this area in Chapter 7).

3.3 THE DEFENDANT IN THE *IN REM* PROCEEDINGS

Historically, there have been two schools of thought.

The one viewed the action *in rem* as being purely against the *res* and developed from the concept of maritime liens, which attach on the ship from the moment of the incident that gave rise to the claim (Chapter 2 para 2). In other words, the *res* has been considered to be the 'personified' defendant – hence, the 'personification theory' (Chapter 1 para 5.1.3). This derived from *The Bold Buccleugh*[41] in which the Privy Council (Sir John Jervis) had held that the action *in rem* was not a procedural device for obtaining personal jurisdiction over ship-owners, but a unique proceeding directly against the ship.

The other school of thought viewed the *in rem* action as a means of compelling the defendant liable for the claim to appear in court and defend the claim personally ('the procedural theory'). This theory emanated from *The Dictator*[42] when Sir Francis Jeune had stated that an *in rem* action aims at the person interested in the ship who becomes personally liable after appearance, or acknowledgment of service, beyond the value of the ship, if the claim exceeds its value.

The procedural theory gradually gained preponderance over the personification theory among English judges, particularly since 1892, when Sir Francis Jeune decided *The Dictator*,[43] which, in fact, concerned the enforcement of a maritime lien claim for salvage, that is, a truly *in rem* claim. The owners of the ship had put up bail, but the sum awarded exceeded the bail. The question was, whether the owners were personally liable for the balance of the judgment, which exceeded the bail amount, and it was held that they were.

The decision was severely criticised by Wiswall,[44] who claimed with audacity that Sir Francis Jeune did not cite any authority for his proposition, which was in complete contradiction to what was thought at the time by other eminent judges. In particular, it has been argued by Wiswall that Jeune J confused the action *in rem* with the maritime attachment,[45] which was a procedural device designed to compel the appearance of a defendant in an action *in personam* (a jurisdiction *in personam*), if he was absent, by

41 *The Bold Buccleugh* (1850) 7 Moo 267, p 282.
42 *The Dictator* [1892] PD 304.
43 [1892] PD 304.
44 See Wiswall, FL (Jr), *Development of Admiralty Jurisdiction Since 1800*, 1970, CUP.
45 See Ch 1, para 1, above.

seizing his property. This was by no means a proceeding *in rem*. 'It is this crucial distinction,' the author says, 'which was so deftly grasped by Sir John Jervis in *Bold Buccleugh*[46] and so unfortunately ignored by Sir Francis Jeune.'[47] However, the procedural theory prevailed except that it was not accepted in two decisions,[48] which concerned truly *in rem* claims. There have been no other authorities that are inconsistent with *The Dictator*.[49]

In modern times, the effect of the procedural theory, as was pronounced by the House of Lords in *The Indian Grace* (below), is that the real defendant in the *in rem* proceedings is the person interested in the ship who appears in the action to defend the asset and the claim.

Before examining *The Indian Grace*, it is important to summarise the features of the *in rem* proceedings.

3.4 TRADITIONAL FEATURES OF THE *ACTION IN REM*

The *in rem* proceeding is a powerful weapon available to claimants for:

(a) obtaining security for the claim;
(b) founding jurisdiction on the merits of the claim subject to restrictions imposed by the Brussels Regulation (examined in Chapter 7);
(c) giving effect to a maritime lien, an already accrued right on the ship, which dates back to the date of its creation;
(d) creating a contingent security right on the ship with regard to a non-truly *in rem* claim from the time of the issue of the *in rem* claim form (as seen in 3.2.1 and 3.2.2, above);
(e) limiting liability up to the value of the ship arrested.

A court sale by the Admiralty Marshal, consequent to judgment in the action *in rem*, extinguishes all encumbrances on the ship and gives a clean title to the purchaser.

In both truly and non-truly *in rem* claims, the value of the ship has always been the limit for the satisfaction of maritime claims. Prior to *The Indian Grace*, in the absence of acknowledgment of service or submission to jurisdiction, the *in rem* proceeding remained solely *in rem*,[50] and no personal jurisdiction over the owner, or the person liable *in personam*, would be created by the service of the writ on the ship. The action would become a hybrid action (*in rem* and *in personam*) from the time of acknowledgment of service.

46 (1850) 7 Moo 267.

47 See Wiswall, op. cit. fn 44, Chapter 6, 'The evolution of the action *in rem*', p 165.

48 *The Longford* (1889) 14 PD 34, which was not cited in argument in *The Dictator*, nor was it considered by the Court of Appeal in *The Gemma* [1899] P 285, which approved *The Dictator* [1892] PD 304. In *The Burns* [1907] P 137, Moulton LJ repudiated the procedural theory and in effect overruled Jeune J's decision on the point.

49 Wiswall, op. cit., fn 44, p 198.

50 *The Nordglimt* [1988] QB 183; *The Maciej Rataj (sub nom The Tatry)* [1992] 2 Lloyd's Rep 552 (CA): after acknowledgment the action continued as a hybrid action, being both *in personam* and *in rem*, but without losing its previous *in rem* character; in *The Anna H* [1995] 1 Lloyd's Rep 11 (CA) the same principle was followed.

3.5 EFFECT OF *THE INDIAN GRACE (NO 2)*[51] ON THE *ACTION IN REM*

It may be argued that the effect of this decision upon the features of the *action in rem*, as understood in the past, is a matter of interpretation of the decision.

3.5.1 Factual background

A cargo of munitions was carried on board the vessel from Sweden to Cochin, India. During the voyage, fire broke out in No 3 hold, necessitating her to divert to the nearest port for inspection. Some shells and charges had to be jettisoned. The remaining cargo was repacked and re-stowed. Some of the boxes of the cargo showed damage, but the vessel resumed her voyage and, finally, discharged the cargo at destination on 4 September 1987. The Ministry of Defence, on behalf of the Indian Government, wrote to the defendants claiming a total loss of £2.6 million. After a year, on 1 September 1988, a claim *in personam* was brought in the Indian court by the Indian Government, seeking damages from the owners of the ship only for the undelivered (that is, jettisoned) cargo for £7,000, on the ground of negligence and carelessness of the defendants while the cargo was in transit.

On 25 August 1989 (prior to judgment being given by the Indian court), the claimants brought an action *in rem* in England. On 16 December 1989, judgment was delivered in India. On 4 May 1990, *The Indian Endurance*, a sister ship of *The Indian Grace*, was arrested, and the owners submitted to the English jurisdiction and provided security for the claim, and the ship was allowed to sail. The claimants amended their claim, claiming damages for £2.6 million (in respect of the damaged cargo in hold No 3) on the ground of breach of contract by the owners of the ship in failing to make the ship seaworthy and failure to take reasonable care in the stowage and carriage. The owners pleaded, originally, issue estoppel as a defence, and were later allowed to amend their defence to rely on s 34 (*res judicata*) of the Civil Jurisdiction and Judgments Act (CJJA) 1982. Only s 34 is relevant here.

Sheen J struck out the English action because the cause of action was the same as that on which the claimants relied when they obtained a judgment in India. Section 34 was an absolute bar to it. The Court of Appeal dismissed an appeal by the claimants. At the House of Lords (*Indian Grace No 1*),[52] it was raised for the first time that the judgment of the Indian Court was not a judgment between the same parties as the parties in the *in rem* action. Thus, the case was remitted to the judge to determine this issue. Clarke J (*Indian Grace No 2*) held that the *in rem* action was against the ship, whereas the Indian action was *in personam*. Therefore, s 34 did not apply to bar the English *in rem* action. The Court of Appeal reversed this decision on the ground that the owners of the vessel served with the action *in rem* were the same persons as the defendants in the Indian action. The owners appealed.

51 [1998] 1 Lloyd's Rep 1 (HL).
52 *The Indian Grace (No 1)* [1993] AC 410, [1993] 1 Lloyd's Rep 387.

3.5.2 *Res judicata*[53]

The central issue for the House of Lords was whether a judgment obtained against the owners of the ship in India for shortage of cargo was a bar to the *in rem* claim brought by the claimants in England, by virtue of *res judicata* on the ground of s 34, which provides that:

> . . . no proceedings may be brought by a person in England and Wales . . . on a cause of action in respect of which a judgment has been given in his favour in proceedings between the same parties, or their privies . . . in a court of an overseas country, unless that judgment is not enforceable or entitled to recognition in England and Wales.

Before deciding the issue, the House had to consider whether the action *in personam* in India was between the same parties as the action *in rem* in England for the purpose of s 34.

It was held that, for the purpose of s 34, an action *in rem* was an action against the owners from the moment the Admiralty Court was seised with jurisdiction. It was further held that the court was seised, or its jurisdiction was invoked, *by the service of the writ*, or where the writ was deemed to be served, as a result of acknowledgment of the issue of the writ by the defendant before service. From that moment, the owners were parties to the proceedings *in rem*, and s 34 was a bar to the action *in rem*.[54]

Lord Steyn, who delivered the main judgment, sought support for this conclusion from previous authorities, starting from a historical perspective of the action *in rem*.

3.5.3 The historical background[55]

During the struggle for power between the Common Law Courts and the High Court of Admiralty, the former, effectively, blocked the assumption of *in personam* jurisdiction by the High Court of Admiralty. This was done by writs of prohibition, which did not, however, extend to the Admiralty jurisdiction over the ship. Admiralty practitioners and judges used the concept that the ship was a defendant in an action *in rem* as a means of defending and extending the jurisdiction of the High Court of Admiralty. An enlarged view was taken of what constituted a maritime lien. The personification theory flourished. But, this struggle for power was ended by the JAs in 1873–1875. Although the ship was still regarded as both the source and limit of liability, the personification theory, gradually, fell into decline. Four reasons contributed to this decline (Lord Steyn said): first, the action *in rem* was permitted in new categories of claims, not just maritime liens; second, there was a new procedure

53 Cf. *United Enterprises Corporation and Anr v STX Pan Ocean Co Ltd (The Wisdom C)* [2008] 753 LMLN 2: The vessel was arrested to provide security for a claim being referred to London arbitration. Owners applied to set aside the arrest on the basis that the vessel was previously arrested in Italy and gave rise to the defence based on *res judicata*, preventing the vessel from being rearrested. However, because the Italian court had lifted the arrest, the court held that, as there was no decision on the merits, there was no '*res judicata*'.

54 Clarke J, at first instance – who followed Moulton LJ in *The Burns* [1907] P 137 (above): that 'the action *in rem* is against the ship itself' and Hobhouse J, in *The Nordglimt* [1988] QB 183 (above): that 'the action *in rem* is against the ship until the defendant acknowledges service of the proceeding' – held that s 34 was inapplicable because the parties in the two sets of proceedings were different at the inception of the proceedings and before acknowledgment of service.

55 For a more extensive historical perspective, see, also, Ch 1, above.

introduced in 1883 by which the owners of the vessel were named as defendants. It was easier to regard an action *in rem* as an action against the owners of the vessel. Thus, he said: '. . . the procedural theory stripped away the form and revealed that, in substance, the owners were parties to the action *in rem*.'[56] Third, until the JAs, it was not possible to combine actions *in rem* and *in personam*. Fourth, judges of the Admiralty Court, with its non-common law roots, were more sympathetic to the personification theory than those trained in the common law. But the breakthrough, Lord Steyn said, came with *The Dictator*[57] and quoted the well-known passage of Sir Francis Jeune, in that:

> . . . the action *in rem* . . . not only determines the amount of the liability, and in default of payment enforces it on the *res*, but is also a means of enforcing against the appearing owners, if they could have been made personally liable in the Admiralty Court, the complete claim of the plaintiff, so far as the owners are liable to meet it.

Lord Steyn was convinced of the change in the character of the action *in rem* and said:

> . . . since *The Dictator*, the law has been that once the owners enter an appearance (or in modern phraseology when they acknowledge issue of the writ) there are two parallel actions: the action *in personam* and the action *in rem*. From that moment the owners are defendants in the action *in personam*.[58]

To complete the historical perspective, he referred to all other cases supporting *The Dictator*. For example, he referred to Scrutton LJ in *The Tervaete*[59] who had affirmed the procedural view, thus: '. . . the action *in rem* was not based upon the wrongdoing of the ship personified as an offender, but was a means of bringing the owner of the ship to meet this personal liability by seizing his property.'[60]

Further, he stressed that the Court of Appeal in *The Gemma*[61] endorsed *The Dictator*, which prevailed, despite the support of the personification theory by Moulton LJ in another Court of Appeal case, *The Burns*.[62] In addition, he said the House of Lords, in *The Cristina*,[63] unambiguously rejected the personification theory and adopted the view that, in an action *in rem*, the owners were the defendants.[64]

3.5.4 The sovereign immunity cases

Lord Steyn next relied on the sovereign immunity cases, such as *The Parlement Belge*,[65] *The Cristina*[66] and *The Arantzazu Mendi*,[67] which, he said, established that the

56 *The Indian Grace (No 2)* [1998] 1 Lloyd's Rep 1, pp 6, 7.
57 [1892] P 304, p 320.
58 *The Indian Grace (No 2)* [1998] 1 Lloyd's Rep 1, p 7.
59 (1922) 12 LlL Rep 252, p 254.
60 This passage harks back to the maritime attachment which was possible through an action *in personam* mentioned by Wiswall, op. cit., fn 44.
61 [1899] P 285, p 291.
62 [1907] P 137, p 149.
63 (1938) 60 LlL Rep 147.
64 Lord Steyn qualified the position with regard to maritime liens, to which the procedural theory would not be appropriate; but, since *The Indian Grace* was not concerned with a maritime lien, he put this issue to one side.
65 (1880) 5 PD 197.
66 [1938] AC 485 (HL).
67 (1939) 63 LlL Rep 89.

sovereign is directly impleaded by the service of the action *in rem* on its vessel. Therefore, the sovereign immunity principle then applied.

3.5.5 Other relevant authorities

He quoted Lord Brandon, in *The August 8*:[68]

> . . . once a defendant in an Admiralty action *in rem* has entered an appearance in such an action, he has submitted himself personally to the jurisdiction of the court, and the result of that is that, from then on, the action continues against him not only as an action *in rem* but also as an action *in personam* . . .

Furthermore, in the context of the Brussels Convention,[69] he drew support from *The Deichland*,[70] in which the Court of Appeal had held that the owner of the vessel who is served with the proceedings *in rem* is 'sued' for the purpose of Art 2 of the Brussels Convention. In this context, the European Court of Justice (ECJ) had previously ruled, in *The Maciej Rataj (sub nom The Tatry)*,[71] that an action *in rem* and an action *in personam* involved the same cause of action and the same parties for the purpose of Art 21 of the Brussels Convention 1968.

Against this background, Lord Steyn concluded that, as Art 21 and s 34 had similar wording, it would be curious if one were to give a different meaning in interpreting the words 'between the same parties', which appear in both provisions. He said that, given the decision of the ECJ in *The Tatry*, *The Nordglimt*, on which Clarke J relied in *The Indian Grace*, at first instance, was no longer good law.

3.6 FLAWS OF THE DECISION

The flaws in the reasoning in *The Indian Grace* concern, to a certain extent, the misapplication of previous decisions and are mentioned below only for the purpose of examining any possible adverse effect of the decision upon the personal liability of the ship-owner concerned. As seen earlier, *The Monica S*, which was not referred to in *The Indian Grace*, had affirmed the well-known principle of English law that, before the defendant acknowledges service, the action *in rem* is regarded to be against the ship. It had never been disputed by any authorities that the person interested in the ship would become the defendant from the time he took the procedural step to acknowledge service and not from the early time of the service. The distinction between these two times is of great significance, because an owner, who does not intend to get involved, personally, in the *in rem* proceedings, has always had the option not to take the procedural step to acknowledge service of the proceedings. Therefore, any judgment given on the claim would be enforced against the ship only. When the action becomes also *in personam* (whereupon it is then a hybrid *in rem* and *in personam*), the judgment could, in theory, at least, be enforced against any personal assets of the defendant, and, for this reason, perhaps, it was provided in previous

68 [1983] 1 Lloyd's Rep 351, p 355.
69 The Brussels I Regulation and its Recast are discussed in Chapter 7 with the relevant cases.
70 [1989] 2 Lloyd's Rep 113.
71 [1995] 1 Lloyd's Rep 302 (ECJ) (discussed in Ch 7).

authorities that the defendant had the choice whether or not to acknowledge service (*The Nordglimt*).

3.6.1 The misapplication of the procedural theory decisions[72]

There is no doubt that, despite the origin of the action *in rem*, which was distinct from the old procedure of the maritime attachment (by which the defendant was compelled to appear in court in an action *in personam*), the procedural theory of the action *in rem*, as developed since the decision of Jeune J in *The Dictator*, prevailed. The problem resulting from *The Indian Grace* stems from the misapplication of the cases that advocated this theory.

All the cases upon which the House of Lords relied in *The Indian Grace* consistently referred to the 'appearance' of the defendant in the action *in rem* as being the trigger of creating a personal jurisdiction against the defendant. It should be noted that the procedure of 'appearance' used in old times has, in modern times, been equated to the procedure of 'acknowledgment' of service, or to acknowledgment of the issue of the proceedings (which would have been a 'deemed' service).

The House of Lords, in *The Indian Grace*, instead of applying the *ratio decidendi* and the *dicta* quoted from those authorities which expressly referred to the 'appearance' of the defendant, replaced the word 'appearance' with 'service' of the writ, or equated the word 'appearance' only with 'acknowledgment of issue of the writ' and not also with acknowledgment of service. Although the service of the proceedings may compel the defendant to appear, he has not yet, at that time, taken a step in the proceedings, unless he had already chosen to acknowledge the issue of the proceedings.

The fact that there was a consistent reference in the old decisions to the 'appearance' of the defendant, which was regarded as the incident creating personal jurisdiction over him, is clearly shown from the following extracts of the relevant judgments.

In particular, Smith LJ had pointed out in *The Gemma*[73] that:

> . . . if the defendants had not appeared, and the proceedings had throughout been solely *in rem*, the judgment . . . according to the practice of Admiralty Court, would have been not . . . condemning the defendants . . . but would have condemned the ship alone.

And, in *The Beldis*,[74] Sir Boyd Merriman said that:

> It is true that, unless the defendant appears to an action *in rem*, satisfaction of the judgment is limited to the value of the *res*, but if the defendant appears, the action proceeds *in personam*, as well as *in rem*. In such a case, as where the action is brought *in personam* in the first instance, execution can issue against any property of the defendant, including any surplus value of the *res* over and above the amount for which bail has been given.

Moulton LJ, in *The Burns*,[75] commented on *The Dictator* and *The Gemma* as follows:

> . . . both of them treat the appearance as introducing the characteristics of an action *in personam*. In other words, it is not the institution of suit that makes it a proceeding *in personam*, but the appearance of the defendant.

72 See, also, in this respect a critique of *The Indian Grace* by Teare, N (QC), 'The Admiralty action *in rem* and the House of Lords', 1998 LMCLQ 33, p 39.

73 [1899] P 285, p 291.

74 [1936] P 51, pp 75–76.

75 [1907] P 137, p 148.

In the same vein of thinking, Hobhouse J, in *The Nordglimt*,[76] pointed out the time at which the action *in rem* would be enforceable also *in personam*, and said:

> Unless and until anyone appears to defend an action *in rem*, the action proceeds solely as an action *in rem* and any judgment given is solely a judgment given against the *res*. It is determinative and conclusive as against all the world in respect of the rights in the *res*, but does not create any rights that are enforceable *in personam*. An action *in rem* may be defended by anyone who has a legitimate interest in resisting the plaintiff's claim on the *res*. Such a person may be the owner of the *res* but, equally, it may be someone who has a different interest in the *res* which does not amount to ownership, or, again, it may be simply someone who also has a claim *in rem* against the *res* and is competing with the plaintiff for a right to the security of a *res* of an inadequate value to satisfy all the claims that are being made upon it . . . Unless and until a person liable *in personam* chooses to defend an action *in rem*, the action *in rem* will not give rise to any determination as against such person or any personal liability on his part, nor will it give rise to any judgment which is enforceable *in personam* against any such person.[77]

Apparently, this was consistent with the authorities on which Lord Steyn relied in *The Indian Grace*, but, nevertheless, he declared, overruling Clarke J (as he then was), that *The Nordglimt* was no longer good law.

There is further force in favour of the argument that the procedural theory was misapplied deriving from the Court of Appeal's decision in *The Aro*,[78] in which Brightman LJ had firmly stated:

> The service of the writ adds nothing to the status of the claimant vis-à-vis the vessel sued. This is established by the issue of the writ. As between the plaintiff and the defendant, service merely causes time to commence running within which the defendant must enter appearance in order to avoid being a respondent to a motion for judgment by default.[79]

3.6.2 The sovereign immunity cases[80] – an inappropriate parallel

These decisions apply provisions of sovereign immunity statutes, which aim to protect a foreign sovereign from being compelled to come to this court. Briefly, the statutes provide that neither *in personam* nor *in rem* proceedings are permitted to be issued against a foreign sovereign, if its ships do not trade for commercial purposes. Scrutton LJ had explained, in *The Jupiter*,[81] the position of a foreign sovereign by referring to the old practice of the Admiralty Court:

> The appearance of a person interested in property used to be enforced, either by seizing him to make him appear, or by seizing his ship, or by seizing his property other than his ship; but, the object of all the processes of seizing was to make the man appear, so that he might be a personal defendant to the action. If he did appear, he at once became personally liable to the judgment of the court. If he did not appear, the court, having given him the opportunity of appearing, might take away his property . . . The foreign government, which does claim a right or interest in the ship, must do one of three things. First, it may appear to defend, but it cannot be compelled to appear; secondly, if it were not to appear and let the action go on, the court

76 [1987] 2 Lloyd's Rep 470.
77 [1987] 2 Lloyd's Rep 470, p 482.
78 [1980] 2 WLR 453, p 465, which was not referred to at the hearing of *The Indian Grace*.
79 Ibid.
80 *The Parlement Belge* (1880) 5 PD 197; *The Cristina* (1938) 60 LlL Rep 147; *The Arantzazu Mendi* (1939) 63 LlL Rep 89.
81 [1924] P 236, p 243.

might feel able to forfeit the property of a foreign sovereign; thirdly, it can come to the court and say: 'I am not going to discuss what my title is; I say I am a foreign sovereign; I claim a right in this property, and you cannot compel me to come to your court to show you that I have good cause for saying that it is my property.'

Whether it is the issue of proceedings, or the service upon the foreign sovereign, or the arrest of a ship of a foreign sovereign that impleads it, the foreign immunity cases are not concerned with when the foreign State becomes a party to the *in rem* proceedings. They are concerned with the fact that 'the writ commands an appearance to be entered', and that alone would constitute impleading of the foreign sovereign.[82] In any event, in most cases referred to by Lord Steyn, the 'appearance' of the foreign sovereign, rather than the service of process upon it, was more relevant to the issue of impleading. There is ample evidence of this in this group of decisions, as well as, for example, in the above citation and in the speeches of both Lord Atkin and Lord Wright in *The Cristina*[83] (in which the ship had been arrested). In particular, Lord Atkin said:

In any case, when they do appear as defendants, and as such I conceive that they are impleaded. And when they cannot be heard to protect their interest unless they appear as defendants, I incline to hold that . . . they are by the very terms of the writ impleaded.

3.6.3 Art 21 of Brussels Convention[84] and s 34 of the CJJA 1982

In ***The Deichland***,[85] in which one of the issues was whether the rules of the Brussels Convention applied to actions *in rem* when the court had to determine *lis pendens* under Art 21 of the Brussels Convention, it was explained by Sir Denys Buckley that before unconditional appearance in the *in rem* proceedings the defendant did not become liable *in personam*.[86] Neill LJ also said that 'it is Deich who is interested in contesting liability and against whom the plaintiff would wish to proceed *in personam* if an *appearance is entered*'.[87] Only for the purpose of the Convention, was it held that it was impossible to conclude that Deich was not being sued, even though, at that time, the proceedings were solely *in rem*. So, the action *in rem* and the action *in personam* were regarded, for the purpose of Art 21, as being between the same parties from the time of service. Nevertheless, it was recognised that the action *in rem* had special characteristics and that they could not affect the application of the rules of the Brussels Convention. Neill LJ said in this context:

By English law an Admiralty action *in rem* has special characteristics . . . I do not consider, however, that the rules relating to such actions and governing the rights of a plaintiff to levy execution can affect the substance of the matter when the court is faced with an international convention designed to regulate the international jurisdiction of national courts.[88]

A similar statement was made by the ECJ in *The Tatry*.

82 *The Cristina* [1938] AC 485 (HL), per Lord Wright.
83 [1938] 60 LlL Rep 147, pp 157 and 163.
84 Presently, Art 27 of the Brussels I Regulation, which will be Art 29 of the Recast when it becomes applicable in 2015.
85 [1990] 1 QB 361, the Court of Appeal held that the owner of the vessel, which is served with the proceedings *in rem*, is 'sued' for the purpose of s 2 of the CJJA 1982.
86 Ibid, p 389.
87 Ibid, p 373.
88 [1990] 1 QB 361, pp 373–374.

3.7 WHAT IS THE EFFECT OF *THE INDIAN GRACE*?

In the previous editions, extensive analysis of the issues concerning the effect of this decision was made, but it, now, appears that such issues may be merely academic. Therefore, a summary of the effect of this case is only offered here.

Despite the attempt of the House of Lords to redefine the 'action *in rem*', the issue in the case was *res judicata* under s 34 of the CJJA 1982, and the *in rem* proceedings were not concerned with the enforcement of maritime liens, or accrued statutory rights *in rem*, or the right of a maritime claimant to obtain security by arresting a ship against which a foreign judgment or an arbitration award can be enforced. Therefore, in the view of the writer, the following conclusions are drawn:

First, this case should be limited to what was in issue: namely, *in rem* proceedings are to be barred by s 34 after judgment *in personam* has been obtained from a foreign court concerning the same cause of action and the same parties because *res judicata* would apply. No new trial on the merits would be permitted afresh by an *in rem* action in England. Arguably, the remaining broader *dicta* concerning the character of the action *in rem* should be *obiter*.

Second, when *in rem* proceedings are brought for the only purpose of obtaining security for the judgment, they should not be barred, as they would not fall within the ambit of s 34. It should be remembered that the claimants in *The Indian Grace* commenced the *in rem* proceedings in the Admiralty Court to re-litigate the same issues after their determination by the foreign court. On the very same issues, the claimants were, in fact, claiming higher damages than they had been awarded by the Indian judgment.

Third, if the above interpretation of the limited application of *The Indian Grace* is correct, most of the features of the *in rem* action should still remain the same, as *The Indian Grace* did not intend to alter these; namely: the *in rem* proceeding (a) is a means of obtaining security for the claim, or judgment, or arbitral award; (b) establishes jurisdiction on the merits of a case, provided there is no *res judicata*; (c) gives effect to the inchoate right of a maritime lien, which can be enforced irrespective of who is liable *in personam*; (d) creates a contingent security right on the ship from the moment of the issue of the *in rem* claim form, in relation to non-truly *in rem* claims, which is enforced even if the ship is later transferred to a new owner[89] (a purchaser should have done a search in the Admiralty Registry); and (e) sale of the ship by the Admiralty Marshal wipes out all encumbrances or claims on the ship.

Fourth, prior to this decision, if the person liable *in personam* chose not to acknowledge service, or not to submit to jurisdiction unconditionally, judgment would be executed only against the ship arrested and up to the value of that ship. If the decision has the effect of creating a personal liability of the owner from an earlier time, in theory, the judgment could be enforced against his other assets whether or not he enters an appearance. Such an interpretation is doubted. In other common law jurisdictions, which follow the procedural theory of *The Dictator* case, the appearance of the defendant is the triggering factor for involving the defendant in personal liability. In any event, in practice, security is provided for the claim in lieu

89 *The Monica S* was not discussed in *The Indian Grace*, so its long-standing ruling about the important effect of the issue of the *in rem* proceeding should not have been affected, despite the general discussion about the action *in rem*.

of the release of the ship and, in most cases, ships are owned by a single-ship company, so that the value of that ship will usually be the only asset against which the claim could be enforced. Furthermore, the person liable may constitute a limitation fund in accordance with the provisions of International Conventions. Since the fund will be the limit of liability, payment for admitted claims will be made *pro rata*. The 1976 Limitation Convention does not permit other assets of the defendant to be arrested after the establishment of the fund.[90]

Fifth, the ruling that the court's jurisdiction is seised from the time of the service is now inconsistent with Art 30 of the Brussels I Regulation. When *The Deicland*, *The Tatry* and *The Indian Grace* were decided, the law under both the Brussels Convention – before its replacement by the Brussels I Regulation in 2002[91] – and English domestic common law, *The Duke Yare*,[92] was that the court was seised in a matter, or its jurisdiction was invoked, from the moment of service of the proceedings. Art 30 of the Regulation provides that a court shall be seised of proceedings when the document instituting such proceedings is lodged with the court. It follows that the same should apply when the application of s 34 (CJJA 1982) is in issue, namely that the *in personam* and *in rem* actions should, for the purpose of s 34 only, be deemed to be between the same parties from the issue of the proceedings.

4 CONDITIONS OF ARREST

It has already been discussed in Chs 1 and 2 and early in this chapter that maritime claims, or rights *in rem*, are divided into *truly in rem* and *non-truly in rem* for conceptual convenience because s 21 of SCA 1981 applies different conditions to each category for the commencement of the *in rem* proceedings and the arrest of a ship.

4.1 TRULY *IN REM* CLAIMS

These include claims that attract maritime liens (damage done by the ship, salvage services and seamen's wages under s 20(2)(e),(j) and (o), respectively) and claims with proprietary rights in the relevant ship (ownership or possession of a ship, claims of mortgagees and droits of Admiralty under s 20(2)(a), (b), (c) and (s), respectively).

For such claims, no conditions of ownership or liability *in personam* are required for the arrest of the relevant ship. It is provided in s 21(2) and (3) of the SCA 1981

90 Limitation Convention 1976, Art 13(2); see Chapter 14, Part IV, Vol 2.

91 Art 30; Art 27 of the Brussels I Regulation, previously Art 21 of the Brussels Convention, regulates the jurisdiction of the court in cases of *lis pendens* in a court of another contracting State (see Chapter 7 which includes the amended Regulation). The proceedings in the court of one State may be *in personam* and in another court the proceeding may be *in rem*, but they must involve the same cause of action and be between the same parties for the *lis pendens* provision to apply. To determine which of the courts has to decline or stay its proceedings, it has to be ascertained which court was seised first of the matter. So the time of issue of the proceeding is important. The court seised second of the matter is obliged to stay its proceedings until the jurisdiction of the court first seised is determined. With this change, the issue of when the court is seised in the matter under the Brussels I Regulation is at variance with the issue of when the defendant becomes a party to the proceedings under s 34 of the CJJA 1982 by reason of *The Indian Grace*.

92 *The Duke Yare* [1991] 2 Lloyd's Rep 557 (CA) and *The Freccia del Nord* [1989] 1 Lloyd's Rep 388.

that an action *in rem* for such claims can be brought against the ship without considering who is the owner of the ship at the time the claim form is issued, or who would be liable *in personam* when the cause of action arose.

However, as maritime liens are also enforceable under s 21(4) (see below) because they are too treated as statutory rights *in rem*, like all maritime claims and this should not cause confusion between truly *in rem* and non-truly *in rem* claims.

4.2 NON-TRULY *IN REM* CLAIMS

In contrast with the truly *in rem* claims, for a claimant to arrest a ship for a non-truly *in rem* claim, two conditions are required: (a) there has to be a personal liability link (s. 21(4)(b)), and (b) ownership link between the person liable and the relevant ship (s 21(4)(b) (i)(ii)).

4.2.1 Personal liability link when the cause of action arose

An *in rem* claim form regarding claims that are listed in paras (e)–(r) of s 20(2) may be brought under s 21(4) of the SCA 1981 where:

(a) the claim arises in connection with a ship; and
(b) the person *who would be liable in an action in personam* (the relevant person) was, when the cause of action arose, the owner or charterer or person in possession or in control of the ship (see definition of these terms under para 5, below).

It should be observed that the statutory rights under s 20(2) paras (e), (j) and (o) are also maritime liens enforceable under s 21(3), but for the purpose of s 21(4) they are treated as statutory rights *in rem*.

4.2.2 Ownership, or possession, or control link when action is brought

Once the identification of the relevant person is made, as per s 21(4)(b), the section further provides that the action may be brought against:

(i) *that* ship, if at the time when the action is brought the relevant person is either the beneficial owner of that ship, as respects all the shares in it, or the charterer of it under a charter by demise; or
(ii) *any other ship* of which, at the time when the action is brought, the relevant person is the beneficial owner as respects all the shares in it.

It should be noted that the expression '*or the charterer of it under a charter by demise*', in sub-para (i) above, was not in s 3(4) of the AJA 1956, but it was added to s 21(4) of the 1981 Act.

4.2.3 Arrest of the relevant ship

For the purpose of arresting the ship in connection with which the claim arose, s 21(4) of the SCA 1981 requires that the arresting claimant must identify first the

relevant person who would be liable *in personam when the cause of action arose*. That person can be either the owner, or the charterer, or the person in possession or control of the ship in connection with which the claim arose, as discussed earlier.

The same section also requires that, at the time *of issuing the claim form in rem* for the arrest of *that* ship, the relevant person must still be either the beneficial owner in respect of all shares in the ship[93] or the demise charterer of the ship. For example, the person liable may have been the demise charterer when the cause of action arose and is still the demise charterer of that ship at the time of the issue of the *in rem* claim, or may have been another charterer, who, by this time, may have become the demise charterer.

4.2.4 Arrest of any other ship (so-called sister ship)[94]

If the ship to be arrested is other than the ship in connection with which the claim arose, the relevant person must be the beneficial owner of *that other ship* (which may be either a 'sister ship' – meaning a ship owned by the same company that owns the ship in connection with which the claim arose – or a ship beneficially owned by the demise charterer of the relevant ship, or a ship beneficially owned by any of the other persons who would be liable *in personam*, as per s 21(4)(b), at the time of issuing the proceedings).

For example, if the person who would be liable when the cause of action arose is not the owner of the relevant ship but he is the demise charterer, or another charterer, or a salvor, and it is not possible to arrest the ship in connection with which the claim arose (if, for example, she was lost after a collision incident), any ship beneficially owned by the demise charterer or another charterer, or the salvor, would be a target for arrest under s 21(4)(ii).

When a ship other than the one in connection with which the claim arose is to be arrested, that other ship must be, at the time of issuing the *in rem* claim form, beneficially owned in all shares by the relevant person who was identified as the person who would be liable *in personam*.

As s 21(4) covers claims within paras (e)–(r), maritime liens can also be enforced this way. However, although a sister ship can be arrested in relation to a claim for which a maritime lien attaches on the relevant ship, the maritime lien will obviously be lost because it only attaches on the ship in connection with which it arose.[95] By contrast, the statute does not include a sister ship arrest for claims in relation to ownership rights, or mortgages, or forfeiture (s 20(2)(a), (b), (c) and (s)), which are enforced only as provided by s 21(2).

4.2.5 The subject matter of arrest

The ship with all appurtenances, including bunkers, the cargo on board or every freight, is property being the subject of arrest.

93 In *The Afala* [1995] 2 Lloyd's Rep 286 Scottish Outer House, Court of Session, the arrest of the ship, which had by agreement been sold to a third party although physical delivery had not yet taken place, was inept. The defendant was no longer the owner of the ship.

94 In South Africa, the 'associated ship arrest' is an extension to sister ship arrest, see para 5.14, below.

95 *The Leoborg (No 2)* [1964] 1 Lloyd's Rep 380.

The ship – in connection with which the maritime claim arose – and/or her sister ship or 'any other ship' are the primary property against which an *in rem* claim can be brought, provided the conditions laid down in s 21(4) of the SCA 1981 are satisfied. A sister ship or 'any other ship' is a ship owned by the relevant person who would be liable *in personam* when the claim arose. For claims enforceable under s 21(2) and (3) (namely those which attract maritime liens or proprietary rights on a ship), there is no express provision for a sister ship arrest. But, as the claims attracting maritime liens are also included in s 21(4), a sister ship arrest is allowed under this paragraph as explained above.

If the ship is under a time charter, the bunkers on board the ship belong to the charterer.[96] So, if a mortgagee arrests the ship, the charterer can intervene in the action,[97] and the proceeds of sale of the bunkers, if the ship is sold by a court order, will be paid to the charterer.[98]

The cargo on board the ship, or freight earned, may be subject to arrest only if there is a maritime lien attached, for example, when there have been salvage services rendered to save ship and cargo. The same would apply to the bunkers on board, which do not belong to the ship-owner. An aircraft can only be the subject of arrest if it is waterborne and there has been salvage, or towage, or pilotage of the aircraft as per ss 21(3), (4) and 24(1).

5 WHO WOULD BE LIABLE *IN PERSONAM*

5.1 MEANING OF 'OWNER'

'Owner' under s 21(4)(b) means the registered owner. Lord Donaldson decided, in ***The Evpo Agnic***,[99] that, on a true construction, the word in s 21(4)(b), which refers simply to 'owners', is to be contrasted with 'beneficial owner' in sub-paras (i) and (ii) (see para 5.4, below). The Arrest Convention 1952 looks to ownership and registered ownership as one and the same. Registered owners appear in the registers of shipping, they are nominal owners, but, in reality, registered owners can be both legal and beneficial owners of all the shares in the ship:

> . . . in real commercial life . . . registered owners, even in one-ship companies, are not bare legal owners. They are both legal and beneficial owners of all the shares in the ship and any division between legal and equitable interests occurs in relation to the registered owner itself, which is almost always a juridical person. The legal property in its shares may well be held by

96 *The Span Terza (No 2)* [1984] 1 Lloyd's Rep 119 (HL); *The Titan* (2007) 712 LMLN 4, HCSA, 18 May 2006: the issue of who owned the bunkers at various times had to be decided. The New York Produce Exchange (NYPE) form states that, on delivery of the vessel, ownership passed on to the time charterer. However, it was argued that, because under South African law there is 'sale by measure', no ownership could pass until the quantity of the bunkers could be ascertained which would occur at the end of the sub-charter. This argument was rejected by the court on the basis that what was relevant was that the sub-charterer had agreed to pay for the bunkers, and therefore ownership belonged to them.

97 *The Saint Anna* [1980] 1 Lloyd's Rep 180.

98 *The Eurostar* [1993] 1 Lloyd's Rep 106; *The Pan Oak* [1992] 2 Lloyd's Rep 36.

99 [1988] 2 Lloyd's Rep 411 (CA).

A and the equitable property by B, but this does not affect the ownership of the ship, or of the shares in that ship. They are the legal and equitable property of the company.[100]

5.2 MEANING OF 'CHARTERER'

In the view of Lord Donaldson, in the same case, above, 'charterer' in s 24(4)(b) was thought to refer only to the demise charterer. However, it will be seen that in subsequent decisions it was decided (and this is the prevailing judicial view) that 'charterer' can include either a charterer by demise, or a time charterer, or even a voyage charterer. This is derived from a true construction of the statute. If the intention of the draftsman was to restrict the meaning of the word to the demise charterer, this would have been spelled out.

The Permina[101]

Upon a failure by the charterer to pay hire under a time charter-party, the owners of *The Ibnu* (which was subject to the charter-party) arrested the charterers' vessel *The Permina*. The charterers applied to set aside the arrest on the ground that the claim asserted had no connection with *The Permina* and that the word 'charterer' meant charterer by demise. At first instance, in Singapore, their motion was dismissed, and the charterers appealed. They lost on appeal in which it was held that the ordinary meaning of the word 'charterer' did not mean only 'by demise'. If the legislature had intended to limit the operation of the sub-section to charterers by demise only, it would have expressly added those words.

This was affirmed by the English Court of Appeal in ***The Span Terza***.[102]

The owners of the ship *N* claimed damages against the time charterer for breach of contract and applied for a warrant of arrest against the vessel *S*, belonging to the time charterer. At first instance, the application was turned down, but, on appeal, the Court of Appeal allowed the arrest on the ground that 'charterer' in the aforesaid provision must have meant to include a 'time charterer'. The same conclusion was reached as in the *Permina*. Furthermore, the court held that, if the word 'charterer' included only the demise charterer, this could have been expressed by the phrase in the section: 'a person in possession or control of the ship', which would have automatically included a demise charterer.

It is also clear from the subsequent decision in ***The Tychy***[103] that 'charterer' includes even a 'slot' charterer, as was decided by Clarke LJ:

> . . . the purpose of the 1981 Act was to ensure that, before a person's ship could be arrested in respect of a maritime claim, that person had some relationship with the ship in connection with which the maritime claim arose; there was no reason, in principle, why a time or a voyage

100 Ibid, p 415; see, also, *Haji-Ioannou v Frangos* [1999] 2 Lloyd's Rep 337, that ownership of a ship for the purpose of the Admiralty jurisdiction means legal ownership, except in those provisions where the word is qualified by the adjective 'beneficial'; *The Tian Sheng* [2000] 2 Lloyd's Rep 430 (HK Court of Final Appeal), in which it was explained that, in the general run of things, registration would be virtually conclusive, unless there was a fraudulent procurement of registration.

101 [1978] 1 Lloyd's Rep 311 (Singapore CA).

102 [1982] 1 Lloyd's Rep 225 (CA).

103 [1999] 2 Lloyd's Rep 11, at 20 (CA).

charterer of the ship should not have been regarded as having a sufficient relationship and no reason to narrow the scope of that relationship by giving the words of s 21(4) other than their ordinary and natural meaning; and, in the case of a sister ship, the ship being arrested must be wholly beneficially owned by the person liable *in personam*; the expression 'the charterer' in s 21(4) was not confined to a demise charterer. If a charterer included a time charterer, it must include a voyage charterer; and it included a voyage charterer of part of a ship.

5.3 MEANING OF 'PERSON IN POSSESSION OR CONTROL'

'Person in possession or control' refers to a person in the position of a demise charterer. Such a person could be a manager and operator of the ship, or a salvor, or a mortgagee who has taken over the possession and management of the ship from the owner in the event of default of the loan conditions.

The liability must have arisen when the owner or charterer or the person in possession or in control of the ship had that status at that particular time. Rix J held in ***The Faial***[104] that the words of the statute require looking at the status of the relevant person at the relevant time, namely when the cause of action arose. In ***The Decurian***,[105] the court in Hong Kong held that the test for 'control' is whether the defendant had the ability to tell the person in possession of a vessel what was to be done in relation to the vessel. The Court of Appeal of Hong Kong was not persuaded that the trial judge applied too narrow a meaning of the phrase 'in control of', which should be given its natural meaning, namely that a power of control would involve having the right to direct the master as to how the ship was to be employed, and its existence would not be consistent with some other party having a superior contractual power of control. It emphasised that the statutory requirement was that the person be in control of the ship, not that he be in control of the company that was the time-charterer of the ship, as was argued by the claimant on appeal.

The same principles were applied by the Singaporean court in ***The Catur Samudra***,[106] where it was held that, on the facts, the defendant guarantor, which was also the parent company of the bareboat charterer, was not '*the person in possession or control of the vessel*' for the purpose of the Admiralty Jurisdiction Act of Singapore. The person in possession or control of a ship had to have possession or control 'as an independent legal right' and not by way of a sham. Possession or control of a subsidiary did not translate into possession or control of its assets. The defendant was not the managers of the ship when the action arose, and, furthermore, a ship manager would not be in possession or control because he exercised rights of control or possession on behalf of his principal and not as an independent legal right.

The meaning of a person in control in relation to associated ship arrest is different under South African law, as defined by the Supreme Court of Appeal in *Belfry Marine Ltd v Palm Base Maritime (M/V Heavy Metal)*[107] (see 5.14, below, regarding piercing the corporate veil).

104 [2000] 1 Lloyd's Rep 473.

105 *Chimbusco Pan Nation Petro-Chemical Co., Ltd v Owners and/or Demise Charterers of the Ship Decurion* [2012] 1 Lloyd's Rep Plus 47 (the judge applied the dicta from *Dollfus Mieg et Compagnie SA v Bank of England* [1950] Ch 333 and he was approved by the Court of Appeal [2013] HKCA 180).

106 [2010] SGHC 18.

107 [1999] 3 All SA 337.

5.4 MEANING OF 'BENEFICIAL OWNERSHIP'

Ownership under English law consists of innumerable rights over property; it includes the merged rights of exclusive enjoyment, destruction and alienation and of maintaining and recovering possession of the property from all other persons.[108]

While 'owner' in the statute refers to the registered owner of the ship, and charterer includes also time and voyage charterers (as seen above), beneficial ownership, which is not a term included in the Arrest Convention 1952, was originally thought to include the person in possession or control of the ship.

This had been decided in ***The Andrea Ursula***[109] (not followed since ***I Congreso del Partido***, below), but it is worth mentioning to illustrate the point.

It concerned the meaning of the expression 'beneficially owned', as used in s 3(4) of the AJA 1956, which stated 'beneficially owned as respects all the shares therein'. The issue was whether the phrase 'beneficial owner' was wide enough to include a demise charterer. Repairs had been carried out on the vessel under the instructions of the demise charterers and prospective owners of the vessel. Upon repudiation of the contract for repairs by the demise charterers, the repairs remained uncompleted, and the ship-repairers accepted the repudiation. Exercising their right of a possessory lien for unpaid costs, they detained the vessel and started *in rem* proceedings. At the time of issue of the writ, the defendants were still the demise charterers of the vessel, but had not yet bought the ship. The question for the court was whether the requirements of s 3(4) of the Act had been satisfied.

It should be noted that this Act did not include the words 'demise charterer', as the present Act does under s 21(4)(i) in the requirements for arrest, so the case would have been decided correctly under the present statute, not because of the definition of beneficial ownership, given below, but because of the inclusion of the words 'demise charterer' in the 1981 Act. In deciding whether the court had jurisdiction to entertain the action *in rem* for this claim, Brandon J held:

> There is no definition in the Act of the expression 'beneficially owned' as used in s 3(4). It could mean owned by someone who, whether he is the legal owner or not, is in any case the equitable owner. That would cover both the case of a ship, the legal and equitable title to which are in one person, A, and also the case of a ship, the legal title to which is in one person, A, but the equitable title to which is in another person, B. In the first case, the ship would be beneficially owned by A, and in the second case by B. Trusts of ships, express or implied, are, however, rare and the words seem to me to be capable also of a different and more practical meaning related not to title, legal or equitable, but to lawful possession and control with the use and benefit which are derived from them. If that meaning were right, a ship would be beneficially owned by a person who, whether he was the legal or equitable owner or not, lawfully had full possession and control of her, and, by virtue of such possession and control, had all the benefit and use of her which a legal owner would ordinarily have.[110]

It was held that 'beneficially owned' could, thus, include a demise charter, but a different view was held by Goff J in ***I Congreso del Partido***.[111]

108 *Halsbury's Laws*, 5th edn (2008) vol 35, 3(1)(i) 1227.
109 [1973] QB 265, [1971] 1 Lloyd's Rep 145.
110 [1973] QB 265, p 269, [1971] 1 Lloyd's Rep 145, p 147.
111 [1978] 1 All ER 1169, pp 1201–1202.

The definition given by Goff J has been widely accepted and applied in subsequent cases. The issue in this case was whether the operator or manager of a ship was a beneficial owner.

Goff J held:

> In my judgment, the natural and ordinary meaning of these words is that they refer only to such ownership as is vested in a person who, whether or not he is the legal owner of the vessel, is in any case the equitable owner . . . Furthermore, on the natural and ordinary meaning of the words, I do not consider them apt to apply to the case of a demise charterer or indeed any other person who has only possession of the ship, however full and complete such possession may be, and however much control over the ship he may have . . . such words are only appropriate when describing ownership in the ordinary sense of the word, and not possession which is concerned with a physical relationship with the vessel founded on control and has nothing to do with shares in the vessel. A demise charterer had, within limits defined by contract, the beneficial use of the ship, he does not however have the beneficial ownership as respects all the shares in the ship.

Thus, 'beneficially owned' refers to equitable ownership, whether or not accompanied by legal ownership. 'Equitable ownership' is meant to cover an owner for whose benefit the legal owner holds the shares in the ship under the English law concept of trust. The adjective 'beneficial' before owner ensures that, if the ship is operated under the cloak of trust, she can still be arrested for maritime claims. The commercial reality is that registered owners of ships are not just legal owners of bearer shares. They are both legal and beneficial owners of all shares in the ship. Any division between the legal and equitable interest in the ship occurs in registration. For example, the legal property in the shares may be held by A and the equitable by B.

In ***The Father Thames ('FT')***,[112] the above definition was adopted.

FT was under a demise charter for a period of two years to B Ltd, and the owners had completely divested themselves of all control and possession of the vessel. A collision occurred, and, subsequently, the benefit and liabilities of the demise charter were assigned to P Ltd. *The Father Thames* was arrested. The owners claimed that there was no jurisdiction to proceed against their vessel because, at the time the cause of action arose, they were not liable for the negligent navigation and the damage done because the crew were employees of the demise charterer. At the time, there was no provision in the statute, the AJA 1956, that the ship could be arrested if the person liable *in personam* was the demise charterer at the time of the issue of the action *in rem*, as the present Act provides. But the owners argued that a beneficial owner included a demise charterer. On the facts of *The Father Thames*, however, the demise charterer was no longer the demise charterer when the writ was issued, because it had assigned its rights and liabilities under the charter.

It was held that 'beneficially owned' did not apply to a demise charterer; the decision in *I Congreso del Partido* was followed. Nevertheless, although the person who would be liable *in personam* was not the beneficial owner of the ship, the arrest was not set aside because a maritime lien (having arisen owing to the collision damage) had attached on the ship from the time of the incident.

112 [1979] 2 Lloyd's Rep 364.

The issue whether or not the demise charter had already been terminated at the time of issue of the proceedings was before the court of Singapore in ***Rangiora, Ranginui and Takitimu***.[113]

These three ships were owned by Deil ship-owners and were chartered by demise to South Pacific Shipping (SPS) in 1995. Owing to outstanding hire, the owners decided to terminate the charter arrangements and gave formal notices to SPS on 18 February 1998. The next day, a shareholders' resolution for voluntary winding up of SPS was passed. On 20 February, a stevedoring company commenced proceedings *in rem* against the vessel *Ranginui* for monies owed to it by SPS with regard to services rendered during the time of the demise charter. On the same day, Mobil Oil New Zealand commenced *in rem* proceedings against the *Rangiora*. The owners of the ships applied to set aside the proceedings, on the ground that the persons who would be liable *in personam*, SPS, were no longer the demise charterers at the time the proceedings were issued. The claimants argued that the notices of termination of the charter did not have an immediate effect, but were notices of future intention, and that, in accordance with the construction of the charter-parties, the charters were still in existence. So, it was argued that SPS were still the demise charterers at the date of the issue of the writ. The court decided that the contractual status remained on foot until the owners took steps to proclaim recovery of possession of the ships from the charterers. Under German law, which applied to the contracts, a demise charter is brought to an end upon physical delivery. The owners' application was dismissed.

It is interesting to note a recent decision of the court in Hong Kong: ***The Liberty Container and Mandarin Container***.[114] Briefly, the vessels *Convenience Container*, *Kingdom Container*, *Liberty Container* and *Mandarin Container* were owned by a Singapore company (Powick). As a result of the voluntary winding up of Powick in Singapore, the four vessels were arrested in Hong Kong and sold by the Admiralty Court. There were seven Admiralty actions *in rem* in existence. Powick (in liquidation) applied to set aside the writs *in rem*. Although he accepted that he was the person who would have been liable on the claims in an action *in personam*, and was the owner of the relevant vessels when the causes of action arose, he argued he was no longer the beneficial owner when the action was brought because of the liquidation. At first instance, Waung J held that, on the liquidation of a company, there was no change of equitable ownership[115] so as to deprive the Admiralty Court of jurisdiction over the claim *in rem*.

On appeal, the case is referred to as ***The Convenience Container***;[116] Powick argued that the winding up of the company in Singapore divested him of beneficial ownership of the vessels and relied on the decision in *Ayerst v C & K Ltd*,[117] where the House of Lords had to construe the expression 'beneficial ownership' in a tax statute and decided that, on the liquidation of a company, the effect was to divest the company of the beneficial ownership of its assets within the meaning of the statute. The claimants relied on *I Congreso del Partido* (above) and argued that the Ayerst,

113 [2000] 1 Lloyd's Rep 36.
114 [2006] 2 Lloyd's Rep 556.
115 It would be very convenient if, upon facing claims, the owner went on voluntary liquidation.
116 *International Transportation Service Inc v The 'Convenience Container'* (2007) 723 LMLN 1.
117 [1976] AC 167.

which was, incidentally, not followed by the High Court of Australia in another case,[118] was not applicable. The CA, agreeing with the judge, held that the question of beneficial ownership was concerned purely with whether a particular ship was an asset in which the relevant person held a proprietary interest against which the claimant could enforce his claim, following the analysis of Goff J in *I Congreso del Partido*. The cases dealing with tax statutes were irrelevant, the court held, because the phrase 'beneficial ownership' can mean different things in different contexts or statutes.

5.5 COMPANY STRUCTURES AND THE 'PERSON WHO WOULD BE LIABLE *IN PERSONAM*'

An example of a company structure by which the arrest of the ship was successfully avoided by the creation of various company structures to distance the beneficial owner or demise charterer from the claim can be observed in a decision of the highest appellate Court of Hong Kong in ***The Tian Sheng (No 8)***.[119]

The owners (TSI) had chartered this ship by demise to T&R, who, in turn, chartered her on a time charter to Tiansheng Ocean, who were the carriers of the cargo and, on their behalf, the bill of lading was signed. The ship deviated, and the cargo was sold by court order. The ship was sold to a company IRI before the issue of the writ by the cargo-owners, who claimed damages for loss of their cargo carried on board. The ship, whose name was changed to *Resourse I*, was arrested, and her new owners contested jurisdiction having obtained her release by putting up bail. Both the judge and the Court of Appeal (HK), suspecting that the documents were fabricated to disguise the real ownership of the person liable *in personam*, Ocean, held that the arrest was valid. The Court of Final Appeal of Hong Kong reversed the decision and held that, when the writ was issued in Hong Kong, the person who would be liable *in personam* was neither the beneficial owner, nor the charterer by demise of the ship for it to be arrested.

The facts of this case, as indeed of other cases involving a series of charter-parties and the creation of companies (see 5.7, 5.9, below), in order to distance the liable person from direct contractual arrangements with claimants, do give rise for concern. However, as the company structure, in the eyes of the law, shields the person who would really be liable *in personam*, the decision is within the bounds of the law. Whether or not the court may order the lifting of the corporate veil is discussed under 5.7–5.12, below.

5.6 MINORITY SHAREHOLDING

For the purpose of arrest, it is not enough that the beneficial owner owns a fraction of 64 shares in the ship to be arrested and not all of them. The SCA 1981,

118 *Commissioner of Taxation of Commonwealth of Australia v Linter Textiles Australia Ltd* [2005] 220 CLR 592 (held that on the liquidation of a company there was no change of beneficial ownership of its assets).

119 [2000] 2 Lloyd's Rep 430.

s 21(4)(b)(i)(ii), requires beneficial ownership in all shares in the ship. The same was confirmed by the Federal Court of Canada in ***The Looiersgracht***.[120]

This ship was arrested in respect of maritime claims, which arose in connection with her and five other vessels, which were believed to be her sister ships. The defendants claimed that security should not include security for alleged damage to cargo carried on the other five vessels, as they did not beneficially own all the shares in them. From the Lloyd's Register of Shipping, it was clear that the defendants were managing agents for many vessels and had minority ownership of some of them. Most of the vessels were owned by either one or more limited partnerships. The plaintiffs alleged that there was a common ownership based on the management of the fleet by the defendants and on their part-ownership in the shares of the ships. The defendants admitted minority ownership interest in some of them, but maintained that each vessel-owning limited partnership was made up of a different group of participants. The Federal Court Act of Canada 1992 is similar to the English statute, except that it does not expressly require beneficial ownership of all shares in the ship. The trial judge of the Canadian Federal Court, Hargrave J, stated:

> Under our legislation, it is not sufficient to show merely some beneficial interest. Our legislation requires that the sistership be 'beneficially owned by the person who is the owner of the ship that is subject of the action'. To come within the Canadian sister ship provisions, there must be common complete ownership of both vessels by the same owner or owners, for that is the plain and ordinary meaning of our legislation. It is not enough to be an owner, but rather it must be the owner, that is a similar complete ownership of both vessels.[121]

The judge also held that this was an instance in which a series of one-ship companies was not a sham to defeat legislation, but had been established for legitimate reasons.

5.7 CORPORATE VEIL AND THE BENEFICIAL OWNER

Under an old English authority, ***Salomon v A Salomon & Co Ltd***,[122] the concept of legal personality given to a corporation means that, no matter who the shareholders are, the company is a legal person separate from its controllers, with its own separate rights and liabilities, and it owns its own assets. It was established by this decision of the House of Lords, once and for all, that a 'one man company' is a legal entity distinct from its owner and controller and that that individual is not liable on the company's obligations. Thus, creditors of the company cannot go behind the corporate veil to pursue the shareholders and persons controlling the company, or its subsidiaries, for liabilities of the company, unless there are special circumstances (indicating a mere façade concealing the true facts) in which the court will regard it as appropriate to 'pierce the corporate veil' and thereby identify the company with those in control of it.[123] In cases in which this is done, subsequent authorities show that it will, or may,

120 [1995] 2 Lloyd's Rep 411.
121 Ibid, p 415.
122 [1897] AC 22 (HL).
123 See, further, *Woolfson v Strathclyde RC* [1978] SLT 159 (HL).

lead to the granting of remedies against the company which, veil piercing apart, might appear in principle to be available only against those controlling it.[124]

In ***Re A Company***,[125] the evidence disclosed an elaborate and most ingenious scheme brought into operation at the instance of the defendant, whereby his personal assets were organised in such a way that they were held by foreign and English corporations and trusts in a manner that effectively concealed his true beneficial interest in English assets. The evidence was that the defendant had deliberately set up this network of companies and trusts to defeat his creditors. The Court of Appeal upheld orders granted for extensive disclosure of assets and imposed injunctions to restrain the defendant from disposing his shares in the companies. The court was willing, in such circumstances, to use its powers to pierce the corporate veil, if it was necessary to achieve justice, regardless of the legal legitimacy of the corporate structure.

In ***Adams v Cape Industries***,[126] Cape, an English company, mined and marketed asbestos. Its worldwide marketing subsidiary was another English company, Capasco. It also had a US marketing subsidiary incorporated in Illinois, NAAC. In 1974, some 462 plaintiffs sued Cape, Capasco, NAAC and others in Tyler, Texas, for personal injuries allegedly arising from the installation of asbestos in a factory. The allegation against them was that, notwithstanding their knowledge about the dangers of asbestos, they failed to give adequate warning. The claims were based on negligent acts and omissions and breaches of implied and express warranties. These actions were settled. Between 1978 and 1979, a further 206 similar actions were commenced and default judgments entered against Cape and Capasco. In 1978, NAAC was wound up, and another subsidiary, AMC, was formed to continue trade in the USA. Another company, CPC, was to act as agent for AMC. The plaintiffs sought to enforce the judgments in England. The defendants denied that the Texas court had jurisdiction over them for the purposes of English law. They submitted that the plaintiffs could not enforce the default judgment by action in this country unless, by the standards of English law, the Tyler court was entitled to take jurisdiction over Cape and Capasco.

It was argued for the plaintiffs that, on the facts of this case, NAAC should be treated as Cape's alter ego in Illinois or, alternatively, that the corporate veil distinguishing NAAC from Cape should be lifted.

Scott J held that there was no reasonable basis, in his view, for regarding NAAC as the alter ego of Cape. NAAC was an Illinois corporation, carrying on business in the United States from which it earned profits and on which it paid United States taxes. Its debtors were *its* debtors, not Cape's debtors. Its creditors were *its* creditors, not Cape's creditors. Cape was not taxed in the United Kingdom or in the United States on NAAC's profits. The return to NAAC's shareholders took the form of an annual dividend passed by a resolution of NAAC's board of directors. The corporate forms applicable to NAAC as a separate legal entity were observed. NAAC made its own warehousing arrangements for the storage of its own asbestos. It had its own pension scheme for its own employees. The expression 'alter ego' when used to

124 See review of principles in *VTB Capital v Nutritek International Corp.* [2012] EWCA Civ 808; [2012] 2 Lloyd's Rep 313 (on the facts, the Court of Appeal did not accept VTB's (the lender's) claim that three controlling parties (Russian) of the borrowing company were bound by the facility agreement entered into between the borrower and the lender; approved by the Supreme Court (majority) [2013] UKSC 5, see at 5.9, below.

125 [1985] 1 BCC 99.

126 *The Times*, 23 June 1988 (unreported); CA [1991] 1 All ER 929; [1990] Ch 433.

describe the relationship between a company and its shareholders is not a term of art and can bear a flexible meaning. But he did not think it was, in the least, apt to describe the relationship between NAAC and Cape. He concluded that a judgment obtained, in the circumstances revealed by the evidence of this case, did not give rise to any obligation of obedience enforceable in any English court.

On appeal, the plaintiffs challenged the judgment. Slade LJ,[127] giving the main judgment, held:

In deciding whether a company is present in a foreign country by a subsidiary, which is itself present in that country, the court is entitled, indeed bound, to investigate the relationship between the parent and the subsidiary. In particular, that relationship may be relevant in determining whether the subsidiary was acting as the parent's agent and, if so, in what terms. In *Firestone Tyre and Rubber Co., Ltd v Lewellin* [1957] 1 WLR 464, the House of Lords upheld an assessment to tax on the footing that, on the facts, the business both of the parent and subsidiary were carried on by the subsidiary as agent for the parent. However, there is no presumption of any such agency. There is no presumption that the subsidiary is the parent company's alter ego. In the court below, the judge refused an invitation to infer that there existed an agency agreement between Cape and N.A.A.C. comparable to that which had previously existed between Cape and Capasco and that refusal is not challenged on this appeal. If a company chooses to arrange the affairs of its group in such a way that the business carried on in a particular foreign country is the business of its subsidiary, and not its own, it is, in our judgment, entitled to do so. Neither in this class of case nor in any other class of case is it open to this court to disregard the principle of *Salomon v A. Salomon & Co., Ltd* [1897] AC 22 merely because it considers it just so to do.

On the issue of the 'corporate veil' the Court of Appeal held:[128]

Quite apart from cases where statute or contract permits a broad interpretation to be given to references to members of a group of companies, there is one well-recognised exception to the rule prohibiting the piercing of 'the corporate veil'. Lord Keith of Kinkel referred to this principle in *Woolfson v Strathclyde Regional Council*, 1978 S.L.T. 159 . . . '. . . it is appropriate to pierce the corporate veil only where special circumstances exist indicating that it is a mere façade concealing the true facts'.

The only allegation of a façade in the plaintiffs' pleadings in this case was that the formation and use of C.P.C. and A.M.C. in the 'alternative marketing arrangements of 1978 were a device or sham or cloak for grave impropriety on the part of Cape or Capasco, namely to ostensibly remove their assets from the United States of America to avoid liability for asbestos claims whilst at the same time continuing to trade in asbestos there'.

In our judgment, whenever a device or sham or cloak is alleged in cases such as this, the motive of the alleged perpetrator must be legally relevant. . . . The decision in *Jones v Lipman* [1962] 1 WLR 832 . . . was one case where the proven motive of the individual defendant clearly had a significant effect on the decision of Russell J . . .

As to Cape's purpose in making the arrangements for the liquidation of N.A.A.C. and the creation of A.M.C. and C.P.C., we think that the extracts from the evidence . . . sufficiently reveal both the substance of what the officers of Cape were doing and what they were trying to achieve. The allegation of impropriety was, in our view, rightly abandoned. The inference which we draw from all the evidence was that Cape's intention was to enable sales of asbestos from the South African subsidiaries to continue to be made in the United States while (a) reducing the appearance of any involvement therein of Cape or its subsidiaries, and (b) reducing by any lawful means available to it the risk of any subsidiary or of Cape as parent company being held liable for United States taxation or subject to the jurisdiction of the United States

127 [1991] 1 All ER 929; [1990] Ch 433 at para 536.
128 Ibid, at paras 540–544.

courts, whether state or federal, and the risk of any default judgment by such a court being held to be enforceable in this country.

The Court of Appeal rejected the challenge to the judge's finding that C.P.C. was an independently owned company and re-emphasised the doctrine that every company is a separate legal person that cannot be identified with its members.

It appears that, while the Court of Appeal in *Re A Company* was willing to pierce the corporate veil if it was necessary to achieve justice, regardless of the legal legitimacy of the corporate structure, the Court of Appeal in *Cape* was not willing to go that far. But any contradiction in the *dicta* of the respective judgments could, perhaps, be justified on the ground of the clear circumstances in *Re A Company*, although the judge in ***Hashem v Shayif***,[129] who summarised the principles, took the view that the *dicta* of Cumming-Bruce in *Re A Company* have not survived what the court of Appeal said in *Cape*. The judge's summary (at paras 160–166) is useful to be borne in mind; only a brief summary of the central points is made here, namely that:

(a) Ownership and control of a company are not of themselves sufficient to justify piercing the corporate veil.
(b) The court cannot pierce the corporate veil merely because it is thought to be necessary in the interests of justice.
(c) The corporate veil can be pierced only if there is some impropriety, but not just if the company's wrongdoing is breach of contract.
(d) The impropriety must be linked to the use of the company structure to avoid or conceal liability.
(e) It follows that, if the court is going to pierce the veil, it is necessary to show both control of the company by the wrongdoer(s) and impropriety, that is, misuse of the company by them as a device or façade to conceal their wrongdoing.
(f) A company can be a façade, even though it was not originally incorporated with any deceptive intent; the question is whether it was so used at the time of the relevant transaction.
(g) Finally, the court will pierce the veil only in so far as it is necessary to provide a remedy for the particular wrong and not for all purposes.

However, it should be noted that the courts in recent years will examine the relationship between a parent and a subsidiary, and a group of companies may not be treated as separate, and a duty of care may be imposed upon the parent, as was shown in ***Chandler v Cape plc***,[130] in which the Court of Appeal held that:

The parent company owed a direct duty of care to the employees of the subsidiary, given its state of knowledge about the nature and management of asbestos risks by the subsidiary, which was no longer in existence. In particular, it was further held that, in appropriate circumstances, the law could impose on a parent company responsibility for the health and safety of its subsidiary's employees. Those

129 [2008] EWHC 2380, at para 160; see also CA in *VTB Capital plc v Nutritek International Corp.* [2012] EWCA Civ 808 and [2013] UKSC 5; *Caterpillar Financial Services (UK) Ltd v Saenz Corp., Ltd* [2012] EWHC 2888 (Comm).

130 [2012] EWCA Civ 525, at paras 79–80; cf. *VTB Capital plc v Nutritek International* [2012] (CA) and [2013] UKSC 5, holding that it was not appropriate to pierce the corporate veil.

circumstances included a situation such as the instant case where (a) the businesses of the parent and subsidiary were in a relevant respect the same; (b) the parent had, or ought to have had, superior knowledge on some relevant aspect of health and safety in the particular industry; (c) the subsidiary's system of work was unsafe as the parent company knew, or ought to have known; (d) the parent knew, or ought to have foreseen, that the subsidiary, or its employees, would rely on it using that superior knowledge for the employees' protection, although it was not necessary to show that the parent was in the practice of intervening in the health and safety policies of the subsidiary.

In conclusion, the court had to look at the relationship between the companies more widely and could find that the element of reliance on its using superior knowledge was established where the evidence showed that the parent had a practice of intervening in the trading operations of the subsidiary. This was not piercing the veil but a remedy in tort.

In ***Caterpillar v Saenz***,[131] Eder J, applying the principles stated above, allowed a financier who had obtained a judgment against a defendant loan guarantor to pierce the corporate veil, to a limited extent, of a 'company' that the defendant controlled, in order to enforce the judgment against it. The most important factor considered by the judge in determining whether or not the company was incorporated with deceptive intent was that the documentary evidence showed the guarantor to be the ultimate owner and controller of the company. The defendant guarantor owned certain valuable properties (in which the company had a shareholding interest), whereas the defendant had asserted it did not own the properties at the time of the court hearing; such assertions showed that the guarantor was not credible.

See further the limitations on piercing the corporate veil by *VTB Capital* and *Petrodel* cases (5.10.1). First, the veil of one-ship companies is examined, and a discussion with regard to decisions in relation to lifting and piercing of the corporate veil follows, including the effect of piercing the veil upon contractual transactions.

5.8 THE VEIL OF ONE-SHIP COMPANIES

As has been seen earlier, the registered owner of a ship is a company which is the legal owner of the asset, the ship, regardless of who is the real owner, the person or persons controlling the company. It is common practice in shipping to arrange ownership of ships in the fleet by a series of one-ship companies, which may be sister companies, or a parent company with various subsidiaries, which are regarded as legitimate legal structures for the purpose of limiting liability up to the assets of the company. One-ship companies may be owned by nominees, who appear in the register of companies of tax haven jurisdictions.

Following the principle of *Salomon v Salomon*, it is not permitted to seek an order from the court to lift or pierce the corporate veil of the company in order to find the real (beneficial) owner of the assets unless there is evidence of a sham transfer of the legal ownership of the ship. For this purpose, the court may order evidence to be produced, in certain circumstances, to investigate the beneficial ownership by lifting

131 [2012] EWHC 2888 (Comm).

the veil.[132] If there is proof of a sham transfer, the court will order the piercing of the veil.

On the facts of ***The Evpo Agnic***,[133] however, the veil was protected.

The plaintiffs were the cargo-owners of cargo laden on board *The Skipper*, which sank. They issued a writ *in rem* against 'the owners of that ship, or of *The Evpo Agnic*', for breach of duty in loading and handling of their cargo. *The Evpo Agnic* was owned by a separate company from that which owned *The Skipper*, but both companies were owned and controlled by the same shareholder and president, Mr Pothitos. According to the plaintiffs, the owners were, at all times, the owners of *The Skipper* also. The defendants applied to set aside the writ *in rem* and the warrant for the arrest of *The Evpo Agnic*. Sheen J, in the lower court, ordered the defendants to disclose all documents relating to the ownership of both vessels. The defendants appealed against this order on the basis that the two vessels were owned by two separate 'one-ship' companies. It was held that there was no evidence that the holding company of the two sister companies was the beneficial owner of all the shares in *The Evpo Agnic*, or the demise charterer. Lord Donaldson MR refused to pierce the corporate veil and defined owner to mean the registered owner, with no rights on the assets of a sister company. He said:

> I would be most reluctant to interfere with the exercise of judicial discretion in an Admiralty action by a judge of the experience of Sheen J and there can be no doubt that discovery can be ordered, if there is any real indication that this may uncover a situation which will confirm, or for that matter negative, the court's jurisdiction. But, there has to be some real indication that further facts may exist which will affect the issue.[134]

It was held that it is legitimate for ship-owners to arrange their affairs by running a series of one-ship companies as a group and cause them to use their individual assets to their mutual advantage. There is no reason why they should not do so without a risk of the arrangement being held to be a sham.

Unlike flexible jurisdictions on arrest of ships, such as South Africa (see criteria for associated ship arrest at the end of this chapter), under English law and in those jurisdictions that follow it (for example, Hong Kong, Singapore, Australia), the controlling shareholders of two sister companies, each owning one ship, will not be sufficient evidence to pierce the corporate veil of a legitimate one-ship company for the purpose of arresting the asset belonging to the other sister company, unless there is fraud. Mr Pothitos' companies were legitimate, said Lord Donaldson, and he was not regarded as the beneficial owner of the ships owned by the separate corporate structures.

It should be noted that in shipping it is not uncommon, before a claim has arisen, or a claim form has been issued, for a ship owned by one company to be transferred bona fide to another company (both of which are controlled by the same person). In such a case, the requirements of s 21(4) of the SCA 1981 will not be satisfied for an arrest of that ship to be effectively made. If, however, such a transfer is made to avoid

132 See *The Aventicum* [1978] 1 Lloyd's Rep 184; also *Linsen International v Humpuss Sea Transport Ptc Ltd* [2011] 2 Lloyd's Rep 663.

133 *The Evpo Agnic* [1988] 2 Lloyd's Rep 411.

134 Ibid, per Lord Donaldson, p 415.

the arrest of the ship when claims are anticipated or have arisen, the court may order evidence to be adduced to examine whether or not the corporate veil should be pierced.

5.9 THE DIFFERENCE BETWEEN LIFTING AND PIERCING THE CORPORATE VEIL

As mentioned above, the courts are, sometimes, prepared to look behind the corporate veil (which is known as 'lifting the veil' to peep behind it), in order to determine whether there is a genuine link between corporate structures. The investigation may reveal that the corporate veil ought to be pierced in order to treat the liabilities of the relevant company as the liabilities of its shareholders or directors.[135]

Staughton LJ said, in ***The Coral Rose***,[136] that, like all metaphors, the corporate veil can sometimes obscure reasoning rather than elucidate it. He explained, relying on the *Adams* case, that there were two senses in which the phrase is used and which needed to be distinguished:

> To pierce the corporate veil is an expression that I would reserve for treating the rights or liabilities or activities of a company as the rights or liabilities or activities of its shareholders. To lift the corporate veil or look behind it, on the other hand, should mean to have regard to the shareholding in a company for some legal purpose.

Thus the court may order evidence to be adduced for this purpose, but it will not do so unless there is an arguable case of a sham, as is shown in the following cases.

5.9.1 Examples of lifting the corporate veil

The Kommunar (No 2)[137]

The plaintiffs applied for the appraisement and sale of the vessel K, which they had earlier arrested for reimbursement of sums owed to them with regard to services for the supply of goods and materials to the ship.[138] The services were provided to various Russian fishing vessels, which at the time were managed by an entity called POL. This entity was a State enterprise under the control of the Russian Ministry of Fisheries through the medium of another State enterprise, S. S had arranged for the plaintiffs to provide agency services to these vessels in Central and South America. POL was privatised in 1993 and became a public joint stock company limited by shares. It was no longer an emanation of the Ministry and it was renamed AOL. The plaintiffs, thus, alleged that AOL had taken over the debts of POL, including the debt owed to the plaintiffs. AOL applied for the arrest to be set aside on the grounds that, at the time the cause of action arose, they were not the owners or charterers, nor in possession or control of the ship. They also submitted that, although they owned the

135 It seems that the distinction between 'lifting' and 'piercing' the corporate veil was made by Slade LJ in *Adams v Cape Industries* [1991] 1 All ER 929.

136 [1991] 1 Lloyd's Rep 563, p 571 (concerning a Mareva injunction).

137 [1997] 1 Lloyd's Rep 8.

138 See also *Kommunar (No 1)* [1997] 1 Lloyd's Rep 1 Ch 2, para 3.12.2, with regard to s 20(2)(m) of the SCA 1981.

vessel K, they were not the same legal person as POL. It was held that, once there was discontinuity of legal personality, no amount of statutory transfer of assets or liabilities by means of legal succession could satisfy the provisions of s 21(4) of the SCA 1981.

Colman J, having examined the corporate arrangements and the legislation, held that the wording of the legislation dealing with privatisation was significantly more consistent with discontinuity of the legal personality than with continuity. Also, the kind of legal entity created in AOL differed fundamentally from the kind that existed up to that time. The creation of a joint stock company out of an unincorporated State enterprise was more than a mere change of name. AOL's motion succeeded because the conditions of s 21(4) were not strictly satisfied.[139]

By contrast, ***The Aventicum***[140]is a good illustration of when the court may order the lifting of the corporate veil: Three separate companies were part-owners and the controlling shareholders of another company, which, in turn, owned two subsidiaries, one of which owned *The Aventicum* (A).

The cargo owners claimed damages for breach of contract and/or duty in the loading/handling of the cargo carried on board the vessel A in 1976. She was arrested, and her owners applied to have the proceedings set aside on the ground that the court had no jurisdiction over the vessel or her owners. The issue for decision was who owned the ship when the cause of action arose, and whether that person was also the beneficial owner of all the shares in the ship when the writ was issued. At the time the cause of action arose, the vessel belonged to a company, Armadora, which was a subsidiary of company Scalotas. Scalotas was owned by three separate parent companies. After the cause of action had arisen, the ship was transferred to a sister company of Armadora, Longan. This company, with the ship, was later bought by Anglo Norse, and a new subsidiary company was set up, Loquat, to which the ship was transferred again. The plaintiffs argued that Longan belonged to Anglo Norse. At the time the writ was issued, the vessel was owned by Loquat, which also belonged to Anglo Norse. In this manner, it could be said that Anglo Norse was, therefore, beneficial owner of both companies and the beneficial owner of the shares in the ship. Although there had been changes in the registered ownership of this vessel, it was argued that the real owners had, throughout, remained the same and, if one looked at all the connecting links between these companies, the beneficial owners were the same person. The defendants urged the court not to lift the corporate veil, but to take matters at face value. Slynn J disagreed and ordered evidence to be adduced:

> I think that it is wrong and that where damages are claimed by cargo-owners and there is dispute as to the beneficial ownership of the ship, the court in all cases can and in some cases should look behind the registered owner to determine the true beneficial ownership . . . I have no doubt that on a motion of this kind it is right to investigate the true beneficial ownership. I reject any suggestion that it is impossible 'to pierce the corporate veil' . . . it is plain that s 3(4) of the Act intends that the court shall not be limited to a consideration of who is the registered owner, or who is the person having legal ownership of the shares in the ship; the directions are to look at the beneficial ownership.[141]

139 As will be seen in Ch 5, below, it was also held by Colman J in *The Kommunar (No 3)* that the arrest was not wrongful because the strict test of mala fides or *crassa negligentia* was not met.

140 [1978] 1 Lloyd's Rep 184.

141 Ibid, p 187.

It was permitted, therefore, to look behind the corporate veil. However, on the evidence, the plaintiffs could not prove that the beneficial owner of the ship arrested was the same person with the person liable *in personam*. That was a smart way of avoiding claims that had already accrued; it is submitted that, in such circumstances, there should be more scrutiny of the arrangements and the motive behind the transfers, particularly, because in this case the successive transfers of the ship from one company to another commenced after the claim had arisen.

By contrast to this complex corporate structure, ***The Maritime Trader***[142] concerned a simple structure of a parent and a subsidiary company.

The owners of the *Antaios* time chartered her to MTO, which was a parent company of MTS, which owned *Maritime Trader*. Believing that MTO was in financial difficulties, the owners issued a writ against *Maritime Trader* and arrested her for unpaid hire. The question was whether, at the time the action was brought, *Maritime Trader* was beneficially owned in respect of all shares therein by MTO, the person who would be liable on the claim *in personam*.

It was held that, unless the corporate veil was to be lifted, it could not be said that *Maritime Trader* was beneficially owned by MTO. There was no evidence of sham, as the vessel had been owned by MTS ever since she was built, which was over four years before the charter-party contract was entered into between the owners and MTO. Without evidence of fraud, the court would not pierce the veil.

Furthermore, in ***The Glastnos***,[143] where there was a genuine transfer of the ship within a group of distinct legal entities for legitimate reasons, Steyn J (as he then was) said:

> My conclusion is that all the companies in the Tolteca Group were distinct legal entities: to describe any as sham is simply not correct. I accept that Mr Farias resorted to the device of incorporation to attain the benefits of limited liability. That is, of course, why the shipping trade is structured on the basis of one-ship companies, but by itself it affords no basis for piercing the corporate veil, and the evidence before me certainly does not justify an inference that the companies were vehicles for the commission of fraud . . .

The judge further held that the companies in question were Tolteca SA, Tolteca Inc. and, possibly, Marbank. One can readily accept that ultimate control rested with Mr Farias. A great many shipping groups, structured in one-ship companies, are ultimately controlled by one individual or family. By itself, this proves nothing. What matters is how business and affairs are carried on.[144]

A sophisticated arrangement of companies' structure and restructure can be found in ***Linsen International v Humpuss Sea Transport***[145] (see facts in Chapter 3, above, in the context of a freezing injunction sought). In the present context, the issues were these: if an arguable case were to be shown for wrongdoings in which the 3rd to 13th defendants were implicated, could the parties to the contracts (which were companies), or the contracts themselves, be regarded as shams? If they were, could it be possible to go on to establish an arguable case that one or more of the

142 [1981] 2 Lloyd's Rep 153.

143 [1991] 1 Lloyd's Rep 482, pp 490, 491.

144 When a company is faced with debts there is temptation for the person in control to find cover behind various corporate veils: *Lindsey v O'Loughnane* [2010] EWHC 529.

145 [2011] 2 Lloyd's Rep 663.

3rd to the 13th defendants should be regarded as liable under the original charter parties, the hire in respect of which had not been paid by the contracting party (who were the first defendant and his guarantor, the second defendant)?

Flaux J, agreeing with counsel for the defendants, repeated what is common and standard practice in the ship-owning world, namely that: (a) most shipping companies are structured in a way that vessels are owned by one-ship companies incorporated in Panama or Liberia or another 'flag of convenience' state and are centrally managed from the true place of business, for fiscal or other reasons; (b) the fact that a one-ship company is being managed by its ultimate parent is no evidence that it has no separate existence; (c) it is quite normal for companies in a group to use inter-group finance or even a central treasury; (d) the fact that intra-group loans were interest free and unsecured is not surprising, and it would not be the basis for piercing the corporate veil.

While regarding the lifting of the veil, the judge found a number of aspects of the transaction (i.e. the sale of a ship of the first defendant to the third) odd; for example, the evidence showed that, although title in the ship was transferred, no price was paid, and the liabilities of the third defendant exceeded its assets to be able to pay the price. Furthermore, the second defendant, who owned the first, resolved to sell its shareholdings to the third defendant and two vessels; the transfer of the shareholdings meant that the interest of the first defendant in an LNG carrier passed to the third defendant; other similar odd transactions without payments took place between 2009 and 2010.

Flaux J (agreeing with Clarke J, who granted the freezing injunction, that on the basis of this evidence there was a real risk of dissipation of assets for the purpose of defeating any seizure of assets of the first defendant for enforcement of a judgment) was satisfied that the claimants could show a good arguable case: (a) that the purported sales of vessels and transfers of assets to the third defendant were shams or façades designed to render enforcement against the first defendant more difficult; and (b) that the corporate structure of the Humpuss group was misused from July 2009 until sometime in 2010 to that end. It seemed to him that, in these circumstances, at least as between the first defendant and the third defendant, there was an arguable case for piercing the corporate veil. However, the judge found it difficult to hold that there was any basis for extending the piercing of the veil within the Humpuss group beyond the third defendant.

5.10 PIERCING THE CORPORATE VEIL[146]

Piercing the corporate veil is an unusual approach for the English courts to take. However, they have, so far, permitted it, albeit in very exceptional cases, in which justice requires the court to do so, as for example, when fraudulent and dishonest means were used by a debtor to defeat the enforcement of a judgment against it. In ***Kensington International Ltd v Congo***,[147] the court pierced the corporate veil

146 It is appropriate to pierce the corporate veil only where special circumstances exist indicating that it is a mere façade concealing the true facts: *Woolfson v Strathclyde RC* [1978] SC (HL) 90.

147 [2005] EWHC 2684 (Comm).

where entities were used as a façade and transactions entered into were not at arm's length in order to create an appearance of a chain of transactions between independent oil traders to enable oil to be traded free from enforcement of judgment.

In ***Dadourian Group International Inc and Others v Simms and Others***,[148] it was held that:

> In all of the cases where the court has been willing to pierce the corporate veil, it has been necessary or convenient to do so to provide the claimant with an effective remedy to deal with the wrong which has been done to him and where the interposition of a company would, if effective, deprive him of that remedy against him. It seems to me that the veil, if it is to be lifted at all, is to be lifted for the purposes of the relevant transaction . . .
>
> It is not permissible to lift the veil simply because a company has been involved in wrongdoing, in particular because it is in breach of contract. And whilst it is clear that the veil can be lifted where the company is a sham or façade or, to use different language, where it is a mask to conceal the true facts, it is, in my judgment, correct to do so only in order to provide a remedy for the wrong which those controlling the company have done . . .

An order to pierce the veil will be made when it is found that there was a sham transfer of the ship to another company in an attempt to avoid liability to claimants.

The definition of a 'sham' transfer was given by Diplock LJ in ***Snook v London and West Riding Investments Ltd***[149] concerning hire purchase:

> . . . it means acts done or documents executed by the parties to the 'sham' which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create. But, one thing, I think, is clear in legal principle, morality and the authorities (see *Yorkshire Rly Wagon Co. v Maclure* and *Stoneleigh Finance Ltd v Phillips*), that for acts or documents to be a 'sham', with whatever legal consequences follow from this, all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating. No unexpressed intentions of a 'shammer' affect the rights of a party whom he deceived.

The facts of the following cases, where the veil was pierced, illustrate what would not be regarded as a genuine single-ship company in the eyes of the law but only used to conceal the true ownership of a ship to evade liability to creditors.

The Saudi Prince[150]

Ship A was owned by Mr Orri, a Saudi businessman, who traded it in the name of company SEL. Cargo of ceramics, carried on board, suffered damage before delivery, and the cargo-owners claimed damages against the carriers. The *Saudi Prince*, also belonging to SEL, was a sister ship of ship A and was arrested when she came within the jurisdiction. Mr Orri applied to have the writ set aside on the ground that, before the writ was issued, the legal ownership of the *Saudi Prince* had been transferred to another company (SSST) in which he owned 80 per cent of the shares, while his two daughters owned 20 per cent. Mr Orri argued he was not the beneficial owner of all

148 [2006] EWHC 2973 (Ch) at paras 682–683.
149 [1967] 2 QB 786, p 802.
150 [1982] 2 Lloyd's Rep 255.

shares in the ship. On the evidence, however, it was not shown that the vessel had been transferred to this company for value. There was no convincing evidence that his children paid money for the shares. The shares were just put in their name as nominees of Mr Orri to divest himself of shares, in name only. In any event, the company had not properly been incorporated in accordance with Saudi Arabian law. Therefore, it was held that an investigation of the true beneficial ownership of the vessel showed that Mr Orri was, at the time of the issue of the writ, the true beneficial owner.

The Tjaskemolen[151]

Bayland Navigation Inc. (B) were a company being part of a group of companies that were formed for the purpose of owning *The Tjaskemolen* (T). B entered into a charter-party with C for the carriage of steel under which B warranted that the ship's certificates of class and seaworthiness were in order. C in turn had contracted with D to sell and transport cargo of steel to Korea. When the notice of readiness for loading of the cargo was tendered, the classification certificate was not on board. As a result, C was unable to load and, therefore, cancelled the charter-party. Consequently, the buyer of the steel, D, cancelled the sale contract. C arrested the ship, seeking security in respect of their claim in damages, which had been submitted to arbitration. B applied for the release of the ship from arrest on the grounds that, at the time of the issue of the writ, the ship was not owned by B, nor was she chartered by demise to the person who would be liable for the claim *in personam*, and that the beneficial ownership had been transferred to another company in the group, G, before the issue of the writ. C alleged that the agreement was a sham and, in any event, neither legal nor beneficial ownership could have passed until the vessel was deleted from the Panamanian ship-register. The deletion did not occur until after the issue of the writ. On evidence, it was shown that, at the time the MOA was signed, G did not exist and was not incorporated until afterwards. In addition, there was never any intention that G should pay a full price for the ship. It was held that the whole arrangement was a sham made only for the purpose of ensuring that the vessel was not made subject to security for any arbitration award.

The Ocean Enterprise[152]

The sale of a ship by a director of the owning company, who had no authority from the board of directors, and where the sale was in breach of his fiduciary duty, was declared invalid and fraudulent on the company. The beneficial ownership in the ship remained with the company. The buyer was not a bona fide purchaser for value and without notice of the defect in the title. On the facts, the director of the purchasing company was involved in a cover-up for the seller in a series of sham sales and registration of the ship. He was ordered by the court to pay damages to the plaintiff (the defrauded company) for conversion of its property.

151 [1997] 2 Lloyd's Rep 465.
152 [1997] 1 Lloyd's Rep 449.

By contrast to the above cases, Toulson J, in ***The Rialto (No 2)***,[153] a case concerning a Mareva injunction, refused to pierce the corporate veil. Mr Yamvrias, as a chartering broker, had signed a charter-party on behalf of the contracting party, the charterers, who eventually repudiated it, and the owners of the chartered ship claimed damages. On evidence, it was shown that Mr Yamvrias had control of the chartering company. The market having fallen, he tried to renegotiate the hire rate and, when that failed, he repudiated the charter. On the day of the repudiation, he caused the transfer of money from the account of the charterers to other companies controlled by him, in order to protect the money from the owners' claim in damages. The judge distinguished the *Tjaskemolen* case from this one on the basis that the charter was not a sham and, at the time of the transfer, liability had not yet arisen following the principle laid down in the *Adams* case seen earlier. He held, in particular, that:

> . . . It is one thing to hold a purported transfer to be ineffective, and another to hold the would-be transferee liable to the plaintiff in damages for the antecedent wrongs of the would-be transferor. I am not persuaded on the authorities or as a matter of principle that the transfer of funds by Rendsburg to Lalidi on the repudiation of the charter party, for the purpose of putting them beyond the reach of Yukong, entitles the court to treat Mr Yamvrias retrospectively as a party to the charterparty and therefore liable in damages for Rendsburg's repudiation of it.[154]

There could not have been a more obvious deliberate evasion of liability by the charterers than the transfer of the money from the company's account on the day of the repudiation, but, technically, liability arose a few hours later on the same day! The law or, perhaps, its application can sometimes produce otiose results particularly in cases in which deliberate skirting of liability is staring one in the face, but this is now clarified by the Supreme Court in *Petrodel v Prest* (below).

5.10.1 Piercing the corporate veil and its effect on contractual transactions

The final question in ***Linsen v Humpuss*** (above at 5.9.1) examined by Flaux J was what would be the effect of piercing the corporate veil on the contracts. Could the court go beyond the unravelling of the transactions implicated in the abuse (i.e. the purported sale of vessels and the transfer of shares in companies), so as to lead to other defendants in the group being held liable as if they were parties to the original contracts? The judge was of the view that it could not in this case. He held (at para 139) that the fundamental difference between this case and the case of Burton J in *Gramsci* was that, in *Gramsci*, the claimants had a good arguable case that the whole purpose of the corporate structure was to perpetrate the relevant fraud, and both the chartering companies and the charters themselves were effectively a sham or a façade from the outset. Flaux J concluded that, where breaches of contract had been followed by transfers of assets, which were an abuse of the corporate structure such as would justify piercing the corporate veil, only those transactions implicated in the abuse of

153 *Yukong Line Ltd of Korea v Rendsburg Investments Corp. (The Rialto No 2)* [1998] 1 Lloyd's Rep 322.

154 Ibid, at pp 310G–310H; it should be noted that Mr Howard QC, counsel for the claimants in *Linsen*, above, submitted, rightly in the present author's view, that this decision was wrongly decided, but Flaux J rejected that submission.

the corporate structure could be unravelled, and it could not lead to the transferees being held liable as if they were parties to the original contracts.

The Court of Appeal, in *Linsen v Humpuss*,[155] refusing to renew the freezing injunction against more defendants, commented that piercing the corporate veil would effectively involve treating the third defendant as if it were a contractual party to the arrangements between the first defendant and L. There was no reason why the mere fact that the third defendant knowingly received assets from the first defendant, for the purpose of avoiding the first defendant's liability under a contract already entered into and breached by the first defendant, should render the third defendant liable under the contract. It might well enable L to follow the assets, but that was an entirely different matter.

By contrast, it is interesting to note the decisions of Burton J: In ***Antonio Gramsci Shipping Corporation v Stepanovs***,[156] he held that there was a good arguable case that the veil of incorporation should be pierced in order to permit the claimant to seek to enforce the charter-party as against the defendant, as a party to it. The company was allegedly used as a device to conceal the true facts. The claimants, Latvian Shipping, alleged that the defendant (charterer) had committed fraud against them.

Burton J explained his reasons for concluding that the claimant had a good arguable case for holding the puppeteers liable on their puppets' charter-parties (at paragraph 26):

I am satisfied that both Warren J in *Dadourian* and Flaux J in *Lindsay*[157] were only ruling out the course of finding the puppeteer liable for breach of contract because in neither case was it appropriate to do so in the event, since a remedy of finding the puppeteer personally liable (as tortfeasor) had already been granted which was, certainly in the case of Dadourian, inconsistent with taking the contractual route. None of the reasons which Warren J put forward argues against a conclusion, depending on how the facts fall out at trial, that in this case the puppeteer should be held party to the puppet company's contract. There is in my judgment no good reason of principle or jurisprudence why the victim cannot enforce the agreement against both the puppet company and the puppeteer who, all the time, was pulling the strings. The claimants seek to enforce the contract against both the puppeteer and the puppet company (as in *Gilford* and *Jones*) . . .

This case sent shockwaves through shareholders of companies. It is seen later that, in *VTB Capital v Nutritek*, the Court of Appeal disapproved of such an extension of the scope of piercing the corporate veil.

In ***Alliance Bank JSC v Aquanta Corp.***,[158] the defendants sought to set aside permission to serve proceedings out of the jurisdiction and challenged the jurisdiction of the English court. The claimant Kazakhstan bank (C) brought proceedings against

155 [2011] EWCA Civ 1042 (paras 11–12 of the judgment).

156 [2011] EWHC 333 (Comm); [2011] 1 Lloyd's Rep 647; see also *A. Gramsci v Lembergs* [2013] 2 Lloyds Rep 295 in which the CA, following the SC decisions in *VTB v Nutritek* and in *Petrobel*, see below, held that the court could not pierce the corporate veil to make the controller of the company a party to the jurisdiction clause in the contract between the company and the claimant on the basis of Art 23 of the Brussels I Regulation.

157 *Dadourian Group International Inc. and Others v Simms and Others* [2006] EWHC 2973 (Ch) (where Warren J refused to pierce the veil) and in *Lindsay v O'Loughnane* [2010] EWHC 529 (QB) (where Flaux J did likewise).

158 [2012] 1 Lloyd's Rep 181; see also CA [2013] 1 Lloyd's Rep 1: the Court of Appeal affirmed the first instance decision on the issue that England was not the most appropriate forum and the case should be tried in Kazakhstan, where the fraud took place.

a number of defendants, alleging that US$1.1 billion had been extracted from it by a dishonest scheme.

Burton J held that by the application of the alter ego[159] principle, there was an arguable case that the off-shore companies were the puppets of the brothers. There was a serious issue of fact and law to be tried by piercing the corporate veil to determine whether three of the defendants were to be treated as parties to the loan agreements. But he held that England was not the most appropriate forum for the trial.

In ***VTB Capital plc v Nutritek International Corp.***[160] the Court of Appeal disapproved of the decisions in both *Antonio Gramski* and in *Alliance* and held that: it would be contrary to principle and authority to hold that, where the court pierced the corporate veil, it could find that those who had misused the corporate structure were parties to the company's contracts.

VTB was a subsidiary of a Russian State-owned bank. It lent money under a facility agreement to a Russian company (R) to fund the acquisition by R of Russian companies from the first defendant (D1). The agreement provided for English law and jurisdiction. R defaulted on the loan. VTB alleged that it had been induced to enter into the facility agreement by fraudulent misrepresentations made by D1, for which the other defendants were alleged to be jointly liable under the facility agreements.

The critical question on appeal of *VTB Capital* was what was the effect and consequences of a finding that the circumstances of the particular case did justify the piercing of the corporate veil. In particular, would proof of VTB's case lead to the legal conclusion that Marcap BVI, Marcap Moscow and Mr Malofeev were also *original* parties to the two facility agreements?

VTB's counsel argued: (a) if the controller of a company fraudulently deceives another into entering into a contract with the company in the belief that the company is, in fact, in different control and, therefore, so uses the company as a mere façade to conceal the controller's true identity, the discovery of the true facts will lead to the consequence that as a matter of law the controller will be regarded as a party to the contract; and (b) even though the controller and the company will thus, in practice, be regarded as one and the same, the controller will not simply be substituted for the company as a contracting party, he will be jointly and severally liable under the contract with the company, his alter ego. Further, if the contract is one that is required to be in writing and signed by or on behalf of the parties to it, the signing by the company as its controller's alter ego will be a sufficient signing also on behalf of the true contracting party, the controller. Counsel disclaimed that his proposition involved the making of any inroads into the basic principle recognised by *Salomon*'s case (that is, that a company is a corporate body separate from its corporators). His submission was founded,[161] essentially, on the fraudulent or dishonest use of a company by its corporators or controllers so as to conceal the latter's true identities.

159 Cf. *Hashem v Shayif* [2008] EWHC 2380, in which the court declined to 'pierce the corporate veil' in ancillary relief proceedings where the relevant company was alleged to be the husband's alter ego; it had not been shown that the husband had the required degree of control for the veil to be pierced or that there had been relevant impropriety.

160 [2012] EWCA Civ 808; see also Ch 6, para 4.5.

161 Relying on *Re Darby ex parte Brougham* [1911] 1 KB 95; *Gilford Motor Company, Limited v Horne* [1933] 1 Ch 935; *Jones and Another v Lipman and Another* [1962] 1 WLR 832. See further *Neufeld v Secretary of State for Business, Enterprise and Regulatory Reform* [2009] 3 All ER 790; *Gencor ACP Ltd and Others v Dalby and Others* [2000] 2 BCLC 734; *Dadourian Group International Inc and Others v Simms and*

The Court of Appeal held:

> Whilst we accept that the court can, in an appropriate case, 'pierce a company's corporate veil' and, in doing so, substantially identify the company with those in control of it, no authority has been cited to us, apart from Burton J's decisions in Gramsci and Alliance, that supports the proposition that, once the veil is pierced, the court either does or can (or that it is arguable that it does or can) proceed in consequence to a holding either that the puppet company was a party to the puppeteer's contract, or vice versa.

The Supreme Court,[162] by majority per Lord Neuberger, Lord Mance and Lord Wilson, agreed with the Court of Appeal and held: The corporate veil would not be pierced to allow VTB to raise an additional claim in contract, by way of amendment to its statement of case. The basis on which VTB sought to pierce the corporate veil involved an inappropriate extension of the cases. It would lead to the person controlling the company being held liable as if he had been a co-contracting party with the company concerned to a contract where the company was a party and he was not, and even though neither he himself nor any of the contracting parties (including VTB) intended him to be a party. The notion that the principle could be extended to such a case had no support from any case save for a very recent decision in *Antonio Gramsci Shipping Corporation v Stepanovs*, which should not be applied here.

Lord Nueberger, who delivered the majority judgment on this issue, was not prepared to permit future attempts to impose contractual liability by piercing the corporate veil. Although Lord Clarke, in minority alone, agreed with Lord Neuberger that this was not a case in which it would be appropriate to pierce the corporate veil on the facts, he expressed his wish (at para 238) to reserve, for future decision, the wider question as to what is the true scope of the circumstances in which it is permissible to pierce the corporate veil. That included, he said, the question whether *Antonio Gramsci Shipping Corp. v Stepanovs* was correctly decided.

The opportunity to clarify this issue, which is not only of great commercial importance but also of public policy, was given in ***Petrodel Resources Ltd & Ors v Prest & Ors***,[163] in which the Supreme Court unanimously (seven SC Justices) declared that the properties held within a corporate structure were held on trust for the husband (the oil tycoon) and that they should be transferred to the wife in satisfaction of the financial settlement. Lord Sumption, giving the main judgment, stated that a limited principle of English law could apply when a person was under an existing legal obligation or liability, which he deliberately evaded by interposing a company under his control. It was not possible to give general guidance going beyond the ordinary principles, as the issue (whether assets, legally vested in a company, were beneficially owned by its controller) was highly fact-specific. But it was recognized that, in a small category of cases, where there is abuse of the corporate veil to evade or frustrate the law, the issue can be addressed only by disregarding the legal personality of the company and this is consistent with authority and long-standing principles of legal policy.

Others [2006] EWHC 2973 (Ch) (where Warren J refused to pierce the veil) and in *Lindsay v O'Loughnane* [2010] EWHC 529 (QB) (where Flaux J did likewise); in *Hashem v Shayif and Another* [2008] EWHC 2380 (Fam) Munby J includes a comprehensive discussion of the principles by reference to which the court may pierce the veil of incorporation (paras 144 and 221).

162 [2013] UKSC 5.

163 [2013] UKSC 34(12.06.13), the judgment was handed down at the stage when the author was reading the proofs of this book, thus, the space for more analysis is restricted.

While Lord Neuberger agreed that 'piercing' should be limited to cases of 'evasion', Lord Clarke expressed a view (agreeing with Lord Mance) that it is often dangerous to foreclose all possible future situations that may arise; for example, situations in which there is 'concealment'. Lord Sumption commented on the *VTB Capital* that the fundamental objection in that case was that the principle was being invoked so as to create a new liability, which would not otherwise exist, namely, to make the controllers of the company jointly and severally liable on the company's contract (para 34).

5.11 BENEFICIAL OWNERSHIP AND PRIVATISATION OF STATE-OWNED CORPORATIONS

The question whether a given corporate entity can be said to be the same legal personality as some previous legal entity is, perhaps, best answered by investigating the different legal characteristics of the two to see whether continuity of the original entity has been broken or maintained (see *The Kommunar (No 2)*[164] at 5.9.1 and below). Further examples illustrate this complex situation.

In ***The Nazym Khikmet (NK)***,[165] Blasko, a State enterprise, was a managing company of a fleet for the Ukraine Government and, by reason of being in possession and control of the ship *NK* when the cause of action arose, Blasko was the person who would be liable *in personam*. The owners of the cargo, which had been damaged on board the ship *NK*, arrested ship Z, a sister ship of *NK*, and claimed that Blasko was the beneficial owner of Z, at the time the action was brought. Both Blasko and the Republic of Ukraine contended that, at the time of the issue of the writ, Z was not beneficially owned by Blasko, but by the Republic. Upon conclusive evidence, Clarke J held that, although Blasko had some rights of ownership, it did not have full rights to dispose of or mortgage the ship without the consent of the Government. The Court of Appeal affirmed his decision, and Sir Thomas Bingham MR stated:

> The evidence makes plain that the process of liberalisation, which took place in the Ukraine once it became independent, has involved a devolution of commercial authority to trading enterprises; this process has led to a loosening of the bonds of State control, but not to a severance of them. The State has retained its ownership of the income earning assets of enterprises, such as Blasko, and the right and power of ultimate decision over the use and exploitation of those assets.[166]

At a later stage, however, as is shown in ***Guiseppe di Vittorio (GV)***,[167] Blasko was thought to have taken over ownership rights by having power to mortgage the ship, which was arrested by the bunker suppliers. The Republic of Ukraine intervened, claiming that it was the beneficial owner of the ship and not Blasko. Therefore, it contended that, as it was a successor State of the USSR, the ship was not subject to arrest under the SCA 1981. The State Immunity (Merchant Shipping) (USSR) Order 1978 applied to a ship owned by it, and it was immune from liability.

The plaintiffs submitted that, at the time the cause of action arose, Blasko was the beneficial owner, or demise charterer, and relied on a mortgage agreement by which

164 *The Kommunar (No 2)* [1997] 1 Lloyd's Rep 8, p 16, per Colman J.
165 [1996] 2 Lloyd's Rep 362.
166 Ibid, p 374.
167 [1998] 1 Lloyd's Rep 136.

it appeared that Blasko had power to mortgage the ship. They also argued that this was an act consistent with Blasko being the legal and beneficial owner of the vessel at the time of the issue of the writ.

Although, at first instance, the judge held that Blasko was the beneficial owner, the Court of Appeal held that, on the evidence, there was no suggestion of a transfer of the ship either by Blasko's representatives, or by the Ministry of Transport. On the issue whether Blasko could be described as a demise charterer of the ship, the court held that there need not be a document which records a consensual agreement between the owner and the charterer, before the statutory definition of 'demise charterer' can be satisfied. The terms on which Blasko held the vessel were set out in a document described as a 'charter' and had the effect that Blasko could sell or mortgage its vessels, provided necessary government or State consent was obtained. Evans LJ held that Blasko's position vis à vis the Republic could be interpreted as a demise charterer and, as such, the provision of s 21(4) for the arrest of the ship was satisfied.

In situations of privatisation of State enterprises, a transfer of the whole undertaking of a fleet of ships from one corporation to another will be done effectively if continuity is broken, so that it can be said that the new corporation is a new entity. The Russian State had successfully broken that continuity, as was shown earlier in ***The Kommunar (No 2)***.[168]

In this case, Russian fishing vessels, which were managed by a State enterprise and controlled by the Ministry of Fisheries, were transferred by privatisation of the managing company. It involved a conversion into a public joint stock, a company limited by shares, and change of its name. The conversion occurred after claims arose, but before the arrest of the ship in connection with which the claim arose. The beneficial owner, therefore, at the time of the issue of the writ was not the person who would be liable *in personam* when the cause of action arose. The ship was released from arrest.

It is worth noting how the Singaporean courts have dealt with issues of ownership of a ship in cases of privatisation from State ownership. In ***The Kapitan Temkin***,[169] the Singaporean court held that beneficial ownership of the vessel was not in the State. The charterers claimed damages for breach of contract against Blasko, the registered owners of the ship. Blasco, contesting the arrest, claimed that the Republic of Ukraine was the beneficial owner, and, without an affidavit in support, the Registrar allowed the application. On appeal to the court by the claimant, it was held that in determining beneficial ownership the entry into the Lloyd's Register of Shipping is the starting point, in addition to the certificate of registration. Other relevant factors are who has the right to sell the ship or dispose of all the shares in the ship. Blasco was stated in the certificate to be the registered owner, but there was an inconsistency in the certificate of registration. Although it described Blasco as the owner of the ship, it contained a clause that stated: 'according to art 30 of the MS Code of USSR, this certificate is to be considered as final and complete evidence of the right of property of USSR in the ship'. However, the court held that the opening words in the certificate meant that Blasco were the only party entitled to sell, dispose of, or pass title in all the shares of the ship. The latter part of the certificate was not relevant,

168 [1997] 1 Lloyd's Rep 8.
169 [1998] SGHC 42.

because art 30 would only apply if the certificate had been issued pursuant to art 30, which was not the case here.

More recently, the Singaporean court in ***The Makassar***,[170] following *The Kapitan Temkin*, held that the registered owner of a ship is prima facie its beneficial owner, and the evidence produced was insufficient to disprove the presumption of ownership raised by the ship's registration showing the name of Djakarta Lloyd. Only in exceptional cases[171] would a different finding from that be made. On the facts, the arrest of the ship was challenged by Djakarta Lloyd, as an intervener, alleging that it was an Indonesian State-owned company and, although it was registered as the legal owner of the ship, the beneficial owner was the Indonesian State. It further argued that the ship had been constructed under a programme of the Indonesian government, which provided the loans to implementing agencies, one of which was Djakarta Lloyd. However, the registration certificate, as to the legal ownership, prevailed.

The Privy Council recently clarified the principle of when a corporate body might be regarded as an organ of a State or as a separate and distinct entity for the purpose of applying State immunity, which may also be relevant when it comes to an arrest of a ship. In ***La Générale Des Carrières et Des Mines Sarl v Hemisphere Associates LLC (Jersey)***[172] it held that:

> Separate juridical status of a corporate entity was not conclusive. An entity's constitution, control and functions remained relevant. But constitutional and factual control and the exercise of sovereign functions did not without more convert a separate entity into an organ of the State. Especially where a separate juridical entity was formed by the State for what were on the face of it commercial or industrial purposes, with its own management and budget, the strong presumption was that its separate corporate status should be respected. It would take quite extreme circumstances to displace this presumption, although the presumption would be displaced if in fact the entity had, despite its juridical personality, no effective separate existence. But for the two to be assimilated generally, an examination of the relevant constitutional arrangements, as applied in practice, as well as of the State's control exercised over the entity and of the entity's activities and functions, would have to justify the conclusion that the affairs of the entity and the State were so closely intertwined and confused that the entity could not properly be regarded for any significant purpose as distinct from the State and vice versa.[173]

It was common ground in this case that the corporate entity was not a sham entity but a real and functioning corporate entity, having substantial assets and a substantial business including interests in over 30 joint ventures with outside concerns. It had its own budget and accounting, its own borrowings, its own debts and tax and other liabilities and its own differences with government departments. Further, it was not in any sense by reason of its functions or activities a core department of, or on that

170 *ANL Singapore Pte Ltd v The Owners of the ship Makassar* [2010] SGHC 306, as reported by Rajah Tann LLP, Admiralty and Shipping lawyers in Singapore.

171 *The Tian Sheng No 8* [2000] 2 Lloyd's Rep 430 (HK Court of Final Appeal).

172 [2012] 1 Lloyd's Law Rep Plus 69, see further Ch 1 under sovereign immunity.

173 Ibid, at para 29; *Kensington International Ltd v Republic of the Congo* [2005] EWHC 2684 (Comm): it was not necessary for there to be a divestment of assets at an undervalue to justify the court piercing the corporate veil in relation to particular transactions; *Walker International Holdings Ltd v Republique Populaire du Congo* [2005] EWHC 2813 (Comm); *Ministry of Trade of the Republic of Iraq v Tsavliris Salvage (International) Ltd* [2008] 2 Lloyd's Rep 90; *Wilhelm Finance Inc v Ente Administrador del Astillero Rio Santiago* [2009] EWHC 1074 (Comm); *First National City Bank v Banco para el Comercio Exterior de Cuba* 462 US 611 (1983); *Roxford Enterprises SA v Cuba* 2003 FCT 763; *Banco de Mocambique v Inter-Science Research and Development Services (Pty) Ltd* 1982 (3) SA 330 (T); *Shipping Corporation of India Ltd v Evdomon Corporation* 1994 1 (SA) 550 (AD), applied.

score inseparable from, the State. It was an entity clearly distinct from the executive organs of the government of the State.[174]

5.12 MANAGING THE RISKS OF BENEFICIAL OWNERSHIP

These cases illustrate that there are various ways of structuring the owning companies of ships, some of which are legitimate in the eyes of the law, but others are illegitimate, if the intention is to avoid liabilities already accrued. For purposes of risk management, a ship-owner can legitimately arrange his affairs in such a way so that the exposure of his assets is limited.

Forming one-ship companies provides one legitimate method of limiting liability up to the value of the relevant ship;[175] a parent company, with a series of subsidiary companies, is another. A genuine transfer of a ship from one sister company to another, before a suspected claim has arisen, limits the liability of the sister companies up to the value of the ship each owns.

Similarly, the ship can be chartered down the line, and the cargo carrier can, for example, be a subsidiary company of the owning company, acting as a time charterer and signing bills of lading as carrier without owning ships. So, although the contractual carrier would be liable personally for possible damage to cargo carried on board, the ship in connection with which a claim might arise might not be arrested, because the contractual carrier would be neither the beneficial owner of that ship nor the charterer by demise at the time when an action might be brought unless the performing carrier still owns the ship and is sued in tort. If the charterer does not beneficially own ships itself, no other ship could be arrested under s 21(4) of the SCA 1981.

In certain limited circumstances, however, as the examples above show, the court may peep behind the corporate veil of a company if there is an arguable case of a 'sham' and may consider who the shareholders are, or the people who direct and control the activities of a company, where the character of a company, or the role of persons controlling it, is a relevant feature (see further 5.14, below, on how the South African legislation is combating the shield of one-ship companies with associated ship arrest).

5.13 COST ORDERS AND PIERCING THE CORPORATE VEIL

The court has power under s 51 of the SCA 1981 to order any party to pay the costs of English proceedings, if that party financially supports the litigation. The central objective of this section is that the successful party is not unjustly burdened with costs of litigation that may have, vexatiously, been brought. Before the court orders litigation funders to pay the costs of a successful defendant, it takes into account public policy considerations in the exercise of its discretion.

174 Ibid, at paras 64, 70 and 71.

175 *Bakri Bunker Trading Co. Ltd v The Owners of Neptune* [1986] HK LR 345; *The Evpo Agnic* (supra) fn 133; Single-ship companies and legal consequences have been examined by Christodoulou, D, *The Single-Ship Company*, 2000, Sakkoulas, which provides an interesting comparative study of the subject matter, particularly in relation to the position of creditors.

Colman J, in ***Arkin v Borchard Lines and Others (No 2)***,[176] summarised these as being: (a) to discourage ill-founded claims or defences; (b) to compensate those who were obliged to protect their rights, and have done so successfully, in the course of litigation; (c) to deter funders of weak claims; (d) to protect the due administration of justice; and (e) to make easy access of impecunious claimants with claims of substance to the court. In this case, the judge did not order the funders to pay the costs of the defendants.

However, the Court of Appeal,[177] while approving the principles of public policy as summarised above, reversed the decision partly and held that: a professional funder, who had financed part of a claimant's costs of litigation, should be potentially liable for the costs of the opposing party only to the extent of the funding provided. Justice would be better served in this manner than by leaving defendants in a position where they had no right to recover any costs from a professional funder, whose intervention had permitted the continuation of a claim that, at the end, proved to be without merit. Furthermore, this way will encourage professional funders to cap the funds they will be providing in order to limit their exposure to a reasonable amount, with the effect that costs would be kept proportionate. They will also take greater care in considering whether the prospects of litigation were sufficiently good to justify the support they were asked to give. MPC, in this case, were ordered to pay a contribution to defence costs.

In ***The Ikarian Reefer***,[178] it was held that the director of a company, a non-party to previous proceedings brought by the assured (the company) against the hull underwriters of the ship for a total loss, was liable to pay the outstanding legal costs of those proceedings in which the assured had lost at the Court of Appeal on the ground of wilful misconduct.

Whether or not the finding of the Court of Appeal on wilful misconduct was correct, the result of this case is alarming to shareholders or directors of one-ship companies who support litigation financially. If they are domiciled in a European Union State, they may be sued in the court seised of the original proceedings under Art 6(2) of the Brussels I Regulation,[179] which provides for an alternative to the domicile rule, that being a special jurisdiction provided against a third party in any third-party proceedings.

In cases where there is transfer of business to avoid cost orders, in circumstances in which the original debtor disappears, the court will order costs against a third party when justice requires it to do so, as it did in ***Total Spares & Supplies Ltd v Antares SRL***.[180] The third party was not in fact an independent third party, in this case, but was closely connected with the company that had disappeared.

The claimant company (L) applied for third-party costs orders pursuant to the Supreme Court Act 1981 s 51(3) to recover costs arising from an action brought by L and another for wrongful termination of a franchise agreement. L had been awarded

176 [2004] 1 Lloyd's Rep 88, at p 94.

177 [2005] EWCA Civ 655; [2005] 1 WLR 3055: the decision is useful also with regard to experts' costs. See also *Gulf Azov Shipping Co., Ltd v Idisi (Costs)* [2004] EWCA Civ 292, where it was held that a funder to litigation was exposed to a costs order where he had controlled or directed the conduct of the litigation in a manner which had resulted in undue expense or hardship to the successful party.

178 *National Justice Compania Naviera SA v Prudential Assurance Co Ltd (The Ikarian Reefer (No 2))* [2000] 1 Lloyd's Rep 129 (CA).

179 See Ch 7.

180 [2006] EWHC 1537 (Ch).

55 per cent of its costs against the defendant Italian franchisor (S). It had been unable to recover those costs, as S had transferred its distribution and sales business to another company (F) just before the start of the trial. S had subsequently sold all its shares and merged its manufacturing and production business with another company (Z). The main shareholder and manager of S (G) had not informed L or the court of those matters until after they had taken place. By the time L applied for enforcement of the costs order against S, it had ceased trading and had been 'cancelled', the equivalent of being struck off the companies register in England and Wales. Costs orders were sought against F and G. Issues arose as to the purpose of the transfer of the business, whether it was at an undervalue, and whether G controlled F.

The court further held that, in the circumstances, it was just to make an order against F. The transfer was intended to render it more difficult for L to recover any damages or costs. F, through those who controlled it, knew and intended the transfer to have that purpose. F was not an independent third party but was closely connected with S. Although an order for costs against a non-party was exceptional,[181] the facts of the case were exceptional and justified the making of an order that F should pay 55 per cent of L's costs incurred after the transfer. G was directly responsible for the transfer; he controlled S; he had misled the court in respect of the status of S after its merger with Z and concealed the merger from the court. G's actions had effectively deprived L of any realistic opportunity of recovering its costs, unless a third-party costs order was made. It was just that he should be responsible for the costs originally ordered to be paid by S.

Issues of piercing the corporate veil arise also in cases where applications are made for a freezing injunction, or for disclosure orders, or for Rule B attachment, as seen in Chapter 3, above.

5.14 ASSOCIATED SHIP ARREST IN SOUTH AFRICA AND PIERCING THE CORPORATE VEIL

At this point, it is relevant and useful to compare the English law approach to piercing the corporate veil (above) with the approach the South African (SA) courts have taken, in recent years, in relation to associated ship arrest under their legislation, the Admiralty Jurisdiction Regulation Act No 105 of 1983, as amended with effect from 1 July 1992 (the Act).[182]

The function of the arrest is, as in England, to found jurisdiction or to obtain security for a maritime claim.

The claimant must show: (a) it has a maritime claim enforceable *in personam* against the owner of the ship, or enforceable by an action *in rem* against that ship or an associated ship; (b) it has a prima facie[183] case on the merits, to its best knowledge

181 *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* (Costs) [2004] UKPC 39, [2004] 1 WLR 2807 applied.

182 See Hare, J (Professor), *Shipping Law and Admiralty Jurisdiction in South Africa*, Part I, 'Admiralty Jurisdiction and Practice' at paras 2–2.6.2–2–2.6.3, 2nd edn (2009) JUTA & Co. Ltd.

183 It is settled law that a prima facie case could be satisfied if a claimant showed that there was evidence that, if accepted, would establish a cause of action and that the mere fact that such evidence put up was contradicted would not mean that the test was not satisfied. Only if it was quite clear that there was no action, or that the claimant could not succeed, that a prima facie case would not be made out. The Supreme

and belief, in respect of such a claim; and (c) it has a genuine and reasonable need for security in respect of the claim.

The attraction of claimants to the SA jurisdiction is the associated ship arrest, which is not the same as a 'sister ship' arrest, but it includes it; it does not exist in other jurisdictions. In practical terms, the associated ship arrest goes behind the veil of a company and circumvents owners' strategies to hide behind a one-ship company.

The relevant sections of the Act are 3(6), which (subject to the provisions of subs (9)) permits the arrest of 'an associated ship instead of the ship in respect of which the maritime claim arose', and 3(7), which defines 'associated ship' as follows:

(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, at the time when the action is commenced, by the person who was the owner of the ship concerned at the time when the maritime claim arose; or
  (ii) owned, at the time when the action is commenced, by a person who controlled the company which owned the ship concerned when the maritime claim arose; or
  (iii) owned, at the time when the action is commenced, by a company which is controlled by a person who owned the ship concerned, or controlled the company which owned the ship concerned, when the maritime claim arose.
(b) For the purposes of (a) –
  (i) ships shall be deemed to be owned by the same persons if the majority in number of, or of voting rights in respect of, or the greater part in value of, the shares in the ship 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;
  (iii) a company includes any other juristic person and any body of persons, irrespective of whether or not any interest therein consists of shares.
(c) If at any time a ship was a subject of a charterparty, the charterer or sub charterer, as the case may be, shall for the purposes of subsection (6) and this subsection be deemed to be the owner of the ship concerned in respect of any relevant maritime claim which the charterer or the sub charterer, and not the owner, is alleged to be liable.

Section 3 (7)(a)(i) of the Act provides for the true 'sister ship' arrest, where the same company owns two vessels. The sister ship can be arrested in respect of a claim which arose in respect of the 'wrongdoing' vessel.

Section 3 (7) (a)(ii) provides for the situation where company A owns the 'wrongdoing' vessel, but company A also owns company B, and the arresting party wishes to arrest the vessel owned by company B ('the targeted ship') – (a situation of parent and subsidiary, as was shown in *The Maritime Trader*, where the arrest of the ship of the subsidiary was not permitted under English law; see 5.9, above).

Section 3 (7)(a)(iii) can be confusing; it seems to provide for the situation where company A (parent) controls companies B and C. The 'wrongdoing ship' may be owned (when the cause of action arose) either by A or its subsidiary, B. It should also cover the situation when A owned the guilty ship, at the relevant time, but no longer does so, because it may have sold it to another company to distance itself from it (as happened in *The Aventicum*, mentioned at 5.9, above). Company C (the other

Court of Appeal of South Africa in *MVS Pasquale della Gatta and Filippo Lembo* – 2012 (1) SA 58 (SCA); 2012 (1) All SA 491 (SCA) – extended this rule to taking into account facts established by the debtor which, with the benefit of discovery, the claimant does not contradict that they are capable of being challenged. Furthermore, drawing of inferences from the facts must be based on objective proven facts and not on speculation.

subsidiary) owns the 'targeted ship' at the commencement of the action (B and C are, in a sense, sister companies – see *The Evpo Agnic*, where the arrest of the ship belonging to a sister company was not permitted under English law (para 3.8, above).

Section 3 (7)(a)(ii) and 3 (7)(a)(iii) of the Act requires proof of control of the companies concerned. A person may control a company without controlling all the shares in the company; control over a company can be exercised even without majority shareholding.[184]

The Supreme Court of Appeal of South Africa interpreted the provisions of s 3(7)(b)(ii)(iii) of the Act in ***Belfry Marine Limited v Palm Base Maritime SDN BHD – the M/V HEAVY METAL***.[185] The case concerned defects in the condition of the vessel, *MV Sea Sonnet*. The claimant, having a claim for damages for breach of the contract of sale of the ship, arrested *The Heavy Metal* under the provisions of the statute for associated ship arrest. The arrest was granted and was challenged by Belfry Marine, the owners of *The Heavy Metal*. The case reached the highest Court of Appeal of South Africa, which by majority upheld the arrest.

With regard to the meaning of 'control' under the statute, the court held that control is expressed in terms of power. Although 'power' is not circumscribed in the Act, it can be power to manage the operations of the company or it can be the power to determine its direction and fate. Where these two functions happen to vest in different hands, it is the latter that the legislature had in mind when referring to 'power' and, hence, 'control'. 'Indirect power'[186] in the Act was thought to refer to the person who, de facto, wields power (that is, the beneficial owner) through, and hence over, someone else. So the latter is the person who wields direct power vis-à-vis the company and the outside world (the legal owner) and who, therefore, in the eyes of the law (that is, *de jure*), controls the shareholding and thus determines the direction and the fate of the company. The same person may exercise both de facto and *de jure* control (per Smalberger JA, at paras 8–9). In the judge's view, if the person who has *de jure* power happens to control, at the relevant time, the companies concerned, that is, the company that owns the guilty ship and the company that owns the targeted ship, the statutory requirement of a nexus between the two companies will have been satisfied.

In this case, Mr Lemonaris (the Cypriot lawyer who was the nominee shareholder of two different beneficial owners, of which each owned the *M/V Sea Sonnet* and *M/V Heavy Metal*) was in that position. Therefore, the arrested ship, *Heavy Metal*, was an associated ship of the guilty ship, the *Sea Sonnet*. The appeal against the first instance decision, which upheld the arrest, was dismissed by the majority.

Marais JA agreed with the result, but for substantially different reasons: it seemed quite plain to him that the words in the statute, 'who controlled the company which owned the (guilty) ship . . . when the maritime claim arose' cannot be interpreted as meaning 'who controlled and still controls the company which owns the (guilty) ship . . .'.

184 *Dole Fresh Fruit International Ltd v MV Kapetan Leonidas* 1995 (3) SA 112, at 119.

185 1999 ZASCA 44; 1999 (3) All SA 337(A).

186 In *MV La Pampalouis Dreffus Amateurs SNC* 2006 (3) SA 441 (D), the court held that for the purpose of s 3(7) (a)(i) a 50 per cent shareholding does not mean that the shareholder has either direct or indirect control of the company, disagreeing with the *obiter* comments of Smallberger JA in *The Heavy Metal* (SCA) that where two parties own equal shares in a company both have indirect control because the company cannot do anything of significance without the concurrence of each (see Hare, J, op. cit. at fn 182, at p 109).

He was further of the opinion that the legislature realised that account would have to be taken of well-known mechanisms whereby the benefits of ownership are retained, but ownership itself is not. The purpose of the legislation is to allow claimants to pierce the corporate veil of apparent or ostensible power to control a company and so reveal the identity of the real holder of power to control the company. The deeming provisions, are obviously designed not only to defeat defensive stratagems which ship owners might deliberately deploy to ward off potential arrests of associated ships by disguising their ownership or their control of such ships, but also to allow to be shown, even in a case where no such motive existed, where power or control *really* lay (at para 4 of his judgment).[187]

This has been a breakthrough decision, which has alerted the world of shipping. However, it is controversial, and, as Professor Hare states in his book[188] at para 2–2.6.3, although this case is the leading decision at present, the majority decision might have been different, had Mr Lemonaris disclosed evidence to the court clarifying the true seat of control of the two ship-owning companies. Mr Lemonaris, as the attorney for the companies, could not do so, as he considered that there was an issue of client–attorney privilege, but the court was unimpressed with a ship-owner 'choosing to operate behind a cloak of secrecy'. It is for this reason, Hare submits, that this case may not be the last word on 'control', which is required to be shown under the associated ship arrest.

An interesting development after this case shows how far owners have gone on the defensive by creating the most complex structures to defeat the SA legislation that enables the piercing of the corporate veil by the associated ship arrest.

In ***China National Chartering Co., Ltd v MT GC Guangzhou and Others***,[189] the company structure was as follows: GC Tankers Ltd wholly owned Grand China Shipping (Hong Kong), which owned the guilty ship, *Global Commander*. The shareholders of GC Tankers were Center Securities (40 per cent), Hainan American Ltd (10 per cent), Grand Columbia Shipping Ltd (25 per cent) and Grand Mississippi Shipping Ltd (25 per cent). The latter two companies were wholly owned by Mega Bulk Holdings Ltd. Both Mega Bulk and Grand China Shipping were subsidiaries of Grand China Logistics Holding Ltd, a company in the HNA Group, which is a large Chinese conglomerate operating in aviation, shipping and other industries through a variety of subsidiaries and associated companies.

A diagram of this strategic design of companies would show that there could not have been a more sophisticated structure than that for the purpose of undermining the application of the associated ship arrest!

The issue before the Natal High Court of Durban was whether the ships were associated ships. Security had been provided by way of an escrow agreement.

The arresting party, China National Chartering Ltd, which had commenced arbitration under the arbitration clause contained in the charter-party, was claiming repayment of hire and damages. So the arrest was for the purpose of obtaining security to enforce the arbitration award.

187 Farlam AJA delivered a long dissenting judgment; his view was that a nominee shareholder simply acted as a post box for the parties that had ultimate control over the two companies and that 'apparent' as opposed to 'real' control is not sufficient under the Act.

188 Op. cit. at fn 182.

189 2011 ZAKZDHC 57.

The parties approached the matter in court on the basis that HNA Group controlled the company that owned the *Global Commander* and also controlled the two companies that together owned 50 per cent of the company that owned the arrested vessel, *GC Guangzhou*.

China National contended that the ships were associated ships, on the basis that HNA probably also controlled Hainan America (the 10 per cent shareholder), thus making HNA in control of 60 per cent of the shareholding in GC Tankers. Various suggestions were put forward to prove that contention, supported by witness statements, which are beyond the scope of this summary.

The court held that the applicants' papers did not make out a case for the conclusion that HNA controlled the 40 per cent of GC Tankers held by Center Securities. The judge was not persuaded that there was a reasonable prospect that oral evidence would show that it did. The shareholders' agreement required control to be exercised by 75 per cent of the shareholders. The combination of the three companies, possibly controlled by 'Mr Big', would not have given him the necessary 75 per cent control. It followed that the vessels were not associated, and the arrest could not stand.

Finally on this topic, the Supreme Court of Appeal, in ***The Cape Courage***,[190] confirmed that the SA legislation goes beyond a sister ship arrest 'by widening the net and providing for a statutory piercing of the veil to combat the practice frequently adopted by ship owners seeking to evade the sister ship provision by setting up a series of one-ship companies' (per Farlam JA, at para 22). *The MV Cape Courage* was arrested as an 'associated ship' on the basis that the second respondent owned *The MV Pearl of Fujairah* when the appellant's claims arose, and the same person or persons controlled the second respondent, at the time when the claims arose, and the first respondent, Qannas Shipping Company Limited (the owner of the *MV Cape Courage*), at the time of the arrest. The order of the court below, setting aside the arrest, was set aside, and the arrest was reinstated.

190 *Bulkship Union SA v Qannas Shipping Co., Ltd* (*The Cape Courage*) 2009 ZASCA 74; 2009 778 LMKN 2 (SCA -SA); see also *Pancoast Trading SA v Orient Shipping (The Bavarian Trader)* 2010 (4) SA 369 (KZD): a ship cannot be an associated ship of itself.

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CHAPTER 5

ARREST OF SHIPS – PRIORITIES OF CLAIMS – CONFLICT OF LAWS

1 ISSUE OF THE *IN REM* CLAIM FORM, SERVICE AND ARREST

1.1 ISSUE OF PROCEEDINGS

In rem proceedings commence[1] by the issue of an *in rem* claim form as set out in CPR Part 61 rule 61.3 and the Practice Directions (PD 61). Admiralty claims start in the Admiralty Court of the Queen's Bench Division of the High Court of Justice (rule 61.2).

More than one ship can be named in the claim form, or separate *in rem* claim forms may be issued against different ships belonging to the same owner for the same claim, but only one ship can be arrested.[2] S 21(8) of the SCA 1981, states:

> Where as regards any such claim as is mentioned in section 20(2)(e) to (r) a ship has been served with a writ or arrest in an action *in rem* brought to enforce that claim, no other ship may be served with a writ or arrested in that or any other action *in rem* brought to enforce that claim.

In ***The Berny***,[3] it was held that the claimants were entitled to institute proceedings *in rem* against more than one ship, provided they served the *in rem* proceeding on, or arrested, only one of such ships. The court can compel them to elect against which of such ships they wish to continue. If they elect one, the writ against the sister ship

1 Civil Procedure Rules 1998 (CPR) Part 61, r 61.3(2).
2 *The Banco* [1971] 1 Lloyd's Rep 49; also s 21(8) of the SCA 1981.
3 *The Berny* [1977] 2 Lloyd's Rep 533.

will be set aside. It would not be right to compel them to continue against one of the sister ships rather than against *The Berny*, simply on the ground that the writ against a sister ship was issued first and the one against *The Berny* second.

In practice, the claimant waits until one of the ships named comes within the jurisdiction, whereupon he amends the claim form and serves it on that ship.

1.2 SERVICE OF THE *IN REM* CLAIM FORM

The service can be effected[4] either upon the property, by affixing the claim form (or a copy) on the outside of the property in a position where it may reasonably be expected to be seen, or upon the defendant's solicitor who has authority to accept service. Following *The Indian Grace* (seen in Chapter 4 above), the effect of service for the purpose of s 34 of the Civil Jurisdiction and Judgments Act (CJJA) 1982 is that the person named in the claim form, as the person who would be liable *in personam*, becomes a party to the proceedings from the time of the service.[5]

The *in rem* claim form cannot be served out of the jurisdiction (the ship must come within the jurisdiction), nor can an order for substituted service be made.[6] In most cases, in practice, however, when an undertaking is given by way of security for the claim to the claimant in an acceptable form prior to the service of proceedings and in lieu of arrest, there is a condition of that undertaking that solicitors will be appointed by the defendant to accept service unconditionally. The solicitors then accept service by endorsing on the claim form such acceptance, which amounts to submission to the jurisdiction of the court by the defendant. Alternatively, the defendant may choose to acknowledge the issue[7] of the claim form, which will amount to submission to jurisdiction. If he wishes to contest the jurisdiction of the court, he may acknowledge service conditionally,[8] as an unconditional acknowledgment will amount to submission.

The particulars of claim, except in the case of the special provisions for collision claims (CPR, r 61.4), must be contained in or served with the claim form, or be served on the defendant by the claimant with 75 days after service of the claim form (CPR, r 61.3(3).

1.3 EFFECTING THE ARREST

The service of the *in rem* claim form on the ship does not constitute arrest.

1.3.1 The warrant of arrest

A separate application for the issue of a warrant of arrest must be made in the Admiralty and Commercial Registry by filing the relevant form (ADM4), containing an undertaking to pay the Marshal's fees.

4 See PD 61, para 3.6.
5 See the effect of *The Indian Grace* upon the action *in rem* in Ch 4.
6 *The Good Herald* [1987] 1 Lloyd's Rep 236.
7 CPR, r 61.3(6).
8 By acknowledging service, the right to dispute the court's jurisdiction is not lost (PD 61, para 3.11).

In a claim *in rem*, a claimant and also a judgment creditor may apply to have the property, proceeded against, arrested (r 61.5 (1)(a)(b)). Practice Direction 61 sets out the procedure for applying for arrest; a party making an application for arrest must: (a) request a search to be made in the register before a warrant is issued to determine whether there is a caution against arrest in force with respect to the property; and (b) file a declaration in the form set out in PD 61; (r 61.5(2)(3)).

The declaration in the prescribed form (ADM 5) contains a brief description of the nature of the claim, the property, the amount of the security sought and, if the claim does not concern a maritime lien, it further includes the person who should be liable *in personam* when the cause of action arose in accordance with the requirements of s 21(4) of the SCA 1981.[9] The declaration must be verified by a short statement of truth[10] containing statements of information and belief about the truth of the facts stated.

The issue of an arrest warrant is 'as of right', which means that the court no longer has the wide discretion which it used to have prior to the decision in *The Varna*[11] because the practice changed with an amendment to the rules in 1986 and there is no requirement of 'full and frank' disclosure. Therefore, a warrant of arrest may be issued, even if the declaration does not contain all the particulars, provided the requirements of CPR, rr 61.5(1) and PD 61, para 5 are complied with. The claimant must, however, correct any inaccuracies promptly.

A warrant of arrest may not be issued as of right in the case of property in respect of which the beneficial ownership has changed since the claim form was issued, as a result of a sale or disposal by any court in any jurisdiction exercising Admiralty jurisdiction *in rem*, CPR, r 61.5(4).

It should be noted that the practice of no requirement of full and frank disclosure for the issue of a warrant of arrest seems now to be contrary to the Admiralty and Commercial Court Guide, 2011 edition, where it is provided, under F2.5, that on all without notice applications it is the duty of the applicant and those representing him to make a full and frank disclosure of all matters relevant to the application. The relevance and importance of this is explained by the author in her article about 'wrongful arrest of ships – a case for reform', mentioned under para 2.4, below.

Only the Admiralty Marshal, or his substitute, may execute the arrest on the property.[12] He will serve the warrant on the ship, or property, to be arrested.[13]

1.3.2 Caution against release

Any other person claiming to have a right *in rem* against the property under arrest may file a caution against its release.[14] There is no need to have issued an *in rem* claim form prior to the caution. The effect of the caution is to prevent release of the ship without court order[15] and ensure that any order for directions is served upon the cautioner. However, if the *in rem* claim form is not issued after the caution is

9 PD 61, para 5.
10 PD 61, para 5.3.
11 [1993] 2 Lloyd's Rep 253.
12 CPR, r 61.5(8).
13 See *The Johnny Two* [1992] 2 Lloyd's Rep 257.
14 CPR, r 61.8(2), (3). Prior to the CPR, the caution was known as 'caveat'.
15 CPR, r 61.8(4) (c) and (d).

placed on the Registry and, in the meantime, the ship under arrest is sold to a third party, the right *in rem* (unless it is a maritime lien) will not have attached on the ship as a statutory right *in rem* for the protection of the maritime claimant (see Chapter 4, above). In addition, the court's jurisdiction will be seised from the time of the issue of the *in rem* claim form for the purpose of the Brussels I Regulation (Art 30), in so far as it applies (see amended Regulation 'The Recast' Art 32, in Chapter 7).

1.3.3 A caution against arrest

To prevent arrest, a caution against arrest may be filed by any person in the Admiralty and Commercial Registry accompanied by an undertaking to file an acknowledgment of service and to give sufficient security to satisfy the claim with interest and costs.[16] The entry of a caution against arrest shall not be treated as a submission to the jurisdiction of the English court, and the property may be arrested, notwithstanding the caution, but the court may order the arrest to be discharged and the party procuring it to pay compensation to the owner or other interested person in the arrested property.[17] Where the person filing the caveat against arrest has constituted a limitation fund, in accordance with Art 11 of the Limitation of Liability Convention 1976, he must state that such fund has been constituted and that he undertakes to acknowledge service of the claim forms that began against the property described in the caution against arrest.[18]

2 THE AFTERMATH OF ARREST

2.1 RIGHTS OF THIRD PARTIES

Once the ship or property is arrested, it is under the custody not the possession of the Admiralty Marshal. A pre-arrest right or remedy of a third party, such as a statutory right of detention of a port authority, is not affected, provided the right is exercised. The Marshal can apply to court for directions. In ***The Queen of the South***,[19] the port authority's right to detain the ship, which was under the custody of the Marshal, was preserved. The port authority was allowed to receive payment for its outstanding dues from the proceeds of sale of the ship by the Marshal before other maritime claimants.

Third parties whose rights are adversely affected by the arrest can intervene, but under the court rules they could do so only if it could be shown they had an interest in the property arrested. Any other interference with the arrest is a contempt of court being subject to committal.[20] In some cases, for example, when the operations of the port, where the ship is arrested, are adversely affected by the arrest, and the port cannot show it has an interest in the ship, the court has inherent jurisdiction to give directions to the Marshal as it thinks fit, as it did so in ***The Mardina Merchant***.[21]

16 CPR, r 61.7(1)(2)(a)(i)(ii).
17 CPR, r 61(5)(a)(b).
18 CPR, r 61.7(1) and (2)(b).
19 [1968] P 449; see further on priorities under para 4, below.
20 CPR, Sched 1, RSC Ord 52.
21 [1975] 1 WLR 147.

Brandon J held:

> I am of the opinion that there must be an inherent jurisdiction in the court to allow a party to intervene if the effect of an arrest is to cause that party serious hardship or difficulty or danger . . . In all such cases it seems to me that the court must have power to allow the party who is affected by the work of the system of law used in Admiralty actions *in rem* to apply to the court for some mitigation of the hardship or the difficulty or danger. If it were not so, then there would be no remedy available for such persons at all.[22]

Any other person interested in the property under arrest, or its proceeds of sale, whose interests are affected by any order sought or made, may be made a party to any claim *in rem* against the property or proceeds of sale where the court considers it would be just and convenient, and on terms the court may think fit.[23] If the ship is under arrest, but cargo on board her is not, and those interested in the cargo wish to secure its discharge, they may request the Marshal to take the appropriate steps, provided the applicant gives a written undertaking satisfactory to the Marshal to pay on demand the Marshal's fees and expenses to be incurred by him in taking the desired steps. The Marshal will apply to court for the appropriate order. Alternatively, they may intervene in the action. The same rules apply when the cargo is under arrest but the ship is not.[24]

2.2 PROVISION OF SECURITY FOR THE CLAIM AND RELEASE FROM ARREST

When a ship is arrested, the defendant or the person interested in the ship may either acknowledge service and contest the arrest without submitting to the jurisdiction, or submit to the jurisdiction by acknowledging service and provide security in lieu of the release of the ship from arrest, or do nothing. In the latter case, the Admiralty Marshal will put the ship for appraisal and sale (see later).

When security is offered, it may be placed either as a bail in court, or by way of an undertaking on behalf of the person interested in the ship. There are standard letters of undertaking provided either by the insurer for third-party liability, the protection and indemnity insurer – known as P&I club – of the ship-owner or demise charterer, or by their bank. The undertaking includes an undertaking that solicitors will be instructed to accept service on the owner's behalf and the owners will submit to jurisdiction. There is no requirement, as yet, for an undertaking in damages to be given by the arresting party to the ship-owner in case of wrongful or unjustified arrest.[25] The amount of security for the release of the ship from arrest must be reasonable and its assessment approximate. The form of guarantee provided is at the discretion of the court.[26]

In ***The Moschanthy***,[27] a high amount of security was requested for the release of the ship from arrest on the ground that the plaintiff, who was claiming for loss of

22 Ibid, p 149.
23 CPR, r 61.8(7).
24 CPR, rr 61.8–10.
25 See later under para 2.4. The Arrest Convention 1999 requires an undertaking in damages to be provided in the event of wrongful arrest but is not yet enacted by the UK.
26 *The Sovereign Explorer* [2001] 1 Lloyd's Rep 60.
27 [1971] 1 Lloyd's Rep 37.

his goods, expected to make a 100 per cent profit from the sale of the goods. It was held that having regard to the value of the goods, and also the amount of interest and costs, which would ultimately be payable if the plaintiffs succeeded, any assessment of a reasonable figure for security could only be approximate. The amount requested fixed was not excessive.

By contrast, in ***The Tribels***,[28] in which the salvors demanded security in the sum of £3,323,000 for having salved property to the value of £16,150,000, the judge granted the sum of £1 million and held that such sum gave an ample margin of protection to the salvors in respect of whatever sum the arbitrator would award in the salvage arbitration.

2.3 RELEASE IN PARTICULAR CIRCUMSTANCES

(a) Where a ship-owner constitutes a limitation fund in accordance with the Merchant Shipping Act (MSA) 1995 and the Rules of Court,[29] he will be entitled to the release of the ship as of right, if the prerequisites of Art 13(2), (3) of the Limitation of Liability Convention 1976 are satisfied.[30]

(b) When a claim is subject to an arbitration agreement and *in rem* proceedings have commenced, the court will stay the proceedings upon the application of the defendant, and may order the release from arrest, provided sufficient security for the claim is given (s 26 of the CJJA 1982).[31] This section coupled with s 11 of the Arbitration Act (AA) 1996, gives the court power either to maintain the arrest as security for the arbitration award, or to order the release from arrest upon provision of security for the satisfaction of any such award. The court's power was confirmed in *The Bazias*,[32] even before the AA 1996 was enacted.

2.4 WRONGFUL ARREST OF SHIPS[33]

The Arrest Convention 1952 does not deal with wrongful arrest of a ship but leaves the matter to be decided by the law of the State parties. Under English law, the test for wrongful arrest, as derived from an old authority of the Privy Council, ***The Evangelismos***,[34] requires proof by the owner of the arrested ship of mala fides or *crassa negligentia* on the part of the arresting party.

28 [1985] 1 Lloyd's Rep 128.

29 CPR, r 61.11 and PD 61, para 10.

30 If a limitation decree is granted, any proceedings arising out of the occurrence may be stayed: CPR, r 61.11(3)(a)(i); see further, Ch 14, Vol 2.

31 Prior to this section, a vessel could be arrested for the purpose of provision of security to satisfy a judgment and not an arbitration award. If the proceedings were stayed in favour of arbitration pursuant to s 1 of the previous Arbitration Act (AA) 1975, the court had a wide discretion whether or not to maintain the arrest. If the court took the view that the proceedings would result in a judgment, the arrest could be maintained as security for that judgment: *The Tuyuti* [1984] 2 All ER 545. Such a wide discretion is no longer needed.

32 [1993] 1 Lloyd's Rep 101; see, also, *The Jalamatsya* [1987] 2 Lloyd's Rep 164, and Ch 6.

33 The subject has been analysed by the author in her article: 'Wrongful Arrest of Ships – A Case for Reform', Journal of International Maritime Law, 2013.

34 *The Evangelismos* (1858) 12 Moo PC 352; *Walter D Wallett* [1893] P 202 (proof of actual damage is not necessary to sustain an action in a court of Admiralty for wrongful arrest, if the seizure of the vessel was the result of mala fides, or *crassa negligentia* implying malice).

2.4.1 The test of malice or *crassa negligentia* and its origin

The meaning of 'mala fides' is not spite or hatred, but that the arresting party had no honest belief in his entitlement to arrest the vessel.[35] The meaning of '*crassa negligentia*' (as derived from *The Evangelismos*) is understood to mean that, 'the action was so unwarrantably brought, or brought with so little colour, or so little foundation, that it rather implies malice on the part of the Plaintiff, or gross negligence which is equivalent to it'.

On the facts of *The Evangelismos*, after a collision on the river Thames in darkness, the vessel that caused the damage got away and, in the morning of the next day, the owners of the damaged ship, the *Hind*, arrested the *Evangelismos* which was found in the docks. By reason of having damage to her bow, she was taken to be the strange colliding ship. She was kept under arrest for three months and could not perform her voyage to carry coal to Levant, until bail was found for her release. After examination of witnesses, Dr Lushington found that it had not been sufficiently proved that the *Evangelismos* was the guilty ship and dismissed the action with costs. Upon application to the judge by the owner of the *Evangelismos* claiming damages against the owner of the *Hind* for wrongful arrest and detention, damages were refused, because the judge considered that the arrest had been made in the bona fide belief that she was the ship that had been in collision and that there had been no mala fides in the proceedings.

On appeal (the case reached the Privy Council), it was argued by the owners of the *Evangelismos* that the arrest was without probable cause, in that there was no shadow of reason for charging the *Evangelismos* as being the guilty ship. Following the ordinary Admiralty Court practice of awarding damages for groundless arrest, it was argued that the court ought to have condemned the arresting party in damages for the losses caused by reason of the false arrest and detention. Reliance was placed on previous decisions (which were unreported but found in the Registrar's Book): *The Orion* (1852), in which damages were awarded for having been arrested by mistake for 6 days; *The Glasgow* (1855), which had been sold by her Master, unbeknown to her owner, to a third party and was renamed *The Yamacraw*. In an action for possession by her previous owner, the ship remained under arrest until the hearing took place, during which the former owner was condemned to pay damages to the new owner in demurrage and costs; *The Nautilus* (1856), which was arrested by the salvor who had already been paid for its services; he was condemned to pay damages in costs and expenses for groundless arrest.

The defendants argued that the arrest was bona fide and invoked the jurisdiction of the court.[36] There being no authorities for wrongful arrest in Admiralty, they relied on authorities concerning false and malicious prosecution of a person as applied by the Common Law courts.[37] In cases of malicious prosecution, malice and no

35 *Mitchell v Jenkins* (1833) 110 ER 908.

36 In those times it was the arrest that founded jurisdiction on the merits. As the arrest of the vessel constituted the commencement of the action then, a high threshold of the test for wrongful arrest was needed to protect plaintiffs' right to proceed *in rem*. See also Shane Nossal 'Damages for the wrongful arrest of a vessel' [1996] LMCLQ 368.

37 Prior to 1875, the common law courts had not merged with the Admiralty Court. The merger was brought by the Supreme Court of Judicature Act 1873, which changed the practice of commencing *in rem* proceedings with the introduction of the writ of summons, and the arrest can take place at a later stage upon the issue of a warrant of arrest (see Chs 1, 2 and 4, above).

reasonable and probable cause were required to be proved by the person contesting the prosecution in order to succeed.[38]

Applying by analogy the principle derived from the malicious prosecution cases,[39] the Privy Council affirmed the decision of the court below. In particular, Rt Hon T. Pemberton-Leigh stated the test:

> Their Lordships think there is no reason for distinguishing this case, or giving damages. Undoubtedly there may be cases in which there is either mala fides, or *crassa negligentia*, which implies malice, that would justify a Court of Admiralty giving damages, as in an action brought at Common law damages may be obtained . . .
>
> The real question in this case, following the principles laid down with regard to actions of this description, comes to this: is there or is there not, reason to say, that the action was so unwarrantably brought, or brought with so little colour, or so little foundation, that it rather implies malice on the part of the Plaintiff, or gross negligence which is equivalent to it?[emphasis added] . . . there is nothing whatever to establish the Appellant's proposition. It is true the identity of the ship was not proved, but there were circumstances which afforded ground for believing that this ship was the one that had been in collision with the barge.[40]

The appeal was dismissed, and the owner, whose vessel should not have been arrested and detained for 3 months, was not even compensated for the legal costs incurred to contest the wrongful arrest.[41]

2.4.2 The stringent test in cases of malicious prosecution

The very early cases in this area had established that to support an action for malicious prosecution, there must be a want of reasonable and probable cause and malice.[42] Hawkins J in ***Hicks v Faulkner***[43] defined the two limbs of the test. With regard to reasonable and probable cause, the prosecution must have had:

> An honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position

38 *Hicks v Faulkner* (1878) 8 QB; *Mitchell v Jenkins* (1833) 5 Barn. and Ad. 588: for malicious prosecution, the plaintiff must prove that the prosecution or arrest was malicious, and without reasonable and probable cause; 'malice is not in the sense of spite or hatred but of "*malus animus*" and as denoting that the party acted by improper motives'.

39 *Mitchell v Jenkins*, ibid; *Herniman v Smith* [1938] AC 305 (HL): it is for the judge to decide whether there was want of reasonable and probable cause; and for the jury to decide whether there was malice, e.g. motives other than a desire to bring to justice someone whom the prosecution honestly believed, on the facts before it, to be guilty; in *Glinski v McIver* [1962] AC 726 (HL) Lord Devlin concurred with Lord Atkin in *Herniman* and added: if there is no proof of reasonable and probable cause, no questions are for the jury. The judge should keep questions of fact to himself.

40 *The Evangelismos*, op. cit. fn 34, at 359; applied by the PC in *The Strathnaver* (1875) 1 App. Cas. 58.

41 In these cases, costs were awarded: *The Active* (1862) 5 L.T.(N.S.) 773; *The Volant* (1864) Br. & L. 321; *The Eudora* (1879) 4 p 208; *The Keroula* (1886) 11 PD 92; *The Village Belle* (1985–1986) 12 TLR 630.

42 *Reed v Taylor* (1812) 128 ER 472; *Gibson v Chaters* (1800) 126 ER 1196; there must be both a want of probable cause and malice proved to support the action. This was an action for maliciously and without any just or probable cause arresting the plaintiff and holding him to bail.

43 *Hicks v Faulkner* (1878) 8 Q.B.D. 167, test approved by Lord Adkins in *Herniman v Smith* [1938] AC 305 (HL).

of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed.[44]

With regard to malice, he said:

As a general proposition, want of probable cause is evidence of malice; but this general proposition is apt to be misunderstood. In an action of this description the question of malice is an independent one – of fact purely – and altogether for the consideration of the jury, and not at all for the judge. The malice necessary to be established is not even malice in law such as may be assumed from the intentional doing of a wrongful act, but malice in fact – *malus animus* – indicating that the party was actuated either by spite or ill-will towards an individual, or by indirect or improper motives, though these may be wholly unconnected with any uncharitable feeling towards anybody.[45]

As private prosecutions and arrests of individuals were proliferating in the seventeenth and eighteenth centuries, this stringent test was not justified because it discouraged actions to be brought for holding someone to bail in a mere civil suit.[46] The test for malicious prosecution and what questions are for the jury were clarified by the House of Lords in *Herniman v Smith*[47] (1938). The House of Lords had another opportunity to refine the test in ***Glinski v McIver***[48] (1962), where the judge had again put to the jury the wrong questions; *Herniman* was applied.

It was held that:

(a) it is for the judge to determine whether there was want of reasonable and probable cause, and for the jury to determine any disputed facts relevant to that determination on which he needed their help;[49]
(b) the question of want of honest belief is relevant to that of want of reasonable and probable cause, but that question may be put to the jury only if there is affirmative evidence of want of honest belief;[50]
(c) in the present case there was no such evidence, nor other evidence of want of reasonable or[51] probable cause for the prosecution.

The following guidelines for the judges were put forward by their Lordships as to the meaning of 'no reasonable and probable cause':

44 Ibid, at 171; The House of Lords in *Herniman v Smith* [1938] AC 305 (HL) approved the judge's definition of 'no probable and reasonable cause'; their Lordships only disapproved the judge's statement at p 172 that 'the reasonableness of the accuser's belief in the existence of the facts on which he acted is a question of fact for the jury'. The test was considered more recently by the Court of Appeal in *Moulton v Chief Constable of the West Midlands* [2010] EWCA Civ 524, where it was held: The judge had directed himself correctly as to the meaning of 'reasonable and probable cause': he had set out the standard definition, which required a finding as to the subjective state of mind of the officer responsible and an objective consideration of the adequacy of the evidence.

45 Ibid, at 175; but see *Mitchell v Jenkins*, fn 38, above, that 'malice is not in a sense of spite'.

46 *Gibson v Chaters* (1800) 126 ER 1196; in *Sinclair v Eldred* (1811) 128 ER 229 Mansfield CJ said: 'With respect to the malicious arrest, there never was a period when this species of action ought more to be encouraged, for there is much abuse made of the power of arrest.'

47 [1938] AC 305 (HL).

48 [1962] AC 726 (HL).

49 Ibid, at pp 742, 768, 779.

50 Ibid, at pp 742, 744, 752, 753, 768.

51 It is noted that the conjunctive 'and' is used interchangeably with the disjunctive 'or', which has caused confusion in subsequent cases.

Per Lord Devlin:

Reasonable and probable cause means that there are sufficient grounds for thinking that the accused was probably guilty but not that the prosecutor necessarily believes in the probability of conviction . . . Objectively there must be reasonable and probable cause for the prosecution, and the prosecutor must not disbelieve in his case . . . even though he relies on legal advice.[52]

Per Viscount Simonds:

In deciding whether there was reasonable and probable cause for the prosecution, the judge cannot ignore the fact of the prosecutor's own belief . . . Want of reasonable and probable cause is not to be inferred from malice. When a police officer preferring a charge has, at every step, acted on competent advice, and has put all the relevant facts known to him before his advisers, it would be hard to say that he acted without reasonable and probable cause.[53]

Their Lordships were in agreement that reasonable and probable cause requires a finding as to the subjective state of mind of the officer responsible and an objective consideration of the adequacy of the evidence.[54] Malice is an independent question of fact and for the jury to decide, provided there is a case of no reasonable and probable cause for the prosecution, as the judge may determine.

It is strikingly surprising that this complex test (involving questions for both the judge and the jury), which is undoubtedly suitable to criminal cases, should be the starting point for and be applicable, by analogy, to Admiralty cases of wrongful arrest of ships.

2.4.3 Inappropriateness of the criminal law test to wrongful arrest of ships

There have been a few old decisions in which the court awarded damages for wrongful arrest of a ship, without insisting on proof of malice.[55] In these cases, the underlying claim was not justified and, thus, failed. In other decisions, the court awarded only

52 Op. cit. fn 48 (pp 766, 769–770) and (p 777).
Further, per Lord Radcliffe:

> If the prosecutor can be shown to have initiated the prosecution without himself holding an honest belief in the truth of the charge, he cannot be said to have acted upon reasonable and probable cause . . . mere belief in the truth of the charge would not protect him, if the circumstances would not have led an ordinarily prudent and cautious man to conclude that the person charged was probably guilty. (pp 753–754)

Per Lord Denning: 'A prosecutor . . . must have reasonable and probable cause in fact and not merely think that he has' (pp 758, 759).

53 Ibid, Lord Reid concurring (pp 742–745).

54 Applied in *Moulton v Chief Constable of the West Midlands* [2010] EWCA Civ 524.

55 E.g. *The Victor* (1860) Lush. 72 (where the cargo on board ship was arrested wrongfully after a collision, because the value of the ship and freight was insufficient to meet the collision damage. The cargo was released with costs and damages for its improper detention); *The Cheshire Witch* (1864) Br & L 362 (substantive claim *in rem* dismissed); *The Cathcart* (1867) LR 1 A & E 333 (wrongful arrest by a mortgagee); *The Margaret Jane* (1869) LR 2 A & E 345 (salvor became aware after the arrest of the appraised value of the wreck, which was lower than the sum for which he arrested, therefore he dropped the proceedings; the court condemned him to pay damages, although malice was not shown). Similarly, on the facts of *The Vindobala* (1888) 13 PD 42; (1889) 14 PD 50 (CA), the managers and part-owners of the ship had no right to arrest her and were liable to the other owners for any damages resulting from their wrongful act.

costs to the ship-owner because no mala fides or *crassa negligentia* was found.[56] In another strand of cases, where the test of mala fides or *crassa negligentia* was met,[57] damages were awarded.

A commentator[58] interprets this test as containing a narrow rule (that is the mala fides or *crassa negligentia*) and a broader rule, that could be applied in three distinct circumstances, such as when the arrest is malicious, or when it is only negligent, or when it is unwarranted, or with very little foundation. The author contends that the Privy Council did not, perhaps, mean the narrow scope of the rule which has been attributed to it by subsequent cases, and, were the House of Lords (now the Supreme Court) invited to re-examine the rule, it would decide that there are, in modern times, insufficient grounds for its stringency. There are some valid points in Mr Nossal's commentary but, as it appears from later interpretations of the decision, the test, even in its most liberal interpretation, does not warrant the inclusion of merely negligent,[59] or even unwarranted, arrest without an assessment of the subjective state of mind of the arresting party.

The Evangelismos test, based on the old criminal law cases of malicious prosecution, which pre-dated the evolution of the tort of negligence, is outdated, causing confusion and conflicting judgments. The test in civil cases for wrongful arrest of ships should be an objective test and should be based on whether or not there were reasonable grounds for the arrest. Fuller analysis has been made in the author's article on 'wrongful arrest of ships – a case for reform'.[60]

In more recent years, in ***The Saetta***,[61] Clarke J applied the old test of mala fides or *crassa negligentia* and on the facts of the case he held: even if the owners were not liable to the claimants for conversion of the bunkers, it could not be said that the claimants or their solicitors acted with *crassa negligentia* in arresting the ship for payment of the bunkers. Unfortunately, the test of 'malice or *crassa negligentia*' was not in issue before the Court of Appeal in ***The Borag***,[62] and an opportunity for its review was lost. The only point on appeal was whether the umpire erred by not granting overdraft interest as damages for wrongful arrest. The ship had been under arrest for 14 days at the action of her managers, who colluded with the master to sail

56 E.g. *The Active* (1862) 5 L.T.(N.S.) 773; *The Volant* (1864) Br. & L. 321*; The Eudora* (1879) 4 p 208; *The Keroula* (1886) 11 PD 92; *The Village Belle* (1985–1986) 12 TLR 630.

57 *The Eleonore* (1863) 167 ER 328: arrest of the vessel for salvage in excess amount was wrongful; *crassa negligentia* was shown; *The Vindobala* (1888) 13 PD 42; (1889) 14 PD 50 (CA), the managers and part-owners of the ship had no right to arrest her and were liable to the other owners for any damages resulting from their wrongful act; *Walter D Wallet* op. cit. fn 34, where the concept of 'without reasonable or probable cause' from common law was equated to *crassa negligentia*; nominal damages were awarded.

58 Shane Nossal: 'Damages for the wrongful arrest of a vessel', LMCLQ (1996) 368, at 377–378.

59 Although the Singaporean judge in *Ohm Mariana* [1992] 2 SLR 623 said at 636: 'the expression "crassa negligence" or "gross negligence" simply means negligence. The vituperative epithet adds nothing to its meaning'.

60 Mandaraka-Sheppard, A. 'Wrongful Arrest of Ships – A Case for Reform', Journal of International Maritime Law, 2013.

61 [1993] 2 Lloyd's Law Rep 268; upon withdrawal of the ship from the charterers by the owners for non-payment of hire, there was a quantity of bunkers on board that was involuntarily transferred to the owners by the transfer of possession of the vessel back to the owners on termination of the charter. Unbeknown to the owner, the bunkers, which were subject to a retention clause, had not been paid by the charterers; thus the ship was arrested for conversion.

62 [1981]1 Lloyd's Rep 483.

to Cape Town, a port which was always avoided upon the instructions of the owners, considering the ease with which arrest of ships is obtained there.

The decision of Colman J in ***The Kommunar (No 3)***[63] shows how difficult it is for the owner to succeed in his claim for damages for wrongful arrest. Although the arresting party knew that the beneficial owners and the person in possession of the ship were, when the cause of action arose, a different entity from the owners of *The Kommunar* at the time of the arrest (owing to privatisation of the company that would be liable *in personam*), the owners did not succeed in their claim for damages. Contesting the arrest, they argued that the conduct of the arresting party amounted to *crassa negligentia* and on that basis they claimed damages. Colman J, referring to Rt Hon T. Pemberton-Leigh of the Privy Council in *The Evangelismos*, understood the test to be as follows:

> Two types of cases are thus envisaged. Firstly, there are cases of mala fides, which must be taken to mean those cases where on the primary evidence the arresting party has no honest belief in his entitlement to arrest the vessel. Secondly, there are those cases in which objectively there is so little basis for the arrest that it may be inferred that the arresting party did not believe in his entitlement to arrest the vessel or acted without any serious regard to whether there were adequate grounds for the arrest of the vessel. [emphasis added] It is, as I understand the judgment, in the latter sense that such phrases as '*crassa negligentia*' and 'gross negligence' are used and are described as implying malice or being equivalent to it.[64]

On the evidence of the *Kommunar*, Colman said that whether or not the conduct amounted to *crassa negligentia*, it was quite impossible to say that it should have been obvious to the arresting party, or their legal advisors, that the claim in England was bound to fail, given the relatively complicated privatisation process and the complex analysis of the Russian legislation. The judge further said that the difficulty in granting damages, including wasted costs or other expenses incurred during a wrongful arrest, is inherent in the procedural rules of arrest of ships under English law. This is so, because the *in rem* jurisdiction of the Admiralty Court requires no undertaking in damages from a plaintiff who obtains the benefit of security for his claim by arresting a vessel, even if he has wrongfully invoked the jurisdiction; and he continued:

> . . . he will not have to compensate the shipowner for the expenses and losses arising out of the arrest unless mala fides or *crassa negligentia* is proved. This is a rule of English law which can bear very harshly on shipowners who for some special reason may be unable to obtain release of their vessel by putting up security. It is not a rule which is found in the civil law systems. The more widely used procedure for obtaining security for a claim *in personam* in English law is the Mareva injunction, but there is an undertaking in damages required and the liability in respect of that undertaking arises upon the basis that, if the underlying claim fails, the plaintiff is liable for all losses caused by the injunction.[65]

The absence of a similar provision in the CPR (Admiralty proceedings *in rem*) leaves without remedy an innocent defendant ship-owner who has suffered loss by an unjustifiable arrest but who is unable to establish malice or *crassa negligentia*.

Recognising the injustice suffered by the ship-owner, the judge did not exercise his discretion to allow a reduction of the ship-owners' recoverable costs (incurred

63 [1997] 1 Lloyd's Rep 22.
64 Ibid, at p 30.
65 Ibid, at p 33.

owing to the wrongful arrest) in order to give credit for the benefit of the bunkers remaining on board. Undoubtedly, this case presented an opportunity for reconsideration of the test.

At about the same time, the court held, in ***The Peppy***,[66] which had been arrested by the manager for alleged outstanding balance of account, that the arrest, which amounted to a repudiatory breach of the management agreement, was wrongful, and the owners suffered recoverable loss by reason of the arrest. It was shown, however, that the conduct of the director of the managing company was dishonest and, on the facts, it was found that there was no outstanding balance of account, at the time of the arrest, because there was a variation of the agreement to defer payments until the vessel was sold.

2.4.4 The confusion

From the interpretation of the test by Colman J above, the cases seem to be of two categories:

(a) 'mala fides arrest', where it is shown from primary evidence that the arrestor did not have an honest belief in the reason of the arrest; or
(b) 'obviously groundless arrest, objectively judged, from which it can be inferred that the arrestor did not believe in, or did not give serious regard to, its entitlement'. What this entails is that there should be an objective assessment of the subjective state of mind of the arresting party (that is, assessing the reasonableness of his belief).

This alternative case test has been taken to be equivalent to the test of 'without reasonable and probable cause' (objectively judged). But it should be noted what Colman J said about this phrase in *The Kommunar* that: '. . . To characterise their continued pursuit of the proceedings and maintenance of the arrest as without reasonable and probable cause would be putting the threshold of crassa negligentia far too low.'[67]

What Colman J must have meant is that without an assessment of the subjective state of mind of the arrestor, the threshold of the test would be too low. It probably stems from the interpretation given to the test in *Walter D Wallet*,[68] in which the concept of 'without reasonable or probable cause' was borrowed from the common law malicious prosecution cases and was equated to *crassa negligentia*. It seems to the author that, upon a literal construction, 'without reasonable and probable cause', in the context of wrongful arrest of ships, should mean that there are no reasonable grounds for the arrest and/or the cause for the arrest is 'more likely than not' to fail. It is submitted that this phrase, in civil cases, as opposed to the malicious prosecution cases, should require only an objective assessment of the situation, without inquiring about the subjective belief of the arrestor. When courts use this phrase as being the test for wrongful arrest of ships, confusion arises because different meanings can be ascribed to it.

66 [1997] 2 Lloyd's Rep 722.
67 Op. cit. fn 63, at p 32.
68 Op. cit. fn 34; it should be noted that the test in the leading cases of malicious prosecution, such as *Glinski v McIver*, contains the conjunctive 'and' and not the disjunctive 'or'.

To compound the confusion, 'no reasonable and probable cause' has been regarded to be the common law test derived from the malicious prosecution cases, as opposed to the Admiralty law test.[69] However, as seen i*n Glinski v McIver*,[70] the 'common law' test requires also malice, which cannot be inferred from a finding of 'no reasonable and probable cause', although the latter was defined to include 'no honest belief' for the prosecution. By comparison, as seen under 2.4.1, above, the Rt Hon T. Pemberton-Leigh put forward that the real question to be asked in cases of wrongful arrest of a ship is this: 'is the action so unwarrantably brought, or brought with so little foundation, that it rather implies malice, or gross negligence which is equivalent to it?' In a sense, he conflated the two limbs of the test applicable to malicious prosecution cases, by using the word 'malice'. Thus, there has been confusion as to the application of the test.

2.4.5 More recent decisions – new trends?

In ***Gulf Azov v Idisi***,[71] the Court of Appeal applied: 'absence of any serious regard to whether there were adequate grounds for the arrest of the vessel'. In this case, there was clear evidence of wrongful detention of both the ship and her crew in Nigeria by the owners of the cargo of two drilling rigs shipped on board this ship. On arrival in Nigeria, part of the deck cargo was missing, and the ship owners argued that it had been lost overboard during a storm. The arresting party demanded US$17 million (an extortionate amount) as security for the release of the ship. Although the P&I club offered security by an IOU for US$1.5 million, it was rejected. After an impasse in negotiations, US$3 million was accepted as security. The claimants in the English action (owners and P&I club) obtained a freezing order on the sum of US$3 million pending execution of the agreement and instituted proceedings alleging that the agreement to pay US$3 million was voidable for duress and that the vessel had been wrongly detained. They obtained a judgment in default, and the defendants applied to set it aside. The judge decided in favour of the claimants and, on appeal, the Court of Appeal affirmed the judgment and held, on the point of wrongful detention, that there was no objective justification for the amount claimed and the question was whether the arresting party believed there was. It seemed from the evidence that, in the absence of any serious regard to whether there were adequate grounds for the arrest demanding such a high amount as security, wrongful arrest was overwhelmingly established (the *Evangelismos*/*Kommunar* test was met). Furthermore, the court held, as there was duress in the detention of the crew, there was no answer to the claim for the return of the amount of US$3 million agreed to be paid for the release of the vessel and crew. No court order detained the crew; thus there was duress of the person. The arresting party must have been aware of the unsustainable claim.

69 It is interesting to note that the Singaporean court (first instance) in *The Ohm Mariana* [1992] 2 SLR 623 endorsed the test of 'no reasonable and probable cause', whereas the Court of Appeal of Singapore rejected it in *The Kiku Pacific* [1999] 2 SLR 595, as it thought it was the common law test applicable to malicious prosecution cases and was different from the Admiralty law test of the *Evangelismos*, being the appropriate one to be applied to wrongful arrest of ships.

70 Op. cit. fn 48.

71 [2001] 1 Lloyd's Rep 727.

In ***The Kallang (No 2)***,[72] Axa Senegal, the insurer of cargo receivers, arrested the ship in Dakar (the discharge port) not just for obtaining security for the receivers' claim, which was subject to London arbitration of which they knew. An offer for security from the owners' P&I club was rejected. Axa insisted that the ship would only be released against a bank guarantee answerable to Senegalese jurisdiction. As the court found, it was Axa's intention to use the arrest to force the owners to relinquish the London arbitration clause, which was a breach of the agreement between the owners and the receivers; therefore, they were liable in damages on the basis of the tort of procuring breach of contract (*OBG v Allan*[73]). There was no need to apply the *Evangelismos/Kommunar* test of wrongful arrest, although the result, on the evidence, might have been the same. Damages were assessed for 10 days' unjustified period of the arrest during which the owners lost the use of the vessel, lost hire from the next fixture (US$120,000) and incurred consumption of gas oil and port charges, totalling US$130,350.

The same tactics were used by the same insurers in ***The Duden***,[74] and the judge decided in the same way on the application of the principle. The only difference here was that the loss had been suffered by the subsidiary, bareboat charterer, not by the ship-owner. Unfortunately, it was too late to allow the ship-owner to amend its case, or join the subsidiary as a party. He was entitled only to an injunction restraining the proceedings in breach of the arbitration clause, but not to damages.

By analogy to a wrongful arrest of a ship, it is interesting to note ***The Nicolas M***,[75] which shows what type of conduct of the arresting party would be examined by the court. Flaux J decided that the charterers, who applied for a freezing order to obtain security against the owners for their counterclaim in London arbitration, had shown a good arguable case of wrongful attachment in New York[76] by the owners in support of an unsustainable cause. On the facts of this case, the owners of the ship 'had engaged in what, at its lowest, was a discreditable conduct involving perjury' on the part of the captain, in relation to the maintenance of the attachment obtained under Rule B. The judge commented that these owners were the sort of people that would stop at nothing to frustrate the charterers from making any substantial recovery by dissipating their assets, unless restrained by the freezing order.

Do these cases support a new trend? Other than the first and the last decisions referred to above, in which there was no difficulty in applying the mala fides or *crassa negligentia* test, the bold tactics used by the claimants in *Kallang* and *Duden*, which are not novel, could be dealt with by applying the *OBG v Allan* principle, as Lord Hoffmann delineated the tort for wrongfully inducing breach of contract from the tort of causing loss by unlawful means. Proceeding in a cavalier fashion to put pressure on the owner to accede to higher demands of security may not always be said to amount to bad faith, if legal advice had been obtained[77].

72 [2009] 1 Lloyd's Rep 124.
73 [2008] 1 AC 1.
74 [2009] 1 Lloyd's Rep 145.
75 [2008] 2 Lloyd's Rep 602. The substantive matter was within the jurisdiction of London arbitrators.
76 US Federal law recognises the tort of wrongful attachment only on showing bad faith, or malice or gross negligence.
77 See similarly what the Court of Appeal of Hong Kong said in *The Maule* [1995]2 HKC 769, below.

2.4.6 Other common law jurisdictions

The test of the *Evangelismos* is also applicable in other common law jurisdictions.[78] There is no need to refer to these decisions, other than mentioning some of them in the notes, because full account about them has been given elsewhere.[79]

It should be noted that, in Australia, the Admiralty Act 1988 has included s 34,[80] which is headed '*Damages for unjustified arrest*' and provides for a different test from the *Evangelismos*/*Kommunar* test: That is (paraphrased): where a party '*unreasonably and without a good cause*' demands excessive security, or obtains the arrest of a ship, or fails to give consent for the release of the ship from arrest, will be liable in damages. Similarly, in Nigeria, the same test is used in the Admiralty Jurisdiction Decree, s 13[81]: '*unreasonably and without good cause*'.

South Africa has also a legislative provision in the Admiralty Jurisdiction Regulation Act 105 of 1983 (SAF), as amended in 1992.[82] It includes claims for wrongful or malicious arrest, attachment or detention in the list of maritime claims. The provision is read with s 5(4), which was amended[83] in 1992 to mirror the South African common law requirements for damages for wrongful arrest of persons, and reads:

> Any person who makes an excessive claim or requires excessive security *or without reasonable and probable cause* obtains the arrest of property or an order of the court, shall be liable to any person suffering loss or damages as a result thereof for that loss or damage.

It should be noted that the judge of Appeal, Scott JA, had no difficulty in awarding damages in ***The Snow Crystal***,[84] for loss of future charter hire as a foreseeable damage consequent upon delay of the vessel in breach of a dry-docking contract owing to the arrest.

The amended wording of the provision was dealt with in ***The Cape Athos***,[85] in which both the arrestor and the local and foreign instructing attorneys were held jointly and severally liable to the owner of the arrested ship. Without reasonable and probable cause was interpreted by the judge to bear a similar meaning to that given to it in the context of the tort of malicious prosecution, namely that a lack of honest belief

78 Canada: *Armada Lines Ltd* [1997] 2 SCR 617, although the court below had awarded damages on the basis that the arrest of the cargo was without legal justification, the Supreme Court held that there was no bad faith. Hong Kong: *The Maule* [1995] 2 HKC 769, mortgagee who arrested the ship without cause of action, as the judge found at first instance, was not held liable in damages by the Court of Appeal because it could not be said he acted in bad faith. Singapore: It is interesting to note that the Singaporean court in *The Ohm Mariana* [1992] 2 SLR 623 endorsed the test of 'no reasonable or probable cause', which was equated to the test in Admiralty law of *crassa negligentia*, whereas the Court of Appeal in *The Kiku Pacific* [1999] 2 SLR 595 preferred to avoid confusion and applied the Admiralty law test of '*crassa negligentia*' or 'malice' of the *Evangelismos*. In both *The Evmar (*fn 76*)* and *Ohm Mariana*, the test was met, and damages were awarded. *USA: Fruit Co., Inc. v Dowling* 91 F 2d 293 (5th Cir, 1937).

79 Michael Woodford: 'Damages for Wrongful Arrest: section 34, Admiralty Act 1988' (2005) 19 MLAANZ Journal pp 115–147.

80 Ibid.

81 As cited in Michael Woodford, ibid.

82 The references to South African law and decided cases are found in http://web.uct.ac.za/depts/shiplaw/booknew by Professor John Hare who states, at para 2–1.3 about disclosure, that, 'claimants and attorneys who play their cards close to their chest run the risk, and rightly so, of being found to have proceeded without reasonable and probable cause'.

83 Prior to the amendment, the test was that the arrest was without 'good cause'.

84 *The Snow Crystal* Case 250/07 judgment delivered 27 March 2008.

85 *MV Cape Athos* 2000 (2) SA 327 (D).

negatives the defence of reasonable and probable cause. Furthermore, the judge held that the value to be attached to the legal advisor's advice would depend upon whether or not the client had put to the advisor all the relevant facts.

The SA Supreme Court of Appeal considered the notion of 'excessive claim' in ***The H Capelo***[86] and adopted an objective standard to determine what the arrestor should reasonably have regarded as having been recoverable.

The Singaporean courts seem to have approached the issue more liberally in recent years.[87] There has been a U turn in the attitude of the courts since the *Kiku Pacific*.[88] This was shown in ***The Vasiliy Golovnin***,[89] where the Court of Appeal set aside the second arrest effected in Singapore by the bank (lawful holder of the bill of lading) of the sister ship of the carrying ship (which had been arrested at Lome, Togo, and released) on the grounds that (a) there was no arguable case shown by the bank for non-delivery of the cargo, which had been discharged at Lome, and (b) the bank failed to disclose material facts that there had been an inter partes hearing at Lome on the same issues and was resolved in favour of the owners. In relation to the disclosure, it held that it was not only prudent but indeed necessary for a party intending to rely on the arrest of a vessel, as security for a potential arbitration award, to disclose in the body of the affidavit in support of the ex parte application for a warrant of arrest the material facts. Such facts included that the bills of lading had been switch bills by which the discharge port had been changed, and that the court of the port of discharge had set aside a previous arrest of the ship for the same claims. The disclosure of these facts would have alerted the court to the fact that the owner had delivered the cargo to the correct port. On the cross appeal by the owner of the ship for wrongful arrest, it was held that the arrest was wrongful. Although the higher threshold of the test of *crassa negligentia* was satisfied and it was further found that the bank could not honestly have believed in the validity of its claim, the court discussed, *obiter*, *The Evangelismos*. It questioned the continued validity of the test and conjectured that it might be out of step with modern practice, stating (at para 26):

> With the historical background in mind and in the light of the legislative reforms undertaken by some other Commonwealth countries, it may be rightly asked if the *Evangelismos* test, which appears conceptually anachronistic, should continue to be the governing rule for wrongful arrest in Singapore. Should not a lower threshold be adopted instead?[90]

In Hong Kong, the court in ***The Avon***[91] thought that the test of malice is harsh and something less than that should be required for wrongful arrest, but generally, there is no consistent approach by the courts in adopting a less harsh test. The author is unaware of any more recent developments in Hong Kong.

86 1990 (4) SA 850 (SCA).

87 *The Evmar* [1989] 2 M.L.J. 460 (Sing HC); the continuation of the arrest after a promise by the ship-owner to give security, under protest, was regarded as wrongful.

88 [1999] 2 SLR 595.

89 [2008] 756 LMLN 3; [2008] SGCA 39; the court usefully reviews wrongful arrest decisions of various jurisdictions.

90 'The reasonable or probable cause' test was endorsed in *The Ohm Mariana* [1992] 2 SLR 623.

91 27 January 1992 (unreported) HKHC.

2.4.7 Civil law jurisdictions

In the civil law systems, there is no unified approach to wrongful arrest among the civil law countries in Europe. According to Professor Frank Smeele,[92] there is a north–south divide on the European continent. In the northern countries, the applicant for arrest is faced with strict liability if his claim fails on the merits, irrespective of fault or good faith. In the south, the law is similar to English law, namely, it requires the various degrees of fault (abuse of rights, gross negligence or bad faith).

For example,[93] in Denmark, Finland, Norway, Poland and Germany, the arrestor will be liable in damages, basically, when his claim fails, or the arrest was unnecessary, or unjustified, irrespective of fault. Similarly, in the Netherlands, the arrestor will make good any loss caused by the arrest if the claim is rejected, even if he reasonably believed that his claim was grounded. It will be abuse of justice, if he demanded excessive security. In Italy and Greece, proof of bad faith or gross negligence is required.

Different tests apply in other countries: in Belgium, the claim of wrongful arrest is in tort and the claimant has to prove fault of the arrestor, his damages and causation. Fault is presumed if the arrestor acted recklessly and with knowledge that his action would probably cause damage. In France, the arrestor will be liable in damages if it is, subsequently, established that he abused his right. Abuse can exist when the arrest was unjustified, or the security requested was excessive. In Portugal, there must be proof of carelessness on the part of the arrestor, and he will be liable if the arrest proves to be wrongful, or the proceedings on the merits did not commence on time. In Spain, he will be liable if the arrest proves to be wrongful, in a sense that it does not meet the conditions for arrest, or the claim fails, or he does not commence proceedings within the prescribed time. It should be noted that Spain has acceded to the Arrest Convention 1999; see below.

2.4.8 The Arrest Convention 1999

A major objective of this Convention is to achieve a balance between the interests of claimants and owners. For the owner to succeed in his application for wrongful arrest under the Arrest Convention 1999,[94] Art 6(1)(a), he must show that 'the arrest is wrongful or unjustified'. Various views about the meaning of these terms were proposed by different delegations.[95] Although the words used are not defined, they could be interpreted to mean that there was no legal ground for the arrest, thus wrongful or unjustified, judged objectively without looking at the belief of the arrestor. In other words, the arrestor should have taken reasonable care to find out whether there were reasonable grounds for the arrest. In the English dictionary,[96] the term is defined as something 'wrong, indefensible, inexcusable, unacceptable, outrageous,

92 Prof Frank Smeele: 'Liability for wrongful arrest of ships from a civil law perspective', Ch 14, *Liability Regimes in Contemporary Maritime Law*, Rhidian Thomas (eds), London, 2007.

93 See Berlingieri, *Arrest of Ships*, 5th edn, Informa (2011), Ch 16.

94 It is interesting to note that Turkey has enacted a new Turkish Commercial Code (TCC) 2012, which contains rules for arrest of ships. Although Turkey is not a party to any of the Arrest Conventions, it adopts the rules of the 1999 Arrest Convention.

95 See Michael Woodford, fn 79, and Berlingieri, fn 93, about the debate that took place regarding the word 'unjustified' before the passing of the Convention.

96 *Collins Thesaurus of the English Language*.

unjust, unforgivable, unjustifiable, unpardonable, unwarrantable'. Such words would seem to indicate that the conduct is to be judged objectively applying the standard of what a reasonable man would have done, had he been in the position of the arrestor at the time of the arrest. As the philosophy behind the Convention has been to balance the interests of the parties, the draftsman must have intended to make the test of a lower threshold than malice or *crassa neglignetia*, unlike the views to the contrary expressed by Professor William Tetley.[97] The Convention also requires that an undertaking in damages is put up by the arrestor, which is in line with the philosophy of the Convention to provide balance between the interests of the parties.

It is of great interest that, on 14 September 2011, the Convention came into force among its ten acceding States, following the accession by the 10th State, Albania. The 10 States to which the 1999 Convention applies are: Albania, Algeria, Benin, Bulgaria, Ecuador, Estonia, Latvia, Liberia, Spain and the Syrian Arab Republic. The 1952 Convention is in force in 77 countries.

2.4.9 Conclusion

As has been discussed, there is apparently great confusion and no uniformity in the application of a test for wrongful arrest of ships. In the English decisions in which wrongful arrest was upheld, the evidence was clear, and there was no difficulty in meeting the higher standard test. However, such cases seem exceptional, and the problem of discharging the burden of proof of the present harsh test lies with the run-of-the-mill cases. *The Evangelismos*, otherwise referred to as the 'Admiralty law', test deters deserving ship-owners from pursuing wrongful arrest claims. The fact that the test was formulated in very different conditions and has not been critically examined in the context of modern commercial litigation is itself a reason for its reassessment.

Certain solutions for reform in the law are proposed elsewhere,[98] but the easiest and fastest method for uniformity would be for the remaining maritime nations to accede to the Arrest Convention 1999, or adopt it into their national law and, when doing so, they should define what the terms 'wrongful' or 'unjustified' mean.

2.5 CAN THERE BE A RE-ARREST?

Litigants frequently consider whether they can have another bite of the cherry by re-arresting another ship even if security has been obtained. There have been re-arrests of ships for increase of the security, and recent decisions have clarified when that can be permitted. There are two categories that must be distinguished: (1) re-arrest after judgment is obtained; (2) re-arrest with the leave of the court.

2.5.1 Re-arrest after judgment is obtained

As is derived from old authorities, there can be no re-arrest when a judgment on the merits has been given and security had previously been obtained for the same cause of action for which judgment has been obtained.

97 W Tetley: 'Arrest, Attachment and Related Maritime Law Procedures' (1999) 73, 5–6 Tulane Law Review 1895, 1970–1971, cited in M Woodford, fn 79, at 128–129.

98 Mandaraka-Sheppard: 'Wrongful Arrest of Ships – A Case for Reform' JIML 2013.

In ***The Kalamazoo***,[99] in which the bail given for a collision claim was found to be insufficient after judgment, Dr Lushington set aside a warrant of arrest by which the claimant sought to obtain further security. It was held that the bail represented the ship, and it would be absurd to contend that you could arrest a ship, take bail to any amount and afterwards arrest her again for the same cause of action.

He emphasised the principle derived from *The Wild Ranger*,[100]and held:

'. . . bail given for a ship in any action is a substitute for the ship; and whenever bail is given, the ship is wholly released from the cause of action and cannot be arrested again for that cause of action.' This principle, based on the notion that the cause of action had become merged in the judgment, therefore *res judicata*, was accepted to be correct in later decisions, *The Point Breeze*[101] and *The Alletta*.[102]

Bateson J expressed a pragmatic view in ***The Point Breeze***,[103] in which bail had been given for a collision liability and the ship was re-arrested after judgment, the amount of which exceeded the bail. Disallowing the re-arrest, he said:

If the plaintiffs are right in their contention that they are entitled to arrest this ship, it seems to me that it will open the door to the re-arrest of vessels, or arrest after getting bail, whenever a party thinks that his claim may be more than he originally thought it was. No immunity from arrest will be obtained by giving bail, and the result of that, on the question of maritime liens, might be very serious.

All the authorities were reviewed by Mocatta J in the ***The Alletta***.

A claim arose out of a collision incident, security was provided in lieu of arrest of *The Alletta*, and her owners submitted to the jurisdiction. A judgment for damages was obtained against the defendants, who were not able to limit their liability. It appeared later that the amount of the security was not enough to satisfy the full claim amount. Seven years later, the ship was sold and she was renamed *The Tarmac I*. In the hands of her new owner, she was threatened to be arrested by the plaintiffs. The buyers knew nothing about the claim prior to delivery; subsequently, they claimed an indemnity from the previous owner (the first defendant in this action) and joined the action seeking an order for the warrant of arrest to be set aside. It was argued that the plaintiffs' right to arrest, either by way of enforcing a maritime lien or a statutory right *in rem*, had been lost (a) by laches, or (b) by the fact that the plaintiffs had obtained judgment against the first defendants. The laches point was not accepted, but on the second point, Mocatta J applied the previous authorities and stated a broad principle:

If a ship may be arrested after judgment on liability has been obtained against her and she is by the date of the arrest the property of a third party, which had bought her without knowledge of the maritime lien, grave injustice may be done. The third party may have no right of indemnity or, which is less unlikely supposition, his indemnity may be worthless. His vendor may, through lack of adequate funds, incompetent legal advice or other reason, not properly and fully have contested the issue of liability . . . The position would be quite different from that obtaining

99 (1851) 15 Jur 885, p 886.
100 (1863) Lush 553; (1862) 1 New Rep 132.
101 (1928) 30 LlL Rep 229.
102 [1974] 1 Lloyd's Rep 40.
103 (1928) 30 LlL Rep 229, p 231.

when an arrest is effected after transfer of the *res* to such a third party, but before there had been judgment on liability. The third party can then intervene.[104]

It was held that the plaintiff's right of arrest was lost because it had become merged in the judgment.

It should be noted that, under CPR, r 61. 5(1), a judgment creditor can arrest a ship. This rule seems to presuppose that no security had been obtained before judgment and the debtor is still the beneficial owner of the ship, rather than suggesting that it has undermined *The Alletta*. It is interesting to note, however, that the Singaporean court in ***The Daien Maru***[105] criticised and did not follow *The Alletta*, but the case is distinguishable and offers an explanation of the '*Alletta*' rule.

The Singaporean court held that the plaintiff, who had instituted an action *in rem* against the ship to enforce a maritime lien for services provided to the ship, but had not obtained security, was entitled to arrest the ship for the same cause of action, even after he had obtained judgment. The facts were unusual. The ship was originally arrested by her owners for a claim of possession they had against the charterers. The crew, who had a claim for unpaid wages against the owners, issued a caveat against release of the ship and proceeded to judgment. Thereafter, the owners persuaded the court to release the ship from arrest they had effected themselves. Subsequently, the crew arrested the ship to obtain security and execute judgment against it. Although the judge accepted that once a judgment has been obtained in an action, the claim is merged in the judgment, he did not find any authority supporting the view that the right to security in the ship is lost or extinguished by such merger. He held that a plaintiff who has instituted an action to enforce a maritime lien must be entitled to arrest the ship in the same action, even after he has obtained judgment, provided always that, in such a case, no bail has been previously put up for the ship in that action.

On the facts of this case, it would be unjust if the arrest of the ship was not permitted after judgment to enforce the judgment against the ship representing the security for the maritime lien. By contrast, *The Alletta*, in which security had been provided and the enforcement of the maritime lien against the ship by arresting it in the hands of an innocent purchaser took an unusually long time after judgment, is clearly distinguishable.[106] Furthermore, in *The Daien Maru*, the second arrest was by the crew who had a maritime lien, and the first arrest had not been effected by them. Their caveat against the release of the ship from the first arrest should not have been lifted.

When a domestic judgment *in rem* has been obtained after bail has been given, which represents the ship and has the effect of submission to jurisdiction by the defendant,[107] but the bail is not sufficient to satisfy the total amount of judgment,

104 [1974] 1 Lloyd's Rep 40, pp 50–51, *The Point Breeze* [1928] P 135 was applied.

105 [1986] 1 Lloyd's Rep 387.

106 That the claimant cannot re-arrest the vessel after judgment, having previously obtained bail up to her full value, was also held in: *The Freedom* (1871) LR 3 A&E 495; *The Gemma* [1899] P 285; *The Ioannis Vatis* [1922] P 213: '. . . having received bail in the full value of the defendants' vessel, the plaintiffs could not arrest her *in rem*, but could proceed *in personam* and were entitled to a declaration that the amounts due in respect of interest and costs were enforceable by seizure and sale of the vessel by a sheriff under a writ of *fi fa*.' The rule that the bail represents the ship and the court will not normally permit a second arrest is not without exception: *The Arctic Star* (CA *The Times*, 5 February 1985).

107 When bail is provided, it is linked with an undertaking given by the defendant to submit to jurisdiction: *The Prinsengracht* [1993] 1 Lloyd's Rep 41. Cf bail could be given under protest if there are grounds for the defendant to contest the jurisdiction of the court: *The Anna H* [1994] 1 Lloyd's Rep 287 (CA), *obiter*, per Hobhouse LJ.

the judgment can be executed *in personam* against the defendant, whereupon seizure and sale of assets belonging to the defendant will be executed by the Sheriff by serving a writ of *fieri facias*.[108] These are *in personam* proceedings for execution of judgment which involve a seizure of assets by the Sheriff.

2.5.2 Re-arrest with the leave of the court

Before judgment on liability has been given, the court has power to direct measures to be taken to do full justice to the claimant, and re-arrest may be allowed, if the bail, or security, given is not sufficient. This was the decision of Dr Lushington in ***The Hero***,[109] in which judgment had not been given at the time of re-arrest. A clerical error had been made about the amount of security, and Dr Lushington found the opportunity to distinguish his previous decisions, namely *The Kalamazoo* and *The Wild Ranger*, by saying that:[110]

> If the expressions in those cases were literally interpreted, it would indicate that the court would not have power to grant a re-arrest for the same cause of action after property had been released on bail. But what was said in those earlier cases must be read subject to the facts that formed the ground of the decisions. In each of those cases, the cause of action had passed into *res judicata* because judgment on liability had been given.

An occasion of permitting re-arrest, in the old days, was when the bail had become insolvent, or the guarantee was inoperative.[111]

This is confirmed by the English court in fairly recent cases, such as ***The Ruta***,[112] in which Steel J held that the discretion of the court to allow re-arrest is a broad one, and the courts adopt a pragmatic approach. The court will not normally permit a second arrest, and the justification for this rule is to avoid oppression and unfairness. CPR r 61.6(2)(b) makes express provision for permitting an arrest or re-arrest so as to obtain further security. However, r 61.6(3) provides that the court may not make an order under para (2)(b) if the total security to be provided would exceed the value of the property at the time (a) of the original arrest, or (b) security was first given (if the property was not arrested).

The judge explained that permission will only be granted in circumstances of oppression or unfairness, and, in this case, the security was insufficient to cover the very substantial cost element brought about by the procedural complications of the default claim.

The same approach is followed in the commonwealth jurisdictions. The New Zealand Court of Appeal in ***The Clarabelle***[113] ordered the re-arrest of a ship applied for by the classification society for the purpose of obtaining adequate security. It was held that release and re-arrest did not involve the exercise of a broad and unfettered

108 CPR, Sched 1, Ords 46 and 47.

109 Dr Lushington in *The Hero* (1865) B&L 447.

110 (1865) B&L 447, p 448.

111 *The City of Mecca* (1879) 5 PD 28; *The Christiansborg* (1885) 10 PD 141; see, also, *Westminster Bank Ltd v West of England Association* (1933) 46 LIL Rep 101, in which it was said that, when there has been a mistake about the amount of bail, or there is a question of solvency of the surety, the bail question may be re-opened. Also, when the security given is by way of a personal guarantee which may prove to be inoperative, further arrest may be allowed.

112 [2000] 1 Lloyd's Rep 359.

113 [2002] 2 Lloyd's Rep 479.

discretion, but it was based on the claimant's best arguable case. This case fell within the exception to the rule against re-arrest on account of the inadequate security provided, and there was nothing oppressive or unfair on the part of the claimant. On the facts, it was shown that there was a genuine dispute as to the merits of the underlying debt for survey fees.

The general rule is that, if there is adequate security provided, a re-arrest will be an abuse of process of the court, as was held in ***The Bumbesti***.[114] It was also an abuse of process in ***The Alina II***,[115] in which after actions *in rem* had been instituted in South Africa and security for the release of the vessel had been provided, Transnet formed the view that its security for the *in rem* actions would be 'wholly insufficient' to satisfy its claims in full, considering the value of the vessel and claims instituted against her by other creditors. Transnet, accordingly, decided to institute an action *in personam* against the owners of the vessel for R45 million, in addition to the security already obtained by the arrest of the ship, based on exactly the same cause of action as the pending action *in rem*. The High Court of Cape Town held that, as the damages claimed were the very same as in the *in rem* action, policy considerations militated against multiplicity of actions. The claimant had already obtained security by the arrest of the ship and was not permitted to obtain further security, particularly as it exceeded the value of the arrested property. Furthermore, to proceed also *in personam* was an abuse of process.

2.5.3 Execution of foreign *in rem* judgment by re-arrest in this jurisdiction

When a foreign *in rem* judgment has been obtained and is not satisfied, the duty of the English court to enforce such judgment had been established since 1608.[116] Such duty to execute a foreign judgment obtained in relation to a maritime lien is founded on international comity and the interest of justice.

Sir Robert Phillimore, in *The City of Mecca*,[117] allowed a judgment obtained *in rem* in Lisbon in respect of a collision damage to be enforced by an action *in rem* in England.[118] It should be noted that the case concerned a foreign judgment for which security had not been provided.

The Rules of Court, r 61.5, permit the arrest of the ship by a judgment creditor, which presupposes that security has not been obtained.

In a twentieth-century case, Sheen J confirmed this principle in ***The Despina GK***,[119] which concerned a cargo claim. The plaintiffs arrested the ship at a Swedish port and commenced an action in the Admiralty Court in Stockholm, which gave judgment and, strangely, awarded a maritime lien (for a cargo claim) on the vessel for the sum adjudged. Sheen J held:[120]

114 *The Bumbesti* [1999] 2 Lloyd's Rep 481.

115 *Transnet Ltd v The Owners of The Alina II* (2011) ZASCA 129; (2011) (6) SA 206 (SCA).

116 Sir Robert Phillimore explained in *The City of Mecca* (1879) 5 PD 28.

117 Ibid.

118 The judgment was reversed by the Court of Appeal (1881) 6 PD 106, as it appeared from a further affidavit that the facts upon which the decision was based were different from the facts proved. But the principle laid down by Sir Phillimore regarding enforcement of a judgment *in rem* by way of execution was not undermined (see Sheen J's comments in *The Despina GK* [1982] 2 Lloyd's Rep 555).

119 [1982] 2 Lloyd's Rep 555.

120 Ibid, pp 558–559.

There is, of course, a distinction between those claims which give rise to a maritime lien and which may, therefore, be enforced against the ship, notwithstanding a change of ownership, and those claims which may only be enforced by an action *in rem* if the person who would be liable *in personam* is still the owner of the ship at the time when the writ is issued. Likewise, there is the further distinction between an action *in rem*, which may be brought in the High Court against the ship, and execution of a judgment obtained in such an action . . .

A judgment creditor who has obtained a final judgment against a shipowner by proceeding *in rem* in a foreign Admiralty Court can bring an action *in rem* in this court against that ship to enforce the decree of the foreign court if that is necessary to complete the execution of that judgment, provided that the ship is the property of the judgment debtor at the time when she is arrested.[121]

2.5.4 Prohibition of re-arrest by statute or conventions

Subject to the foregoing, re-arrest of the ship or a sister ship is, generally, not allowed by s 21(8) of the SCA 1981 for claims mentioned in s 20(2)(e)–(r) with regard to proceedings in this country. Section 21(8) provides:

Where as regards any such claim as is mentioned in section 20(2)(e) to (r) a ship has been served with a writ or arrest in an action *in rem* brought to enforce that claim, no other ship may be served with a writ or arrested in that or any other action *in rem* brought to enforce that claim.

It emphasises the common law position,[122] as held in *The Kommunar (No 2)* and in *The Banco*, namely that only one ship can be arrested in this jurisdiction. S 21(8) intends to prevent multiple ship arrest to enforce the same claim. It does not intend to override the court's discretion to order a re-arrest in special circumstances, where there is no oppression or unfairness, or when the security given is inoperative, or when there has been a genuine error in the amount of security requested, as is shown in the decisions discussed above.

Art 3(3) of the Arrest Convention 1952 provides, specifically, for one situation in which re-arrest or multiple arrest is permitted in contracting States. This is where the bail or other security, which was provided originally for the release of the ship, has been released. That is a very rare occasion.

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.

The 1999 Arrest Convention expressly and clearly specifies the occasions of re-arrest by Art 5 in the following circumstances, which encompass the situations at common law discussed under the foregoing paragraphs:

121 The action must be for the purpose of execution (as the judge stressed) and not for the trial of the matter.

122 *The Kommunar (No 2)* [1997] 1 Lloyd's Rep 8; *The Banco* [1971] 1 Lloyd's Rep 49.

(1) where, in any State, a ship has already been arrested and released, or security has already been provided to secure a maritime claim, that ship shall not thereafter be rearrested or arrested in respect of the same maritime claim unless:
   (a) the nature or amount of the security in respect of that ship already provided in respect of the same claim is inadequate, on condition that the aggregate amount of security may not exceed the value of the ship; or
   (b) the person who has already provided the security is not, or is unlikely to be, able to fulfil some or all of that person's obligations; or
   (c) the ship arrested or the security previously provided was released either upon the application or with the consent of the claimant acting on reasonable grounds, or because the claimant could not by taking reasonable steps prevent the release;
(2) with regard to any other ship, which would otherwise be subject to arrest in respect of the same maritime claim, arrest shall not be allowed unless the nature or amount of the security provided in respect of the same claim is inadequate; or the provisions of (1)(b) and (c) above are applicable.

2.5.5 Re-arrest and risk management

In most cases in practice, security is provided by agreement and, in consideration of that agreement, the claimant releases the ship from arrest and promises not to re-arrest this, or any other ship, in the same ownership, etc. A further arrest would not only be in breach of the agreement, but would also be against good faith, unless there were circumstances in which the agreement was rendered inoperative.[123] It is important to bear in mind, however, that any agreement, by which the claimant promises not to re-arrest a vessel in return of security, should expressly be made, not only between the claimant and the entity providing the security, but also between the claimant and the ship-owner, or demise charterer, as the case may be.[124]

There have been instances in which a ship has been re-arrested in consequence of the bail becoming insolvent.[125] The rule that the bail represents the ship, so there should be no re-arrest, is not without exceptions, as seen earlier. The justification for the rule is, and always has been, to avoid oppression and unfairness.[126] The same would apply where the security given is not bail, but consists of a personal undertaking such as a guarantee. Where proper reasons are shown for it, re-arrest may be permitted.[127] The discretion of the English court is broad, and the judges adopt a pragmatic approach, guided by what would be fair and just in the circumstances.

Litigants should bear in mind that, if an arrest in one jurisdiction is lifted by an order of the court, because the court found that there was no right of arrest, there can be no re-arrest of the same ship or a sister ship in another jurisdiction, because the release from arrest by the previous court will constitute an issue estoppel, as was decided in *The Vasiliy Golovnin*[128] by the Singaporean court.

123 *The Christiansborg* (1885) 10 PD 141; see, also, *Westminster Bank Ltd v West of England Association* (1933) 46 LlL Rep 101; see fn 111, above.

124 A suggestion made by Clarke LJ in his speech on the subject ('The civil justice reform, its impact on maritime litigation, the maritime industry and London', lecture in memory of Professor Cadwallader, the London Shipping Law Centre, 7 July 1999).

125 *The City of Mecca* (1879) 5 PD 28, per Sir Robert Phillimore.

126 Lloyd LJ, in *The Arctic Star* (1985) *The Times*, 5 February; the same view was held by Steel J, in *The Ruta* [2000] 1 Lloyd's Rep 359.

127 *Westminster Bank Ltd v West of England Steamship Owners' P&I Association Ltd* (1933) 46 LlL Rep 101, per Roche J.

128 (2007) 728 LMLN 3.

2.6 APPRAISEMENT AND SALE

2.6.1 Sale by the Admiralty Marshal

If there is no acknowledgment of service and/or defence to a claim *in rem* within the time required, the claimant may apply for a judgment in default by filing an application, a certificate proving proper service of the claim form and evidence proving the claim to the satisfaction of the court. There is a presumption of good service if the claim form was served by the court. The property under arrest will be appraised and sold by court order. Appraisement is an official valuation of the property by a court-appointed valuer.

The Admiralty Marshal can sell either by private treaty or public auction advised by brokers. The effect of sale by him is that all encumbrances, including maritime liens, are extinguished. Private negotiations for sale by the owner, or a third party, after a court order is made will be in contempt of court. An order for sale before judgment may only be made by the Admiralty judge.[129]

In ***The APJ Shalin***,[130] it was held that, while a ship was under arrest, it was in the custody of the Admiralty Marshal. The claimants could only sell her if they could find someone willing to buy her while she was under arrest. However, where an order for sale was made by the court, there could not be a private sale, because such a transaction would be open to abuse.

In ***The Cerro Colorado***,[131] when an order for the sale was made, the Spanish Embassy in London sent a note to the effect that a purchaser of the ship would find himself subject to substantial claims by the crew for unpaid wages, which had been incurred by the previous owner. An article in Lloyd's List, published soon thereafter, contained the same warning. Upon an application by the Admiralty Marshal to the court for directions, it was held that a sale by the Admiralty Marshal gave the purchaser a title free of all liens and encumbrances and that the articles published could be treated as contempt of court, tending to interfere with the administration of justice. The master and crew were given 28 days in which to make a claim *in rem* against the ship, or the proceeds of sale, if they so wished.

The Admiralty Marshal cannot sell the ship for less than the appraised value without an order of the court. In ***Halcyon The Great***,[132] the ship was appraised, after arrest by the mortgagees, and the Admiralty Marshal invited bids, which were substantially below the appraised value. As the commission of appraisement and sale required the Admiralty Marshal not to sell below the appraised value, he applied to the court for an order to sell below the appraised value. The claimants opposed the application. Having considered that there was a risk that there might be a bid lower than the price offered, the judge agreed to grant the claimants' request, on the condition that they undertook to indemnify the court against any loss, which could result from refusing the Marshal's application to sell below the appraised value. On receiving the undertaking, the judge held that the Marshal was, thus, denied liberty to sell the ship for less than the appraised value without further order of the court.

129 PD 61.10, para 9.3.
130 [1991] 2 Lloyd's Rep 62.
131 [1993] 1 Lloyd's Rep 58.
132 [1975] 1 Lloyd's Rep 525.

The proceeds of sale will be kept in court until all claimants, who have obtained judgment against the ship, apply to be joined in the list for payment. The court will determine the priorities of the various claimants when it distributes the court fund (see paras 4 and 5 below).

2.6.2 Sale *pendente lite*

Appraisement and sale of the ship may be ordered pending action (*pendente lite*) in certain circumstances, as in ***The Myrto***.[133]

On the evidence, it was held that it was unlikely that the owners would have sufficient resources either to pay off the claims against the ship or to complete the voyage, which had been seriously disrupted already by the events that had taken place leading up to the arrest of the vessel.

Brandon J said:

> I accept that the court should not make an order for the appraisement and sale of a ship *pendente lite* except for good reason, and this, whether the action is defended or not. I accept further that, where the action is defended and the defendants opposed the making of such an order, the court should examine more critically than it would normally do in a default action the question whether good reason for the making of an order exists or not . . . It would, in my view, be unreasonable to keep the ship under arrest at great expense for seven months or more, with the result that, if the bank succeeded in their claim, the amount of their recovery would be reduced by the costs incurred. If the owners were prepared to bear or contribute to those costs for the time being in order to prevent a sale, different considerations might apply.[134]

Following this principle, appraisement and sale were permitted *pendente lite* in the circumstances of ***The Gulf Venture***.[135]

The vessel was a wasting asset and ought to be sold for the benefit of all the creditors, as the cost of maintaining her under arrest would exceed £5,000 per month. It was held that the plaintiffs had a probable case on liability, and, also, it was probable that, if judgment was obtained in their favour, it would not be satisfied by the defendants personally. The plaintiffs would still have to obtain an order for the sale of the ship. Concerning the second mortgagees, it was in their interest that they should intervene to enforce their security at the present time, rather than later, seeing that the security available one year later after the adjudication would be about £60,000 or less. The sale of the vessel was therefore ordered.

2.6.3 Expert evidence on condition of ship before sale

The Admiralty Marshal may seek the advice of experts about the condition of the ship and what repairs may be necessary to be carried out on the vessel before it is sold in order to achieve a better price.

133 [1977] 2 Lloyd's Rep 243.
134 *The Myrto* [1977] 2 Lloyd's Rep 243, pp 260–261.
135 [1985] 1 Lloyd's Rep 131.

The Westport (No 2)[136]

The case concerned the supply of necessaries to the defendants' ship by the plaintiffs who had a claim for the price. The court had already ordered a sale of the vessel *pendente lite*. In a motion for judgment in default of defence, the plaintiffs applied for an order that the feed water pump of the ship was repaired. The brokers advised that it would be good commercial practice to repair the ship, so that she might be sold at a better price than if the pump remained unrepaired. The court held that, in order to safeguard the interests of all the claimants, including those of the owners, the advice of the brokers would be taken, and the ship was duly repaired.

3 COMPETITION OF CLAIMS BROUGHT IN ADMIRALTY AND COMPANIES COURTS

Company creditors may petition to the court dealing with company matters (Chancery Division of the High Court) for the winding up of the company. At the same time, maritime claimants may exercise their right *in rem* either by the issue of a claim form or by the arrest of the company's asset, the ship. Which class of creditors should be permitted to proceed with enforcement of their rights against the company's assets? On the one hand, the policy of the insolvency legislation aims to protect the company's assets for the benefit of the company's creditors, and, on the other hand, the policy of the Admiralty Court is to protect secured maritime creditors. Secured maritime creditors, such as maritime lien holders and mortgagees, may be allowed to proceed in the Admiralty Court to realise their security, only with the leave of the Companies Court. Such leave will be given, even if the secured maritime creditors issue their *in rem* claim after the winding up order is made against the company (s 130(2) of the Insolvency Act 1986).

Maritime claimants, other than maritime lien holders and mortgagees, are not secured creditors, unless they issue their *in rem* claim before commencement of the winding up of the company, as is illustrated by the ***Re Aro Co Ltd***,[137] below.

An unregistered Liberian shipping company was ordered to be wound up compulsorily in the Commercial Court, following a petition by a P&I club to which the company was indebted to the sum of $134,912.37. The company had no assets in the UK, and the only asset it had was the vessel, *Aro*, which had been laid up for years for lack of employment. The vessel's value was only about $300,000, and there were numerous other claims against the vessel, including that of the plaintiffs. The plaintiffs' claim was for damage to its cargo carried by the vessel and estimated to be about $60,000. There was also a debt owed to the Admiralty Marshal, incurred after the arrest of the vessel. The plaintiffs had issued a writ in the Admiralty Court with respect to their claim, prior to the commencement of the winding up, but they had not served it, nor had they arrested the vessel because she was already under arrest by S Ltd. They merely entered a caveat against release on the same day, so that, even if the arrest was lifted, the petitioners could not have her removed without notice to the plaintiffs. They also applied for leave pursuant to s 231 of the Companies Act

136 [1965] 1 Lloyd's Rep 549.
137 [1980] 2 WLR 453.

(CA) 1948 to continue their action against the vessel and the Liberian company pending in the Admiralty Court, notwithstanding the winding-up order. The trial judge held that the plaintiffs remained unsecured creditors because they had not served the writ or arrested the vessel. The Court of Appeal overturned this decision and held that the plaintiffs were considered as having the status of secured creditors because, after the issue of the writ, they could have served it and could have arrested *The Aro*, with the result that the vessel would effectively be encumbered with their claim.

It had been a long-established practice to issue a caveat against release of a vessel under arrest, rather than cause multiple arrests. Relief under s 231 of the CA 1948 could not be confined to a case of a claimant who had served a writ on the ship, as distinct from one who had issued his writ but not served. According to Brightman LJ:

> The service of the writ adds nothing to the status of the claimant vis-à-vis the vessel sued. This is established by the issue of the writ. As between the plaintiff and the defendant, service merely causes time to commence running within which the defendant must enter appearance in order to avoid being a respondent to a motion for judgment by default.[138]

He further stated that the rights of a plaintiff suing *in rem* have points of similarity with legal or equitable mortgagees or charges. The similarity has been carried forward by the decision in *The Monica S*, where it was held that the burden of the statutory right *in rem* ran with the ship, so as to enable the plaintiff to arrest the ship, notwithstanding the transfer of ownership since the writ was issued.[139]

The principle has not been doubted. In ***Lineas Navieras Bolivianas SAM, Re***,[140] a creditor, TO, arrested the ship, Bolivia. D issued a writ *in rem*, and thereafter further creditors also issued writs *in rem*. D then presented a petition to wind up the company L. TO obtained judgment in default and an order for the appraisement and sale of the ship subject to the leave of the Companies Court, which was granted. L was ordered to be wound up, but, by the date of the winding-up order, only one of the writs *in rem* had been served. The applicants applied for leave to continue their actions in the Admiralty Court, so as to receive a share of the proceedings of the sale of the ship. Granting the applications, the Chancery court held that, by arresting the ship prior to the presentation of D's petition, TO had security. The effect of an order for sale by the Admiralty Court was to convert the company's interest in the ship into a right to receive the balance of the proceeds of the sale after satisfaction of the prior claimants. On that basis, leave was not required under the Insolvency Act 1986 s 130(2), as the applicants were not proceeding against the company or its property. If leave were needed, it would be equitable to grant it, because the order for sale showed that the Admiralty Court contemplated that the proceeds of sale would be distributed in the ordinary way. The writs were validly issued. A refusal of leave would prevent the applicants enforcing security, enabling the other claimants to 'scoop the pool', and a better price would be obtained by selling it through the Admiralty Marshal than by a liquidator.

138 [1980] 2 WLR 453, p 465.
139 See Ch 4.
140 [1995] BCC 666.

4 PRIORITIES IN PAYMENT OF CLAIMS OUT OF THE COURT FUND

As soon as the arrested ship has been sold by court order, the proceeds of sale remain under the control of the Admiralty Marshal. The fund will be distributed on the basis of established priorities. The court still maintains discretion. Priorities are a matter of procedure and are subject to the law of the forum, *lex fori*.

Some rights, however, which are based on special statutory powers of arrest and detention, fall outside the scheme of priorities. These are considered below.

4.1 STATUTORY POWERS OF PORT AUTHORITIES FOR DETENTION AND SALE

The Harbours, Docks and Piers Clauses Act (HDPCA) 1847 empowers the port authorities to arrest and sell any vessel or wreck within the precincts of the port for unpaid port dues or damage done to its premises by the ship. The statute grants a statutory right of detention on the ship in favour of the port authority. If the relevant ship comes under the custody of the Admiralty Marshal, the following issues arise: (1) Is the port authority's statutory right over the ship preserved? (2) Can the port authority sell the ship free of encumbrance? (3) Is the claim of the port authority transferable to the court fund, or the limitation fund, while retaining its preferential treatment over and above other preferential claims?

4.1.1 Preservation of the statutory right of detention

The Court of Appeal in ***Emilie Millon***[141] held that the right of detention should be maintained until the port was paid, regardless of maritime liens. It was further stated:

> While the port's dock tonnage rates remained unpaid in respect of any vessel liable, the Board would cause such vessel to be detained until all such rates were paid. Such a right given by the statute was paramount, notwithstanding that the master and crew of the vessel had a maritime lien upon her for wages due before she entered the dock. Therefore, the court could not, in such an action, make an order for the sale and delivery of a ship to a purchaser which would deprive a dock authority of its statutory right of detention without its consent; and that such a right was not transferable to the court fund representing the ship.

This decision was followed by subsequent decisions concerning the same issue of preserving the port authority's statutory right of detention and sale over the Marshal's jurisdiction to deal with the *res* and the priorities of other claims.

4.1.2 Can a port authority sell the ship free of encumbrances?

Even if the statutory power of detention of the port authority is preserved, such power would be of no practical use if the port authority were not able by law to sell the ship free of other encumbrances. A purchaser would not be prepared to buy from the port authority; only a sale by the Admiralty Marshal would extinguish all encumbrances.

141 [1905] 2 KB 817.

In ***The Sea Spray***,[142] Dean J resolved the question of priorities between the port authority for their expenses incurred in respect of raising the wreck of this ship (which sank after a collision with a barge) and the claim of the barge for damages suffered due to the collision, by allowing the port authority (who intervened in the action) to sell the ship, pay itself and deposit the balance of the proceeds with the court. The main reason of this decision was that, had it not been for the port authority, which raised the wreck, there would be no *res* for the Marshal to sell. The decision did not deal with the question whether the purchaser from the port authority could buy the ship free from encumbrances.

Willmer J, in ***The Ousel***,[143] followed *The Sea Spray* by upholding the motion of the harbour board as interveners (claiming wreck removal expenses) in the arrest of the ship by salvors exercising their maritime lien on the cargo on board. The board could proceed with its statutory power of detention and sale and reimburse itself out of the proceeds. The judge did not decide, but accepted, *obiter*, that the sale by the port authority in the exercise of its statutory power could give title free of encumbrances. The motion requiring the Marshal to withdraw from the arrest was not opposed.

In ***The Spermina***,[144] there was a motion, this time by the Manchester Ship Canal Company, as interveners in a mortgagees' action, requesting that the Marshal be directed to withdraw from possession of the steamer, *The Spermina*, or, alternatively, that the warrant of arrest be set aside to enable the interveners to exercise their statutory right of sale of the vessel. Hill J held that, while the Canal Company were in a preferential position to be paid for outstanding dues in priority to the mortgagees' claim, it might be disastrous if the Canal Company sold, because they could not give a clean title, whereas the Marshal could.

In ***The Veritas***,[145] the port authority sold the vessel and, after deduction of its expenses, it paid the money into court for distribution between the claimants, including maritime lien holders. As the proceeds were not sufficient, the claim of the board was satisfied first as they took priority over the maritime lien of salvors. Bearing in mind that the sale was not a court sale to extinguish all encumbrances, the salvors, in theory, would have a right of arrest of the ship in the hands of the new buyer, but this issue was not before the court.

In ***The Blitz***,[146] the court decided that the port authority could pass title to a purchaser of the ship free only of mortgages, but not free of maritime liens.

A mortgage for a loan granted in connection with this ship was duly registered, but the debt remained unpaid. The vessel was arrested for unpaid harbour dues and, pursuant to s 44 of the HDPCA 1847, the harbour authority sold the vessel to the defendant. The mortgagee claimed the money due under the mortgage, and the question was whether the sale of the vessel pursuant to s 44 of the HDPCA 1847 was a sale free from encumbrances, so that a bona fide purchaser obtained a title, free of the mortgage, on the ship.

142 [1907] P 133.
143 [1957] 1 Lloyd's Rep 151.
144 (1923) 17 LlL Rep 17.
145 [1901] P 304, see under 5, below.
146 [1992] 2 Lloyd's Rep 441.

Sheen J held that the harbour authority could give a title free from any mortgage, because the purchaser could not be expected to investigate the registry of interests on the ship before buying from a harbour authority. If the harbour authority was required to find out whether there was a mortgage and advertise for sale subject to that mortgage, it would not be possible to sell the vessel. If that was allowed, the owner of a ship could effectively deprive a harbour authority of its remedy under s 44 by mortgaging the ship for her full value. The risk of non-payment should be borne by the person who, voluntarily and unwisely, lends a large amount on the security of a ship, rather than by a harbour authority, or an innocent purchaser without notice of the mortgage.

4.1.3 Transferability of the port authority claim to the limitation fund, or the court fund

In subsequent decisions, guidance was given by the House of Lords in ***The Countess***,[147] in which a limitation fund had been established under the Limitation of Liability Convention, and the issue was whether the statutory claim by the port authority was transferable to the limitation fund set up by the ship-owner.

By majority of 3:2, the House of Lords held that the claim by the port authority for damage done to the port by the ship permitted the port to be paid first out of the limitation fund, provided it had exercised its right of detention. Overruling the decisions of the courts below, the majority held that the board's claim, having the status of a statutory possessory lien conferred by the statutory power to detain, remained effective against the fund. Although the harbour authority had parted with possession of the ship, the right was not extinguished. The court, in distributing the statutory amount of the ship owners' liability *pro rata* among the claimants, ought to have regard to the priorities as well as to the amounts of the claims; consequently, the whole amount the board's claim should be paid from the fund, as its special right was not adjunct to the right to participate in the distribution of the limitation fund.

The majority of the Lords agreed with the Court of Appeal in *Emilie Millon* that the right of detention of the port authority was paramount, because the authority did not have a charge on the ship or any other protection. It could not see how the problem could be resolved, if the port authority was not paid first, to avoid keeping the ship under detention.[148]

The Scottish Court of Session (Outer House), in ***The Sierra Nevada***,[149] applied the reasoning of the House of Lords in the above case and held that the port authority's right would be transferable to the proceeds of sale where the ship was sold by the court with the consent of the port authority, on the understanding that its priority was preserved. It distinguished on the facts the *Emilie Millon* decision (that the claim could not be transferred to the court fund), in that it concerned a private sale and that the harbour authority had intervened before the sale had been sanctioned by the court.

147 *Mersey Docks and Harbours Board v Hay* [1923] AC 345.

148 Lord Sumner (dissenting) did not think that the port should have priority over other claimants, as the right to detain was not equivalent to an arrest or proceeding *in rem*. If the port continued to detain the ship after the money owed was deposited with the court, the owner would have an action in detinue. Further, he said that, apart from pressure put upon the owner, detention may lead to nothing.

149 (1932) 42 LlL Rep 309 (Ct Sess).

Clyde Navigation Trustees in the Scottish case were, therefore, entitled to enforce their statutory right by its notional transference to the fund in the competition of claims and to enjoy a preference over the first mortgagees in the distribution of the proceeds of sale.

4.1.4 A practical approach

The House of Lords, in *The Countess*, did not have to decide whether the Admiralty Marshal can proceed with the sale of the ship, regardless of the port authority's statutory right, but only dealt with the situation of claims when a limitation fund is constituted. Brandon J had to decide this issue, in ***The Queen of the South***,[150] and he chose a practical route.

If the matter were free from authority, he said, he would have followed the Scottish approach, which, as was indicated by Lord Fleming in *The Sierra Nevada*, allows the court to sell, free of rights, while transferring equivalent rights with equivalent priority to the court fund, whether or not the dock or harbour authority consents. However, he recognised the issue was a disputed area in the law, considering the decision of the Court of Appeal in *Emilie Millon*. He preferred not to express a final view, as he did not have to, and he thought that there was a simpler solution. As English law allows the Marshal to incur expenditure on the ship where it is for the benefit of all parties interested in her, so, the court, if it thinks fit for the benefit of all, has power to pay off the claims of the intervening port authority and then include such expenditure to his expenses of sale. In future cases, he suggested, the Marshal could ask all interested parties whether they objected to such a solution; if all interested parties consented, the Marshal would apply to the Registrar to give such authority. If, on the other hand, one or more parties objected, the Registrar should determine the matter himself or apply to the judge.[151] In the case before him, Brandon J decided that, for the benefit of all parties, the interveners' claims for rates should be paid off, so that the Marshall could sell the vessel free from the port authority's rights:

> If the interveners are to be paid off in this way, however, it must be on the basis that they give a written undertaking to the court not to exercise their rights of detention or sale in respect of the rates concerned.[152]

4.2 THE SHIP-REPAIRERS' LIEN

This type of lien arises at common law and it is known as a possessory lien at common law. It commences as soon as the ship enters the yard of a ship-repairer and continues as long as the yard retains possession of the ship. But it is lost if it is not exercised. Provided the ship repairing yard does not give up possession of the ship, it is entitled to priority of payment of its fees and the cost of repairs over all other claims, except

150 [1968] P 449; if the port authority does not exercise its power of detention, its right will be lost: *The Charger* [1966] 2 Lloyd's Rep 670.

151 [1968] P 449, pp 462–466.

152 Ibid, p 465.

for maritime liens created before it exercised its possessory lien, as is shown in ***The Russland***:[153]

Salvors successfully placed the ship in the dock after standing for temporary repairs and they commenced *in rem* proceedings for payment of salvage. Having carried out the repairs, the ship-repairer claimed that the sum for the repairs due to him should be allowed over the salvors' claim. The court ordered that a ship-repairer's claim ranked after maritime liens already accrued, and there was no basis on which the ship-repairer's claim could be preferred to those of the salvors, even taking into consideration that the repairs benefited the salvors.[154]

However, in some jurisdictions, such as the USA, a ship-repairer enjoys a maritime lien under US law. Conflict of laws can arise if the ship-repairer lets the ship leave the yard without obtaining security and the ship is arrested in a jurisdiction that does not recognise his maritime lien, as will be seen under para 6 below.

If a yard maintains possession of the ship, a line of old authorities show that the English court has recognised and preserved the priority of the possessory lien holder over other maritime claims, even maritime liens that arose after the ship entered the shipyard.

In ***The Immacolata Concezione***,[155] there was a competition between claims of a necessaries man, the master and crew, and the shipyard in which the ship had entered before the other claims arose. Some wages for the crew had already accrued. Butt J said:

> But for *The Gustaf*,[156] I should not feel quite clear that [the claim of the repair yard] had not priority over a maritime lien, but, by that decision of Dr Lushington, I am bound. I shall, therefore, give priority to Carter [repair yard] over all the other claimants, except the mariners, so far as regards the claim of the latter for wages [already accrued before the ship entered the yard]. *The Gustaf* is a clear decision to the effect that the claim of the mariners has priority over the shipwrights' common law possessory lien up to the time of the beginning of such lien, and therefore, as I have said, the seamen's wages must have priority over the other claims. With regard to the rest of the wages claim, it will rank after Carter's claim.

Following this principle, the judge held, in ***The Tergeste***,[157] that a possessory lien holder who surrenders the ship to the Admiralty Marshal, upon the arrest of the ship by another claimant, should be put in exactly the same position as if he had not surrendered the ship; he is granted a notional lien against the ship's sale proceeds by the court.

The Italian steamship *The Tergeste* was arrested by the Admiralty Marshal in an action for wages and disbursements brought by the master on behalf of himself and the crew. At the time she was arrested, the ship-repairers claimed to have a common law possessory lien on the ship for work that they had done, but they surrendered the ship to the Marshal. The ship was sold in the wages action, and, as the proceeds in court were insufficient to meet the total amount of both claims, the question that arose was about the priority of the possessory lien holder. Phillimore J, relying on previous authorities, stated as follows:

153 [1924] P 55.
154 See, also, *The Katingaki* [1976] 2 Lloyd's Rep 372.
155 (1883) 9 PD 37, p 42.
156 Cited by Butt J.
157 [1903] P 26.

The view which the Admiralty Court took with regard to conflicting claims by shipwrights having a possessory common law lien, and claims which have been sustained by process in the Admiralty Court, has been well established . . . It is that it is the duty of the material man not to contend with the Admiralty Marshal but to surrender the ship to the officer of the court, and let the officer of the court, under the order of the court, remove and sell her; but when he has done that, the court undertakes that he shall be protected, and that he shall be put exactly in the same position as if he had not surrendered the ship to the Marshal. The court has further decided in the case of *The Gustaf* that the possessory lien of a shipwright is subject to maritime liens attaching prior to the ship being taken into the shipwright's yard. If there is a possessory lien, that possessory lien takes precedence of all maritime liens for claims which accrue after the date when the possessory lien begins.

This decision and relevant Singaporean authorities were recently followed by the New Zealand court in ***Babcock Fitzroy Ltd v The M/V Southern Pacifica***,[158] in which Babcock, ship-repairer, arrested the ship for unpaid fees. The Admiralty Registrar sold the ship, and the priority of Babcock, based on his possessory lien, was preserved by a notional lien over the sale proceeds. The mortgagee, however, who intervened, disputed the priority of the ship-repairer's claim. It argued that the competing priorities in the circumstances of this case gave rise to a novel situation under both English and New Zealand law, so the previous authorities did not apply. The question for the court was whether the pragmatic solution, which effectively prioritised the possessory lien of a ship-repairer, should be altered because the Admiralty processes were being invoked, not by a third party, but by the repairer itself. The court held that it could see no compelling reason for such a policy change. The court thought that it would be absurd if a possessory lien holder maintained priority when Admiralty jurisdiction was invoked by another claimant, but lost priority when the repairer itself invoked the jurisdiction.

5 DISTRIBUTION OF THE COURT FUND

The court will determine the distribution following the order of priorities (s 21(6) of the SCA 1981), but questions of priorities cannot be compartmentalised in the form of strict rules of ranking. The court has broad discretionary power, taking into account considerations of equity, public policy and commercial expediency, with the ultimate aim of doing what is just in the circumstances of each case.[159] Payment will be made only to judgment holders as follows:

(a) the Admiralty Marshal's costs;
(b) claimant's costs;
(c) maritime lienees;
(d) mortgagees in the order of registration, equitable mortgagees having last priority;
(e) claimants who become secured creditors by the issue of the *in rem* claim form (statutory liens *in rem*); as between themselves, they run *pari passu*;
(f) claimants who have obtained a judgment *in personam* against the ship-owner of the *res* will be last; for the execution of the judgment, a judgment creditor will

158 (2012) LMLN 22.06.12
159 *The Ruta* [2000] 1 Lloyd's Rep 359, per Steel J, citing with approval Thomas on Maritime Liens, BSL Vol 14 at para 418.

seek the issue of a writ of execution, *fieri facias*, and the sheriff will seize any property of the company in England.

As most ship-owning companies are foreign, the sheriff will execute such a writ upon a ship when it comes within the jurisdiction. If the sheriff seizes the ship before the issue of an *in rem* claim form by maritime claimants (other than maritime lien holders) and prior to mortgagees, it is likely that the *in personam* creditor will be able to have his judgment executed against the seized ship.[160] It would be expected, however, that a mortgagee would intervene, and maritime claimants may have issued an *in rem* claim form and arrest the ship when it comes to the jurisdiction.

(g) The balance, if any, will be paid to the owner of the ship.

As far as maritime lien holders are concerned, the following examples illustrate how the courts have dealt with priority principles between different maritime lienees when the value of the ship is not sufficient.

Subject to the broad discretionary approach of the court to do what is just in each case, all liens rank *pari passu*,[161] except in relation to salvage, where the last in time may take priority on the justification that the ship is saved by the last salvor for the benefit of all other claimants. Such an approach serves also to encourage salvors to save maritime property. It must be the latest in time of creation as compared with all other liens (including all other salvage and damage liens)[162] in order to take priority. As regards wages, no distinction is made between wages earned before or after salvage; the salvage claim takes priority over wages.

In ***The Lyrma (No 2)***,[163] the master and crew claimed priority for wages, earned before and after the salvage was rendered, and repatriation expenses. It was held that there was no distinction in priorities between wages earned before or after salvage, as against a salvor's claim. It was a long-established principle that a salvor's lien took priority over all liens, including those of wages claimants.

In ***The Veritas***,[164] the proceeds of sale were insufficient to meet the claims of the two salvors and the claim of the port authority for the damage done to it. It was held that the port authority's statutory lien took first priority, overriding the prior salvage liens. Between the two salvors, the claim of the second salvor took precedence, being the one that preserved the *res* for the benefit of the earlier claimants.

The issue whether a damage claimant has priority over a wages' claimant or vice versa was decided in ***The Ruta***[165] in favour of the wages' maritime lien. The judge said, in particular:

Although there was a suggestion in some of the textbooks that there was a rule whereby a damage lien had priority over a wages' lien, it was clear that questions of priority were not capable of being compartmentalised in the form of strict rules of ranking.

160 *The James W Elwell* [1921] P 351. CPR, Sched 1, Ords 46 & 47.

161 *The Steam Fisher* [1927] P 73 (it concerned four separate collisions with this ship and the proceeds were not sufficient to satisfy all claims. Bateson J, after reviewing all authorities and textbooks came to the conclusion that all maritime liens run *pari passu*).

162 *The Inna* (1938) 60 LlL Rep 414.

163 [1978] 2 Lloyd's Rep 30.

164 [1901] P 304.

165 [2000] 1 Lloyd's Rep 359.

The decisive factor in resolving the present issue was the fact that the wages' claimants had no alternative forms of redress; the owners of *The Ruta* were insolvent; and where the only remedy open to the wages' claimants was recovery from proceeds of sale, consideration of public policy justified a very high level of priority; any preferment of the damage lien to the wages' lien would encourage crews to refuse to disembark from vessels, and this was likely to exacerbate their plight, at least in the short term.

In ***The Turiddu***,[166] it was held that payment of wages to a ship agent on account of the crew under a contract of employment, which had been agreed to be paid to the agent with the consent of the crew as wages for their services, was not for the account of the agent, but it was properly agreed as wages for the crew. Therefore, they had priority over the bank's claim as mortgagee, because the claim attracted a maritime lien.

The maritime lien that attaches to the ship in connection with which the claim arose will lose its priority over other claims *in rem*, if a sister ship, and not that ship, is arrested, but the right will remain in the class of the statutory rights *in rem*.

In ***The Leoborg***,[167] it was held that the claim for wages for service on board *The Leoborg* took priority over the first mortgagees' claim, whereas the claim for wages relating to service on a sister ship, H, came after the mortgagees' claim, because the maritime lien for wages earned while in service on ship H had attached on that ship, which was the sister ship of the arrested one.

6 APPLICABLE LAW TO MARITIME LIENS AND CONFLICT OF LAWS[168]

The concept of maritime liens, as discussed in Chapter 2, originated from the *The Bold Buccleugh*:[169] A maritime lien attaches on the ship in connection with which the claim arose and cannot be extinguished until a court sale. It follows the vessel even into the hands of a bona fide purchaser for value.

6.1 CLASSIFICATION OF MARITIME CLAIMS IN DIFFERENT JURISDICTIONS

Under English law, claims that attract maritime liens are: the damage lien, the salvage lien and crew's accrued wages, master's wages and disbursements.

There are, however, other maritime claims, which are assigned the status of a maritime lien by the law of the country in which they arose or the contract was made. As a ship moves from one jurisdiction to another, there is a risk that the priority of a mortgagee may be affected. This raises a conflict of laws problem when the court

166 [1998] 2 Lloyd's Rep 278; whether a ship agent, or a volunteer, who paid crew wages is able to claim maritime lien on the sum paid, see voluntary payments of wages by third parties and assignment of the wages claim, para 7.2, below.

167 [1964] 1 Lloyd's Rep 380.

168 See, also, Ch 6, Vol 2, of this book.

169 [1851] 7 Moo PC 267, p 284.

has to determine the validity of the foreign lien before it determines priorities of claims for the distribution of the proceeds of sale of a ship.

English law, and the laws of countries following it, recognise the priority of a mortgage over other statutory rights *in rem*, but not over a maritime lien. In the USA, however, as Professor William Tetley states: 'the American system of ranking is very original and out of step with most of the rest of the world'.[170] Contractual maritime liens (necessaries), which include repairs to a ship, supply of bunkers, other supplies, stevedores' claims, claims under towage, damage to cargo, and charterers' liens, are under English law statutory rights *in rem*, which become statutory liens *in rem* from the issue of the claim form. In the USA, they could have priority even over a US preferred mortgage, only if they entered into before the filing of the mortgage. Foreign ship mortgages that are not guaranteed under Title XI of the Merchant Marine Act 1936 have lower priority to US preferred contract liens.[171]

In particular, in order to understand the cases discussed later, it is relevant to summarise the ranking under US law[172]:

1 special legislative rights of governments (e.g. wreck removal, Panama Canal tolls and damages, rights of detention, removal and destruction for pollution, rights of forfeiture for various federal statutory offences);
2 costs of seizure and judicial sale;
3 preferred maritime liens:
   (a) crew wages;
   (b) salvage and general average (cargo against the ship);
   (c) maritime torts (collisions) including personal injury and death, property damage and cargo tort liens;
   (d) longshoremen (individuals, not stevedore company);
4 preferred US ship mortgage liens, as of the date of filing, as well as preferred ship mortgages on foreign ships whose mortgages have been guaranteed under Title XI of the MSA 1936;
5 US contract liens (necessaries) arising after the filing of the US preferred ship mortgage (these are not preferred maritime liens);
6 foreign ship mortgages (not guaranteed under Title XI of the MCA 1936);
7 US contract liens (other than necessaries), e.g. contract cargo damage liens and charterer's liens, accruing after foreign ship mortgages;
8 unregistered (i.e. non-preferred) mortgage and perfected, non-maritime liens; liens for maritime attachment; foreign contract liens (statutory rights *in rem)*;

It should be noted that, in the US, the charterer (and not merely the ship-owner) is presumed to have authority to bind the ship for necessaries. If the charterer does not have authority to bind the ship, the supplier of necessaries must be informed in

170 Lecture delivered at the Scandinavian Institute of Maritime Law, 16 September 2004; see further, Tetley, W, *International Conflicts of Laws*, 1994, Ch XVII, pp 533–587; *Maritime Liens and Claims*, 2nd edn, 1998; *International Maritime and Admiralty Law*, 2002, pp 512–514; www.tetley.law.mcgill.ca.

171 See Tetley, W, *Maritime Liens and Claims*, 2nd edn, 1998, pp 872–876; and Tetley, W, *International Conflict of Laws (Common, Civil and Maritime)*, 1994, International Shipping, p 540.

172 Tetley, W, ibid.

advance. The supplier need not inquire if there is a prohibition of lien clause in the charter or in the ship mortgage, but, see *The Ship Nordems*,[173] below.

6.2 *LEX FORI* OR *LEX CAUSAE*

For the purpose of priorities, a very important question is whether or not the recognition of a maritime lien should be decided by applying the law of the State where the claim arose (the *lex causae*), or the law of the forum deciding the matter of priorities (the *lex fori*). If the maritime lien is regarded as a substantive right by *lex causae*, then it should be enforceable in another jurisdiction where the claims against the vessel are being tried, and it should be afforded the priority that it commands by its nature. On the other hand, if it is a mere procedural remedy, then its enforcement will depend on the procedure of the forum of the court that determines priorities.

This issue was decided by the Privy Council (3:2 majority) in ***The Halcyon Isle***.[174] The case involved the priority of claims between a mortgagee, an English bank, granted under English law and an American ship-repair yard, which carried out repairs to the vessel in New York. It should be noted that the mortgage at this time was not registered. Knowing that his right of enforcement was protected under US law, the ship-repairer let the vessel sail prior to payment for his cost of repairs. Later, the mortgage was registered. The ship was diverted by the mortgagees to Singapore and was arrested by them. Subsequently, she was sold by the order of the High Court of Singapore. The Singaporean court, in the exercise of its Admiralty jurisdiction, applies English law. When the proceeds from the sale were insufficient to satisfy all claims, the question was whether the claim of the mortgagees should take priority over the claim of the ship-repairers. As the latter's claim gave rise to a maritime lien under US law, the judge decided in favour of the ship-repairer, but his judgment was reversed on appeal. Upon further appeal to the Privy Council, the issue was which law should be applied, the *lex loci contractus*, or the *lex fori*.

By a majority of 3:2, it was held that a maritime lien was a remedy and, therefore, subject to the law of the forum, English law, which regarded the claim of the ship-repairer as a statutory right *in rem* ranking after mortgages. Lord Diplock (delivering the majority judgment) stated:

> As explained in the passage from *The Bold Buccleugh* . . . any charge that a maritime lien creates on a ship is initially inchoate only; unlike a mortgage, it creates no immediate right of property; it is, and it will continue to be, devoid of any legal consequences unless and until it is 'carried into effect by legal process, by a proceeding *in rem*'. Any proprietary right to which it may give rise is thus dependant upon the lienee being recognised as entitled to proceed *in rem* against the ship in the court in which he is seeking to enforce his maritime lien. Under the domestic law of a number of civil law countries, even the inchoate charge to which some classes of maritime claims give rise is evanescent. Unless enforced by legal process within a limited time, for instance, within one year or before the commencement of the next voyage, it never comes to life. In English law, while there is no specific time limit to a maritime lien, the right to enforce it may be lost by laches.[175]

173 *World Fuel Services Corp. v The Ship Nordems* (2011) 819 LMLN 3.
174 [1981] AC 221, p 234.
175 Ibid.

Academic writers,[176] particularly Professor Tetley, have criticised this decision. It has been argued that there are three flaws in this judicial statement: (a) it cuts through the very essence of maritime liens; (b) it misinterprets the word 'inchoate' used in *The Bold Buccleugh*; (c) it disregards principles applicable to conflict of laws. The recognition of a right created by foreign law should be a matter of substance to be determined by applying that law, and not a matter of procedure to be determined according to *lex fori*. Once the validity is determined according to foreign law, then it would be a matter of determining its ranking, the procedure of priorities, in accordance with the law of the forum.

Clearly, this decision was based on policy considerations in order to protect the security of mortgagees by avoiding uncertainty in the law regarding the enforcement of their security rights over the ship. It was thought to be necessary, particularly, because of the law in the USA where more maritime claims than those under English law are treated as giving rise to a maritime lien. This problem was highlighted very succinctly by the minority view in the Privy Council in answering the question: should English and Singaporean laws recognise a foreign maritime lien, where none would exist, had the claim arisen in England or Singapore?

> Whatever the answer, the result is unsatisfactory. If in the affirmative, maritime States may be tempted to pass 'chauvinistic' laws conferring liens on a plurality of claims, so that the claimants may obtain abroad a preference denied to domestic claimants; if in the negative, claimants who have given the ship credit in reliance upon their lien may find themselves sorely deceived. If the law of the sea were a truly universal code, those dangers would disappear. Unfortunately, the maritime nations, though they have tried, have failed to secure uniformity in their rules regarding maritime liens.[177]

In the view of the minority, the balance of authorities, the comity of nations, private international law and natural justice, all answer the question of recognition of a foreign maritime lien according to the *lex loci contractus*. If this was correct, they said, the *lex fori*, English law, should give the maritime lien created by the *lex loci contractus* precedence over the mortgagees' mortgage. If it were otherwise, injustice would prevail, because the American ship-repairer relying on his lien, valid as it appeared to be throughout the world, unlike an English ship-repairer, who would keep possession of the ship, gave up his possession. The minority concluded that the question whether or not a claim attracts a maritime lien, therefore, should be determined by the *lex loci contractus* and the priority by the *lex fori*.[178]

The correctness of the majority decision of the Privy Council has now been seriously undermined by the Rome Convention 1980, which was enacted in English law by the Contracts (Applicable Law) Act 1990 and has been in force since 1 April 1991. The decision has, nevertheless, been followed in other jurisdictions.[179] The Supreme Court of Canada, in a case decided prior to *The Halcyon Isle*, had a different view.

176 See Tetley, W, fn 153, 154, Jackson, DC, *Enforcement of Maritime Claims*, 4th edn, 2005, LLP, pp 683, 616–718; and Ch 6, Part II, Vol 2 of this book.

177 [1981] AC 221, p 244; see, also, Berlingieri, F, 'An analysis of the issues and difficulties involved in the ratification of the International Conventions of Maritime Liens and Mortgages, 1926, 1967, 1993' [1995] LMCLQ 57.

178 Lord Diplock espoused the view of the Bermuda court in *The Christine* (1974) AMC 331.

179 See the South African case of *The Andrico Unity* [1987] 3 SALR 794; New Zealand, Australia, Singapore, Malaysia, Cyprus and Israel followed *The Halcyon Isle*; China applies the law of the forum pursuant to its Maritime Code; European countries have their own codified systems, but the Rome

The Ioannis Daskalelis[180]

The vessel, a Panamanian ship, was subject to a Greek-registered mortgage (i.e. a foreign mortgage). Ship-repairers rendered necessary repairs to the vessel in New York. The ship left the shipyard without paying the cost of repairs and was diverted by the mortgagees to a port in Vancouver, Canada, where they arrested her. The question for the Supreme Court of Canada (Abbott, Martland, Ritchie, Hall, and Spence, JJ) was whether the shipyard's claim had priority over the mortgage. Ritchie J quoted with approval from Cheshire's *Private International Law* (8th edn, p 676) thus:

> Where, for instance, two or more persons prosecute claims against a ship that has been arrested in England, the order in which they are entitled to be paid is governed exclusively by English law.
>
> In the case of a right *in rem* such as a lien, however, this principle must not be allowed to obscure the rule that the substantive right of the creditor depends upon its proper law. The validity and nature of the right must be distinguished from the order in which it ranks in relation to other claims. Before it can determine the order of payment, the court must examine the proper law of the transaction upon which the claimant relies in order to verify the validity of the right and to establish its precise nature.[181]

The court recognised the ship-repairer's maritime lien applying US law, because it held that the lien was a substantive right governed by the law of the country in which it was created. Thus, applying its own procedural law, *lex fori*, on priorities, it held that it had priority over the mortgagee's claim.

It relied on the English Court of Appeal decision in ***The Colorado***,[182] which the Supreme Court interpreted as being the authority for the contention that, where a right in the nature of a maritime lien exists under foreign law which is the proper law of the contract, the English courts will recognise it and will accord it the priority which a right of that nature would be given under English procedure.[183] However, the claimant (a ship repairer for repairs done in the UK) in *The Colorado* (a French ship) did not take priority over the French mortgagee and Hill J, who was approved by the Court of Appeal, applied the *lex fori* to determine priorities. The court applied French law only for the purpose of examining what the instrument of the hypothequé was under French law. Thus, neither *The Colorado* nor *The Zigurds* (to which the Canadian Supreme Court referred and misrepresented) are authorities for the proposition that the English Courts examined the *lex causa contractus* to determine the nature of the claim for the purpose of priorities.

Convention 1980 must now be the guide to conflicts. For details of relevant cases in different jurisdictions, see the useful references in op. cit., Tetley, 1994, fns 153, 154.

180 [1974] 1 Lloyd's Rep 174; so Canada recognises foreign maritime liens, such as the US maritime lien for repairs, although no such maritime lien exists in Canadian law.

181 Ibid, p 177.

182 1923] P 102.

183 op. cit. fn 180, pp 177–178. The Supreme Court of Canada also interpreted *The Zigurds* [1932] P 113 as having been misunderstood, and expressed the view that a closer examination would reveal that it did not really support the contrary proposition. The German suppliers of necessaries to the ship in a German port argued that, if the ship was under arrest in Germany, they would have rights analogous to those given by a maritime lien and, therefore, would rank in priority to other claimants. On the evidence called in proof of German law, it was not shown that their claim would be recognised in Germany as being equivalent to an English maritime lien. In the result, the English court treated them as ordinary creditors. In fact, the judge held that foreign law could not be adduced to alter the English rule of ranking that claims of necessaries rank after those of a mortgagee.

Contractual provisions to protect the repairer's or the bunker supplier's contractual lien may not be successful and their enforcement will depend on the law of the contract and the jurisdiction where enforcement is sought. A few cases below illustrate this point:

Bominflot Inc and Anr v The M/V Heinrich S[184]

A bunker supplier supplied bunkers to *M/V Heinrich S* under standard terms and conditions that provided, inter alia: 'the buyer warrants that the seller has a right to arrest and enforce a lien against the receiving vessel for the amount of the product . . . plus any other expenses related to enforcement of the lien'. The contract was subject to English law with the rider that,

> nothing in this clause shall, in any event of breach by the buyer, preclude the seller from taking any such action as it shall, in its sole discretion, consider necessary to enforce, safeguard, or secure its rights under the contract in any court or tribunal in any State or country.

The bunker supplier brought an action in the US District Court (South Carolina) claiming a maritime lien pursuant to Rule C of the Federal Supplement Rules. The court dismissed the action because English law applied, which did not recognise such a lien. On appeal to the Federal Court of Appeal, the claimant argued that the above clauses had to be read together and required the court to apply US law, which allowed the lien. The appeal was dismissed because, upon construction of the clauses, they did not expressly provide that lien rights could be enforced 'in accordance with local law', and therefore English law had to apply.

The English Court of Appeal, in ***The Fresco Angara***,[185] affirmed that, under English conflict of laws rules, recognition of a right to enforce a maritime lien was a matter to be determined according to the *lex fori*. Under English law, there was no maritime lien for necessaries, so that there was no maritime lien for the supply of bunkers. Therefore, the appellant could not pursue his claim for a US maritime lien in this jurisdiction. However, as the English jurisdiction clause was not exclusive, he could pursue his lien in the US and he would not be in breach of the English jurisdiction clause.

In ***The Ship Nordems***,[186] an American bunker supplier supplied bunkers to the ship in South Africa under a contract with the sub-charterer (Parkroad), which was governed by US law. However, both the head and sub-charters prohibited the creation of liens and expressly prohibited the charterers from taking bunkers on the credit of the ship-owner. The sub-charterer went bankrupt and did not pay for the bunkers. The supplier arrested the ship in Canada, arguing that the sub-charterer contracted also on behalf of the ship-owner. The owners denied that the sub-charterer had actual or ostensible authority to contract on their behalf and on the credit of the ship and, in any event, Canadian law, unlike US law, did not allow the enjoyment of a maritime lien for necessaries. The judge gave judgment in favour of the owner and referred to the differences between US and Canadian law. Under US law, he said, the necessaries man is presumed to have contracted on the credit of the ship. That presumption

184 (2006) 704 LMLN 4.
185 [2011] 1 Lloyd's Rep 390.
186 *World Fuel Services Corp. v The Ship Nordems* (2011) 819 LMLN 3.

could only be rebutted by establishing that the necessaries man had actual knowledge that the contracting party did not have authority to bind the ship. On the other hand, under Canadian law, the necessaries man did not have a maritime lien but only a statutory right *in rem*, provided the owner was personally liable for the claim. The question was whether the owner was bound by the contract for bunkers supply. The judge held that, as the relevant charter parties expressly prohibited the sub-charterer from acting on behalf of the ship, there was no actual authority, and the plaintiff was on notice that there was no such authority. The judge concluded that the owners were not personally liable and, therefore, dismissed the *in rem* and *in personam* claims. Applying the Canadian conflict of laws rules, the judge found that, as the owners were not in a contractual relationship with the plaintiff, the choice of law in the bunkers supply contract was of less significance, and there were more non-American connecting factors than American. If it was necessary to choose the proper law, he said, the proper law was South African. On appeal by the supplier, the Federal Court of Appeal approved the decision. It is interesting to note what the court said in relation to notice and the extent to which the supplier had to make inquiries to ascertain the authority of the person requesting the supplies:

> In determining whether the duty to inquire had been met, the court should be mindful of the fact that modern technology made it much easier for a supplier to obtain, in a timely manner, the type of information which it required to make an assessment as to whether or not a charterer, or other person, had authority from the ship-owner to bind the ship. The plaintiff knew or ought to have known that Parkroad was not the owner of the ship . . . consequently, the plaintiff was on notice and should have taken steps to verify whether Parkroad had authority to bind the vessel. Nor was there any conduct or behaviour on the part of the ship owners which could have led the plaintiff into thinking that Parkroad was somehow authorised by them to purchase bunkers on their behalf.

6.3 RISK MANAGEMENT ISSUES

In the light of the conflict that exists in this area, the mortgagee usually protects its position in the deed of covenants, requiring the owner to provide information about the movements of the ship in case she calls at a port of a jurisdiction where *The Halcyon Isle* has been applied. There is also insurance cover for such a risk. At the time of enforcement of his security, the mortgagee usually considers the jurisdiction in which to proceed, although this necessitates forum shopping.

As regards a ship-repairer, he could protect his rights by demanding payment before giving up possession of the ship. Attempts to safeguard the enforcement of a contractual lien, which is recognised as a maritime lien in certain jurisdictions, would require express reference to enforcement in accordance with local law, particularly when the law governing the contract is English.

In addition, it should be borne in mind what the Federal Court of Appeal said about the extent to which a necessaries man has to make inquiries to ascertain the authority of the person with whom he might contract for the supply of goods, or bunkers, to the ship.

In this connection, bunker suppliers should also bear in mind the decision of the CA of Singapore in ***Bunga Melati 5***[187] on the issue of showing an arguable (not a

187 [2012] SGCA 46.

'good arguable') case on the merits of the claim, when the bunker supplier arrests a ship and the arrest is contested on the basis that the contract for the supply of bunkers was not with the owner of the ship. It is paramount that the bunker supplier ascertains with whom he is contracting.

7 EXTINCTION OF MARITIME LIENS AND TRANSFERABILITY

7.1 EXTINCTION

The space in this book allows only a list of the circumstances in which the lien can become extinct:[188]

- immunity from suit (in cases of foreign State immunity and Crown ships, the maritime lien may lie dormant until the ship is transferred out of Government ownership);
- delay of suit to enforce the lien by an *in rem* claim (extinguishes by laches);
- stay of proceedings upon provision of security;
- provision of bail, payment into court or provision of security by way of an undertaking or guarantee;[189]
- establishment of limitation fund under the Limitation Convention;
- waiver, or general principles of estoppel;
- destruction of the property;
- execution of judgment on liability upon the property;
- judicial sale.

7.2 TRANSFERABILITY

A voluntary payment by a third party of claims to which a maritime lien has attached will not transfer the lien to that party, unless the payment is made with judicial consent or is ordered by the court.

Whether a lien can effectively be assigned depends on principles of assignment applicable to 'choses in action', which are rights enforceable by litigation. An assignment of a bare right of litigation (e.g. not being ancillary to an assignment of a property right, or in cases where the assignee does not have a genuine commercial interest) is not valid. This principle has been laid down in ***Trendtex Trading Corp. v Credit Suisse***:[190]

> If the assignment is of a property right or interest and the cause of action is ancillary to that right or interest or if the assignee had a genuine commercial interest in taking the assignment and in enforcing it for his own benefit, the assignment of a chose in action is valid.

188 See further Jackson, DC, *Enforcement of Maritime Claims*, 4th edn, 2005, LLP, at pp 501–508.

189 The Canadian court in *The Birchglen* [1990] 3 CF 301, cited in *The Ruta* [2000] 1 Lloyd's Rep 359, held that, whether or not a maritime lien continues, or is revived, or is extinguished when security has been put up, is determined according to the facts of each particular case and the requirements that full justice and equity be applied.

190 [1981] 3 All ER 520, p 531.

For the purpose of assignment of a maritime lien, which is considered to be a chose in action, an assignment of the claim does not mean that it carries with it the maritime lien, if the right reflected in the claim is not assignable. For example, wages' lien cannot, by virtue of s 39 of the MSA 1995, be renounced by any agreement.

A question that frequently arises is whether an assignment of the wages' claim to a person who pays the wages voluntarily can be seen as falling foul of this section. This question came before the court in Hong Kong, for the first time, in ***The Sparti***,[191] and the judge considered the equivalent statutory provision to s 39 under the Merchant Shipping (Seafarers) Ordinance, s 93(1), and reviewed all relevant authorities.

The owners of the vessel were in financial difficulties and asked the assignee, who was acting as the agent of the vessel in Colombo, to pay the crew. Although the assignee was under no legal duty to do so, he agreed to pay the crew, taking appropriate assignments from them. Each of the assignments from the members of the crew was in the same form and provided, inter alia:

> In consideration of the payment by you to me of US . . . in respect of wages and other amounts due for my employment on board *MV Sparti*, I hereby assign to you all my rights against the owners of the vessel or against the vessel itself.

No written notice of the assignment was given by the crew, or the assignee, to the owners of the vessel, so that the assignments were equitable. Both the mortgagee and the agent of the ship obtained judgments for their respective claims against the ship, and the ship was sold by court order. As the court fund was insufficient to satisfy the claims in full, the issue was one of priorities.

The judge held that a maritime lien as understood by the British and Hong Kong courts was regarded as a personal privilege that was for the sole benefit of the maritime lienee; this personal right of maritime lien was not capable of being voluntarily transferred. He further held that, by contrast to Scottish law[192] and US law,[193] under which a person, who pays off the crew wages in a foreign port, is put into the shoes of the seaman whose wages he had paid, the weight of English authorities was strongly against this doctrine.

The judgment of Hill J in ***The Petone***,[194] in which the matter of assignability of maritime liens was left open, could not be read as indicating that the maritime lien can be transferred by assignment. That judgment had established that persons in the position of volunteers who make payments in discharge of seamen's wages and master's disbursements do not thereby acquire the maritime lien which the seamen and master had in respect thereof.

Hill J, in *The Petone*, specifically held (at 208) that:

> In my view the weight of authority is strongly against the doctrine that the man who has paid off the privileged claimant stands in the shoes of the privileged claimant and has his lien, whether it be regarded as a general doctrine or as applied to wages only. I say nothing about contractual assignments of debts or claims supported by maritime liens. It is not necessary to consider

191 [2000] 2 Lloyd's Rep 618.

192 *Clark v Bowring* (1908) SC 1168.

193 *The President Arthur* (1928) 25 F (2d) 999, in which public policy applied in favour of the payer of wages.

194 [1917] P 198.

how far such an assignment carries with it, in all cases, the maritime lien; it does so in the case of bottomry; whether it does so in any other cases it is not necessary to express an opinion. In the present case there is no question of assignment. The plaintiffs paid the wages and/or disbursements. The master and crew have been paid and their debts satisfied. They assigned nothing to the plaintiffs. The plaintiffs do not claim as their assignees but in their own right as having paid the men off. Counsel for the plaintiffs contends that the doctrine is an application of the principle of subrogation. But I know of no principle of English law which says that one who, being under no compulsion and under no necessity to protect his own property, but as a volunteer, makes a payment to a privileged creditor, is entitled to the rights and remedies of the person whom he pays. That is the position of the plaintiffs. They chose as volunteers to pay off debts which constituted a marine lien upon the ship. They did not, in my opinion, thereby acquire any maritime lien. They have, therefore, no right *in rem* based upon a maritime lien. They have no right *in rem* independent of a maritime lien.

The same issue came before the Federal Court of Australia, in ***The Ship 'Hako Fortress'***.[195] The ship agents were authorised by its owner or demise charterer to provide and pay the crew of the ship, and the question for the court was whether they could be subrogated to the security of the crew's maritime lien. The court held this was, at least, arguable, and *The Petone* should not be followed, in particular because crewing arrangements by a third party had since become commonplace, and the position of the agents was clearly not that of a third-party volunteer.

It seems that the issue of transferability of a maritime lien in such circumstances can, perhaps, be re-examined by the English courts and the legal basis for such a claim by ship agents, who have paid the crew (certainly out of necessity), may be considered to be subrogation of the right to the maritime lien of the crew.

195 [2012] FCA 805.

CHAPTER 6

DISMISSAL OR STAY OF PROCEEDINGS, FORUM SHOPPING

1 INTRODUCTION

Although the jurisdiction of the Admiralty Court is very wide (see Chapter 1), there are certain limits and restrictions that the court will consider in exercising its discretion to determine its own jurisdiction. For example, as mentioned in Chapter 1, para 6, the jurisdiction of the Admiralty Court cannot be assumed in circumstances provided by the Crown Immunity Act 1947 and the State Immunity Act 1978. Convention rules or other doctrines also restrict the scope of exercising or maintaining jurisdiction on the merits of a case, as will be seen in this chapter and in Chapter 7. On the other hand, the court may, by an anti-suit injunction, restrain a litigant from continuing proceedings commenced in a foreign court (which is not a court of a Member State of the Brussels I Regulation), if there are grounds for protecting rights, or asserting its own jurisdiction (see Chapter 8). In this chapter, the circumstances in which the court will dismiss proceedings or decline jurisdiction and stay the proceedings on grounds of *forum non-conveniens* or a valid foreign jurisdiction, or arbitration, agreement are examined. This chapter, in particular, contains many important new decisions and highlights how important it is for lawyers to manage litigation and arbitration risks with care for their clients.

1.1 JURISDICTION BASES

There are two broad types of jurisdiction bases under English procedural law: the one that is based upon 'service of process' and the other based upon the rules of a 'Convention'.

As regards the 'service of process' jurisdiction basis, there has traditionally been no need for substantive connecting factors between the jurisdiction and the claim. In claims *in personam*,[1] the claim form is served upon the defendant provided the defendant is within the jurisdiction, unless he voluntarily submits to jurisdiction. Special rules apply in collision damage claims, if pursued *in personam* (see Chapter 4, para 2).

In cases in which the defendant is not within the jurisdiction, there are exceptions to the general rule of no connecting factors with the English jurisdiction; these are the occasions described by the Civil Procedure Rules 1998 (CPR) for service out of the jurisdiction (Ord 11, now found in Pt 6, section III, rr 6.17–6.31 of the CPR). A substantive connecting factor must be shown for the court to give leave to the claimant to serve the defendant out of the jurisdiction.

As far as claims *in rem* are concerned, once the ship is within the jurisdiction, it provides the link and can be served with the *in rem* claim form (Chapter 4 para 3).[2]

With regard to the 'Convention jurisdiction' basis (examined in Chapter 7), founding jurisdiction depends on specified substantive links with the relevant jurisdiction as required by Conventions, which have been enacted into, or partly adopted by, English law.

The occasions in which the court has discretion whether or not to exercise or maintain its jurisdiction are examined below.

1.2 JURISDICTION NOT EXERCISED OR DISCONTINUED

Jurisdiction will not be exercised, or may be discontinued by staying the proceedings, on the following grounds:

(a) time bars applicable to instituting proceedings;
(b) no leave for service of proceedings out of the jurisdiction when the cause of action does not fall within any of the prescribed rules;
(c) *forum non-conveniens* doctrine;
(d) breach of a foreign jurisdiction agreement;
(e) breach of an arbitration agreement;
(f) *res judicata* (as seen in Chapters 4 and 5);
(g) convention jurisdiction provisions, which allocate jurisdiction according to special rules of a particular Convention; the Conventions that are relevant to maritime claims, and the Brussels jurisdiction regime, are discussed in Chapter 7.

The grounds from (a) to (e) are examined in this chapter, below.

2 DISMISSAL ON TIME BAR GROUNDS

There are statutory and consensual time limits within which a claim may be brought. Delay in bringing suit may bar the remedy or, in exceptional cases, the claim itself,

1 Governed by CPR, Pt 58 and PD 58.
2 PD 61, para 3.

unless an extension of time has been obtained, either by agreement or by an order of the court.

The CPR also provide for certain time limits regarding procedures. The court has power to strike out proceedings for failure by the litigants to observe a rule, or practice directions, or a court order. Inexcusable delays may amount to an abuse of process. Once proceedings have started, case management under the new rules[3] is intended to assist the parties in taking the required procedural steps without delay and has, in a way, curtailed the strict approach of the court under the old rules to strike proceedings out.

As a general rule, under English law, a time bar is a procedural remedy and is governed by the law of the forum, unless the substantive matter is governed by foreign law, when limitation will also be treated as a matter of that law in accordance with the Foreign Limitation Periods Act 1984. In addition, the Contracts (Applicable Law) Act 1990 (which enacted the Rome Convention 1980) has affected the classification of time bars as procedure. It provides that matters of extinguishing obligation, prescription and limitation of action are matters of the applicable law to the contract.

The general time limits are contained in the Limitation Act (LA) 1980, as amended by the Latent Damage Act (LDA) 1986, which does not apply where other statutes dealing with particular matters prescribe limitation. In maritime claims, particularly for collision damage or salvage or personal injury claims, limitation provisions of Conventions, as enacted into English law, have been consolidated in the Merchant Shipping Act (MSA) 1995, which are referred to below. Limitation of time, with regard to contracts to which the Hague–Visby Rules (HVR) apply by force of law, is governed by those rules.

2.1 CARGO CLAIMS AGAINST THE CARRYING SHIP OR HER OWNERS

When there is a contract to which the HVR do not apply, or when they do not apply by force of law but by agreement, there is usually a contractual time limit,[4] which may be extended by agreement. When the HVR apply by force of law, Art III, r 6 provides:

> Subject to para 6 *bis* (referring to indemnity claims) the carrier and the ship shall, in any event, be discharged from all liability whatsoever in respect of the goods, unless suit is brought within one year of their delivery, or of the date when they should have been delivered. This period may, however, be extended if the parties so agree after the cause of action has arisen.

3 CPR, Pt 3.

4 A specifically negotiated clause is likely to take precedence over the merely incorporated, but clear words are required for a time bar, so that, in a case of doubt or ambiguity, the conflict must be resolved in favour of a longer time limit: *Finagra (UK) Ltd v OT Africa Line Ltd* [1998] 1 Lloyd's Rep 622. It should also be noted that, under the AA 1996, s 12(2) limited the right to seek an extension of time by an application to the court to circumstances: 'after a claim has arisen and after exhausting any available arbitral process for obtaining an extension of time'. This provision postpones formally any right to apply to the court for an extension under any scheme of arbitration giving the arbitrators the power first to extend time; it would, therefore, be the arbitrators who may determine whether or not any time bar applied, before deciding whether to grant an extension: *The Seki Rollete* [1998] 2 Lloyd's Rep 638.

The wording of this Article makes time bar mandatory, and the court does not have power to extend it.[5] The effect of lapse of time, without prior agreement to extend it, is that it extinguishes the claim and no reliance on it can be made, by way of defence, or a set off, in accordance with the view of the majority of the House of Lords in ***The Aries***.[6]

Lord Wilberforce clearly stated the effect of Art III, r 6:

> This amounts to a time bar created by contract. But, I do not think that sufficient recognition to this has been given by the courts below; it is a time bar of special kind, viz, one which extinguishes the claim . . . not one which, as most English statutes of limitation . . . and some international conventions do, bars the remedy while leaving the claim itself in existence . . . The charterers' claim, (in this case) after May 1974 and before the date of the writ, had not merely become unenforceable by action, it had simply ceased to exist, and I fail to understand how a claim which has ceased to exist can be introduced for any purpose into legal proceedings, whether by defence or (if this is different) as a means of reducing the respondents' claim, or as a set off, or in any way whatsoever. It is a claim which, after May 1974, had no existence in law, and could have no relevance in proceedings commenced, as these were, in October 1974.[7]

The severe consequences of loss of the right to claim by the lapse of the limitation period can occur even if a claim form has been issued within time, but is not served within the time of the validity of the 'claim form'. Under the CPR, r 7.5, a claim form *in personam* is valid for service for four months, unless it is to be served out of the jurisdiction, when it is valid for six months. An application to extend the time of service must be made within the period of service (CPR, r 7.6). If the application is made out of time, the court has discretion to extend the time if the claimant has taken all reasonable steps to serve, but has been unable to do so, and if he acted promptly in making the application (r 7.6(3)). In ***Pirelli v United Thai***,[8] the court was lenient to extend the time for issuing a concurrent 'writ'[9] under the previous Rules of the Supreme Court (RSC) (Ord 6, r 8), which had not been issued within the validity of the original writ, as provided by the old rules. In order to cure this defect, the original writ was deemed to be extended for six months. An *in rem* claim form is valid for 12 months (CPR, r 61.3(5)(b)).

It should also be noted that an amendment to the claim form would not be permitted, once the time bar has expired, to include a defendant not named in the original claim form, which was issued against another defendant within time.[10]

Under the Gold Clause Agreement (GCA) 1950, as amended in 1977, the time for bringing suit for a cargo claim may be extended. The GCA is an agreement entered into between insurers, certain cargo interests and ship-owners. Clause 4 provides that, upon the request of any party representing the cargo, whether made before or after the expiry of the one-year period, the ship-owners will extend the time for bringing suit for a further 12 months, provided notice of the claim, with the best particulars available, has been given within the one-year period.

5 *The Antares* [1987] 1 Lloyd's Rep 424.
6 [1977] 1 WLR 185 (HL).
7 Ibid, p 188.
8 [2000] 1 Lloyd's Rep 663; the case is also relevant to stay of proceedings on ground of a foreign jurisdiction agreement, discussed below.
9 Apparently, the CPR do not refer to the issue of a concurrent claim form under Pt 7.
10 *The Jay Bola* [1992] 2 Lloyd's Rep 62.

2.2 INDEMNITY CLAIMS FOR LIABILITY TO CARGO OWNERS

Allocation of liability for cargo claims, as between owners and charterers (contracted under a New York Produce Exchange (NYPE) time charter which incorporates the Inter-Club NYPE Agreement), in respect of cargo carried on board under bills of lading to which the HVR are incorporated, is subject to a two-year time limit.

The HVR, by Art 6 *bis*, also provide that indemnity claims can be brought, even after the expiration of the year provided for in Art 6, if brought within the time allowed by the law of the court seised of the case. However, the time allowed shall not be less than three months commencing from the day when the person bringing such action for indemnity has settled the claim, or has been served with process in the action against himself.

The Privy Council gave the interpretation of this provision in ***The Xingcheng and Andros***,[11] in which it held that:

> Rule 6 *bis* of Art III created a special exception to the generality of r 6; r 6 *bis*, in a case to which it applied, had a separate effect of its own independently of r 6; the case to which r 6 *bis* applied was a case where shipowner A, being under actual or potential liability to cargo-owner B, claimed an indemnity by way of damages against ship or shipowner C; if that claim was made under a contract of carriage to which the HVR applied, then the time allowed for bringing it was that prescribed by r 6 *bis* and not r 6; there was no requirement in r 6 *bis* that the liability to shipowner A should also arise under a contract of carriage to which the HVR applied and there was no reason why such a requirement should be implied.

2.3 CLAIMS FOR LOSS OF LIFE OR PERSONAL INJURY AGAINST THE CARRYING SHIP

Claims for loss of life or personal injury of persons carried on the ship, except when the Athens Convention applies (see Chapter 15, Volume 2), occasioned by negligence are subject to the Fatal Accidents Act 1976,[12] in respect of claims by the dependants of a deceased, and the LA 1980. The time limit against the carrying ship is three years, commencing from the date of the incident that gave rise to the cause of action. The period may not commence until the claimant has knowledge of the injury.[13]

2.4 CLAIMS OF PASSENGERS CARRIED ON PASSENGER VESSELS

Claims for loss of life or personal injury or loss of luggage of passengers carried on passenger ships are subject to a two-year time limit, commencing from a date as specified by Art 16 of the Athens Convention 1974, as amended by the 2002 Protocol (see Chapter 15), when it applies. The commencement date depends on the particular claim made. The date of disembarkation is the relevant date for personal injury claims,

11 [1987] 2 Lloyd's Rep 210.
12 As amended by the AJA 1982.
13 LA 1980 (ss 11, 12, 13), as amended by the LDA 1986.

or the date of death for loss of life when death occurred after disembarkation of an injured passenger, provided that the time should not exceed three years from the date of disembarkation. The date of disembarkation or the date when disembarkation should have taken place is relevant for damage to, or loss of, luggage. These time limits may be extended either by a written declaration of the carrier or by agreement of the parties after the cause of action has arisen.

2.5 PROPERTY OR PERSONAL INJURY/LOSS OF LIFE CLAIMS

Under s 190(1), (3) of the MSA 1995, the time limit to bring any claim against owners or ship, in respect of damage or loss caused by the fault of that ship to another ship, its cargo or freight, or any property on board it, or for damages for loss of life or personal injury caused by the fault of that ship to any person on board another ship, is two years from the date of the incident causing the damage or loss. This may be extended on grounds of reasonableness.[14]

2.6 CLAIMS FOR CONTRIBUTION

Claims for contribution by one ship against the other ship at fault, in respect of liability to third parties for loss of life or personal injury, are subject to a one-year time limit, commencing from the date of payment under s 190(4) of the MSA 1995. But, contribution claims for liability incurred to third parties concerning damage to property are subject to a two-year time limit, commencing from the date of payment under s 1 of the Civil Liability (Contribution) Act 1978.

2.7 SALVAGE CLAIMS

Under Art 23 of the Salvage Convention 1989, any claim for payment under the Convention shall be time barred, if judicial or arbitral proceedings have not been instituted within a period of two years. The limitation period commences on the day on which the salvage operations are terminated. The person against whom the claim is made may extend this period by making a declaration to the claimant. An action for indemnity by a person liable may be instituted, even after the expiration of the aforesaid limitation period, if brought within the time allowed by the law of the State where proceedings are instituted.

2.8 CLAIMS FOR WAGES

The LA 1980 provides for a six-year time limit to bring claims arising from breach of contract, commencing from the date of the breach. This time limit applies to claims of seamen against their employer for unpaid wages.

14 *The Berny* [1979] 2 Lloyd's Rep 533.

3 JURISDICTION NOT EXERCISED – NO LEAVE FOR SERVICE OUT

There will be no assumption of jurisdiction if a claim *in personam* is not within the prescribed rules for service out of the jurisdiction (formerly Ord 11, which has been incorporated in CPR, Pt 6, Section III (rr 6.17–6.31) and PD 6B (service out of the jurisdiction)). Save for cases where the defendant is within the jurisdiction to be served with the claim form, or he has agreed to submit to the jurisdiction of the court, and for those in which the Brussels Regulation or the Lugano Convention applies (examined in Chapter 7, below), a claimant will need the permission of the court to serve proceedings out of the jurisdiction. This is only applicable to limited circumstances in which there is a link between the claim and the jurisdiction.[15]

For example, there may be a contractual link if the contract was made here, or is governed by English law. Another link with this jurisdiction will be in cases of claims based on tort, where the alleged tort happened within the jurisdiction.

Granting permission is discretionary. The claimant must state the grounds of the application and show that, in his belief, he has a good cause of action and that there is a real issue to be tried. No permission shall be granted, unless it shall be made sufficiently to appear to the court that the case is a proper one for service out of the jurisdiction.

In ***Cherney v Deripaska (No 2)***,[16] Clarke J held that: The claimant had shown that he had a good arguable case that the claim fell within CPR 6.20. In particular he stated that:

> [W]here there was a dispute between two apparently credible witnesses the court should usually, before giving permission, be satisfied that the claimant's contentions about the alleged agreement provided a much better, or at any rate a better, argument in favour of there being the ground for jurisdiction alleged than of there not being one. In granting permission to serve out of the jurisdiction the court was exercising an exorbitant jurisdiction over those who are not within its ordinary reach. In those circumstances the court was justified in applying the good arguable test in that manner in order to avoid the risk of compelling individuals or companies to submit to a jurisdiction to which they ought not in truth to be made subject. . . . If it were otherwise it would appear to follow that a defendant who had at least as good a chance of showing that he did not agree to litigate in England as the claimant had of showing that he did, would be likely to find himself compelled to litigate in England, on the footing that, once a good arguable case was made out in favour of an English exclusive jurisdiction clause, discretionary considerations would be unlikely to call for the case to be decided elsewhere . . . I do not regard this as introducing by the back door a requirement that a claimant seeking permission should prove his case on the balance of probabilities. The Court is concerned, at this stage, with the *arguments* . . . in the light of the material then tendered. Whilst the Court is entitled to reject the wholly implausible, what it will be concerned with is the relative plausibility of the contentions . . .[17]

He concluded:

> I am not satisfied, on the material before me, that Mr Cherney has a good arguable case that there was an oral agreement as to English law and jurisdiction . . . I am not satisfied that on either of those issues he has either much the better or even the better side of the argument.[18]

15 CPR, Pt 6, s III (rr 6.17–6.31) and PD 6B.
16 [2008] EWHC 1530 (Comm); affirmed by the CA [2009] EWCA Cir 849.
17 Ibid, at paras 41, 42, 44, 135 and 144.
18 Ibid.

In circumstances outside the provisions of this procedural rule, the court cannot assume jurisdiction if the defendant is foreign, unless there is a convention jurisdiction basis, or the parties to a dispute have agreed to this jurisdiction. However, there may be issues to be tried where a foreign forum may be more appropriate for the interests of justice, so *forum non-conveniens* may apply (provided the Rules of the Brussels Regulation do not apply), instead of giving force to the jurisdiction agreement[19] (see para 4, below).

It is beyond the scope of this book to deal with this procedural area, which requires a book in its own right.

4 STAY ON GROUNDS OF *FORUM NON-CONVENIENS*

Even if English jurisdiction has been properly invoked, the English court has power to exercise its discretion and stay an action before it, when there are grounds of *forum non-conveniens*. When there are connecting factors with the jurisdiction of a foreign court that is amenable to the defendant, the English court may consider, taking also into account all the circumstances of the case, whether that court is more appropriate to determine the matter for the ends of justice and the interests of all parties.

Being originally a Scottish doctrine, *forum non-conveniens* was gradually incorporated into English law in the 1970s. It is not used in civil law jurisdictions.

4.1 ORIGINS OF THE DOCTRINE AND 'THE 1936 RULE'

Prior to the Judicature Act (JA) 1873, the High Court had power to grant an injunction to restrain proceedings in England. By s 24(5) of the 1873 Act, however, this power to restrain proceedings by an injunction was removed, but, in the same sub-section, the court's inherent power to stay proceedings, as it thought fit for the purpose of justice, was recognised.

Section 24 of the JA 1873 was later replaced by s 41 of the Judicature (Consolidation) Act 1925. The court's inherent power to stay proceedings was maintained in the new Act, as it had been in the 1873 Act. However, the rule in the 1925 Act added a requirement of proof of vexation or oppression on the part of the applicant (defendant) for a stay to be granted, whereas the rule in the 1873 Act contained no reference to vexation or oppression.

In ***McHenry v Lewis***,[20] the Court of Appeal, in a matter involving multiple proceedings in England and America, used the word 'vexatious' as an illustration of the provision. In later decisions,[21] the court followed this principle, but without placing too much weight on the words oppressive and vexatious. The emphasis was on whether the defendant would be subjected to such an injustice, that he ought not to be sued in the court in which the action was brought.

19 *VTB Capital plc v Nutritek International Corp.* [2012] EWCA Civ 808.

20 (1882) 21 Ch D 202.

21 *Peruvian Guano Co. v Bockwoldt* (1883) 23 Ch D 225; *Hyman v Helm* (1883) 24 Ch D 531; *Logan v Bank of Scotland* [1906] 1 KB 141.

This principle was formulated in the ***St Pierre v South American Stores***,[22] known as 'the 1936 rule'. The case concerned lease of land in Chile, and proceedings had commenced in both Chile by the defendants (English companies) and in England by the plaintiffs. The defendants applied for a stay of the English action, on the grounds that Chile was a more appropriate forum.

Scott LJ held that: (1) a mere balance of convenience was not a sufficient ground for depriving a plaintiff of the advantages of prosecuting his action in England when the English action was, otherwise, properly brought; and (2) in order to justify a stay, the defendants had to prove (a) that the continuance of the action in England would cause an injustice that was oppressive or vexatious to him, or would be an abuse of the process of court in some way, and (b) that the stay would not cause an injustice to the plaintiff. The burden of proof in both situations was on the defendant.

Thus, if the plaintiff was not acting vexatiously or oppressively, but genuinely believed that England would be to his advantage (although there was another more appropriate forum), the court would not grant a stay.

In this case, the applicant could not easily satisfy the court that the continuance of the action would work an injustice to him. This was owing to the difficulty of proving that the action was oppressive or vexatious in the opprobrious sense, which was a meaning these epithets were, generally, regarded of having in the context in which they were used.[23] The application of the 1936 rule in subsequent cases, until 1973, operated in such a way as to make it extremely difficult for the defendant to obtain a stay of an action. Such applications were, invariably, dismissed.[24]

4.2 THE 1936 RULE VERSUS THE DOCTRINE OF *FORUM NON-CONVENIENS*

There was at least one fundamental difference between the 1936 rule and the doctrine of *forum non-conveniens* as developed since 1973. The 1936 rule recognised an exceptional power of the court which could only be described by reference to vexation or oppression. The court's discretion, however, was general, as is shown in ***Peruvian Guano***.[25]

An action was brought in this court by an English company against a firm of French merchants for the delivery of cargo carried on certain ships, or in the alternative for damages, and for an injunction and appointment of a receiver. At the commencement of the action, the ships were in British waters, but they had since been removed by the direction of the defendants to ports in France, and the cargoes had been taken possession of by the defendants. Proceedings had been instituted by the plaintiffs in France for recovery of the cargoes. The English action comprised a claim for the cargo of one ship, which was not claimed in the French action. A motion by the defendants, that the plaintiffs be ordered to elect whether they would proceed with the English action or with the French proceedings, was refused.

22 [1936] 1 KB 382 (CA).

23 *The Abidin Daver* [1984] 1 All ER 470, p 481, per Lord Brandon of Oakbrook.

24 *The Janera* [1928] P 55; *The London* [1931] P 14; *The Madrid* [1937] 1 All ER 216; *The Quo Vadis* [1951] 1 Lloyd's Rep 425; *The Monte Urbasa* [1953] 1 Lloyd's Rep 587; *The Lucile Broomfield* [1964] 1 Lloyd's Rep 324.

25 *Peruvian Guano Co. v Bockwoldt* (1883) LR 23 Ch D 225.

Jessel MR laid down the criteria for a stay, which was rarely granted in those days. He stressed that the consideration of causing injustice by the stay of proceedings was very important, and went on further:

> Of course, a man brings an action at the peril of costs if the action does not succeed, and as a general rule that is sufficient to protect defendants from ill founded actions. There is another protection, which is that, where the action is vexatious, it may be stayed. Now it may be vexatious on many grounds. It may be so utterly absurd that the judge sees it cannot possibly succeed, and that it is brought only for annoyance, and then the judge has jurisdiction to stay the action. That is pure vexation. Or, it may be vexatious in another way; that is, the plaintiff not intending to annoy or harass the defendant, but thinking he would get some fanciful advantage, sues him in two courts at the same time under the same jurisdiction – two of the Queen's courts. That is vexatious, because whatever the intention of the plaintiff may be he cannot get any benefit in that way, and the defendant is harassed by two suits . . .
>
> It may be put, as regards this case, shortly in this way: that it is not vexatious to bring an action in each country where there are substantial reasons of benefit to the plaintiff. He has the right to bring an action, and if there are substantial reasons to induce him to bring the two actions, why should we deprive him of that right? It is very unpleasant, no doubt, to be sued twice – it is unpleasant to many people to be sued once – but still that does not make it vexatious where the plaintiff seeks to get a real substantial advantage.[26]

4.3 THE GRADUAL INCORPORATION OF THE SCOTTISH DOCTRINE INTO ENGLISH LAW

The incorporation of the Scottish doctrine of *forum non-conveniens* into English common law was effectively done by *The Abidin Daver* in 1984, but the process started in 1973 with *The Atlantic Star* and it was refined further in *Macshannon*. The trilogy of these decisions had a great impact on the change of the attitude of English judges, so that a tendency for jurisdictional chauvinism was gradually diminished.

The difficulty of showing that the action in England was oppressive or vexatious was for the first time examined by the House of Lords in ***The Atlantic Star***,[27] which followed a liberal approach in the interpretation of the words oppressive or vexatious.

After a collision between a barge and the *Atlantic Star*, in Belgian waters, the respondents (claimants), Dutch owners of the barge, arrested *The Atlantic Star* (AS) in England and obtained security for their claim. The owners of the AS (appellants) sought a stay of the English action on the ground that the Belgian court was the more appropriate forum to deal with the claim. The court surveyor in Belgium had already been called to give evidence in court, and the conclusion in his report appeared to point to the opinion that the appellants' vessel was not at fault. Therefore, the chances were that, if the action was tried in Belgium, the respondents would fail. The trial judge held that, although the balance of convenience was heavily in favour of the Belgian court, and the case had absolutely no connection with England, he felt bound by previous authorities and refused a stay, as it was not proved that the plaintiffs were acting 'vexatiously' or 'oppressively', or in abuse of the process of the court. His decision was upheld by the Court of Appeal in which Lord Denning MR re-emphasised that access to the Queen's court, even by a foreign plaintiff, must not be lightly refused; it is worth stating his famous statement:

26 Ibid, at p 230
27 [1973] 2 Lloyd's Rep 197.

No one who comes to these courts asking for justice should come in vain . . . This right to come here is not confined to Englishmen. It extends to any friendly foreigner. He can seek the aid of our courts if he desires to do so. You may call this 'forum shopping' if you please, but if the forum is England, it is a good place to shop in, both for the quality of the goods and the speed of service.[28]

There was a further appeal and Lord Reid, in the House of Lords, criticised Lord Denning's statement; his reply below should be noted in the books of English legal history:

My Lords, with all respect, that seems to me to recall the good old days, the passing of which many may regret, when inhabitants of this island felt an innate superiority over those unfortunate enough to belong to other races . . . There was a time when it could reasonably be said that our system of administration of justice, though expensive and elaborate, was superior to that in most other countries. But, today we must, I think, admit that as a general rule there is no injustice in telling a plaintiff that he should go back to his own courts . . . So, I would draw some distinction between a case where England is the natural forum for the plaintiff and a case where the plaintiff merely comes here to serve his own ends. In the former, the plaintiff should not be 'driven from the judgment seat' without very good reason, but, in the latter, the plaintiff should, I think, be expected to offer some reasonable justification for his choice of forum if the defendant seeks a stay . . . I think that a key to the solution may be found in a liberal interpretation of what is oppressive on the part of the plaintiff. The position of the defendant must be put in the scales. In the end, it must be left to the discretion of the court in each case where a stay is sought . . . looking to all the circumstances, including the personal position of the defendant.[29]

Lord Wilberforce reviewed the previous authorities and concluded with regard to 'vexatious and oppressive':

These words are not statutory words; as I hope to have shown from earlier cases, they are descriptive words, which illustrate, but do not confine, the courts' general jurisdiction. They are pointers rather than boundary marks. They are capable of a strict, or technical application; conversely, if this House thinks fit, and as I think they should, they can in the future be interpreted more liberally.[30]

Lord Kilbrandon agreed and added:

There are plenty of earlier examples of the use of the words 'oppressive' and 'vexatious' in this context. But the words have, at all events today, certain shades of meaning which make it difficult to accept an uncritical construction . . . 'Oppressive' is an adjective which ought to be, and today normally is, confined to deliberate acts of moral, though not necessarily legal, delinquency, such as an unfair abuse of power by the stronger party in order that a weaker party may be put in difficulties in obtaining his just rights. 'Vexatious' today has overtones of irresponsible pursuit of litigation by someone who either knows he has no proper cause of action, or is mentally incapable of forming a rational opinion on that topic. Either of these attitudes may amount to abuse of the process of the court, but in my opinion a defendant moving for a stay cannot be compelled to bring the plaintiff's conduct within the scope of these grave allegations.

Thus, the House of Lords rejected the narrow construction of the expressions 'oppressive' and 'vexatious'. It was invited to take the opportunity in this case to bring English law into line with the Scottish doctrine of *forum non-conveniens* and make the

28 [1972] 2 Lloyd's Rep 446, p 451.
29 [1973] 2 Lloyd's Rep 197, pp 200–201.
30 Ibid, p 209.

plea available in England. However, unfortunately, it refused to adopt this approach, but upheld the court's residual right to decline to exercise its jurisdiction in appropriate cases. It was for the court to consider the following criteria:

(a) any advantage to the plaintiff in this jurisdiction, and
(b) any disadvantage to the defendant caused by a refusal of the stay.

It was held by majority of 3:2 that the defendants (appellants) had shown that they ought not to be required to litigate in England, and the action was stayed.

At this stage, the judgment of Scott LJ in *St Pierre* was still treated as the framework on which the law was built, but the words 'oppressive' and 'vexatious' were no longer to be understood in their natural meaning. Furthermore, there was a further welcomed advancement in the law when the House of Lords in ***Macshannon v Rockware Glass Ltd***[31] eliminated these words from the test.

An action against employers was brought in the English court by Scots employees for damages arising from personal injury or disabilities suffered in the course of employment in a factory in Scotland owing to alleged negligence of the employers, whose head offices were in England, but their place of business was in Scotland. Although there was no connection with England, the claimants were advised by their solicitors that the English court would be likely to award higher damages and more generous party and party legal costs. The Court of Appeal, on appeal, acknowledged that Scotland was the more appropriate forum for the action, but considered that the *ratio decidendi* of *The Atlantic Star* compelled the court to allow the proceedings to continue in England.

Lord Diplock, on appeal to the House of Lords, examined the *ratio decidendi* in *The Atlantic Star* and stated that, although a liberal interpretation of the words vexatious and oppressive had been given in *The Atlantic Star*, these words still caused problems and should be eliminated to avoid confusion, as in the instant case:

> In order to justify a stay two conditions must be satisfied, one positive and the other negative: (a) the defendant must satisfy the court that there is another forum to whose jurisdiction he is amenable in which justice can be done between the parties at substantially less inconvenience or expense, and (b) the stay must not deprive the plaintiff of a legitimate personal or judicial advantage which would be available to him if he invoked the jurisdiction of the English court.[32]

No reference was made to the burden of proof. Lord Keith added:

> Where England is the natural forum for the action, in the sense of being that with which the action has the most real and substantial connection, it is necessary for the defendant, in order to establish injustice to him and no injustice to the plaintiff, to show some very serious disadvantage to him which substantially outweighs any advantage to the plaintiff. Where, however, the defendant shows that England is not the natural forum and that, if the action be continued there he would be involved in substantial (that is, more than *de minimis*) inconvenience and unnecessary expense, or in some other disadvantages, which would not affect him in the natural forum, he has made out a prima facie case for a stay, and if nothing follows it may properly be granted. The plaintiff may, however, seek to show some reasonable justification for his choice of forum in the shape of advantage to him. If he succeeds, it becomes necessary to weigh against each other the advantages to the plaintiff and the disadvantages to

31 [1978] 1 All ER 625 (HL).
32 [1978] 1 All ER 625, p 630.

the defendant, and a stay will not be granted unless the court concludes that to refuse it would involve injustice to the defendant and no injustice to the plaintiff.[33]

The advantages of hearing the action in Scotland were: the availability of medical and other expert witnesses, who treated the plaintiffs in Scotland, and all the witnesses of facts were living in Scotland. The main disadvantage of hearing the action in England would be the inconvenience, not only for the parties, but for all the witnesses concerned. The plaintiffs alleged that the advantage they would be deprived of, if the action was tried in Scotland, was an unsubstantiated, though perhaps bona fide, belief of their legal advisers on the advantages of English over Scottish legal process. It was held that the advantage to the plaintiff must be a real one, it must be shown objectively and, on balance of probabilities, that it exists. The defendants had shown that Scotland was the only natural and appropriate forum for the actions, where they could be tried at substantially less inconvenience and expense. The plaintiffs had not shown that they would be deprived of any real personal or judicial advantage. The action was stayed.

In the final case of the trilogy, ***The Abidin Daver***,[34] the doctrine of *forum non-conveniens* was firmly embedded in English law. The existence of *lis pendens* in a foreign jurisdiction was a factor to be taken into account, but this alone would not be sufficient to tilt the balance.

This involved a collision, in Turkish territorial waters, between a Turkish and a Cuban ship. Both vessels sustained damage. The Turkish parties arrested the Cuban ship and started an action in the Turkish court. Three months later, the Cuban ship-owners arrested a sister ship of the Turkish vessel in England. The Turkish owners applied for a stay of the action in England, giving an undertaking to provide security for any cross-claim that the Cubans may decide to make in the Turkish action. The stay was granted by the trial judge, but his order was reversed by the Court of Appeal. The Court of Appeal held that a mere balance of convenience was insufficient to deprive the plaintiffs of pursuing their action in England. It was also held that a situation of *lis pendens* in another jurisdiction was not, in itself, a bar to the plaintiffs' right to proceed in England.

On appeal to the House of Lords, Lord Keith referred to the 'natural forum', which he had already defined in the *Macshannon* case. A natural forum is 'that with which the action had the most real and substantial connection'. He said that, in this case, the defendant would be involved in substantial inconvenience and expense, if the action continued in England. Lord Diplock, delivering the main judgment, examined all the factors pointing towards Turkey as the forum in which justice could be done at less inconvenience and expense than in England. Neither party had any connection with England. The connecting factors with Turkey were: (a) the crew and the pilot were Turkish; (b) the surveyors were appointed in Turkey; (c) the collision took place in Turkish waters; and (d) most of the witnesses were Turkish. As far as the Cuban witnesses were concerned, there was little to choose between Turkey and England. Turkey was definitely the natural and appropriate forum for the action, which was already pending there. It was stressed that:

. . . the essential change in the attitude of the English courts to pending or prospective litigation in foreign jurisdictions, that has been achieved step by step during the last 10 years as a result

33 Ibid, pp 644–645.
34 [1984] 1 All ER 470.

of the successive decisions of this House in *The Atlantic Star*, *Macshannon* and *Amin Rasheed*, is that judicial chauvinism has been replaced by judicial comity to an extent which I think the time is now ripe to acknowledge, frankly, that is indistinguishable from the Scottish legal doctrine of *forum non-conveniens*.[35]

Lord Brandon also added:

> . . . the Court of Appeal . . . have fallen into error. Mere balance of convenience cannot, of itself, be decisive in tilting the scales; but strong, and a fortiori overwhelming, balance of convenience may easily, and in most cases probably will, be so. Similarly, the mere disadvantage of multiplicity of suits cannot of itself be decisive in tilting the scales; but multiplicity of suits involving serious consequences with regard to expense or other matters, may well do so. In this connection, it is right to point out that, if concurrent actions in respect of the same subject matter, proceed together in different countries, as seems likely if a stay is refused in the present case, one or other of two undesirable consequences may follow: first, there may be two conflicting judgments of the two courts concerned; or, second there may be an ugly rush to get one action decided ahead of the other, in order to create a situation, or *res judicata*, or issue estoppel in the latter.[36]

It was also held that there was no evidence that, in Turkey, the plaintiffs would be under any disadvantage compared with a plaintiff in England, or that they would not obtain justice in the Turkish courts. Thus, from this point in time, the Scottish doctrine of *forum non-conveniens* became part of English law.

4.4 THE PRESENT FORMULA OF *FORUM NON-CONVENIENS*

The principles of *forum non-conveniens*, as applied under English law today, were crystallised by Lord Goff in the ***The Spiliada***,[37] which should be applied unrestrained, as Warren J recently held in *Niche Products Ltd v MaCdermid Offshore Solutions LLC*.[38]

A Liberian ship-owner, with part of their management in Greece and the other part in England, contracted to carry on their ship, *The Spiliada*, cargo of sulphur from Vancouver to India, the chemicals of which caused damage to the ship by severe corrosion. The charter party provided for arbitration in London. The shippers and sellers of the cargo, as exporters of sulphur, carried on business in Canada. The ship-owners commenced an action in England and obtained leave to serve proceedings on the shippers in Vancouver, on the ground that it was an action to recover damages for breach of a contract governed by English law. The sellers applied to have the ex parte order discharged on the ground that the case was not a proper one for service out of jurisdiction under Ord 11, r 4(2). The trial judge, who was at the same time hearing the trial of a similar action involving the same sellers and another ship, *The Cambridgeshire*, dismissed the application. He considered that the availability of witnesses, possible multiplicity of proceedings and the experience of counsel and solicitors, derived from their participation in *The Cambridgeshire* action, would save money and time. On appeal by the shippers, the Court of Appeal allowed the appeal

35 Ibid, p 476.
36 [1984] 1 All ER 470, p 485.
37 [1987] 1 AC 460 (HL).
38 [2013] EWHC 1493 (Ch); a useful summary of the principles is made.

and set aside the writ. It thought that it was impossible to conclude that the factors considered by the judge showed that the English court was distinctly more suitable for the ends of justice. On appeal to the House of Lords, it was held that, in order to determine whether a case was a proper one for service out of the jurisdiction under Ord 11, r 4(2) of the RSC, the court had, as in applications for a stay on the ground of *forum non-conveniens*, to identify in which forum the case would be most suitably tried for the interests of all parties and the ends of justice.

After examining the Scottish authorities on *forum non-conveniens*, and the trilogy of cases referred to above, Lord Goff found the opportunity to consolidate and summarise the law concerned with the doctrine of *forum non-conveniens*. He laid down the general principle and a two-stage test for guidance to the courts below in applications for a stay on the ground of *forum non-conveniens*.

4.4.1 General principle

A stay will only be granted where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial and in which the case may be tried more suitably for the interests of all parties and the ends of justice.

4.4.2 Effect of founding jurisdiction as of right

The fact that the claimant has founded jurisdiction as of right in accordance with the law of England and Wales is not in itself an advantage for the claimant that should not be disturbed by the court. However, in cases in which there is no natural forum (that is, collision on the high seas), the English court will not disturb the jurisdiction so established.

4.4.3 First-stage test – connecting factors

In determining whether there exists another forum clearly more appropriate for the trial, the court will look first to see what factors there are that point in the direction of another forum. It will look at the forum with which the action had the most real and substantial connection. These connecting factors will include, not only those affecting convenience or expense, such as the availability of witnesses,[39] but also other factors, such as the law[40] governing the relevant transaction and the parties' place of residence or business. If the court concludes, at that stage, that there is no other available forum which is clearly more appropriate for the trial, it will ordinarily refuse a stay.

39 It is worth noting that modern technology, such as video links, has reduced the inconvenience of having witnesses who are out of jurisdiction. This was made clear by the New Zealand courts in the case of *Udovenko v The Ship Pelican* (2011) 817 LMLN 3(2).

40 In *Saldanha v Fulton Navigation Inc. (The Omega King)* [2011] EWHC 1118, it was held that the general rule in a situation where a tort was committed entirely on board a foreign vessel, while in the waters of another State, is that it is the law of the State that applies, not the law of the flag State.

4.4.4 Second stage – all the circumstances

If, however, the court concludes, at that stage, that there is some other available forum which, prima facie, is clearly more appropriate for the trial, it will ordinarily grant a stay, unless there are circumstances by reason of which justice requires that a stay should, nevertheless, not be granted. In this inquiry, the court will consider all the circumstances of the case, including circumstances which go beyond those taken into account when considering connecting factors with the other forum. One such factor, if established objectively by cogent evidence, can be the fact that the plaintiff will not obtain justice in the foreign jurisdiction.

4.4.5 Burden of proof

In general, the burden of proof rests on the defendant to establish that there is another forum which is clearly, or distinctly, more appropriate than the English forum for the trial. Where a party seeks to establish some evidence to persuade the court to exercise its discretion in his favour, the evidential burden will rest on that party. If the court finds that another forum is prima facie the appropriate forum for the trial, the burden will then shift to the plaintiff to show that there are special circumstances, by reason of which justice requires that the trial should, nevertheless, be held in England.

4.4.6 Treatment of a legitimate personal or juridical advantage

Other advantages to the plaintiff proceeding in this jurisdiction may be relevant but not decisive. The key to the solution as to the treatment of a legitimate personal or juridical advantage lies in the underlying fundamental principle, which is where the case may be tried suitably for the interests of all the parties and the ends of justice. Typical examples of such advantages are: the award of higher damages; power to award interest; a more generous limitation period. However, even if the plaintiff were to be deprived of an advantage, such as a higher award of damages, a procedural advantage, time bar, and such like, it would not mean that the action should not be stayed. The most important element would be that the court was satisfied that substantial justice would be done in the available forum.[41]

It was held in *The Spiliada* that the trial judge, having identified the correct test, considered the relevant factors and that his exercise of discretion should not be interfered with. The existence of *The Cambridgeshire* action was also a relevant factor to be considered in the exercise of the court's discretion.

In a subsequent decision, ***Lubbe v Cape and Africa v Cape plc***,[42] concerning claims by employees of South African subsidiaries of the defendant (an English-based company) for asbestos-related diseases allegedly caused to workers over a period of 20–30 years; at first instance, the *Lubbe* action was stayed by the judge on the ground that South Africa was clearly a more appropriate forum than England. The Court of Appeal lifted the stay, and the defendants appealed to the House of Lords. Thereafter, further actions were commenced on behalf of 1539 claimants (see later), neighbours to the South African subsidiaries, who alleged they suffered asbestos-related damage.

41 [1987] 1 AC 460 (HL), pp 476–478, 482–484.
42 [2000] 2 Lloyd's Rep 383 (HL) or 1 WLR 1545 (see first CA decision at [1998] C.L.C. 1559).

The defendants applied for a stay, again, in these new actions. Two reasons were submitted by the claimants against a stay: first, that the South African court did not have experience in group actions with multiple claimants, and, second, that the claimants would not be able to obtain legal aid there. It was held by Buckley J that, as the circumstances had changed since the last Court of Appeal decision, the African and other actions should proceed as a group in the more appropriate forum, South Africa.

On appeal, the Court of Appeal affirmed the judgment of Buckley J, and Pill LJ described the factors pointing towards South Africa as 'overwhelming':[43]

> It is not disputed that South Africa has a legal system of high repute, both with respect to the quality of its judges and its administration. I am entirely unpersuaded by arguments that the South African High Court would be unable to handle these actions efficiently, either on the ground that there are territorial divisions within South Africa, or because there is at present no procedure expressly providing for group actions. It is common ground that the law potentially to be applied is the same throughout South Africa . . .[44]
>
> Justice does not in my judgment require the refusal of a stay . . . The general rule is that the court will not refuse to grant a stay simply because the plaintiff has shown that no financial assistance will be available to him in the appropriate forum. It may exceptionally be a relevant factor, but the plaintiff has far from established that substantial justice cannot and will not be done in South Africa. I have already referred to the high repute in which the South African courts are held. There is also in South Africa a legal profession with high standards and a tradition of public service, though I do not suggest that lawyers in South Africa, any more than those anywhere else, can be expected to act on a large scale without prospects of remuneration. While I would not be prepared to apply the second stage of *The Spiliada* test, so as to permit English litigation, even in the absence of evidence that legal representation will be available, I am unable to conclude that in the circumstances it would not become available for claims in the South African courts. Moreover, given the accessibility to the wealth of scientific, technical and medical evidence available in this context, I am confident that it could be made available in a South African court to the extent required to achieve a proper consideration of the plaintiffs' cases. The action would by no means be novel or speculative.[45]

On appeal to the House of Lords[46] by the claimants, the House reiterated the principles thus:

> . . . It is the interest of all the parties, not those of the plaintiff only or the defendant only, and the ends of justice as judged by the court on all the facts of the case before it, which must control the decision of the court. In *Spiliada*, it was stated (at page 476):
>
> 'The basic principle is that a stay will only be granted on the ground of *forum non conveniens* where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, i.e. in which the case may be tried more suitably for the interests of all the parties and the ends of justice.'
>
> In applying this principle the court's first task is to consider whether the defendant who seeks a stay is able to discharge the burden resting upon him not just to show that England is not the natural or appropriate forum for the trial but to establish that there is another available forum which is clearly or distinctly more appropriate than the English forum. In this way, proper regard is had to the fact that jurisdiction has been founded in England as of right (*Spiliada*, page 477). At this first stage of the inquiry the court will consider what factors there are which point in the direction of another forum (*Spiliada*, page 477; *Connelly v RTZ Corporation Plc* [1998] AC 854 at 871). If the court concludes at that stage that there is no

43 [2000] 1 Lloyd's Rep 139, p 160.
44 Ibid, p 162.
45 Ibid, p 164.
46 [2000] 1 WLR 1545 (both actions (the group actions) were decided together).

other available forum which is clearly more appropriate for the trial of the action, that is likely to be the end of the matter. But if the court concludes at that stage that there is some other available forum which prima facie is more appropriate for the trial of the action it will ordinarily grant a stay unless the plaintiff can show that there are circumstances by reason of which justice requires that a stay should nevertheless not be granted. In this second stage the court will concentrate its attention not only on factors connecting the proceedings with the foreign or the English forum (*Spiliada*, page 478; *Connelly*, page 872) but on whether the plaintiff will obtain justice in the foreign jurisdiction. The plaintiff will not ordinarily discharge the burden lying upon him by showing that he will enjoy procedural advantages, or a higher scale of damages or more generous rules of limitation if he sues in England; generally speaking, the plaintiff must take a foreign forum as he finds it, even if it is in some respects less advantageous to him than the English forum (*Spiliada*, page 482; *Connelly*, page 872). It is only if the plaintiff can establish that substantial justice will not be done in the appropriate forum that a stay will be refused (*Spiliada*, page 482; *Connelly*, page 873).

Lord Goff of Chieveley stated in *Connelly* (at p 873):

I therefore start from the position that, at least as a general rule, the court will not refuse to grant a stay simply because the plaintiff has shown that no financial assistance, for example in the form of legal aid, will be available to him in the appropriate forum, whereas such financial assistance will be available to him in England. Many smaller jurisdictions cannot afford a system of legal aid. Suppose that the plaintiff has been injured in a motor accident in such a country, and succeeds in establishing English jurisdiction on the defendant by service on him in this country where the plaintiff is eligible for legal aid, I cannot think that the absence of legal aid in the appropriate jurisdiction would in itself justify the refusal of a stay on the ground of *forum non conveniens*. In this connection it should not be forgotten that financial assistance for litigation is not necessarily regarded as essential, even in sophisticated legal systems. It was not widely available in this country until 1949; and even since that date it has been only available for persons with limited means. People above that limit may well lack the means to litigate, which provides one reason for the recent legalisation of conditional fee agreements.

The House of Lords in *Connelly* held by majority that the case before it was a very exceptional one. The nature and complexity of the case were such that it could not be tried at all without the benefit of legal representation and expert scientific assistance, available in this country, and not in the more appropriate *forum*, Namibia. That being so, the majority concluded that the Namibian *forum* was not one in which the case could be tried more suitably for the interests of all the parties and for the ends of justice.

The House of Lords in the *Lubbe and Africa v Cape* (the group action) also refused to stay the English proceedings on the ground that the lack of means of the plaintiffs to prosecute their case in South Africa, in the unusual circumstances of the proceedings, would amount to a denial of justice, as the proceedings could only be handled efficiently, cost-effectively and expeditiously on a group basis, and the preparation of the case required the service of professional lawyers. The claimants won in their appeal.

Whether the issue of delay by the foreign court to deliver judgment would be a factor to be taken into account at the second stage of *The Spiliada* test, Newman J held in ***Radhakrishna v Eih***[47] that the court was not satisfied that substantial justice could not be done in India, although it might well be that it would take longer than if the proceedings had remained in England. In addition, the difference in the level

47 *Radhakrishna Hospitality Service Private Ltd and Eurest SA v Eih Ltd* [1999] 2 Lloyd's Rep 249.

of recoverability of costs was not something that denied substantial justice to parties in India.

Further, the English courts do not view favourably the selection of a forum solely on the basis of the level of damages that could be awarded in a foreign forum for the purpose of displacing the most obvious and convenient forum.[48]

In ***Karafarin Bank v Mansoury – DARA***,[49] the judge held that it would be an abuse of process, prima facie, if a claimant pursues a defendant for the same debt or damages in two jurisdictions, unless the judgment obtained in the foreign proceedings was not enforceable in England. The Iranian judgment was not enforceable here under s 34 of the Civil Jurisdiction and Judgments Act (CJJA) 1982 because it was obtained in the absence of the defendant, who had not been served, and the commencement of fresh proceedings in England was permitted by s 34 and could not be regarded as an abuse of process. A stay of the English proceedings in favour of Iran, which was assumed to be the natural and appropriate forum, was not granted because the claimant had a legitimate juridical advantage (for example, ability to enforce an English judgment in England against the assets of the defendant).

4.5 *THE SPILIADA* IMPACT UPON THE DOCTRINE OF *FORUM NON-CONVENIENS*

In a nutshell, the significance of *The Spiliada* in relation to the doctrine of *forum non-conveniens* has been as follows:

(a) it pronounced a coherent statement of the doctrine;
(b) it provided clear guidelines for judges, by dividing the test into two stages;
(c) it delineated the burden of proof; and
(d) it explained the treatment of a legitimate personal or juridical advantage in the context of the interests of justice.

In collision cases, the appropriate forum would be easily identifiable from the place of the collision, if it did not occur on the high seas, unless a limitation fund was established at the court of another forum. In ***The Wellamo***,[50] where the collision took place in Swedish territorial waters, the action in England was stayed in favour of the court in Stockholm.

However, if the interests of all parties and the ends of justice are not served, the place of the collision will not be the only factor. In ***The Vishva Ajay***,[51] despite proof of a natural forum, a stay of the English action was refused. The collision took place in India, but the circumstances prevailing in India at that time (delay in delivering a judgment, non-realistic award of legal costs) would constitute denial of justice to the plaintiff, who had come to the English courts for justice.[52]

It should be noted, however, that the court has wide discretion and, if it considers that these factors do not deprive the claimant of substantial justice, it may order the

48 *Bristow Helicopter Ltd v Sikorsky Aircraft Corporation* [2004] 2 Lloyd's Rep 150.
49 [2009] 2 Lloyd's Rep 289.
50 [1980] 2 Lloyd's Rep 229.
51 [1989] 2 Lloyd's Rep 558.
52 See, also, *The Sidi Bishir* [1987] 1 Lloyd's Rep 42.

stay of the English proceedings, as was done in *Radhakrishna Hospitality v Eih Ltd*.[53] The conclusion to be drawn is that the court has wide discretion on the treatment of a juridical advantage of the claimant, which depends on the circumstances of a particular case and the time at which the issue is determined.

Where there is no natural forum, the court will refuse a stay.[54]

In ***Vishva Abha*** (VA),[55] there was a collision in the Red Sea between a sister ship of VA and *Dias*. The sister ship sank, and VA was served with a writ. The defendants contended that the English court was not the appropriate forum for the hearing of this action and applied for a stay on the ground that they had already commenced proceedings in South Africa, where they had arrested the *Dias*. The limitation fund was much lower in South Africa than in England. The court was not convinced that South Africa was a more appropriate forum. Mr Justice Sheen held that the defendants, Indian ship-owners, whose ships frequently came to England, would not be put to more inconvenience or expense by having their witnesses attend the English court than they would in attending a court in South Africa. It was mere chance that the defendants found themselves litigating in South Africa. Moreover, it would be a grave injustice to deprive the claimants of their right to litigate in England and instead send them to South Africa, where their chances of recovering damages would be much less than the sum they would recover in this country under English law. The principles of *The Spiliada* were applied.

4.6 *FORUM NON-CONVENIENS* AND SERVICE OUT OF THE JURISDICTION COMPARED

Similarities do exist between the doctrine of *forum non-conveniens* and the criteria applicable to applications for service out of the jurisdiction, as is shown in ***Amin Rasheed Corp. v Kuwait Ins***.[56]

A Liberian shipping company, having their place of management in Dubai, brought their claim for constructive total loss of their ship in England against their insurers, who had their head office in Kuwait and a branch office in Dubai. The form of policy was based upon the Lloyd's standard form of marine policy, but Kuwait was stated as the place of issue and the place for the payment of claims. There was no provision as to proper law of the contract. In order to bring their action in England, as opposed to in the Kuwaiti court, the claimants had to bring their case within RSC Ord 11 r 1(f) to obtain leave to serve the writ out of the jurisdiction on the insurers. Both Bingham J and the Court of Appeal held that, under that rule, there was no jurisdiction of the English court so as to give leave to serve the writ on the defendants in Kuwait. On appeal to the House of Lords, Lord Diplock stated:

> . . . the jurisdiction exercised by an English court over a foreign corporation which has no place of business in this country, as a result of granting leave under RSC Ord 11 r 1(1)(f) for service out of the jurisdiction of the writ on that corporation is an exorbitant jurisdiction . . . [thus]

53 [1999] 2 Lloyd's Rep 249.

54 *The Coral Isis* [1986] 1 Lloyd's Rep 413; *The Po* [1990] 1 Lloyd's Rep 418 (CA); [1991] 2 Lloyd's Rep 206.

55 [1990] 2 Lloyd's Rep 312.

56 [1984] AC 50.

the judicial discretion to grant leave under this paragraph of RSC Ord 11 r 1(1) should be exercised with circumspection in cases where there exists an alternative forum, viz the courts of the foreign country where the proposed defendant does carry on business, and whose jurisdiction would be recognised under English conflict rules. Such a forum in the instant case is afforded by the courts of Kuwait.[57]

Their Lordships went on to examine whether a Kuwaiti court, in addition to having jurisdiction, was also a *forum conveniens* for the dispute. According to Lord Wilberforce:

In considering this question the court must take into account the nature of the dispute, the legal and practical issues involved, such questions as local knowledge, availability of witnesses and their evidence and expense. It is not appropriate, in my opinion, to embark upon a comparison of the procedures, or methods, or reputation or standing of the courts of one country as compared with those of another . . .[58]

Having considered the necessary factors, it was held that the Kuwaiti court was an alternative forum where the defendant had its place of business, and where the contract was made and had jurisdiction over the matter in dispute. The plaintiffs had not shown, either that justice could not be obtained, or that it could only be obtained at excessive cost, delay or inconvenience. Therefore, it was held that this case was not a proper one for service out of jurisdiction under the rule.

Thus, *forum non-conveniens* principles can be considered at the time of the application to obtain leave to serve out of the jurisdiction.

Lord Goff concluded in *The Spiliada* that, although the general principle of *forum non-conveniens* was remarkably similar to the principle applied to cases of the court's discretionary power under RSC Ord 11, as derived from what Lord Wilberforce said in *Amin Rasheed*, he identified three differences:

(a) in Ord 11 cases, the burden of proof rests on the plaintiff, whereas in *forum non-conveniens* cases, it rests on the defendant, at least at the first stage;
(b) in Ord 11 cases, the plaintiff is seeking to persuade the court to exercise its discretionary power to permit service on the defendant outside the jurisdiction. Although statutory authority has specified the particular circumstances in which that power may be exercised by Ord 11, r 1, the court can decide whether to exercise such power in a particular case, by virtue of r 4(2) of Ord 11. Permission shall not be granted, unless it shall be made sufficiently to appear to the court that the case is a proper one for service out of the jurisdiction. Special regard must be had to the fact stressed by Lord Diplock in *Amin Rasheed*, that the jurisdiction exercised under Ord 11 may be exorbitant, meaning extraordinary;
(c) the importance to be attached to any particular ground invoked by the plaintiff may vary from case to case. For example, the fact that English law may be the putative proper law of the contract may be of great importance in some cases, but of little importance in others.[59]

57 Ibid, pp 65–66.
58 Ibid, p 72.
59 *The Spiliada* [1987] 1 AC 460 (HL), pp 480–481; see recent example: *Alliance Bank JSC v Aquanta Corp.* [2012] 1 Lloyd's Law Rep 181; despite the jurisdiction clause in the contract, England was not the most appropriate forum. There were strong reasons or exceptional circumstances why the claims should be tried in Kazakhstan; the CA affirmed the judgment [2012] EWCA Civ 1588; [2013] 1 Lloyd's Rep 175.

In the ***Olympic Galaxy***,[60] however, the Court of Appeal, overruling the judge below, held that: there was a substantial argument, which the judge in this case appeared not to have appreciated, that the rights and wrongs of the claims and cross-claims for general average contribution and indemnity for being exposed to general average or salvage claims would fall to be determined in accordance with Sri Lankan law where the adventure ended, even if the bond was itself governed by English law. In any event, even if English law undoubtedly applied to the general average claims, it would not necessarily follow that the disputes should be determined in England. The Sri Lankan courts were well used to applying English law, and the English law factor was only one factor among many to be considered. The judge had erred in the exercise of his discretion. The judge had also failed to give sufficient weight to the fact that the Sri Lankan proceedings had been issued first and would continue in the absence of a successful application for them to be stayed.[61] The existence of foreign proceedings was not decisive but deserved weight, especially where, as in the instant case, the cargo owners' claim appeared to be considerably larger than that of the ship-owners. The judge had not accorded the Sri Lankan proceedings their proper weight, and his exercise of discretion was flawed on that ground also.

A very good example of how the significance of various connecting factors can be given different weight by different judges is shown in ***VTB Capital plc v Nutritek International Corp.***,[62] where the Supreme Court,[63] by majority, agreed with the Court of Appeal that Russia was the most appropriate forum, while Lord Clarke (in minority with Lord Reed) held that England was the most appropriate forum; his judgment deserves a thorough reading.

One of the questions for the court, in this case, was whether VTB had satisfied the court that England was clearly or distinctly the appropriate forum for the trial of the dispute and that in all the circumstances the court ought to exercise its discretion to permit service of the proceedings out of the jurisdiction, on the basis that England was the proper place in which to bring the claim.

The appellant bank (VTB) appealed against a decision refusing permission to amend and ruling that the English court lacked jurisdiction and discharging a worldwide freezing injunction. VTB was a subsidiary of a Russian State-owned bank. It lent money under a facility agreement to a Russian company (RAP) to fund the acquisition by RAP of Russian companies from the first defendant, Nutritek (D1). The agreement provided for English law and jurisdiction. RAP had defaulted on the loan. VTB alleged that it had been induced to enter into the facility agreement by fraudulent misrepresentations made by D1, for which the other defendants were alleged to be jointly liable, as to the value of the companies sold.

VTB's case against the defendants was pleaded in misrepresentation, deceit and unlawful means conspiracy. It applied for permission to amend to raise a contractual claim based on piercing the corporate veil of RAP and treating the defendants liable for breach of the facility agreement (see Chapter 4, above, on this issue). The Court of Appeal held that: VTB had a good arguable case that its loss was sustained in

60 [2006] 2 Lloyd's Rep 27.
61 *Owners of the Las Mercedes v Owners of the Abidin Daver* [1984] AC 398 applied.
62 [2012] EWCA Civ 808.
63 [2013] UKSC 5.

England, but other elements of the torts occurred elsewhere. In the circumstances, there was no presumption that England was the natural or appropriate forum. The judge had erred in his approach by failing to decide what the most significant elements of the torts of deceit and conspiracy were on the facts.

On appeal to the Supreme Court, Lord Mance, delivering the majority judgment on this issue, concluded (at para 66) that:

> The alleged torts were committed in England under English law, but the fundamental matters in dispute – whether there was any such deceit, whether the respondents were party to it, and what, if any impact, any falsely made representations had on VTB are, as I have shown, heavily focused in this case on Russia and Russian witnesses.

He continued (at paras 70–71):

> . . . in summary, the major part of the factual subject matter involves Russia, and it is clear that the great bulk of evidence on both sides will have to come from Russian witnesses. The location in law of the alleged torts is of much diminished relevance, on examination of their circumstances and place in which they are said to have originated, the process by which they are said to have reached and impacted on VTB and the evidence which would be involved in undertaking such examination. The fact that any deceit was intended to induce an English law contract which provided for English jurisdiction is relevant, but cannot determine the appropriate forum in which to decide whether there was in fact any such deceit or conspiracy.
>
> In my opinion, the Russian connection is of such strength and importance in this case that, despite the existence of some factors favouring England, the appellant is quite unable to discharge the onus on it of showing that England is clearly or distinctly the appropriate forum for determination of the issues in this case.

Lord Clarke, in the minority with Lord Reed, agreed that, where the only challenge which can be advanced depends upon persuading the appellate court to balance the various jurisdictional factors differently, an appellate court should not interfere. They considered, however, that a number of errors of principle were made in the exercise of the power to decide the jurisdictional issue, which required the Supreme Court to reach its own independent conclusion. For this to be done, it would be important, Lord Clarke said (at para 192), for the court to know what issues would be likely to arise at the trial of the action on the merits and, only when such issues were identified, would it be possible to compare the two jurisdictions.[64]

He continued (at para 219) that:

> The significance of the conclusion that English law is the applicable law is that it is generally appropriate for a claim in tort governed by English law to be adjudicated upon by an English court and the non-exclusive jurisdiction clause also pointed in the direction of England. The same would of course be true *mutatis mutandis* if the claim in tort were governed by Russian law. . . . It is not clear what, if any, role Russian law might play at a trial. It seems most unlikely to play a role if the action proceeds in England. . . . Given that VTB has shown that the applicable law of the tort is English law and that the respondents have asserted no positive

64 He referred to *Dicey, Morris and Collins on Conflict of Laws*, 15th edn (2012) para 11–143 and to *Limit (No 3) Ltd v PDV Insurance Co.* [2005] EWCA Civ 383; *Sawyer v Atari Interactive Inc.* [2005] EWHC 2351 (Ch); *Islamic Republic of Pakistan v Zadari* [2006] EWHC 2411 (Comm); *Novus Aviation Ltd v Onur Air Tasimacilik* AS [2009] EWCA Civ 122; *Mujur Bakat v Uni Asia General Insurance Berhad* [2011] EWHC 643 (Comm).

case to the contrary even if the action were to proceed in Russia, this is a strong factor in favour of England as the natural forum.

A further important factor, Lord Clarke stated (at paras 220–224, 227, 232) was the fact that it was provided in the agreement, which on VTB's case was fraudulently induced to enter into, that the courts of England had non-exclusive jurisdiction to settle any dispute arising out of the agreement. Although a significant number of preliminary events, as Mr Howard QC, counsel for VTB, put forward, happened in Russia, the critical ingredients of all the torts took place in England. In the opinion of Lord Clarke, a weighty factor was that the alleged misrepresentations, if made, were deliberate acts committed within the jurisdiction which caused VTB to suffer loss within the jurisdiction; he stressed that the claim was by VTB and not by VTB Moscow, and VTB was not suing upon a tort committed in Moscow. For these reasons, he did not agree with the Court of Appeal, which held that the centre of gravity of the torts lay in Russia. As regards the evidence, the respondents failed to identify what classes of evidence they might wish to adduce. All these factors, he said, seemed to be strong pointers to the conclusion that the natural forum was England.

From the detailed reference to this judgment, it would seem that the minority's decision, which focused on issues that were likely to arise at the trial, appears to be more in accord with settled principles than the decision of the majority, which gave more weight to the location of the evidence.

4.7 FORUM SHOPPING BY WAY OF LIMITATION ACTIONS

As has already been seen, prior to 1973, there was an inclination by the English courts towards English jurisdictional chauvinism, which culminated with the well-known remark of Lord Denning MR that:

> No one who comes to these courts asking for justice should come in vain provided he acts in good faith . . . You may call this forum shopping . . . but if the forum is England, it is a good place to shop in, both for the quality of the goods and the speed of service.[65]

To which Lord Reid responded in the House of Lords: '. . . that seems to me to recall the good old days, the passing of which many may regret, when inhabitants of this island felt an innate superiority over those unfortunate enough to belong to other races.'[66]

Until then, it was rare for proceedings brought in England to be stayed, or be set aside in favour of a foreign jurisdiction, even if that could be shown to be more appropriate in the particular case.

In a limitation action brought by a person entitled to limit liability (see Chapter 14, Vol 2) in respect of maritime claims, consideration is given by that person to bring limitation proceedings either in a forum in which the system of law provides for low limits (such as the law of the countries following the International Convention for Limitation of Liability 1957), or in a forum in which the law provides for a rigid

65 *The Atlantic Star* [1972] 2 Lloyd's Rep 446 (CA), p 451.
66 *The Atlantic Star* [1973] 2 Lloyd's Rep 197 (HL), p 200.

test by which the right to limitation may be broken (such as those countries that have adopted the 1976 Limitation Convention).[67] The latter has been ratified by States holding 45 per cent of the world tonnage, and the former applies to 7.6 per cent; the remaining States adhere to limitation of their own national law.

Outside the EU countries in which the EU Regulation on jurisdiction and enforcement of judgments applies (discussed in Chapter 7, below), there is flexibility in relation to forum shopping, and this has been acceptable in practice. This position seems to have been strengthened by recent decisions.

The person seeking to limit liability will usually admit liability when the limitation action is commenced at the forum of his choice. The limitation fund is established and deposited with the court as provided by the relevant Convention which applies in that jurisdiction. It is not unusual to have liability and limitation determined by courts of different jurisdictions, as was decided in the following case.

Caspian v Bouygues[68]

There was a loss of a barge in Cape Town, South Africa, being towed under a towage contract which provided for English jurisdiction. The owners and time charterers of the tug boat brought limitation proceedings in England to determine the limitation of their possible liability to the barge owners under the Limitation Convention 1976. In South Africa, the old Convention of Limitation of Liability 1957 applies. The owners of the barge, who commenced proceedings on liability in Cape Town, contested jurisdiction on the ground that a court in South Africa was the more appropriate forum.

Rix J, having thoroughly reviewed all relevant authorities, held that admission or determination of liability was not a condition precedent to limitation. Limitation of liability for the loss of a barge could be determined here on the basis of the Limitation Convention 1976, prior to liability actions that had commenced in both South Africa and England. Although there was no connection with England, other than that the towage contract provided for English jurisdiction, the advantage to the applicants for limitation here was that it would be harder for limitation to be broken, whereas under South African law (which applies the 1957 Convention) it would be easier. Applying the second stage of *The Spiliada* test, the judge decided in favour of England, despite South Africa being the natural forum for the liability issues. There was nothing unusual in determining a limitation action in a forum different from that of liability, Rix J said. The Court of Appeal[69] upheld the decision and allowed the limitation action to continue here; it confirmed that the right to limit was a quite separate issue from the issue of liability. The action for damages, by the owners of the barge against the owners of the tug, its time charterers and the Cape Town port authorities, was allowed to continue in South Africa.

A similar situation arose in ***Caltex Singapore v BP Shipping***.[70]

67 These Conventions are examined in Chapter 14, Vol 2.
68 [1997] 2 Lloyd's Rep 507.
69 [1998] 2 Lloyd's Rep 461.
70 [1996] 1 Lloyd's Rep 286.

BP's ship collided with the jetty of the plaintiffs (Caltex oil companies) in Singapore. Liability proceedings against BP were brought in England, where the limitation under the 1976 Convention was higher than the plaintiffs' claim. Naturally, BP commenced its limitation action in Singapore (the natural forum for determination of liability), in view of lower limits applicable there under the 1957 Limitation Convention. There was no issue of apportionment of fault. BP also applied for a stay of the English action. Although Clarke J ruled that the appropriate forum for liability was Singapore, he dismissed BP's application for stay of the English proceedings on the basis of the second stage of *The Spiliada* test. He concluded that the interests of both parties and the ends of justice – viewed objectively – would be better served if the plaintiffs were not deprived of the larger limit, as it was proper to regard the 1976 Convention as representing a widely accepted development, and, being part of English law, it could be fairly regarded as part of English public policy.

It was that very reasoning that the judge in Hong Kong found difficult to accept in the subsequent decision, ***The Kapitan Shvestov***,[71] basically because the *Caltex* judgment seemed to equate the local public policy (being a subjective value judgment) with objective substantial justice, which was a distinct requirement laid down by *The Spiliada* and *De Dampierre v de Dampierre*.[72]

There were similar facts to the *Caltex* case in *The Kapitan Shvestov*. A collision between a Russian and a Singaporean ship took place in the dredged channel of the Chao Fhraya river in Thailand, but neither of the ship-owners wanted proceedings brought in Bangkok (natural forum). Instead, the Singaporean owners commenced an action in Singapore, and the Russian owners brought an action in Hong Kong. Both applied for a stay of the respective proceedings of each other. An important factor in the applications was that Singaporean law applied the 1957 Limitation Convention, whereas Hong Kong applied the 1976 Convention. Waung J stayed the Hong Kong action on the ground that – as the parties had displaced the natural forum of the Bangkok court – Singapore was a more appropriate forum than Hong Kong, on the basis of various connecting factors and, also, because the proceedings in Singapore had reached an advanced stage. There, objectively, substantial justice could be done for the interests of all parties and the ends of justice. The judge thought that, in the *Caltex* case, undue emphasis had been placed on the loss of the advantage to the plaintiffs, if their limitation action in England was stayed, which was thought by the judge in this case not to be in accord with *The Spiliada* and *De Dampierre* cases.

However, the Hong Kong Court of Appeal, by majority of 2:1, reversed this result and decided in favour of the Hong Kong jurisdiction. The majority thought that, as Singapore was not the natural or appropriate forum, the trial there would deprive the Russian owners of a legitimate juridical advantage and, as the Russian ship was more severely damaged, the limitation fund in Singapore would not be sufficient, particularly if the Singaporean ship was found more to blame. An interesting point was raised by the minority in the Court of Appeal, which supported the judge's decision as regards the result. This was that substantial legal costs had already been incurred in the Singaporean proceedings, and, given that the burdensome additional

71 [1998] 1 Lloyd's Rep 199 (HK Court of first instance and CA).
72 [1988] 1 AC 92 (HL).

legal costs which were likely to be incurred were expected to reach the same level of the proceedings in Hong Kong, the possible shortfall in the limitation figure of US$338,000 could hardly justify a second set of legal proceedings in Hong Kong.

In the subsequent case, ***Herceg Novi and Ming Galaxy***,[73] the competing fora were Singapore and England. A collision occurred in the straits of Singapore between the *Ming Galaxy* and *Herceg Novi*, which resulted in the sinking of the latter. The owners of the former began an action *in rem* in Singapore, and the owners of the latter commenced an action in England. The motives of the parties to the actions were, again, the differences in the law of each forum with respect to limitation of liability. The defendants to the English action sought a stay of the action on the ground that England was not the natural or appropriate forum. The plaintiffs' argument was that, were the stay to be granted, they would be deprived of the benefit of the more generous limitation amount under the 1976 Convention. Clarke J was inclined to refuse the stay, bearing in mind this factor, but temporarily granted it until the determination of the liability and quantum issues were resolved in Singapore.

The Court of Appeal[74] chose to discourage forum shopping, on the basis of higher limitation applicable by the law of a forum in which jurisdiction is obtained as of right by arrest of a ship, particularly when there is another forum which is more appropriate by being the natural forum, as was Singapore in this case. It was stressed that, as the 1976 Convention has not received universal acceptance, the preference for it had no greater justification than the 1957 regime. The Court of Appeal agreed with the first instance judge in *The Kapitan Shvetsov* and with the dissenting judgment of the Hong Kong Court of Appeal in the same case.

Apparently, there is a conflict between two Court of Appeal decisions, *The Caspian*, which encourages forum shopping, if a party chooses to proceed in a jurisdiction where the higher limit of the 1976 Convention applies, and *The Herceg Novi*, which discourages such an approach. Although there may be an opportunity in the future for that conflict to be resolved by the House of Lords, it is submitted that no general principle can be drawn either way. Each case should be looked upon its own circumstances (see *The Western Regent* discussed in Chapter 7). Where there is a natural forum, the first-stage test of *The Spiliada* can easily be satisfied, although this factor alone will not be decisive. As regards the balancing act of advantages and disadvantages at the second stage, the 1976 Convention limit should not weigh heavy, if the court is satisfied that substantial justice could be done in the alternative, more appropriate forum. However, better justice could be done if there is a larger fund in court to satisfy many claims, and this reason may in some cases justify the separation of the liability from the limitation action.

73 [1998] 1 Lloyd's Rep 167.
74 [1998] 2 Lloyd's Rep 454.

5 STAY OF ENGLISH PROCEEDINGS ON GROUND OF A FOREIGN JURISDICTION AGREEMENT

The parties to a contract usually agree where and how any disputes arising out of the contract will be adjudicated. Such agreements may provide either for arbitration, or for the jurisdiction of a competent court, English or foreign. There are occasions, however, when one party to the agreement decides to bring suit in a jurisdiction other than the contractual, in breach of the jurisdiction agreement, or there are occasions when there is more than one jurisdiction clause in the agreements, and proceedings are brought in any or both jurisdictions provided in the contracts.[75] The aggrieved party will apply for a stay of those proceedings.

In the following paragraphs, both the principles and the approach of the English court with regard to proceedings brought in the English courts in breach of a foreign jurisdiction clause (to which the Brussels I Regulation ('the Regulation') does not apply) are examined. With respect to jurisdiction agreements to which the Regulation applies, see Chapter 7.[76] As far as breach of an English jurisdiction clause or arbitration agreement is concerned, see Chapter 8, where issues of anti-suit injunctions are discussed.

5.1 GENERAL PRINCIPLE

With regard to a non-exclusive jurisdiction agreement, the general principle, as laid down by the Court of Appeal in ***Deutsche Bank AG v Highland Crusader Offshore Partners LP***,[77] is that:

> A non-exclusive jurisdiction agreement precludes either party from later arguing that the forum identified is not an appropriate forum on grounds foreseeable at the time of the agreement, for the parties must be taken to have been aware of such matters at the time of the agreement. For that reason an application to stay on *forum non conveniens* grounds an action brought in England pursuant to an English non-exclusive jurisdiction clause will ordinarily fail unless the factors relied upon were unforeseeable at the time of the agreement.

5.2 BREACH OF A FOREIGN JURISDICTION CLAUSE – STAY UNLESS STRONG REASON SHOWN

When there is a breach of a foreign jurisdiction clause, which is outside the scope of the Regulation, the English court, upon the application of the aggrieved party for a stay of the proceedings, is not bound to stay the action, but it has discretion. The

75 E.g. *Deutsche Bank AG v Sebastian Holdings* [2010] EWCA Civ 998.

76 The rules applicable under the Brussels I Regulation and Lugano Convention are different, as explained in Chapter 7.

77 [2010] 1 WLR 1023 (CA) Toulson LJ at para 50: By contracting for non-exclusive jurisdiction, parties had to have anticipated and accepted the possibility of some parallel proceedings, and the court was to exercise its discretion in deciding whether or not to grant an anti-suit injunction (see Chs 7 & 8, below); see also *Bankhaus Wolbern & Co. (AG & CO KG) v China Construction Bank Corp., Zhejiang Branch* [2012] EWHC 3285 (Comm); *Royal Bank of Scotland plc v Highland Financial Partners LP Star Reefers Pool Inc. v JFC Group Co. Ltd* [2012] EWCA Civ 14; *Deutsche Bank AG v Sebastian Holdings Inc.* [2009] EWHC 2132 (Comm).

court's discretion is exercised in favour of a stay of the English proceedings, unless the claimant shows a *strong reason or cause* for not giving effect to the foreign jurisdiction clause. The English courts have followed this principle consistently.[78] All the circumstances of the particular case will be considered in order to determine in which forum justice will best be served with less inconvenience and expense.

The discretion of the first-instance judge should not easily be disturbed by the appellate court, if the latter disagrees with it, unless it is shown that the judge made an error in principle, or that he took or omitted to take into account matters which he ought not to, or he evaluated the circumstances wrongly.[79]

The following broad factors may influence the judge's discretion in deciding whether or not a stay should be granted:

(a) at which forum the evidence is available;
(b) the country with which either party is closely connected;
(c) whether the law chosen is different from English;
(d) whether the defendant genuinely desires to proceed in the chosen forum;
(e) whether there are related actions already commenced in one forum;
(f) whether the claimant would be prejudiced in the chosen forum, if:
    (i) the claim is time barred in that forum,
    (ii) he may be deprived of security for the claim, or
    (iii) there was delay in procedures of administration of justice there.

It will be seen that one of these factors alone may not be sufficient to tilt the balance in favour of not granting the stay. In recent years, a less nationalistic attitude of the English courts and more respect for the parties' choice of forum have been shown.

Broadly, for the court to refuse a stay of the English proceedings commenced in breach of the foreign jurisdiction clause, there must be either expert evidence in the English jurisdiction, or multiplicity of proceedings, or connecting factors such as those described in *The Spiliada* decision.

Sometimes, a jurisdiction clause may not be clear, and it would be a matter of construction of the whole contract. For example, in ***Aizkir Navigation Inc. v Al Wathba National Insurance Co. PSC***,[80] there was a clause in a marine insurance policy providing that claims 'be settled in accordance with English Law and practice and shall be so settled in Abu Dhabi (UAE)' amounted to an exclusive jurisdiction clause in favour of the Abu Dhabi courts, and there was no overwhelming or very strong reason to displace the jurisdiction clause. In any event, the claim had no connection with England, and Abu Dhabi was the appropriate forum. Applying English contractual construction principles and looking at the clause as a whole and in the context of the rest of the agreement, it was clear that it was an exclusive jurisdiction clause conferring jurisdiction on the Abu Dhabi courts.

A few examples of what would constitute *a strong cause* are shown below.

78 In *The Cap Blanco* [1913] P 131, p 13, it was said that 'effect must be given, if the terms of the contract permit it, to the obvious intention and agreement of the parties'; *The Fehmarn* [1957] 2 Lloyd's Rep 511; *The Chaparral* [1968] 2 Lloyd's Rep 158; and other, more recent, cases mentioned in this section.

79 *The Nile Rhapsody* [1994] 1 Lloyd's Rep 382; *Reichhold Norway v Goldman Sachs Int.* [2000] 1 WLR 173 (the judge had not misdirected himself).

80 [2011] EWHC 3940 (Comm).

5.2.1 Expert evidence in England

Evidence of experts appointed in England was regarded as an exceptional factor for not granting a stay. Both the judge and the Court of Appeal decided against a stay in ***The Adolf Warski***.[81]

A jurisdiction clause in bills of lading provided for the jurisdiction of the Polish courts in case of any disputes between the carrier and the cargo interests. Polish law was to apply. The claims in Poland had, however, become time barred, and the defendants had refused to agree an extension of time. The claimants, cargo-owners, started actions *in rem* against the ship-owners for damages to cargo carried on their Polish ships from South America to England. The owners provided security for the claims and applied for a stay of the English proceedings. The claimants objected on the grounds that the receivers were English companies, and the evidence was more readily available in England. They pleaded two further important factors: their claim had become time barred in Poland and, if it were necessary to call witnesses from Chile, the port of loading, there could be political difficulties in obtaining visas for them to visit Poland. The trial judge came to the conclusion that the court should exercise its discretion by refusing a stay and allowing the actions to proceed in England. Looking at all aspects of the main evidence, there was a strong balance of argument in favour of a trial in England, rather than Poland. The Court of Appeal held that the judge was entitled to exercise his discretion that way. Cairns LJ stated:

> The judge . . . considered that the jurisdiction clauses were reasonable, but that this did not mean that it would be right to enforce them irrespective of the circumstances . . . There was no evidence of any difference between the English and Polish law, and nothing to show that the English court would have difficulty in applying Polish law. He considered that expert evidence was the most important factor in this case, and as the damaged goods had been surveyed by English surveyors, and both sides had consulted English experts . . . it would be difficult to put the evidence in a satisfactory form before the Polish court. He attached some, but no great, weight to possible difficulties in calling Chilean witnesses.[82]

On the question as to what made this case exceptional, Cairns LJ, having approved the judge's approach, said that it was the necessity of calling English expert witnesses on a highly technical matter.[83]

Similarly, in ***The El Amria***,[84] a stay of the English proceedings, which were commenced despite the Egyptian jurisdiction clause, was refused because, on balance, there was a significant or strong cause shown for refusing the stay. That was, again, the evidence of expert witnesses in England (surveyors and agronomists) who had examined the cargo during and after discharge, and the evidence relating to the slowness of discharge. Such evidence, being at the centre of the dispute, was more readily available in England, and there would be considerable difficulty in conveying – through interpreters to the Egyptian judge or court – expert technical evidence which the surveyors and agronomists would be called to give.

81 [1976] 2 Lloyd's Rep 241.
82 [1976] 2 Lloyd's Rep 241, p 244.
83 Ibid, p 246.
84 [1981] 2 Lloyd's Rep 119.

5.2.2 Multiplicity of proceedings

Another factor, which the Court of Appeal in ***The El Amria***,[85] unlike the judge in the same case, found to be not just a matter of convenience, but of great importance, was the existence of another action in this jurisdiction by the same claimant against another party (Mersey Docks and Harbour Company). In this action, many of the issues were the same as the action between the claimants and the defendants with regard to the cargo claim for which a stay was sought in favour of the chosen jurisdiction, Egypt. It would be a potential disaster if these actions were not tried together, because of the inherent risk that the same issues might be determined differently in the two countries. The Court of Appeal approved the application of the general principle by the judge, but it criticised it in three respects and said the judge: (a) had misapprehended the potential importance of oral evidence which the defendant might reasonably have wished to call from Egypt; (b) had failed to take into account the close connection of the defendants with Egypt; and (c) had taken into account a factor which he should not have, namely a supposed inferiority of the procedures used by the Egyptian court. On the whole, there were strong conflicting considerations in favour of either court. However, the two factors stressed by the Court of Appeal, namely, the expert evidence and the parallel action in England, led it to refuse the stay. In addition, the fact that the defendants did not just ask for a stay merely for a procedural advantage (as security for the claim had been provided) added a weight in favour of England.

The El Amria case, which has been applied by judges in subsequent decisions, in so far as jurisdiction agreements are concerned, represents the school of thought of 'broad judicial discretion'. In particular, in determining whether or not a stay should be granted, it allows judges to consider which would be the appropriate forum (England or the chosen one) for the ends of justice and the interests of parties, which is almost identical to the doctrine of *forum non-conveniens*. Sometimes, the agreement of the parties as to jurisdiction may play, relatively, a less important role. The 'broad judicial discretion' school of thought has, however, been criticised for allowing *forum non-conveniens* principles to assist instead of preventing a party to an agreement breaking his bargain.

Since ***The Angelic Grace***[86] – which involved a breach of an arbitration clause – there has emerged a school of thought supporting the view that there should be a 'narrow judicial discretion' when there is a contractual choice of jurisdiction. In particular, the Court of Appeal, in this case, stressed, in strong terms, that a choice of forum by parties to a contract should be respected. The differences between these two strands are examined in Chapter 8, in the context of anti-suit injunctions.[87]

85 [1981] 2 Lloyd's Rep 119.

86 [1995] 1 Lloyd's Rep 87; see also *Reichhold Norway v Goldman Sachs* [2000] 1 WLR 173; stay of related proceedings in England was granted pending determination of arbitration in Norway.

87 Consistency in the treatment of foreign and domestic jurisdiction clauses is needed. Other than those cases concerning breach of an arbitration agreement, or a jurisdiction agreement that is within the Brussels Regulation, where special rules apply, all other cases of breach of a jurisdiction agreement, whether the application is for an anti-suit injunction or for a stay of proceedings, should be treated in the same way: see, further, Chapter 8.

The English court has, however, emphasised[88] that English law applied the same principle whether the contractual forum was England or another country,[89] and it made no difference whether the jurisdiction clause was exclusive or non-exclusive, and the force of the general rule was not in any way weakened where the clause was a standard clause and not one freely negotiated. Unless circumstances had arisen which could not have been foreseen at the time of the contract, release on the ground only of foreseeable matters of convenience was likely to be rare.

In ***Bankhaus Wolbern & Co. (AG & CO KG) v China Construction Bank Corp., Zhejiang Branch***,[90] Field J did not grant CCB's application for a stay on *forum non-conveniens* grounds or on case management grounds. Applying the principle set by Toulson LJ in *Deutsche Bank* (above), he held that, at the time of the execution of the refund guarantee under a shipbuilding contract, the 'Preservation Order' obtained from the Chinese Court (see below) was a foreseeable occurrence.

It is interesting to note the facts briefly: the CCB issued a refund guarantee on behalf of the ship builder in favour of Vision 93 (the second claimant in the proceedings against CCB) who was by novation the buyer of the bulk carrier to be built. The shipbuilding contract provided for arbitration in London. Subsequently, the guarantee, which was governed by English law and was subject to a non-exclusive jurisdiction of the English courts, was assigned to Bankhaus (the first claimant). The builder failed to complete and deliver the ship by the due date and also refused to refund the deposit upon demand by Vision 93, who commenced arbitration under that contract and succeeded in obtaining an award in its favour. Meanwhile, CCB commenced proceedings against Vision 93 in China alleging failures to make payments under six shipbuilding contracts. The Chinese court handed down a judgment in favour of the builder; it also issued a Notice of Enforcement ordering CCB to suspend payment under the guarantee to Vision 93 and, if so requested, it was ordered to pay any sum to the court to hold in an escrow account. The Chinese court also issued a 'Preservation Order' granting the builder's application for property preservation or freezing the guaranteed sum. Against this background, when the claimants made demands under the guarantee for payment, CCB responded that, in view of the court orders, it was unable to make payment. Upon an ex parte application, the claimants sought permission from the English court to serve proceedings on CCB in China on the basis of the English non-exclusive jurisdiction clause of the guarantee, and permission was granted. It was on the appeal to set aside this order that CCB claimed that the English court had no jurisdiction, because the Chinese court was a more appropriate forum, which was rejected by Mr Justice Field.

88 See *Import Export Metro Ltd v Compania Sud Americana De Vapores SA* [2003] 1 Lloyd's Rep 405; also see *Karafarin Bank v Mansouri – Dara* [2009] EWHC 1217, involving English and Iranian proceedings. A stay of the English proceedings was not granted on ground of pending proceedings in Iran, because there was a legitimate juridical advantage for the claimant in the English proceedings, as the Iranian judgment would not be enforceable in England.

89 The court stayed English proceedings where the real dispute between the parties had been referred by the defendants to arbitration in the United States under the rules of the Financial Industry Regulatory Authority. The English proceedings risked unwarranted interference with that regulatory regime, and in the unusual circumstances they should be stayed: *Citigroup Global Markets Ltd v Amatra Leveraged Feeder Holdings Ltd* [2012] EWHC 1331 (Comm); see further *Messier Dowty Ltd v Sabena SA*, CA [2000] 1 WLR 2040.

90 [2012] EWHC 3285 (Comm).

Multiplicity of proceedings[91] is, undoubtedly, a strong cause, as has clearly been stated in *Citi-March v Neptune*[92] and *The MC Pearl*[93] (see later), in which Colman J and Rix J (respectively) applied *The El Amria*, having considered that the strong cause was the multiplicity of suits in England. This was a paradigm of cases, Rix J said, requiring the concentration of all relevant parties' disputes in a single jurisdiction.

Occasionally, however, there may be a clash of jurisdiction clauses contained in separate contracts, which involve disputes of related issues and may give rise, unintentionally, to multiplicity of proceedings in different jurisdictions. Such a clash arose in ***Sinochem v Mobil Sales***,[94] in which Rix J decided in favour of each exclusive jurisdiction clause contained in the individual contracts, which provided for jurisdiction in Hong Kong and England, respectively. The mere possibility of multiplicity of proceedings, when no proceedings had yet commenced in Hong Kong under the separate contract, was not a strong reason why, in the interests of justice, Sinochem London should be relieved of its bargain to litigate disputes under its English contract in England.[95]

Problems arising from multiple jurisdiction clauses in the contracts are now resolved by applying the modern purposive approach to construction. In ***Deutsche Bank AG v Sebastian Holdings***,[96] where there were exclusive and non-exclusive jurisdiction conflicting clauses, the Court of Appeal applied a broad and purposive construction. It was necessary to construe each clause by taking account of the overall scheme and to read sentences and phrases in the context of that overall scheme. The English proceedings were not stayed, and the judge's decision was confirmed in that the parties should be held to their contractual choice of English jurisdiction, unless there were overwhelming, or at least very strong, reasons for departing from that rule. The fact that the New York court had jurisdiction also did not take the matter any further.

The same approach had been followed in ***Middle Eastern Oil v National Bank of Abu Dhabi***,[97] where it was held that the wording of the jurisdiction clause indicated that the draftsman had addressed the question of proceedings concerning the banking relationship being brought in jurisdictions other than the UAE and had expressly provided that N might do so. No mention was made of M being able to do so. The obvious inference to be drawn from that omission was that, properly construed, the jurisdiction clause was intended to oblige M to commence proceedings concerning its banking relationship in the courts of the UAE, but not to oblige N to do so. The customer's general right to do so was prejudiced. The bank's general right to do so was not prejudiced. That was the meaning which the clause would convey to a reasonable person in the situation of the parties at the time they entered into

91 See *Karafarin Bank v Mansouri – Dara* [2009] EWHC 1217, involving English and Iranian proceedings. A stay of the English proceedings was not granted on ground of pending proceedings in Iran, and, in any event, the Iranian action concerned 4 out of the 13 cheques which were the subject of litigation. Cf. *Alliance Bank JSC v Aquanta Corp*. [2012] 1 Lloyd's Rep 181, where claims under loan agreements were not confined to the English exclusive jurisdiction, because Kazakhstan was a more appropriate forum.

92 [1997] 1 Lloyd's Rep 72.

93 [1997] 1 Lloyd's Rep 566.

94 [2000] 1 Lloyd's Rep 670.

95 See also *Import Export Metro Ltd v Compania Sud Americana De Vapores SA* [2003] 1 Lloyd's Rep 405.

96 [2010] EWCA Civ 998; 1 Lloyd's Rep 104.

97 [2008] EWHC 2895 (Comm); [2009] 1 Lloyd's Rep 251.

their banking relationship. Therefore, M was contractually bound to commence proceedings concerning its banking relationship with N in the civil courts of the UAE. That being so, the burden lay on M to show that there was a strong reason for not enforcing the exclusive jurisdiction clause by granting a stay.

Furthermore, it is important to note what the court held about the connecting factors and the applicable law:

The loss suffered in England was the only significant connecting factor with England. M's shares in England had not been 'damaged' for the purposes of the Private International Law (Miscellaneous Provisions) Act 1995 s 11(2)(b), and the most significant element or elements of the events constituting the tort occurred in the UAE for the purposes of s 11(2)(c). Therefore, the applicable law of the alleged tort was that of the UAE. If that was wrong, it was substantially more convenient within s 12 for the applicable in determining the tort claims to be that of the UAE. Even if the applicable law of the alleged torts was that of England, that would not be a strong reason for not enforcing the jurisdiction clause. M's submissions about the quality of justice and the likelihood of a fair trial in the UAE were rejected. It followed that there were no strong reasons for not giving effect to the exclusive jurisdiction clause by granting a stay. If that was wrong, the courts of the UAE were clearly and distinctly the more appropriate forum for the determination of M's claims. M failed to show that there were circumstances by reason of which justice required that a stay should nevertheless be refused.

5.2.3 *The Spiliada* connecting factors[98]

Connecting factors, which were important at the first stage of *The Spiliada* case, pointed towards the chosen jurisdiction as being the most appropriate forum, and so a stay of the English proceedings was granted in ***The Rothnie***.[99]

The claimants were the demise charterers (an English company) of the vessel, R. The defendants were also an English company carrying on business as a shipyard and ship-repairer in Gibraltar. The parties entered into a contract to repair the vessel in drydock in Gibraltar. The contract expressly provided that 'the agreement shall be governed by and construed in accordance with the laws of Gibraltar and the parties hereto submit to the non-exclusive jurisdiction of the courts of Gibraltar'.

A dispute having arisen concerning the work carried out on the vessel, the claimants proceeded *in rem* in England. The defendants, who had not been paid, served proceedings in Gibraltar and applied for a stay of the English proceedings. They contended that the effect of the non-exclusive jurisdiction clause, by which the parties acknowledged the jurisdiction of the courts of Gibraltar, combined with the defendants' commencement of proceedings there, created a strong prima facie case that the jurisdiction of Gibraltar was an appropriate one. The claimants contended that both parties were English companies and jurisdiction had been founded as of right in the English court. Moreover, the wording of the jurisdiction clause imposed no obligation to litigate in Gibraltar. Having summarised the principles laid down by Lord Goff in *The Spiliada*,[100] the judge held that the defendants had satisfied the court that there was another available forum which was, prima facie, the appropriate forum for the trial of the action. The jurisdiction agreement created a strong prima

98 *The El Amria* [1981] 2 Lloyd's Rep 119.
99 [1996] 2 Lloyd's Rep 206.
100 [1987] 1 AC 460 (HL).

facie case that the jurisdiction of Gibraltar was an appropriate one. The action had its most real and substantial connection with Gibraltar, having regard to all the relevant factors, such as the place where the work was completed, the law, witnesses resided there, and such like. There were no circumstances by reason of which justice required that a stay should not be granted, after considering all the circumstances of the case. Had the connecting factors existed in relation to the English jurisdiction, they would have been taken into account in support of not granting the stay, despite the foreign jurisdiction clause.[101]

Other important factors, as considered in ***Star Reefers Pool v JFC Group Co. Ltd***,[102] were the fact that there was no need of translation of documents, which were in English, and that the underlying dispute was subject to London arbitration, and any dispute about the guarantee would deploy the same lawyers and experts. The only connecting factor with Russia, where the defendant had commenced proceedings, alleging that he was not bound by the arbitration clause, was that he was a Russian, resident there. The court concluded that England was clearly the appropriate forum.

5.3 WHAT WOULD NOT CONSTITUTE A STRONG CAUSE OR REASON?

By a process of elimination, the circumstances that have not been regarded as constituting a strong cause or reason by the courts for the purpose of staying the English proceedings, in favour of a foreign jurisdiction clause, are shown in the following examples.

5.3.1 Availability of factual evidence in England is not in itself a strong cause

In ***The Eleftheria***,[103] an express jurisdiction clause was contained in the bill of lading, which provided that all disputes arising under it were to be decided in the country where the carrier had his principal place of business, applying the law of such country. The principal place of business of the defendants, the ship-owners, was in Greece. *The Eleftheria* carried wood intended to be discharged in London and Hull. When she arrived at docks in London, there was labour trouble, and she could only discharge part of the cargo. She sailed for Rotterdam, where she discharged the rest, as was allowed by the contract in the circumstances. The plaintiffs claimed the expenses to tranship the cargo back to its destination and arrested the vessel in England, alleging breach of contract. In this court, the defendants confined themselves to the application for a stay of the action on the ground that the Greek courts had jurisdiction by express agreement of the parties, which was not disputed. Considering the fact that the parties had agreed the jurisdiction and the law for their disputes, Brandon J held that the inconvenience to the plaintiffs in having to take witnesses to Greece was not insuperable. It was of substantial importance that Greek law governed the contract, and that it would be more satisfactory for the law of a foreign country to be decided by the courts of that country. Therefore, he exercised his discretion by granting the stay. The plaintiffs had not shown a strong cause why they should not be held to

101 See further, on these issues, *BP plc v Aon Ltd* [2006] 1 Lloyd's Rep 549.
102 [2011] 2 Lloyd's Rep 215.
103 [1969] 1 Lloyd's Rep 237.

their agreement, and they would not be prejudiced by having to sue in Greece. All the circumstances in each case need to be taken into account.

In ***The Makefjell***,[104] the Court of Appeal upheld the decision of the trial judge, Brandon J, in this case, affirming the same principle. At the time, and after *The Atlantic Star*, a more liberal and less nationalistic attitude was being displayed by the English judges.

The case involved Norwegian ship-owners, a Canadian shipper and an English receiver of a cargo of cheesecakes, which was loaded on *The Makefjell* in Canada for carriage to London. The bills of lading provided for Norwegian law and jurisdiction in the place of business of the carrier, with respect to any disputes arising under the bills. The cargo arrived in London and was partly discharged. Owing to some difficulties in further discharge of the cargo, the rest of it was left in a non-refrigerated shed. Consequently, the cheesecakes thawed. The plaintiffs brought two actions in England, one *in personam* (by serving out of the jurisdiction) and one *in rem*, and threatened to arrest a sister ship, which was about to come to England. They also issued summons in the Norwegian court to protect themselves in the event the English action was stayed. The defendants applied for a stay on the ground of the express jurisdiction clause, while the plaintiffs contended that they should not be held to their agreement, because the facts giving rise to their claim arose in England. This, they alleged, was because the factual witnesses were here. As regards the applicable law, Norwegian lawyers who were familiar with English language could give evidence on Norwegian law (which was not materially different from English law).

It was held that the inconvenience of witnesses, if they had to give evidence in the foreign agreed jurisdiction, was not a strong cause to refuse a stay. The existence of factual evidence in England was not, in itself, a decisive factor for not granting a stay.

On the discretion point, the judge (at first instance) thought that English witnesses could very well give evidence in Norway, as it could equally happen the other way around. Two considerations were influential upon exercising his discretion to grant the stay: (a) The key point was, in his view, whether the circumstances that the bulk of the evidence was to be found here were something of such an exceptional character as to afford strong reasons for allowing the plaintiffs to depart from their contract. The answer to this, in his view, was that, although this may be an important factor, there must also be other factors operating against a stay. Besides, a large number of cargo claims involved evidence that would be found in the country of discharge. If all such cases were treated as exceptional, the rule as to enforcement of jurisdiction clauses would be undermined. (b) A broader consideration, which the judge took into account, was the tendency of the courts, both in England and the USA, at that time to adopt a more liberal and less nationalistic attitude to questions of choice of jurisdiction. The Court of Appeal, constituted by Cairns and Stevenson LJJ and Sir Gordon Willmer, approved the judge's reasoning and conclusion.

5.3.2 Time bar in the contractual jurisdiction is not in itself a strong cause

Whether or not the time bar of a claim in the contractual jurisdiction is a strong cause in refusing a stay of the English proceedings has not been treated uniformly by the

104 [1976] 2 Lloyd's Rep 29.

courts. There are three possible views: it is either a factor against a stay (*The Blue Wave*),[105] or a factor in favour of a stay, or a neutral factor. The judge in *The Adolf Warski*[106] preferred the second view, but it was *obiter* and the Court of Appeal did not decide the point, although it thought that the time bar might be a neutral factor.

There are a number of interesting decisions on the issue. Rix J in ***The MC Pearl***[107] adopted a robust approach. In this case, the claim in the contractual jurisdiction, South Korea, had become time barred. He considered the authorities and conflicting views on this issue and distinguished cases concerning *forum non-conveniens*. He held that, as regards jurisdiction clauses, the time bar point alone would not have assisted the plaintiff to continue their case here, if he did not have a strong cause for it separately.[108] He was not prepared to find that the existence of a limitation defence in South Korea saved this action, or caused him even to stay it only on terms that the South Korean limitation defence was waived.[109] Even where the plaintiff did have a strong cause for jurisdiction in England, the fact that he had allowed the time bar to go by default in the contractual jurisdiction always required some consideration or explanation.[110] Although Rix J agreed with Colman J, who stated the law in *Citi-March v Neptune*[111] as derived from previous cases, he stressed his disagreement with the following proposition of Colman J that:

> In a case where, however, but for the time bar, strong cause in favour of England could not be shown, a plaintiff may be able to rely on the prejudice to him by reason of the time bar in the contractual forum if he can show that he did not act unreasonably in failing to issue protective proceedings in order to prevent time running against him . . . At the end of the day, the court must consider whether in the interests of justice it is more appropriate to permit a plaintiff to proceed in England, although he has omitted to preserve time in the contractual forum, and although England is not clearly the more appropriate forum, than to deprive him of all opportunity of pursuing his claim in any forum.[112]

Such a soft approach was not acceptable to Rix J, who preferred a hard-line attitude to deprive a litigant of pursuing his claim, if he let the time limit in the contractual jurisdiction expire.

In some cases, however, a plaintiff may be unable to obtain an extension of time under the law of the country of the chosen jurisdiction, either because there had been a waiver, or because of the exercise of discretion by the court. In such a case, the Court of Appeal held in ***Baghlaf v Pakistan National Shipping***.[113] that the action commenced here as protective measures should not be stayed. It reversed the previous

105 [1982] 1 Lloyd's Rep 151.

106 [1976] 2 Lloyd's Rep 241.

107 [1997] 1 Lloyd's Rep 566.

108 The strong cause was multiplicity of proceedings, of which see later. Previously, Sheen J (in *The Blue Wave* [1982] 1 Lloyd's Rep 151) had decided that a time bar in the contractual jurisdiction would be an important factor for refusing a stay of the English action, unless the plaintiff acted unreasonably and his conduct showed that, without good reason, he had deliberately allowed the time limit to expire without instituting alternative proceedings. Lord Goff, *obiter*, in *The Spiliada* [1987] 1 AC 460, seemed to support that view. The Court of Appeal, in *The Adolf Warski* [1976] 2 Lloyd's Rep 241, thought that it was a neutral factor to considerations of a stay with regard to jurisdiction clauses.

109 [1997] 1 Lloyd's Rep 566, p 576, 2nd col: to that extent he differed from the view expressed by Colman J in *Citi-March v Neptune* [1997] 1 Lloyd's Rep 72.

110 [1997] 1 Lloyd's Rep 566, p 576; Rix J thought that this case was on all fours with *Citi-March v Neptune* [1997] 1 Lloyd's Rep 72.

111 [1997] 1 Lloyd's Rep 72.

112 Ibid, p 77, 1st col, per Colman J.

113 *Baghlaf Al Zafer Factory Co. v Pakistan National Shipping Co. (No 2)* [2000] 1 Lloyd's Rep 1.

order by which a stay had been granted on ground of *forum non-conveniens* and on the condition that the defendants gave an undertaking to waive the time bar point in the contractual jurisdiction, Pakistan. At this hearing, it was shown that it would be very difficult under the local statute to obtain a waiver of the time bar.

A warning to litigants who deliberately let a time limit lapse in the contractual jurisdiction in order to proceed in another forum was given in the strongest terms by Godfrey J, sitting in the Court of Appeal of Hong Kong, which was cited with approval by Lord Goff at the Privy Council in the same case, ***The Pioneer Container***.[114] Godfrey J said:

> If you find yourself bound to litigate in a forum which is more expensive than the one you would prefer, deliberately to choose the latter rather than the former seems to me . . . to be forum shopping in one of its purest and most undesirable forms. And, if in pursuance of your deliberate decision to litigate here, instead, you let time run out in the jurisdiction in which you are bound to litigate, without taking the trouble (because of the expense) even to issue a protective writ there, you are not, as I think, acting reasonably at all; you are gambling on the chance of a stay being refused here and you cannot complain if you then lose that gamble. That may seem to you at the time a justifiable commercial risk to take. But that, in the context of the litigation, does not make your decision a reasonable one.

On a voyage from Taiwan to Hong Kong, the vessel in this case sank off the coast of Taiwan. Despite the Taiwan exclusive jurisdiction clause contained in the bill of lading, the cargo-owners, plaintiffs, allowed the time limit to expire deliberately and commenced an action in Hong Kong. An application for a stay by the defendants, ship-owners, was successful on appeal, as it was found that, apart from the time bar point, there was strong connection of the case with Taiwan.

5.4 JURISDICTION AGREEMENTS – FORUM SHOPPING AND RISK MANAGEMENT

Considering the foregoing, before litigants embark on wasted litigation, careful consideration should be given to the circumstances that the courts have considered to constitute a strong cause, or reason, for refusing to stay the proceedings brought in this jurisdiction in breach of a foreign jurisdiction agreement. The burden of proof is on the claimant to show why a stay of the English proceedings should not be granted in favour of the agreed jurisdiction. By contrast, in cases in which a stay is sought on grounds of *forum non-conveniens*, the burden of proof, at the first stage of *The Spiliada* test, is on the defendant to show why the stay should be granted.

With regard to the factors taken into account in each of these grounds for a stay of English proceedings, there seem to be similarities between the two. The courts, in some cases, tend to conflate the principles and assimilate *forum non-conveniens* principles with the grounds taken into account when considering a stay for breach of foreign jurisdiction agreements.[115] Such an approach may, sometimes, lead to inconsistent results given that, in other cases, the courts have distinguished the doctrine of *forum non-conveniens* per se from considerations applicable to a stay in favour of a foreign jurisdiction agreement. Some judges have approached the matter with caution

114 [1994] 1 Lloyd's Rep 593.

115 *The El Amria* [1981] 2 Lloyd's Rep 119; *The Nile Rhapsody* [1992] 2 Lloyd's Rep 399 and [1994] 1 Lloyd's Rep 382 (CA).

in order to keep the parties to their bargain.[116] The most important factor which judges take into account is that the parties should be held to abide by their contractual choice of jurisdiction (whether that is English or foreign), unless there are circumstances that were not foreseeable at the time they agreed the jurisdiction; Colman J emphasised this principle in ***Konkola Copper Mines plc v Coromin Ltd***[117] and stated:

> The concept that it is not normally open to an overseas defendant seeking to set aside service in the face of a non-exclusive English jurisdiction clause, which had been freely negotiated to rely, in support of a *forum non conveniens* argument, on factors of inconvenience which he ought reasonably to have appreciated might arise when he entered into the jurisdiction agreement, presents itself to me as entirely correct in principle. Were it otherwise, it would be open to a defendant to invite the court to exercise a discretion to enable him to escape from his contract for reasons of which he ran the risk of occurrence from the outset.

Whether reasons of judicial comity, for example respect to the jurisdiction of the court chosen, should be taken into account, giving a broader application of the principles as stated in *Patel v Airbus* on issues of anti-suit injunctions, are discussed in Chapter 8.

However, jurisdiction clauses will not be upheld if the HVR apply to the bill of lading contract by force of law, and the foreign law chosen by the foreign jurisdiction clause confers less liability upon the carrier than the liability under the HVR – unless the defendant undertook to take no advantage of the lower limit.[118] If not, then the foreign jurisdiction will be null and void by virtue of Art 8 of the HVR.[119]

Sometimes, there may be more than one jurisdiction agreement in a contract or in the various contracts of the same parties, creating a conflict,[120] or a jurisdiction clause may not be exclusive (see below), or it may be obligatory only upon one party to the agreement,[121] or it may not be effective.[122]

A clear example of a non-exclusive jurisdiction clause is seen in ***RBC v Rabobank***.[123] Although the contract provided that the parties irrevocably submitted to English jurisdiction, if the contract was expressly governed by English law, it did not preclude the parties from bringing proceedings in any other jurisdiction. Proceedings were commenced in New York, where both RBC and Rabobank had business dealings, after a breach of a 'Swap agreement'. On an application by RBC for an anti-suit injunction to prevent Rabobank from taking any step to obtain determination of any issue, Mance LJ held that, if it could be assumed that a non-exclusive jurisdiction clause in the form of this contract could relax the inhibitions which the English court might otherwise feel in interfering with a foreign suit, considerations of comity grew in importance the longer the foreign suit continued

116 *The MC Pearl* [1997] 1 Lloyd's Rep 566; *The Pioneer Container* [1994] 1 Lloyd's Rep 593; *The Angelic Grace* [1994] 1 Lloyd's Rep 168; [1995] 1 Lloyd's Rep 87 (CA) (see Ch 8).

117 [2006] 2 Lloyd's Rep 446, at p 452.

118 *Pirelli v United Thai* [2000] 1 Lloyd's Rep 663.

119 *The Morviken (sub nom The Hollandia)* [1983] 1 Lloyd's Rep 1 (HL).

120 See the modern approach to construction of multi and conflicting jurisdiction clauses involved in contracts of the same parties in *Deutsche Bank AG v Sebastian Holdings* [2010] 1 Lloyd's Rep 104; cf. *UBS AG v HSH Nordbank AG* [2008] 2 Lloyd's Rep 500, where the parties had entered into different agreements for different aspects of an overall relationship with different terms as to jurisdiction, therefore intending that any disputes arising out of their relationship would not be determined by the same tribunal, as is normally to be expected.

121 *RBS v Highland Financial Partners* [2012] EWHC 1278 (Comm).

122 *Insurance Co. Ingosstrakh Ltd v Latvian Shipping Co.* [2000] IL Pr 164.

123 [2004] 1 Lloyd's Rep 471 (CA).

and the more the parties and the judge had engaged in its conduct and management. The presence of a non-exclusive jurisdiction clause might have the effect of lightening the burden on the applicant of establishing vexatious or oppressive conduct by the other party in pursuit of parallel proceedings. Similarly, the Court of Appeal in ***Sabah Shipyard (Pakistan) Ltd v Islamic Republic of Pakistan***[124] had held, in 2002, that the terms of the non-exclusive jurisdiction clause would be relevant to whether there was oppression or vexation. Parallel proceedings in England and Pakistan simply on the basis that both were convenient was contrary to the spirit of the jurisdiction clause agreed.

An attempt by one party to the agreement to oust the jurisdiction clause, by issuing proceedings in a jurisdiction other than the chosen one on the ground of *forum non-conveniens*, will be futile, if the clause provides for an exclusive jurisdiction, which is a matter of construction of the agreement.

An exclusive jurisdiction clause will be upheld. Collins J, in ***Bas Capital Funding Corporation v Medifinco Ltd***,[125] stated that it would require very strong grounds to override a choice of English jurisdiction, and that the normal *forum non-conveniens* factors had little or no role to play, especially where it could be inferred from the lack of other connections with England that the parties had chosen the English forum as a neutral forum. He continued that the fact that, in some cases, the clause was non-exclusive might make it easier to displace the strong presumption in favour of upholding the choice; but that would depend on the circumstances.

On the basis of the same reasoning, Colman J upheld the exclusive jurisdiction clause in *Konkola Copper Mines plc v Coromin Ltd (No 2)*[126] (supra).

Whether or not an agreement provides for an exclusive jurisdiction, guidance has been given by the courts in two further cases. In ***Aerospace v Dee Howard***,[127] Webster J took the view that a plea of *forum non-conveniens* would not be open to the parties when their agreement was freely negotiated and it was not just a standard term incorporated by reference. The jurisdiction clause provided: 'This agreement shall be governed by and be construed and take effect according to English law and the parties hereto agree that the courts of law in England shall have jurisdiction to entertain any action in respect hereof . . .'

It was also held that the use of the word 'shall' was apposite to create the language of an obligation. Furthermore, the words 'any action' clearly do mean all actions. This clause was, under English law, which was the law of the contract, an exclusive jurisdiction clause, and there was no need to state expressly 'exclusive' jurisdiction. It was not open to the defendant to start arguing about the relative merits of fighting an action in Texas as compared with England, where the factors relied upon would have been eminently foreseeable at the time of the contract. Adopting that approach, the judge thought, was not permissible to displace England based on such factors as inconvenience of witnesses, the location of documents, timing of the trial, and so on, in favour of Texas.

When a party alleges that it never accepted the jurisdiction clause (as in a case of standard terms contracts), the court's task was in ***Polskie v Rallo*** to determine

124 [2002] EWCA Civ 1643.
125 [2004] 1 Lloyd's Rep 652, p 678.
126 [2006] 2 Lloyd's Rep 446.
127 [1993] 1 Lloyd's Rep 368; this case concerned a breach of an English jurisdiction clause, the remedies for which are discussed in Chapter 8.

if there was sufficient consensus between the parties as a question of fact, without recourse to any rule of national law.[128]

Litigants should also note from ***Sinochem v Mobil Sales***[129] that the party suing in the non-chosen jurisdiction must show a strong cause why he should not be held to the agreement; the judge said that matters of convenience are, at any rate, largely, if not entirely, irrelevant. With regard to the determination of whether or not the clause was an exclusive jurisdiction one, the judge said that, not only did the clause in the Hong Kong contract provide for Hong Kong law to apply, but also that the Hong Kong courts 'are to have jurisdiction to settle any disputes' between the parties and that the parties 'submit to the jurisdiction of those courts'. In the judge's view, such a clause, as well as the clause under the London contract, provided for exclusive jurisdiction. 'It has all the indicia of such a clause', the judge said. 'It is mutual, it refers to "any disputes" . . . and the language "are to have jurisdiction" . . . is a language of obligation and not an option.'[130]

To the extent that proceedings are brought to obtain security for the claim, the English court has power, under s 26 of the CJJA 1982, to retain the arrest of a ship until sufficient security is provided to satisfy a judgment of a foreign court of competent jurisdiction, which had been chosen by the parties in their contract to have exclusive jurisdiction.[131]

6 STAY OF ENGLISH PROCEEDINGS IN FAVOUR OF ARBITRATION

The intention of the Arbitration Act (AA) 1996 is to limit the involvement of the courts, as much as possible, in matters of jurisdiction allocated by the parties to a contract in accordance with an arbitration agreement. In place of such a limitation, the Act has extended the powers of arbitrators. When a party to an arbitration agreement commences court proceedings, there may be a breach of the arbitration agreement, if that agreement is valid and enforceable. The remedies for breach of an English arbitration agreement are: (a) damages;[132] (b) an anti-suit injunction (see

128 *Polskie Ratowninctwo Okretowe v Rallo Vito* [2010] 1 Lloyd's Rep 384.

129 [2000] 1 Lloyd's Rep 670, p 677, per Rix J; see, also, *Insurance Co. Ingosstrakh Ltd v Latvian Shipping Co.* [2000] IL Pr 164 (CA).

130 Ibid, p 676.

131 *The Havhelt* [1993] 1 Lloyd's Rep 523.

132 Applying the principle that the contract breaker should not be entitled to benefit from its own wrong (*New Zealand Shipping Co Ltd v Societe Des Ateliers et Chantiers de France* [1919] AC 1 at 8. *CMA CGM SA V HMD LTD* [2008] EWHC 2791 (Comm): Damages for breach of the arbitration agreement can be awarded, in appropriate cases, as was decided by the arbitration tribunal (affirmed by the court) for continuing to pursue, and not discontinuing, the French proceedings after the respective transfer dates of four shipbuilding contracts by novation agreements. CMA was in breach of the arbitration agreements in each of the shipbuilding contracts, as novated, and consequently HMD was entitled to recover damages, that being the sum they were ordered to pay, and did pay, to CMA by the French court, coupled with compensation in respect of lost management time and their own French legal costs and interest.

Very interesting and novel issues were before the court on appeal of the arbitration award: (a) whether the arbitration clause in the novated shipbuilding contracts applied to the pre-existing dispute between CMA and HMD, which had had already been referred to the French court, and was pending before it at the time of novation; (b) if so, whether the arbitrators were bound by the French court's determination of the same issues between the same parties in a judgment that the English courts would be bound to recognise pursuant to the Council Regulation. The arbitrators had in fact resolved the second issue in H's favour, paying no regard to the French judgment. The judge held: disregarding the French judgment did not circumvent the Regulation; see, further, Ch 7 on recognition and enforcement of judgments.

Chapter 8); or (c) a stay of the court proceedings. Under this paragraph, the focus is mainly on the principles and recent decisions regarding the stay of proceedings in favour of arbitration under s 9 of the AA 1996. Stay of Admiralty proceedings when security is provided to ensure that an award can be enforced against such security under s 11 of the AA 1996 is briefly dealt with under para 6.3, below.

6.1 STAY OF THE COURT PROCEEDINGS UNDER S 9 OF THE AA 1996

The stay of court proceedings on the ground of an arbitration agreement is discretionary with regard to domestic arbitration and mandatory in respect of non-domestic arbitration.

By s 9(1) of the AA 1996, a party to an arbitration agreement against whom legal proceedings are brought in respect of a matter, which under the agreement is to be referred to arbitration, may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings, so far as they concern the matter which has been referred to arbitration.

The grant of a stay in non-domestic arbitration has been mandatory since the previous AA 1975, by s 1, which is reflected in s 9(4) of the 1996 Act. Section 86 of the AA 1996 expressly states that s 9(4) does not apply to domestic arbitration. In domestic arbitration, the court has a general discretionary power under s 86, which is retained on a transitional basis only, owing to the apparent illegality of the discrimination between UK and EU nationals under the EC Treaty, and is likely to be repealed in the near future pursuant to s 88 of the AA 1996. Pending a decision on repeal, s 86 has not been brought into force, so that for the time being domestic agreements are treated in the same way as non-domestic ones.[133]

A significant difference between s 9(4) and the equivalent s 1(1) of the 1975 Act is that the latter was specifically providing that, if there was in fact no dispute between the parties with regard to the matter referred to arbitration, a stay would not be granted. In such a case, an application under Ord 14 of the old RSC (now Pt 24 of CPR) would be made to the court to give a judgment, where it was shown that there was no arguable defence. The words of s 1(1) of the 1975 Act relating to where there is no dispute have been omitted from s 9 because, if one party to the agreement commences English proceedings, a stay of those proceedings is mandatory. This is so even when the party who has resorted to the court argues that there is no contract. Even if the main contract has been validly rescinded, for example for fraud or bribery, the principle of separability enacted in s 7 of the AA 1996 means that the invalidity or rescission of the main contract does not necessarily entail the invalidity of the arbitration agreement contained in the main contract, because the latter has to be treated as a distinct agreement and could be void or voidable only on a ground that relates directly to the arbitration agreement.[134]

133 Merkin, *Arbitration Law*, Vol 1, para 4.1(b) (Service Issue No 60, 1 January 2012).

134 The House of Lords, in *Fiona Trust & Holding Corporation v Privalov* [2008] 1 Lloyd's Rep 254, confirmed the decision of the Court of Appeal [2007] EWCA Civ 20.

6.2 PRECONDITIONS TO A STAY OF COURT PROCEEDINGS UNDER S 9

It is now settled that there is a two-stage approach for the court in considering a stay under s 9: (a) the court may grant a stay of its proceedings only if there is a concluded arbitration agreement that extends to the dispute in question, and the onus is on the applicant to prove these conditions; (b) if the applicant succeeds, then the court must grant the stay unless it is satisfied, as per s 9(4), that the arbitration clause is null and void, inoperative or incapable of being performed; the burden of proof at this stage is upon the respondent.

If there is an issue as to the validity or scope of the arbitration agreement, as the cases below show, it will be resolved by the court, and, pending such determination, s 9(1) does not yet apply for the court to grant the stay. On the other hand, if the court decides to leave the issue of validity to arbitrators, a stay of the court proceedings will be under the court's inherent jurisdiction.

6.2.1 The arbitration agreement must be valid

Section 9(4) provides that, upon an application under this section, the court shall grant a stay, unless satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed.

In ***Lombard North Central plc v Gatx Corp.***,[135] the court held that the arbitration agreement was not inoperative. Referring to previous authority,[136] it was further held that, even when a respondent to an application for a stay contended that an arbitration agreement was null and void, inoperative or incapable of being performed, nevertheless a stay should be granted if the applicant could raise an arguable case in favour of validity.[137]

On the facts, the applicant (G) applied for the proceedings brought by the respondents (L) to be stayed pursuant to the AA 1996 s 9. L and G were parties to arrangements about financing trains. Cl 9.4 of the contract was concerned with the ownership, leasing and management of certain trains and it was later amended to require the parties in certain circumstances to establish a joint venture; if they had been unable to establish a joint venture by a particular date, they agreed to negotiate in good faith to achieve their objectives through other means at the earliest opportunity. By cl 9.4(x), any disputes 'relating to the creation of the joint venture pursuant to clause 9.4' that could not be resolved by the good faith efforts of the parties were to be referred to arbitration in London under London Court of International Arbitration (LCIA) rules. The parties disagreed about the scope of the arbitration clause. L brought Part 8 proceedings against G seeking a declaration that, because of the parties' failure to establish a joint venture by the due date, L's sole obligation was to negotiate

135 [2012] EWHC 1067 (Comm); [2012] 1 Lloyd's Rep 662 (see further under 6.2.6, below).

136 *Hume v AA Mutual International Insurance Co., Ltd* [1996] LRLR 19; *Downing v Al Tameer Establishment* [2002] BLR 323.

137 *Downing v Al Tameer Establishment* [2002] EWCA Civ 721, [2002] 2 All ER (Comm) 545 followed (denial by one party to a contract that any contractual relationship existed between the parties).

in good faith, and such an obligation was unenforceable for want of legal content. G applied for a stay of the proceedings under the AA 1996 s 9 or pursuant to the inherent jurisdiction of the court, on the basis that the proceedings were in respect of a matter which, under the agreement, was to be referred to arbitration, namely the interpretation of the arbitration agreement. It was not disputed that, by agreeing to the LCIA rules, the parties agreed that the jurisdiction of any arbitral tribunal should be determined by that tribunal.

Smith J held that, in the event that *Lombard* was correct that no joint venture had been agreed and so the arbitration agreement was spent, the arbitration clause would not be inoperative, but it would simply not cover the dispute that had arisen. The judge further held that s 9(4) of the 1996 Act is in similar terms to the New York Convention (on the Recognition and Enforcement of Foreign Arbitration Awards 1958) and is based on the Model Law (on Arbitration drafted by UNCITRAL and adopted by the United Nations in June 1985). 'Inoperative' under s 9(4) covers circumstances in which the party seeking to invoke the arbitration agreement is not entitled to do so: one example is where the party has waived the right to invoke it (see *AED Oil Ltd v Puffin FSPO Ltd (No 2)*)[138] or, otherwise, lost the right to make a reference.[139] Smith J finally explained that an examination of the scope of an arbitration agreement is covered by the requirements of s 9(1); G was entitled to have the claim stayed under s 9. If that was wrong, the claim should be stayed under the inherent jurisdiction. In either case, the stay was dependent on a reference being made (see later, 6.2.6).

In ***JSC BTA Bank v Ablyazov***,[140] it was shown that an arbitration agreement had been concluded, and it was not shown that it was null and void. The burden of proving the existence of an arbitration agreement is borne by the respondent in the judicial proceedings who seeks a stay. If he is able to satisfy the court that an agreement has been entered into, the burden then switches to the claimant to show that the arbitration clause is null and void, inoperative or incapable of being performed.

The provisions of Kazakh law, in this case, quoted by the expert did not appear to limit arbitration to contractual claims. Whether the clause extended to the instant non-contractual disputes depended on its construction.[141] It appeared that Kazakh law adopted a literal meaning, and, taking that meaning, the disputes came within the clause as they either arose out of the agreement or were connected with it. By contrast, Gloster J, in ***Claxton Engineering v TXM***,[142] found on the written evidence before her that Claxton had not accepted the Hungarian arbitration clause, and, therefore, she refused to stay the proceedings of which the English court had jurisdiction pursuant to a jurisdiction agreement.

138 [2009] VSC 534.

139 Other circumstances in which an arbitration agreement is inoperative are described by Professor Merkin in *Arbitration Law* (2011) at para 8.33.2 and include cases where the arbitration agreement has been terminated by an accepted repudiation, cases where the dispute is incapable of being determined by arbitration, and cases where the arbitration will not be enforced by the court (e.g. because a named arbitrator in the agreement is actually or apparently biased). See, too, Professor Margaret L Moses, *The Principles and Practice of Commercial Arbitration* (2nd edn, 2012) at p 34.

140 [2011] 2 Lloyd's Rep 129.

141 See *Fiona Trust & Holding Corporation v Privalov* [2008] 1 Lloyd's Rep 254.

142 [2011] 1 Lloyd's Rep 252.

Issues of validity of the arbitration clause and of a stay of proceedings were clarified by the court more recently in ***Joint Stock Co. Aeroflot Russian Airlines v Berezovsky***.[143] Floyd J held, applying *A V B*[144] (of Colman J) and *Albon v Naza Motor Trading (No 3)*,[145] that: There had to be a concluded agreement before the court could order a stay under s 9(1), and not merely an arguable case that there was such an agreement. Similarly, it was not enough for the court to refuse a stay under s 9(4) on the ground that there was merely an arguable case that the arbitration agreement was null and void, inoperative or incapable of being performed. The correct approach was that the burden of establishing the matters identified in s 9(4) rested on the party asserting them. The use of the word 'satisfied' in sub-s (4) was an indication that the court had to come to a clear conclusion that the agreement was null and void, inoperative or incapable of performance.

Similarly, in the *Albon*, above, Lightman J held that, until the validity of the arbitration clause had been determined, the court had no jurisdiction under s 9(1) of the AA 1996 to grant a stay. Two threshold requirements had to be satisfied: (a) that there was a concluded arbitration agreement; and (b) the issue was a matter which, under the arbitration clause, was to be referred to arbitration. The court could stay its proceedings so that these matters could be resolved by the arbitrators, but only under its inherent jurisdiction and not under s 9. In addition, he held that the power of the court to refuse a stay under s 9(4) presupposed that an arbitration agreement had been concluded; and the court would exercise its inherent jurisdiction to grant a stay only in exceptional cases.

Floyd J, in *Joint Stock Co. Aeroflot*, explained how the court will exercise its power and held:[146] Under CPR 62.8(3), where a question arose as to whether an arbitration agreement has been concluded or the dispute which was the subject matter of the proceeding fell within the terms of such an agreement, the court could decide that question or give directions to enable it to be decided and could order the proceedings to be stayed pending its decision. The court could also stay its proceedings to allow the arbitrator to rule on his own jurisdiction. Such a stay would not be ordered under s 9 because it was first necessary to conclude that an arbitration agreement had been made. Instead, a stay could be ordered under the court's inherent jurisdiction.

Interestingly, it is worth noting the judge's further comments who said: even on the assumption that the arbitration clause was valid, but it was unenforceable under s 9(4) of AA because there were conflicting dispute resolution clauses in the contracts between the parties, it would be an abuse of rights under Swiss law (the applicable law) to compel the other party to initiate different proceedings before different tribunals, with the risk of irreconcilable decisions.

143 [2012] 1 Lloyd's Rep 56.
144 [2007] 1 Lloyd's Rep 237.
145 [2007] 2 Lloyd's Rep 1, at paras 67–73.
146 Ibid, at paras 74 and 75; applying *Birse Construction ltd v St David Ltd* [1999] BLR 194; *Al Naimi v Islamic Press Agency Inc.* [2000] 1 Lloyd's Rep 522; *El Nasharty v J Sainsbury plc* [2004] 1 Lloyd's Rep 309; *Albon v Naza Motro Trading (No 3)* [2007] 2 Lloyd's Rep 1.

6.2.2 Are there conflicting or tiered dispute resolution clauses?

6.2.2.1 Conflict between two arbitration agreements

Very complex factual issues arose in ***Ases Havacilik Servis v Delkor UK Ltd***[147] concerning a conflict between two arbitration agreements provided in different but related contracts. The one was the 'cooperation agreement LML' between Ases and Delkor, which provided for Swiss law and arbitration, and the other was the underlying contract on the basis of which a supply of specific manufactured goods to customers would be made. This was the 'Contract Order', allegedly incorporating an English arbitration clause by virtue of incorporation of the 'Delkor standard terms and conditions', but agreement as to details had been left over. There were issues as to which contract was validly signed, which gave rise to contesting the arbitrator's jurisdiction. One of the issues for the judge was which was the governing arbitration clause, the Swiss or the English? Hamblen J, considering the overall purpose and wording of the LML contract, held that the governing dispute resolution agreement between Ases and Delkor was the Swiss arbitration clause. He further held (at para 119) that it would, of course, be possible for the parties to contract otherwise in relation to a particular project, but the intention to derogate from the specifically agreed Swiss law/arbitration regime generally applicable would need to be made clear. Thus, Ases' application on the basis of s 67 of AA 1996 succeeded.

6.2.2.2 Option of one party to elect arbitration

When there is an option in the contract in favour of the one party to elect arbitration, but there is also an English court choice agreement, difficult questions arise. When should the party with the option exercise it, and should he do so promptly? Could the other party commence court proceedings, or should he wait for the option to be exercised? The parties would normally discuss how to resolve their dispute, but it is not uncommon to find that they try to get around a complex clause for tactical advantage.

This issue arose in ***NB Three Shipping Ltd v Harebell Shipping Ltd***,[148] where the applicant ship owner (H) applied under the AA 1996 s 9 to stay proceedings commenced against it by the respondent charterers (N), pending arbitration. H had agreed to charter two vessels to N by two bareboat charter parties on the Barecon 89 Form. Under the terms of the charter parties, the courts of England had jurisdiction to settle any disputes. In addition, H had the option of referring any dispute to arbitration. A dispute arose between the parties, and N issued proceedings. H purported to exercise its right to refer the dispute to arbitration and appointed an arbitrator. N argued that its action should not be stayed because, when it commenced proceedings, it had not been acting in breach of any covenant in the contract and, under the terms of the charter parties, the only forum of choice was England.

Morrison J held (at para 12) that:

147 [2013] 1 Lloyd's Rep 254; the case also refers to 'good faith/reliance' reasons applicable under Swiss law for concluding that the Swiss arbitration clause be the governing clause and which were factually compelling. The judge commented that although English law does not overtly apply such principles, it is reassuring that it reaches the same result.

148 [2005] 1 Lloyd's Rep 509.

Clause 47, as Mr Hancock QC submitted, has two streams running through it: the litigation stream and the arbitration stream. The arbitration stream [cl 47.10] satisfies the requirements of an arbitration agreement since a one sided choice of arbitration is sufficient. The words of section 9(1) 'in respect of a matter which under the agreement is to be referred to arbitration' are to be applied when the application for a stay is applied for. Are these disputes under the agreement to be referred to arbitration? Yes, once the option, which Owners have, has been exercised. These are disputes which, at Owners' option, [the parties] wish to be arbitrated under the arbitration agreement. Neither the fact that the proceedings were properly brought nor that the terms of section 9(1) only applied after the option was exercised affects the conclusion. A party might commence an action in the belief that the other party would not exercise a right to apply for a stay; his action may have been proper . . ., if Owners had decided not to exercise their option. I would be sorry if any other conclusion had to be reached. Apart from anything else, one of the fundamental objectives of the 1996 Act is to give the parties autonomy over their choice of forum. On my view of the contract, once Owners exercise their option the parties have agreed that the disputes should be arbitrated. By refusing a stay, the court would not be according to them their autonomy.

Accordingly, in my judgment section 9(1) of the Act applies and I should order a stay pending arbitration.

The point made here is that the parties should discuss the position before they embark upon commencing proceedings, if there is an option of arbitration in the contract. In the normal course of events, the judge said, where a dispute arose, the parties would seek to resolve by agreement whether that dispute was to be arbitrated or litigated, but with a reservation of a right to owners to decide to have that dispute referred to arbitration (cl 47.10). Thus, it would have been in the contemplation of the parties that the issue of arbitration or not would be decided before proceedings were commenced in the courts by charterers.

The judge further held, interpreting cl 47 (at paras 10–11), that the clause is designed to give 'better' rights to owners than to charterers. Thus, although charterers are limited to action in the English court, owners are given the right to bring proceedings in any court that has jurisdiction by virtue of a Convention. Charterers are required to provide a place for service within this jurisdiction, whereas owners are not; charterers are constrained not to challenge enforcement of any judgment 'which is given or would be enforced by an English Court', whereas owners are not. It seems to me that cl 47.02 gives owners a right to stop or stay a court action brought against them, at their option. This gives the clause some practical effect and was designed to apply in circumstances such as these. If charterers seek to bypass the owners' determination to have disputes resolved by arbitration, as contemplated by cl 47.10, then the owners' option of bringing the disputes to arbitration remains, continuing owners' control over the issue of arbitration or court. Charterers can obtain no advantage from 'jumping the starting gun'. Although I can see the force of the submission as to the words 'bringing any disputes' and the absence of the word 'refer', it is, in my view, putting too much weight on what is a point of semantics. The sense of the whole of cl 47 is clear, I think. It seems to me that the option granted by cl 47.02 is not open ended. It would cease to be available if owners took a step in the action or they otherwise led charterers to believe on reasonable grounds that the option to stay would not be exercised. It would have been better had the precise circumstances in which the option could be exercised or lost, been spelt out with greater clarity, but this failure does not, in my judgment, render the clause unenforceable. In other cases referred to, the election or option has been properly circumscribed; here, owners have

given themselves in this charter-party considerable latitude, consistent with what is, largely, a one-sided clause.

6.2.2.3 When a mediation provision is not effective

With the increasing use of mediation as a method for dispute resolution, parties to a contract tend to use a tiered dispute resolution clause. In some cases, the agreement to mediate may be a purported condition precedent to commencing arbitration, but such a conclusion will depend on the construction of the clause. In practice this is very important because one party may argue that, as the condition precedent was not fulfilled, arbitration cannot commence and may start court proceedings instead. For the mediation clause to be enforceable, the criteria of an enforceable clause were examined by the court in ***Wah v Grant Thornton International Ltd***.[149] It is important to first note the contents of the provision:

(a) Any dispute or difference as described in Section 14.2 shall in the first instance be referred to the Chief Executive in an attempt to settle such dispute or difference by amicable conciliation of an informal nature. The conciliation provided for in this Section 14.3 shall be applicable notwithstanding that GTIL may be a party to the dispute or difference in question.
(b) The Chief Executive shall attempt to resolve the dispute or difference in an amicable fashion. Any party may submit a request for such conciliation regarding any such dispute or difference, and the Chief Executive shall have up to one (1) month after receipt of such request to attempt to resolve it.
(c) If the dispute or difference shall not have been resolved within one (1) month following submissions to the Chief Executive, it shall be referred to a Panel of three (3) members of the Board to be selected by the Board, none of whom shall be associated with or in any other way related to the Member Firm or Member Firms who are parties to the dispute or difference. The Panel shall have up to one (1) month to attempt to resolve the dispute or difference.
(d) Until the earlier of (i) such date as the Panel shall determine that it cannot resolve the dispute or difference, or (ii) the date one (1) month after the request for conciliation of the dispute or difference has been referred to it, no party may commence any arbitration procedures in accordance with this Agreement.

The court held:

Provisions for conciliation of disputes prior to arbitration had historically created tension between the desire to give effect to what the parties agreed, and the difficulty in giving what they had agreed objective and legally controllable substance. Agreements to agree, and agreements to negotiate in good faith, would generally be unenforceable because faith was too open-ended a concept to provide sufficient definition or clarity. However, especially, where the relevant provision was part of an otherwise legally enforceable contract, the court would strain to find a construction which gave a conciliation provision effect: it might imply criteria to enable it to determine what process to follow, and when; and without the need for a further agreement, how to treat the process as successful, exhausted, or properly terminated. The court would be especially ready to imply criteria for agreeing a fair and reasonable price. It would consider each case on its own terms rather than ticking off minimum ingredients for validity. The test was not whether there was a valid provision for a recognised process of mediation,[150] but whether the obligations imposed were sufficiently clear and certain to be given legal effect.

149 [2012] EWHC 3198 (Ch), (paras 72, 76–79, 82).

150 Hildyard J rejected the comment by Colman J in *Cable & Wireless plc v IBM* [2002] EWHC 2059 (Comm) to the effect that 'where there is an unqualified reference to ADR, a sufficiently certain and

In the context of an obligation to attempt to resolve a dispute before referring it to arbitration, the test was whether the provision provided, without the need for further agreement: (a) a sufficiently certain and unequivocal commitment to commence a process; (b) a means of discerning the steps each party was required to take to start the process; (c) sufficient clarity and definition to enable the court to make an objective determination of the minimum participatory requirements for each party; (d) an indication of how the process would be exhausted or properly terminated without breach.[151]

The relevant provisions of the agreement were too equivocal and nebulous in communicating the parties' respective obligations to be given legal effect as an enforceable condition precedent to arbitration. The omission to give any guidance as to the quality or nature of the attempts to be made to resolve a dispute rendered the court unable to determine or direct compliance with the agreement. The tribunal's conclusion regarding the true effect of the provision was correct.

Moore-Bick LJ, in ***Sul America***[152] (upon which Hildyard J relied), was of the view that there is a need for a reference to a specific mediation provider or a defined mediation process.

The mediation, cl 11, provided:

If any dispute or difference of whatsoever nature arises out of or in connection with this policy including any question regarding its existence, validity or termination, hereafter termed as dispute, the parties undertake that, prior to a reference to arbitration, they will seek to have the dispute resolved amicably by mediation. All rights of the parties in respect of the dispute are and shall remain fully reserved and the entire mediation including all documents produced or to which reference is made, discussion and oral presentation shall be strictly confidential to the parties and shall be conducted on the same basis as without prejudice negotiations, privileged, inadmissible, not subject to disclosure in any other proceedings whatsoever and shall not constitute any waiver of privilege whether between the parties or between either of them and a third party. The mediation may be terminated should any party so wish by written notice to the appointed mediator and to the other party to that effect. Notice to terminate may be served at any time after the first meeting or discussion has taken place in mediation. If the dispute has not been resolved to the satisfaction of either party within 90 days of service of the notice initiating mediation, or if either party fails or refuses to participate in the mediation, or if either party serves written notice terminating the mediation under this clause, then either party may refer the dispute to arbitration. Unless the parties otherwise agree, the fees and expenses of the mediator and all other costs of the mediation shall be borne equally by the parties and each party shall bear their own respective costs incurred in the mediation regardless of the outcome of the mediation.

At first instance, the insured had submitted that clause 11 of the policy contained an enforceable obligation to mediate, and that compliance with its terms was an essential precondition to arbitration. That condition was not satisfied, and the insurers had therefore not validly commenced an arbitration which called for protection by

definable minimum duty of participation should not be hard to find'; in Hildyard J's view, this suggested that all that was required was that the court 'should be able to discern what is the minimum that is required to be done'. Colman had held in *Cable* that: cl 41.2 contained an enforceable obligation to participate in ADR procedures recommended by CEDR. There was no basis for the submission that the wording of cl 41.2 suggested that the parties had not mutually intended that the clause should be a binding agreement to refer disputes to ADR. Although the law did not generally recognise contracts to negotiate owing to their intrinsic uncertainty, the fact that cl 41.2 prescribed the means by which dispute negotiation should take place, by the identification of a specific recognised procedure, meant that the requirement for contractual certainty was fulfilled, and the clause was thus enforceable.

151 *Sul America Cia Nacional de Seguros SA v Enesa Engenharia SA* [2012] EWCA Civ 638, [2012] 2 All ER (Comm) 795 applied; see further about this case at para 6.2.3, below, and in Ch 8, below.

152 [2013] 1 WLR 102 and below at para 6.2.3

the grant of an injunction. The judge held, however, that condition 11 did not give rise to any binding obligation. He referred to, and was content to follow, the decisions of Colman J in *Cable & Wireless plc v IBM United Kingdom Ltd*[153] and Ramsey J in *Holloway v Chancery Mead Ltd*,[154] in each of which the court expressed the view that an agreement to enter into a prescribed procedure for mediation is capable of giving rise to a binding obligation, provided that matters essential to the process do not remain to be agreed. He held, however, that condition 11 of the present policy did not meet those requirements, because it contained no unequivocal undertaking to enter into a mediation, no clear provisions for the appointment of a mediator and no clearly defined mediation process. Essential matters, therefore, remained for agreement between the parties. Accordingly, condition 11 did not give rise to a legal obligation of any kind, and in the absence of a binding obligation there could be no effective precondition to arbitration. On appeal, Mr Wolfson for the insured submitted that, contrary to the conclusions of the judge, condition 11 did contain a clear definable minimum duty to participate in a mediation that was capable of having legal effect. The essential preconditions to arbitration, he submitted, were a notice initiating mediation followed by one of the three outcomes identified in the fourth paragraph of that condition.

Moore-Bick LJ held, at paras 35–36:

> I have little doubt that the parties intended condition 11 to be enforceable and thought they had achieved that objective. In those circumstances the court should be slow to hold they have failed to do so. However, in order for any agreement to be effective in law it must define the parties' rights and obligations with sufficient certainty to enable it to be enforced. The task of the court when questions of this kind arise, therefore, is to determine whether the clause under consideration fulfils that requirement. . . . Each case must be considered on its own terms.
>
> In the present case, unlike *Cable & Wireless plc v IBM United Kingdom Ltd* . . . and *Holloway v Chancery Mead Ltd* . . . condition 11 does not set out any defined mediation process, nor does it refer to the procedure of a specific mediation provider. The first paragraph contains merely an undertaking to seek to have the dispute resolved amicably by mediation. No provision is made for the process by which that is to be undertaken and none of the succeeding paragraphs touches on that question. I agree with the judge, therefore, that condition 11 is not apt to create an obligation to commence or participate in a mediation process. The most that might be said is that it imposes on any party who is contemplating referring a dispute to arbitration an obligation to invite the other to join in an ad hoc mediation, but the content of even such a limited obligation is so uncertain as to render it impossible of enforcement in the absence of some defined mediation process. I think that the judge was right, therefore, to hold that condition 11 is incapable of giving rise to a binding obligation of any kind.

6.2.3 Which law governs the arbitration agreement?

The insured in ***Sul America***[155] argued before the judge, in addition to their argument that, as they alleged, the mediation provision was a condition precedent to arbitration (as seen under 6.2.2.3, above), that they were not bound to arbitrate because the arbitration agreement was governed by the law of Brazil, which governed the insurance policies, and under Brazilian law the arbitration agreement was not enforceable against them without their consent.

153 [2002] 2 All ER (Comm) 1041.
154 [2008] 1 All ER (Comm) 653.
155 [2013] 1 WLR 102, and Ch 8, below.

The issues raised in this regard were: (a) which was the proper law of the arbitration agreement, and (b) how could a conflict between the court choice and the arbitration agreement be resolved. The judge[156] held that the arbitration clause was governed by English law because it had its closest and most real connection with the law of the seat, and it covered the dispute. It also prevailed over the jurisdiction provision.

On appeal, the Court of Appeal agreed and held that: (1) There was no rule of law that the proper law of the arbitration agreement was the law of the place of the seat.[157] (2) The authorities established that the proper law of an arbitration agreement might not be the same as that of the substantive contract of which it formed part.[158] (3) In the absence of any indication to the contrary, an express choice of law governing the substantive contract was a strong indication of an implied choice of the same law in relation to the agreement to arbitrate.

That is the starting point, but it is necessary to examine the remaining terms of the contract. There were two important factors that pointed away from the implied choice, that is, Brazilian law: first, the choice of London as the seat imported acceptance that the arbitration would be conducted and supervised according to the provisions of the AA 1996. Second, if Brazilian law meant that the arbitration agreement was enforceable only with the consent of the one party, that was an indication that the parties did not intend the agreement to be governed by that law. The choice of Brazilian law would run the risk of the agreement not being enforceable against the insured. It was concluded that the arbitration agreement had its closest and real connection with the seat, England.

Applying these principles, the judge in ***Cruz City 1***,[159] where the issue was whether the chosen law of the contract governed the arbitration agreement in which the seat of arbitration was London, held that: The present case concerned the law governing the scope of the jurisdiction of the tribunal appointed under the LCIA Rules, namely, the law of the reference. That was not identical to the law applicable to the arbitration agreement, but the two would be the same in all but exceptional cases; neither had to be the same as the law applicable to the contract containing the arbitration clause

156 [2012] EWHC 42 (Comm); [2012] 1 Lloyd's Rep 275.

157 *C v D* [2007] EWCA Civ 1282, [2008] Bus LR 843, at para 43.

158 At para 15 Moore Bick LJ said:

> the choice of curial law is normally made by identifying the seat of the arbitration. In the passage in his speech in *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334, Lord Mustill recognised that it is more common for the curial law of the arbitration to differ from the proper law of the substantive contract, as a result of the parties' agreeing to arbitrate in a country other than that whose law they have chosen to govern their agreement, than it is for the proper law of the arbitration agreement to differ from the proper law of the substantive contract. He did not explain why that should be the case, but in my view two reasons suggest themselves. One is that it is not at all uncommon in certain kinds of international arbitration, especially those involving government contracts, for the seat of the arbitration to be chosen on grounds (often a desire for a neutral forum) which differ from those which underlie the choice of law to govern the substantive contract. Another is that parties entering into a contract, whether containing an arbitration agreement or not, are likely to intend that the whole of their relationship, including the agreement to arbitrate, is to be governed by the same system of law. Lord Neuberger MR expressed the view (at paras 51–52) that given the desirability of certainty in the field of commercial contracts and the number of authorities on the point, it is, at least at first sight, surprising that it is by no means easy to decide in many such cases whether the proper law of the arbitration agreement is (i) that of the substantive contract or (ii) that of the seat. But the issue is a matter of contractual interpretation. Even allowing for that, however, one might have expected the cases to have provided clear and consistent guidance.

159 *Arsanovia Ltd and Others v Cruz City 1 Mauritius Holdings* [2012] EWHC 3702 (Comm); [2013] 1 Lloyd's Rep Plus 6.

(the *lex causae*), or the curial law. However, the parties would not be expected to have chosen pointlessly to resort to numerous different legal systems to govern their affairs, so an express choice of a law to govern them in one respect was a strong indication that it might apply to others. The difficulty which arose in the present case was that the parties had chosen different laws for the *lex causae* and the seat.[160] The parties to the agreement were to be taken to have evinced an intention that the arbitration agreement in it be governed by Indian law. The governing law clause was, at the least, a strong pointer to their intention about the law governing the arbitration agreement, and there was no contrary indication other than their choice of a London seat for arbitration. The wording of the arbitration agreement itself reinforced the conclusion that the parties intended Indian law to govern it, in that the reference to IACA in the arbitration agreement evinced an intention that the arbitration agreement should be governed by Indian law (except in so far as they agreed otherwise).[161] There was a case for an express choice of Indian law, because the parties had chosen that 'This Agreement' should be governed by Indian law, and they might be thought to have meant that Indian law should govern and determine the construction of all the clauses in the agreement which they signed, including the arbitration agreement.[162] Had it been necessary to decide which system of law had the closest and most real connection with the arbitration agreement, that would have been English law, but the point had not arisen.[163]

6.2.4 There must be a dispute to refer to arbitration

The question as to whether or not there is a dispute has been the subject of fruitful discussion over recent years. It has long been accepted that there is a dispute until the defendant admits that the sum is due and payable;[164] such an admission would, in effect, amount to an agreement to pay the claim, and there would then clearly be no further basis for referring it to arbitration.[165]

The expression in arbitration clauses such as 'any dispute' is to be approached simply as one of construction of the relevant arbitration clause. If, for example, one party required the other to make immediate payment, and the other refused to do so, they were in dispute, notwithstanding that the party refusing to pay had admitted liability.

160 Ibid, at paras 9–10; *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] 1 Lloyd's Rep 291; [1993] AC 334, *C v D* [2007] 2 Lloyd's Rep 367, applied.

161 Ibid, at para 20; *C v D* [2008] 1 Lloyd's Rep 239; [2008] 1 All ER (Comm) 1001, *Sul América Cia Nacional de Seguros SA v Enesa Engenharia SA* [2012] 1 Lloyd's Rep 671; [2012] Lloyd's Rep IR 405, considered; *Bhatia International v Bulk Trading SA* (2002) 4 SCC 105, *Bharat Aluminium Co v Kaiser Aluminium Technical Service Inc* [2012] INSC 500, referred to.

162 Ibid, at para 22; *Fiona Trust & Holding Corporation v Privalov* [2008] 1 Lloyd's Rep 254, referred to.

163 Ibid, at para 24.

164 *Ellerine v Klinger* [1982] 1 WLR 1375; *Amec Civil Engineering Ltd v Secretary of State for Transport* [2005] EWCA Civ 291; *Halki Shipping Corp. v Sopex Oils Ltd (The Halki)* [1998] 1 Lloyd's Rep 49, Clarke J; [1998] 1 Lloyd's Rep 465 (CA) in which it was held that there was a dispute once money was claimed, unless and until the defendants admitted that the sum was due and payable. If a party refused to pay a sum, which was claimed or denied that it was owed, then, in the ordinary language, there was a dispute between the parties.

165 *The M Eregli* [1981] 2 Lloyd's Rep 169.

For example, in ***Exfin Shipping Ltd v Tolani Shipping Co. Ltd***,[166] the judge held that, unlike the previous cases, in which the issue had been whether or not the claim had been admitted, in this case the question, which arose for the first time, was whether or not the failure to make payment admittedly due constituted a dispute arising under a charter party. Applying *The Halki*,[167] Langley J affirmed that refusal to pay the amount due notwithstanding that it was admitted was a dispute under the arbitration clause in the charter party. If one party said you must pay now, and the other refused, they were in dispute. There was no difference between a refusal to admit a claim and a refusal to pay it.

6.2.5 The dispute must be covered by the arbitration agreement

There have been a few very important decisions about the court's approach in applications for a stay under s 9, particularly with reference to s 30 of the AA 1996, the power of arbitrators to determine their own jurisdiction, and its interrelationship with the CPR.

In ***Al-Naimi v Islamic Press***,[168] concerning a building contract, the subject matter of the court proceedings was whether the dispute between the parties was covered by the arbitration agreement of the main contract, or arose under a separate oral contract not being subject to arbitration. The Court of Appeal approved the approach of HHJ Humphrey Lloyd QC in *Birse Construction Ltd v David Ltd*,[169] relating to s 9 applications in a situation in which the dispute was not about whether a clause existed at all, but about what the clause precisely covered.[170] It is important, therefore, to refer to extracts of the judge's approach in this case and then add the comments made by Waller LJ in the *Al-Naimi* case.

Per HHJ Humphrey Lloyd QC in ***Birse Construction v David Ltd***:

The following courses are open to me:

1 To determine, on affidavit evidence that has been filed, that an arbitration agreement was made between the parties, in which case the proceedings will be stayed in accordance with s 9 of the AA 1996.
2 To stay the proceedings but on the basis that the arbitrator will decide the question of whether or not there is an arbitration agreement since s 30 of the AA 1996 provides: '(1) unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction, that is, as to (a) whether there is a valid arbitration agreement . . . (c) what matters have been submitted to arbitration in accordance with the arbitration agreement. (2) Any such ruling may be challenged by any available arbitral process of appeal or review.' This sub-section refers to s 67 of the Act about challenging the award.
3 Not to decide the question immediately but to order an issue to be tried. Under the old procedure rules, RSC Ord 73 r 6(2) provided, 'in a question whether an arbitration

166 [2006] 2 Lloyd's Rep 389, per Langley J.

167 This question had been dealt with, *obiter*, by Clarke J (as he then was) in *The Halki* in which he commented that, even if the defendant admitted that the sum was due but then refused to pay, there could be an argument that the claimant would be entitled to an award.

168 [2000] 1 Lloyd's Rep 522 (CA).

169 [1999] BLR 194.

170 Although his decision was later reversed by the Court of Appeal, on the point that the parties had failed to make it clear to the judge that he should decide the question on affidavit evidence alone, it was understood that his approach was not disapproved of.

agreement has been concluded or whether the dispute which is the subject matter of the proceedings falls within the terms of such agreement, the court may determine that question or give directions for its determination, in which case it may order the proceedings to be stayed pending the determination of that question'.

4 To decide that there is no arbitration agreement and dismiss the application to stay.

The judge held that the power of the arbitrator under s 30 is not mandatory. The Act does not require a party who maintains that there is no arbitration agreement to have that question decided by the arbitral tribunal. The existence of the power does not mean that the court must always refer a dispute, which concerns whether or not an arbitration agreement exists, to the tribunal whose competence to do so is itself disputed. The judge then referred to another decision (*Azon Shipping Co. v Baltic Shipping Co.*),[171] which supported the approach that the court ought to decide questions relating to the existence or the terms of the arbitration agreement, for there may, otherwise, be a real danger that there will be two hearings: the first, before the arbitrator under s 30 of the Act, and the second before the court on a challenge under s 67 of the AA 1996.

In the ***Al-Naimi v Islamic Press*** case, Waller LJ entirely supported the above approach and added:

> If the court decides that it is the court which should determine whether the matters, the subject of the action, are the subject of an arbitration clause, unless the parties were agreed that the matter should be resolved on affidavit, then, if there is a triable issue, directions should be given for trying that issue. . . . It is right to point out that under the CPR the court has a wider discretion to rule what evidence it needs to decide any particular point . . . The only other comment I would like to make, so far as the above approach is concerned, is that it must not be overlooked that the court has an inherent power to stay proceedings. I would in fact accept that on a proper construction of s 9 it can be said with force that a court should be satisfied (a) that there is an arbitration clause and (b) that the subject of the action is within that clause, before the court can grant a stay under that section. But a stay under the inherent jurisdiction may in fact be sensible in a situation where the court cannot be sure of those matters but can see that good sense and litigation management make it desirable for an arbitrator to consider the whole matter first.[172]

The English courts have taken a firm stance on the issues of who, the arbitrator or the court, is to determine the validity or the scope of an arbitration clause in a case before them. The cases confirm that the court is more likely to determine either the validity or the scope of an arbitration agreement to save time and costs, thus removing from the arbitrators the power to determine their own jurisdiction.[173]

171 [1999] 1 Lloyd's Rep 68, per Rix, J: that there was an interest in encouraging parties to put their arguments on jurisdiction before the arbitrator himself under s 30; in many cases where there was simply an issue as to the width of an arbitration clause and no issue as to whether a party was bound to the relevant contract in the first place, the arbitrator's view might be accepted; where, however, there were substantial issues of fact as to whether a party had made the relevant agreement in the first place, then, even if there had already been a full hearing before the arbitrator, the court, upon a challenge under s 67, should not be placed in a worse position than the arbitrator, for the purpose of determining the challenge.

172 Waller LJ in *Al-Naimi v Islamic Press* [2000] 1 Lloyd's Rep 522 (CA), p 525.

173 See further decisions in which a stay was refused: *Anglia Oils Ltd v Owners of the Marine Champion* [2002] EWHC 2407; *T & N Ltd v Royal & Sun Alliance plc* [2002] EWHC 2420; *El Nasharty v J Sainsbury plc* [2003] EWHC 2195 (concerning the authority of an agent to enter into a contract).

The landmark decision of the House of Lords in ***Fiona Trust v Privalov***[174] resolved, in 2007, the long-standing conflict between decisions of the lower courts that an arbitration agreement in which the clause provides that 'any dispute arising under' or 'arising out of' the agreement shall be referred to arbitration is not wide enough to cover any dispute in connection with the contract.[175]

The charters in Shelltime 4 form contained a jurisdiction clause in relation to 'any dispute arising under this charter', and an arbitration clause which provided that any party could elect to have any such dispute referred to arbitration. P had argued successfully before the Court of Appeal that the issue of whether F was entitled to rescind should be determined by arbitration rather than by a court. F maintained that it was entitled to bring court proceedings because (1) the question of whether the charters were procured through bribery was not a dispute arising under the charters, and so the arbitration clause did not apply; (2) if a contract was invalid through having been procured by fraud, the jurisdiction clause contained in it was not binding.

Lord Hoffmann (with whom the other Lords agreed) held that:

1 It was time to draw a line under the authorities on the distinction between 'disputes arising under' and 'disputes arising out of' an agreement. A fresh start in relation to the construction of arbitration agreements was justified by the adoption of the principle of separability in the AA 1996 s 7. The construction of an arbitration clause had to start from the assumption that the parties, as rational businessmen, were likely to have intended any dispute arising out of the relationship into which they had entered, or purported to have entered, to be decided by the same tribunal. The clause had to be construed in accordance with that presumption unless the language made it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction. The language of the arbitration clause in the charters contained nothing to exclude disputes about the validity of the contract, whether on the grounds that it had been procured by fraud, bribery, misrepresentation or anything else. Accordingly, the clause applied to F and P's dispute.
2 The principle of separability contained in s 7 of the Act meant that the invalidity or rescission of the main contract did not necessarily entail the invalidity or rescission of the arbitration agreement. The arbitration agreement had to be treated as a distinct agreement and could be void or voidable only on grounds which related directly to it. F's allegation was that the main agreement had been entered into as a result of bribery, but that did not show that it had been bribed

174 [2008] 1 Lloyd's Rep 254; the main charter party on Shelltime 4 form was rescinded by the owners of the ship who claimed that it had been entered by bribery. The charterers, who commenced arbitration asked the arbitrators to determine the effectiveness of the owners' rescission. The owners applied to the court under s 72 of the AA 1996 to restrain the arbitration proceedings on the basis that there was no valid arbitration since the charters and, therefore, as alleged, the arbitration agreement had been rescinded for bribery.

175 E.g. see *Heyman v Darwin Ltd* (1942) 72 Ll L Rep 65; *Overseas Union Insurance Ltd v AA Mutual International Insurance Co. Ltd* [1988] 2 Lloyd's Rep 63; *Fillite (Runcorn) Ltd v Aqua-Lift* (1989) 45 BLR 27; cf. *The Evje* [1975] AC 797 (holding that there was no difference between the two phrases).

to enter into the arbitration agreement. Section 7 of the Act meant that the two agreements had to be treated as having been separately concluded, and the arbitration agreement could only be invalidated on a ground which related directly to it and was not merely a consequence of the invalidity of the main agreement.

Applying this principle in ***Deutsche Bank AG v Tongkah Harbour Public Co. Ltd***,[176] Blair J held that there was a general presumption that the parties intended all of their disputes to be resolved in a single forum. It was also common ground that, if an arbitration clause conferred upon one party the choice as to whether or not to refer a dispute to arbitration, exercise of that choice created a binding obligation to arbitrate, and the judicial proceedings could be stayed.[177] The question was what matters had been referred to arbitration. The judge held that an action against a company should be stayed under the AA 1996 s 9 where the same matter had been referred to arbitration, but an action against the company's parent on a guarantee was not stayed, as there was no arbitration agreement, and the claimant bank was entitled to enforce the guarantee, if it could make good its claim, regardless of the claim against the principal debtor.

Important questions arise with regard to the parties of the arbitration agreement when there is incorporation of an arbitration clause from one contract, for example a charter party, to another contract, for example a bill of lading; it is trite law that, for the arbitration to be binding, there must be specific incorporation of the clause existing in another contract by express reference to it in the subsequent contract. Sometimes there may not be an issue of incorporation but simply of construction, when, for example, a guarantor endorses a contract expressly: it was held in ***Stellar Shipping Co. LLC v Hudson Shipping Lines***,[178] approving the arbitrators' award, that, subject to questions of authority, a company which had endorsed a contract of affreightment as guarantor had thereby agreed to the arbitration of disputes arising out of the guarantee in accordance with the arbitration clause in the contract of affreightment. Hamblen J further held that:[179] That was both the natural and the commercially sensible construction of S's endorsement as guarantor of the contract of affreightment and the arbitration clause. It was commercially sensible because the parties were entering into a tripartite relationship enshrined in a single contractual document and would reasonably be expected to intend that all disputes arising out of that relationship would be dealt with in a like manner.[180] The instant case was not one of incorporation by reference, and it would be wrong to take a restrictive approach.[181] Nor was the case one of implication: S's endorsement of the contract of affreightment involved an express agreement to arbitrate.

Whether or not a dispute that arose under a settlement agreement of all claims which had been the subject of arbitration comes within the scope of the arbitration

176 [2011] EWHC 2251 (QB).
177 See *NB Three Shipping Ltd v Harebell Shipping Ltd* [2005] 1 Lloyd's Rep 509.
178 [2010] EWHC 2985 (Comm).
179 Ibid, at paras 53–55, 59–63, 65.
180 *Fiona Trust & Holding Corp. v Privalov* [2007] UKHL 40, [2007] Bus LR 1719 followed.
181 *Habas Sinai Ve Tibbi Gazlar Isthisal Endustri AS v Sometal SAL* [2010] EWHC 29 (Comm), [2010] Bus LR 880 considered.

agreement under the main contract has been a matter of contention. If the settlement agreement provides that, 'in full and final settlement of all our claims under the above contract without prejudice to our outstanding obligations', it was held to be a discrete contract and, therefore, not subject to the arbitration clause of the earlier contract.[182] But if the settlement provides that, 'this adjustment of the total contract price shall be in full and final settlement', it has been held to be a mere variation of the original agreement, so any matter or dispute under the variation would be covered by the original adjudication provision of the contract.[183] Similarly, side agreements modifying the main contract would be subject to the same adjudication provision of the main contract, because the side agreement was not intended to be a full and final settlement of all disputes under that contract.[184]

6.2.6 Legal proceedings brought 'in respect of a matter'

Section 9(1) provides that:

> a party to an arbitration agreement against whom legal proceedings are brought in respect of a matter, which under the agreement is to be referred to arbitration, may . . . apply to the court in which the proceedings have been brought to stay the proceedings . . .

The meaning of the words 'in respect of' in s 9(1) was construed, for the first time, in ***Lombard North Central plc v Gatx Corp***.[185] Smith J held that the question depends upon the nature of the claim(s) made in the legal proceedings.

However, the judge held, the formulation of the claim form and any pleadings should not be the only guide for the court, because this would allow a claimant to circumvent the arbitration agreement by formulating proceedings in terms that avoid reference to a referred matter. It was not a precondition to a stay application that all the matters in dispute be referred matters, nor was it necessary that the proceedings (in order to be 'in respect of' a referred matter) were mainly or principally to resolve a dispute about a referred matter.[186] The judge further held that, if he was wrong that the proceedings in this case met the threshold requirements of s 9(1), then he would conclude that the proceedings should be stayed under the court's inherent jurisdiction in order to uphold the parties' agreement that the jurisdiction of an arbitral tribunal should be decided only by the tribunal. The stay was dependent on a reference being made. The court might achieve the same end, the judge said, by making an injunction to restrain the claimant from pursuing the proceedings in so far as this involves a breach of the agreement.

182 *Shepherd Construction Ltd v Mecright Ltd* [2000] BLR 489.

183 *McConnell Dowell Constructions Pty Ltd v National Grid Gas plc* [2007] BLR 92.

184 *L Brown & Sons Ltd v Crosby Homes (North West) Ltd* [2005] EWHC 3503 (TCC); cf. *Interserve Industrial Services Ltd v ZRE Katowice SA* [2012] EWHC 3205 (TCC).

185 [2012] EWHC 1067 (Comm); [2012] 1 Lloyd's Rep 662.

186 *Fulham Football Club (1987) Ltd v Richards* [2011] EWCA Civ 855, [2012] Ch 333 considered.

6.3 THE SCOPE OF S 11 OF THE AA 1996

Section 11 of the AA 1996 re-enacts s 26(1) of the CJJA 1982, in so far as an order for security to be provided and an order to stay the court proceedings in favour of the arbitration clause are concerned.

It has already been discussed[187] that, before the enactment of s 26, when a ship was arrested for the purpose of obtaining security in satisfaction of an arbitration award, the court had a *wide discretion* either to release the ship from arrest by setting aside the warrant of arrest, or to maintain the arrest until security was provided for the arbitration award, if the plaintiff showed that an arbitration award in his favour would be unlikely to be satisfied by the defendant.[188] If the discretion was exercised in favour of ordering security to be provided, the plaintiff would thereafter pursue the action *in rem*, to enforce the security.

Such a wide discretion was abolished by s 26 of the CJJA 1982, and, subsequently, similar provision was included (s 11) in the AA 1996. However, s 26 is, naturally, wider in scope than s 11, in that it empowers the court to make the same orders when the dispute should be submitted to another court, either in the UK or overseas. Both sections provide that, where Admiralty proceedings are stayed on the ground that the dispute in question should be submitted to arbitration, and property has been arrested, the court may: (a) order that the property, or security provided, be retained for the satisfaction of the award; or (b) order that the stay of the proceedings be conditional on the provision of equivalent security for the satisfaction of any such award. The maintenance of arrest is discretionary.[189]

The English court will not restrain a party to an English arbitration from arresting a vessel of the other party in another jurisdiction, where the sole purpose of the arrest is to provide security for the English arbitration.[190]

Section 26(2) of the CJJA 1982, which allows the court to attach any other conditions as it thinks fit when it makes the orders referred to in s 26(1) – such as the prompt commencement of the arbitration – has been omitted from s 11 of the AA 1996 for three reasons:

First, under the 1996 Act, it is for the arbitrators to enforce their directions and orders, and not for the court (other than when the court's assistance is sought under the AA 1996, s 44).

Second, given that the stay of judicial proceedings is mandatory in all cases under the AA 1996, it is difficult to see how any condition on the lifting of a stay could lawfully be imposed by the court. As the court has no right to refuse a stay, it cannot have any right to impose conditions on the grant of a stay, so that, on ordering the stay, the arrest must either be maintained or discharged.[191]

Third, its inclusion would have caused difficulties with regard to non-domestic arbitration to which the New York Convention applies, which prevents the grant of a stay being made subject to any conditions.

187 Chapter 5 (above).

188 *The Rena K* [1978] 1 Lloyd's Rep 545; *The Vasso* [1984] 1 Lloyd's Rep 235 (CA); *The Tuyuti* [1984] 2 Lloyd's Rep 51 (CA).

189 *The Bazias* [1993] 1 Lloyd's Rep 101.

190 *The Kallang* [2008] EWHC 2761 (Comm), in which the defendant was not simply seeking security but was using the arrest to frustrate the English arbitration and proceed in Senegal.

191 *Arbitration Law*, Vol 1, para 14.78 (Service Issue No 60, 1 January 2012).

As regards the power of the court under s 44 of AA 1996, which is relevant to this issue under s 11, an interesting decision of Mr Justice Walker deserves mentioning: ***Phaethon International Co. Sa v Ispat Industries limited***.[192]

The applicant disponent ship-owner (P) sought an order for steps to be taken to ensure the release of its vessel from arrest. P had chartered the vessel to the respondent (R) under a Gencon form charter-party. The charter-party contained a lien clause. The lien extended not merely to freight but expressly to cover damages for detention. The charter-party contained a London arbitration clause. Bills of lading had been issued which incorporated the charter-party terms, including the arbitration clause. Disputes arose as to delivery of the cargo in Mumbai. P obtained an urgent injunction from the English court prohibiting R from taking any steps to obtain discharge of the cargo. That prohibition would cease to apply if R provided security in an amount sufficient to secure P's claim in arbitration for damages for detention, interest and costs. Despite knowing of the English court order, R sought and obtained the arrest of the vessel in proceedings brought *in rem* in Mumbai.

The judge granted the application in a form of a mandatory injunction, having taken into account the following: (1) The court in Mumbai was misled, because no reference was made to the nature of the claim by P being for damages for detention, nor to the provisions both in the charter-party and the bills of lading requiring any dispute to be referred to arbitration in London. (2) There was jurisdiction to grant the order sought by P under the AA 1996 s 44(2)(e) and s 44(3). (3) The court would make the order sought as a matter of discretion. On the face of the documents, the provisions in the charter-party and bills of lading were perfectly clear. The lien on the cargo extended to damages for detention. Enforcement was to be by arbitration in London. Under the terms of the charter-party and bills, the conduct of R in arresting the vessel was unlawful. It had caused, on the face of it, serious harm to P, and it was right for the court to make the position absolutely clear.

Unlike this case, in non-exceptional circumstances, the court will not circumvent the power of the arbitrators to make orders under s 44, as for example orders for disclosure. In ***NB Three Shipping Ltd v Harebell Shipping Ltd***,[193] Morrison held (at para 14):

> as to the claim for section 44 relief, I am bound to say that I can see no grounds for making the orders sought. Disclosure of documents is a matter for the Arbitrators; they have the necessary powers; if early disclosure is thought to be desirable then an application can be made to them for that relief. A mandatory order at this time was not appropriate.

192 [2010] EWHC 34466 (Comm).
193 [2005] 1 Lloyd's Rep 509.

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CHAPTER 7

THE EU JURISDICTION REGIME AND ITS REVIEW

1 INTRODUCTION

Under English procedural law (see Chapter 5), there are two broad types of jurisdiction bases by which the jurisdiction of the court can be invoked, or seised, on the merits. The one depends merely on service of the proceedings on the defendant, without requiring substantive connecting factors between the claim and the jurisdiction, subject to certain exceptions (see Chapters 5–6). The other is conferred by various International Conventions, known as the 'convention jurisdiction' basis, and depends on jurisdiction rules provided by the particular Convention that applies in a particular case.

It is shown in this chapter when the English court may be restrained from determining the merits of a case and, in the event of conflict between jurisdictions, how such conflict is resolved by Convention rules that are applicable to maritime disputes.

This chapter is about the European Union (EU) jurisdiction regime, commencing with the Brussels Convention 1968 on Civil Jurisdiction, Recognition and Enforcement of Judgments in Civil and Commercial Matters ('the Convention'), its counterpart (the Lugano Convention), the replacement of the Brussels Convention by the Brussels I Regulation[1] ('the Regulation'), and subsequent developments that led to amendments of the Regulation and the adoption of the EU Recast Regulation

1 (EC) 44/2001 – OJ L 12/1 [2001].

2012 ('the Recast Regulation'). This Regulation came into force on 10 January 2012 (20 days after its publication in the Official Journal)[2] and it shall apply from 10 January 2015, with the exception of Arts 75 and 76, which shall apply from 10 January 2014.

In the light of this gap between the time of writing and 2015, this chapter examines the changes brought by the Recast Regulation, which is compared with the Regulation, and refers to case law that, which is not likely to be affected by the reform.

2 BACKGROUND TO THE EU JURISDICTION REGIME

2.1 INCEPTION

The EU has set itself the objective of facilitating access to justice and promoting judicial cooperation between Member States in civil and commercial matters, which is considered necessary for the proper functioning of the internal market. The reason behind this objective has been that differences between national rules governing jurisdiction and recognition of judgments hamper the sound operation of the internal markets. Therefore, it was thought that provisions aiming to unify the rules of conflict of jurisdiction are essential.

The Convention, as amended by the Accession Conventions in 1978[3] and in 1989 (the San Sebastian Convention),[4] was enacted into English law by the Civil Jurisdiction and Judgments Act (CJJA) 1982.[5] It came into force in the UK on 1 January 1987. In 2001, the Convention was superseded by the Regulation,[6] except in the case of Denmark, which agreed to be bound by the Regulation in 2007, whereupon an amended version was agreed by the Union on 27 November 2008.[7]

A parallel Convention (known as the 'Lugano Convention') on the same matters was entered into by the Members of the European Community (EC), as it then was – now it is the Union (EU) – and the then six members of the European Free Trade Association (EFTA),[8] dated 1988. It was enacted by, and came into force in, the UK

2 No:1215/2012 – OJ L 351/1, 20.12.2012. This Regulation shall be binding in its entirety and be directly applicable in the Member States in accordance with the Treaties.

3 This Accession Convention brought the UK into the Brussels Convention when the UK, Ireland and Denmark joined the EC.

4 The San Sebastian Convention incorporated Spain and Portugal into the scheme of civil jurisdiction and judgments when they joined the EC. When Greece joined the EC, this was done by the Greek Accession Convention, which was signed on 25 October 1982, but made no other changes to the Brussels Convention.

5 The contracting States to the Brussels Convention in 1982 were the then members of the European Economic Community (EEC) (now the European Union). These were Belgium, Denmark, France, (West) Germany, Greece, Republic of Ireland, Italy, Luxembourg, Netherlands and the UK.

6 The Civil Jurisdiction and Judgments Order 2001 amended the CJJA 1982 accordingly, where it was made necessary in view of the changes brought about by the Regulation (EC 44/2001).

7 OJEU – L147/6 – 10.06.2009.

8 The founding members of EFTA were Austria, Denmark, Norway, Portugal, Sweden, Switzerland and the United Kingdom. During the 1960s, these countries were often referred to as the 'Outer Seven', as opposed to the 'Inner Six' of the then-EEC. Later on, the EFTA members were Norway, Sweden, Finland, Iceland, Austria and Switzerland. In 1996, Austria, Finland and Sweden joined the European Community and became parties to the Brussels Convention (1997 OJ C 15/1). The Lugano Convention applied to other EFTA states, Norway, Iceland, Liechtenstein, Poland (became applicable on 1 Febraury 2000) and Switzerland.

on 1 May 1992 (the CJJA 1991). The Lugano Convention was substantially identical to the post-San Sebastian version of the Brussels Convention and was revised in 2007.[9]

2.2 AIMS AND OBJECTIVES

2.2.1 Reciprocal recognition and enforcement of judgments

The primary purpose of the EU jurisdiction regime has been to give effect to Art 220 of the Treaty establishing the EEC and ensure the simplification of formalities governing the reciprocal recognition and enforcement of judgments within the contracting States (now referred to as Member States). To this end, it was necessary to provide a scheme for determining which courts were to have jurisdiction over what matters, and prevent occasions in which conflicting judgments might be issued if two courts of different Member States became involved in the same matter.

2.2.2 Protection of defendants domiciled in EU Member States

The most important aim has been to protect defendants, who have their domicile or seat in an EU Member State, or are deemed to be domiciled there, from being sued in the courts of States other than where their domicile or seat is established. The EU jurisdiction regime, however, recognises the importance of respecting the freedom of the parties to choose their jurisdiction. With regard to insured parties, consumers and employees, the objective is to protect the weaker party, and so the jurisdiction of the court as provided by the rules cannot be ousted.

If the above connecting factors do not apply, national rules on jurisdiction will apply pursuant to Art 6 of the Recast Regulation (previously Art 4) (see below).

2.2.3 Certainty and mutual trust

As it will be seen, the European Court of Justice (ECJ) (now renamed the Court of Justice of the European Union) (CJEU) made it clear in its decisions (which will be seen later) that the rules of the Regulation aim for certainty, and therefore there is an obligation of mutual trust between Member States in each other's legal systems. Common rules on jurisdiction apply when the defendant is domiciled in one of the Member States. There is, inevitably, rigidity in the application of the rules. This is shown by the strict application of the *lis pendens* rule in *Gasset v Missat*[10] and by forbidding the application of the *forum non-conveniens* principle (*Jackson v Owusu*[11]) (both discussed under paras 4 and 5, below).

9 Signed at Lugano on 30 October 2007 by the Community, Denmark, Iceland, Norway and Switzerland ('the 2007 Lugano Convention'). In 2007, Denmark agreed to be bound by the Regulation, and the amended version was signed in 2008, published in OJEU – L147/6 – 10.06.2009.

10 C-116/02 [2004] 1 Lloyd's Rep 222.

11 C-281/02 [2005] ECR I-1383.

2.3 THE BRUSSELS I REGULATION AND THE NEED FOR ITS REVIEW

The UK, by virtue of the Civil Jurisdiction and Judgments Order 2001,[12] adopted the Regulation, which replaced the Brussels Convention and came into force on 1 March 2002.

2.3.1 Objectives of the Regulation

The replacement of the Convention by the Regulation was considered essential for the following reasons:

(a) to make the rules of jurisdiction highly predictable;
(b) to clarify the domicile of a legal person, so as to make the common rules more transparent;
(c) to preserve the autonomy of the parties to a contract, save for insurance, consumer and employment contracts, in which the parties' autonomy is limited;
(d) to minimise the possibility of concurrent proceedings and to ensure that irreconcilable judgments will not be given in two Member States by providing a clear and effective mechanism for *lis pendens* cases and related actions;
(e) to extend the protection given to consumers; and
(f) to ensure effective and swift enforcement procedures.

2.3.2 Reasons for the review of the Regulation

The application of the Regulation was to be revised, pursuant to para 28 of the preamble, no later than five years after its entry into force. The Commission's proposal for reform of the Regulation,[13] was the result of detailed studies[14] on the application of the Brussels I Regulation.[15]

It was concluded that, although the Regulation was, in overall terms, considered to have been a success, a number of deficiencies were revealed that would need rectification.

The most important reasons for the reform have been:

(a) abolition of exequatur in order to simplify the procedure of recognition and enforceability of judgments between Member States;
(b) enhancement of effectiveness of choice of court agreements by providing an exception to the *lis pendens* rule;
(c) clarification of the arbitration exception;
(d) regulation of identical and related proceedings brought in a court of a 'Third State' and a Member State.

These are dealt with in this chapter under the relevant headings.

12 (EC) 44/2001 – SI 2001/3929.
13 COM (2010) 748 final, 14.12.2010.
14 The Heidelberg Report 2007, the Nuyts Report 2007, and the Green Paper, 21 April 2009.
15 See a review of the issues in the collection of papers titled: 'The Brussels I Review Proposal Uncovered', Eva Lein editor, published by the British Institute of International and Comparative law (BIICL) 2012.

As a number of amendments were to be made to the Regulation, it was decided, in the interests of clarity, that it would be a 'Recast' Regulation.

In the following paragraphs, the main provisions of the 'Recast Regulation' are set out and compared with the provisions of the Regulation where changes have been made. The law as developed under the Convention[16] and the Regulation is referred to and comments are offered whether or not it is still good law. Issues that arose under the Regulation are also explained for the purpose of giving the background against which it was felt necessary to amend the Regulation.

3 THE REGULATION AND THE RECAST COMPARED

3.1 APPLICATION

In the same way as the Conventions (above) and the Brussels I Regulation, the Recast applies to civil and commercial matters, whatever the nature of the court or tribunal. It shall not extend to revenue, customs or administrative matters or to the liability of the State for acts and omissions in the exercise of State authority (Art 1(1)).

The Recast Regulation has clarified Article 1(2), which provides that the Regulation shall not apply to:

(a) the status or legal capacity of natural persons, right in property rising out of a matrimonial relationship or out of a relationship deemed by the law applicable to such relationship to have comparable effects to marriage;
(b) bankruptcy and analogous proceedings;
(c) social security;
(d) arbitration;[17]
(e) maintenance obligations arising from a family relationship etc.;
(f) wills and succession, including maintenance obligations arising by reason of death.

'Civil and commercial matters' is not to be interpreted by national law but by Community law.[18] A distinction has been drawn between private and public law matters; for example, acts or omissions of a public authority, exercising its public powers, is not within the subject matter of the Convention.[19] This has been expressly included in Art 1(1) of the Recast Regulation.

16 The 1968 Brussels Convention will continue to apply to the territories of the Member States which fall within the territorial scope of that Convention and which are excluded from the Recast Regulation pursuant to Art 355 of the TFEU – see Recital 9 of the Recast Regulation.

17 It is pleasing to see in 1(d) that, although the Commission had originally proposed a limited exception of arbitration from the Regulation, the adopted Recast Regulation maintains the arbitration exception without limitations, and in Recital 12 (see Annex to this chapter) it is set out which court will determine the validity of the arbitration agreement.

18 *LTV GmbH & Compania KG v Eurocontrol* [1977] 1 CMLR 88.

19 *Netherlands State v Ruffer* [1980] ECR 3807: The Dutch Government removed a wreck from the international waterway and tried to recover its cost from the German defendant in the Dutch court. The case reached the European Court on the issue whether or not the claim concerned a civil or commercial matter. The Court held that, as the removal of the wreck was carried out under the public powers of the Dutch Government, the claim did not arise in a civil or commercial matter, and therefore it was outside the scope of the Convention.

3.2 THE DOMICILE RULE

The basic and fundamental rule of the European jurisdiction regime is that the defendants are entitled to be sued in the courts of their domicile, whatever their nationality. It used to be Art 2, but, in the Recast Regulation, the domicile rule is provided in Art 4, under Ch II, Section 1, stating:

(a) Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.
(b) Persons who are not nationals of the Member State in which they are domiciled shall be governed by the rules of jurisdiction applicable to nationals of that Member State.

Recital 15 (see Annex of this chapter) reinforces the position that the rules of jurisdiction should be highly predictable and founded on the principle that jurisdiction is generally based on the defendant's domicile, except for a few well-defined situations in which the subject matter of the dispute or the autonomy of the parties warrant a different connecting factor.

The domicile of the claimant is not relevant, as was also the case previously.[20] The domicile of an individual is to be determined at the time the proceedings are issued by the law of the Member State whose court is seised of the matter[21] and Art 62(1). If a party is not domiciled in the Member State whose courts are seised of the matter, then, in order to determine whether the party is domiciled in another Member State, the court shall apply the law of that Member State (Art 62(2)).

Under Art 63 (1) of the Recast Regulation, a company or other legal person or association of natural or legal persons is domiciled at the place where it has its (a) statutory seat or (b) central administration[22] or (c) principal place of business. In order to determine the seat, the court shall apply its rules of private international law (Art 63(3)). For the purposes of Ireland, Cyprus and the UK, 'statutory seat' means the registered office or, where there is not such an office anywhere, the place of incorporation, or the place where the formation took place (63(2)).

3.3 WHEN NATIONAL RULES CAN BE APPLIED

Article 6 of the Recast (previously 4) provides:

(a) If the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall, subject to Arts 18(1) (consumers), 21(2) (employers),

20 *Overseas Union Insurance v New Hampshire Insurance Co.* [1991] ECR I–3317; *Universal General Insurance Co. v Groups Josi Reinsurance* [2000] ECR I-5925.

21 Per Lord Steyn in *Canada Trust Company v Stolzenberg (No 2)* [2002] 1 AC 1; the major aim of the Convention is to achieve predictability and certainty at all stages for all concerned.

22 The central administration of a company was where decisions were made and where the entrepreneurial management took place and was not simply where a company's board meetings and AGMs were held*: Vava v Anglo American South Africa Ltd* [2012] EWHC 1969 (QB).

24 (exclusive jurisdiction) and 25 (choice of court) be determined by the law of that Member State.

(b) As against such a defendant, any person domiciled in a Member State may, whatever his nationality, avail himself in that State of the rules of jurisdiction there in force, and in particular those of which the Member States are to notify the Commission pursuant to point (a) of Art 76(i), in the same way as nationals of that Member State.

The last three lines from the word 'force' are new, and Member States have to notify the Commission about their jurisdiction rules that are applicable.

Thus, if the defendant is domiciled outside the Regulation Member States, this Article permits the courts of Member States to exercise jurisdiction in accordance with their own national law (see also Recital 6 of the Recast). The effect of this, in terms of application of the *forum non-conveniens* doctrine as far as UK national law is concerned, will be seen later at para 7.

As the jurisdiction of a Member State in case of Art 6(1) (or Art 4(1) of the Regulation) is, however, derived from the Regulation, it may be exercised subject to other rules imposed by the Regulation, such as the *lis pendens* rule, explained by *Gasser v MISAT*,[23] which is considered at greater length later (para 4.2.5).

3.4 EXCEPTIONS TO THE DOMICILE RULE

Recital 16 of the Recast clarifies that, in addition to the defendant's domicile, there should be alternative grounds of jurisdiction based on a close connection between the court and the action, in order to facilitate the sound administration of justice.

Article 5 permits the overriding of the domicile rule only as provided by the rules set out in Sections 2–7 of Chapter II. These are the same as previously, save to the extent that the wording of the provisions has been refined and expanded for clarity purposes. It should be noted that Art 5(2) (previously Art 3(2), which had caused confusion regarding the inapplicability of certain national law rules), has been improved.

In particular, the exceptions to the domicile rule are set out in the following sections: Section 2 of the Recast Regulation deals with 'Special Jurisdiction' in matters of contract or tort (Art 7); multiple defendants, third-party actions and counter claims (Art 8); liability and limitation actions regarding maritime claims (Art 9).

Section 3 sets out jurisdictional rules regarding insurance claims (Arts 10–16); Section 4 is concerned with jurisdiction over consumer contracts (Arts 17–19); Section 5 deals with jurisdiction over individual contracts of employment (Arts 20–23).

Section 6 provides extensively for exclusive jurisdiction with regard to property and company matters (Art 24) (previously Art 22), and Section 7 is concerned with prorogation of jurisdiction (Art 25) by the parties' court choice agreements (previously Art 23), or by unconditional submission to the jurisdiction of the court in which a person is being sued (Art 26) (previously Art 24).

23 Case C-116/02 [2004] 1 Lloyd's Rep 222.

3.5 MANDATORY DEROGATION FROM THE DOMICILE RULE

Mandatory exceptions to the general rule of domicile are provided by:

(a) Article 24 (previously 22), which relates to the exclusive jurisdiction of the court of a Member State, provides: in matters of dispute concerning immovable property, the court of the Member State where the property is situated shall have jurisdiction (except with regard to some tenancies, where the court of the domicile of the defendant will also have jurisdiction, provided that the tenant is a natural person and both the tenant and the landlord are domiciled in the same Member State).
(b) Art 24(2),[24] stating that in proceedings which have as their object the validity of the constitution, the nullity or the dissolution of companies or other legal persons or associations of natural or legal persons, or of the validity of the decisions of their organs, the courts of the Member State in which the company, legal person or association has its seat, shall have jurisdiction. In order to determine the seat, the court shall apply its rules of private international law.
(c) Article 26 (previously 24) of the Regulation provides that a court of a Member State in which the defendant enters an appearance, which may be other than the court of the Member State where the defendant is domiciled, shall have jurisdiction. This Article, however, will not apply:
    - where appearance was entered solely to contest jurisdiction, or
    - where another court has exclusive jurisdiction under Art 24.

3.6 OPTIONAL DEROGATION FROM THE DOMICILE RULE

An option is given to the claimant in certain circumstances to sue in a court of a Member State other than that of the defendant's domicile.

The optional derogation from the domicile rule can be found in Section 2: Special Jurisdiction.

Article 7 (previously 5, which has been changed) provides:

1 (a) In matters relating to a contract, in the courts of the place of performance of the obligation in question;
(b) for the purpose of this provision, unless otherwise agreed, the place of performance of the obligation in question shall be:
    - in the case of sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered;
    - in the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided;

(c) if point (b) does not apply, then point (a) applies;
2 in matters relating to tort, or delict or quasi delict, in the court of the place where the harmful event occurred or may occur;

24 See *Ferrexpo AG v Gilson Investments Ltd* [2012] EWHC 721 (Comm); [2012] 1 Lloyd's Rep 588.

3 as regards a civil claim for damages or restitution that is based on an act giving rise to criminal proceedings, in the court seised of those proceedings, to the extent that it has jurisdiction under its own law;
4 as regards claims for cultural property rights, in the courts of the place where the cultural property is situated;
5 as regards a dispute arising out of the operation of a branch, agency or other establishment, in the courts of the place where the branch, agency or establishment is situated;
6 as regards disputes relating to trusts, in the courts of the Member State in which the trust is domiciled;[25]
7 as regards disputes concerning the payment of remuneration claimed in respect of the salvage of cargo or freight, in the court under the authority of which the cargo or freight in question:
   - has been arrested to secure such payment; or
   - could have been arrested, but bail or other security has been given, provided that the defendant has an interest in the cargo or freight or had such an interest at the time of the salvage.

Article 8 (previously 6):

1 A person domiciled in a Member State may also be sued: where he is one of a number of defendants, in the courts of the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings ('*The Kalfelis* test').[26]
2 As a third party in an action of a warranty or guarantee or in any other third-party proceedings, in the court seised of the original proceedings, unless these were instituted solely with the object of removing him from the jurisdiction of the court which would be competent in his case.
3 On a counter-claim arising from the same contract or facts on which the original claim was based, in the court in which the original claim is pending.

Article 9 (previously 7): In limitation of liability actions, where by virtue of this Regulation a court of a Member State has jurisdiction in actions relating to liability from the use or operation of a ship, that court, or any other court substituted for this purpose by the internal law of that Member State, shall also have jurisdiction over claims for limitation of such liability. (see para 7.5, below).

25 However, the question that arises is 'where is the trust domiciled?' In the bank's head office or in the branch were it was established? In *Mahme Trust v Lloyds TSB Bank plc* [2004] 2 Lloyd's Rep 637. The claimant was entitled to sue the bank in England (where the head office was) under Art 2 of the Lugano Convention. The court had no jurisdiction to grant a stay of the English proceedings in favour of Switzerland (where the branch was located in which the trust had been established). This decision may have to be reviewed.

26 *Kalfelis v Bankhaus Schroder Munchneyer Hengst & Co.* [1988] ECR 5565, at 5584; *Marsi v Consolidated Group SAL (Holding Company) and Others* [2006] 1 Lloyd's Rep 391; *Casio v Sayo* [2001] ILPR 43: 'a broad common sense approach is to be adopted, an over-sophisticated analysis is to be avoided'; *FKI Engineering Ltd v Dewind Holdings Ltd* [2007] EWHC 72 (Comm); *Réunion Européenne SA v Spliethoff's Bevarachtingskantoor BV* [1998] ECR I-6511: claims in contract and in tort are not sufficiently connected to fall within Art 6(1); cf. *Andrew Weir Shipping Ltd v Wartsila UK Ltd and Another* [2004] 2 Lloyd's Rep 377, distinguished from the former case.

The Regulation has specific provisions of jurisdiction with regard to consumer, insurance and employment contracts.

3.7 INTERPRETATION OF CONCEPTS

It is for the CJEU to interpret the following concepts, which have an autonomous meaning:

(a) civil and commercial matters under Art 1;[27]
(b) *lis pendens* and related actions;[28]
(c) the terms 'same cause of action' and 'between the same parties' have an independent meaning;[29]
(d) cause of action;[30]
(e) exclusive jurisdiction;[31]
(f) place of harmful event;[32]
(g) sufficient time for defence; and
(h) the date on which a court is seised, dealt with by Art 32 (previously 30).
(i) Other concepts are left to be determined by national laws; for example, the place of performance of the obligation,[33] now under Art 7(1).

3.8 CONFERMENT TO SPECIALISED CONVENTIONS

Article 71 of the Regulation, which remains the same number under the Recast (previously Art 57 of the Convention), confirms that this Regulation shall not affect any Conventions to which the Member States are parties and which, in relation to particular matters, govern jurisdiction or the recognition of enforcement of judgments.

BAT v Excel Europe [2012] 2 Lloyd's Rep 1, per Cook J: Article 31.1(a) of CMR Convention did not create any conflict with the Regulation. BAT had a choice. It could either bring proceedings under Art 31.1 against Excel in the jurisdiction designated by agreement between them, namely England, or it could bring proceedings under Art 31.1(b) in the country where the goods were taken over by the carrier or of the place designated for delivery. In such jurisdictions, in relation to each consignment, all of the relevant carriers alleged to be liable under Art 36 could have been sued. The jurisdiction provisions in the CMR did not in any way conflict with the premises upon which the Regulation was based, and there was therefore no need to look to Art 6.1 of the Regulation. There was no need to create a 'necessary or proper parties' rule by reference to that article in order to allow all carriers to be sued in the same jurisdiction, when the claimant was already given that option by the terms of the CMR itself.

27 *LTV GmbH & Compania KG v Eurocontrol* [1977] 1 CMLR 88.

28 *Gubisch v Giulio Palumbo* [1989] ECC 420; *The Maciej Rataj* [1995] 1 Lloyd's Rep 302 (CJEU).

29 See *Gubisch v Giulio Palumbo* [1989] ECC 420; Case 144/86) [1987] ECR 4861; *Drouot v Assurances SA v Consolidated Metallurgical Industries*, Case C-351/96 [1998] ECR I-3075.

30 *Maersk Olie v Firma*, Case C-39/02 [2005] 1 Lloyd's Rep 210; *JP Morgan v Primacom* [2005] 2 Lloyd's Rep 665, cause of action in Art 27 is an independent autonomous term.

31 *JP Morgan Chase Bank NA v Berliner Verkehrsbetriebe (BVG)* [2010] EWCA Civ 390: The correct approach, set out in *Grupo Torras*, required the court to undertake an exercise in 'overall classification' and make an 'overall judgment' as to whether the proceedings were 'principally concerned' with one of the matters set out in Art 22(2).

32 *Kronhofer v Maier* [2005] 1 Lloyd's Rep 284.

33 Where there are many obligations to be performed, the place of performance for the purpose of Art 5(1) is the place of the primary obligation: *Union Transport v Continental Lines* [1992] 1 All ER 161 (HL).

For example, if any of these Conventions applies and the jurisdiction of the Admiralty Court is seised by virtue of its rules, the Admiralty Court shall have jurisdiction. If, however, another court of a Member State had already been seised, the rules of *lis pendens* as prescribed by Art 29 (previously 27) and Art 30 (previously 28) of the Regulation will apply.[34] Detailed discussion of how these rules work is set out later under para 6, below.

4 MULTIPLE PROCEEDINGS WITHIN MEMBER STATES

4.1 '*LIS ALIBI PENDENS*'

This concept is concerned with pending proceedings in more than one jurisdiction, which creates conflict of jurisdictions with the risk of irreconcilable judgments. Multiple proceedings are an unavoidable result of the fact that there is more than one jurisdiction basis provided by Conventions, or by other jurisdictional criteria.

English law has developed the doctrine of *forum non-conveniens* to resolve conflicts (see Chapter 6, above), and this is applied by the common law jurisdictions. Thus, the treatment of *lis alibi pendens* under English law is not uniform, but it depends on the procedural topics in which the issue of conflict of jurisdiction arises. For example, the law on discretionary stays is different from the law on anti-suit injunctions.

However, in both a stay and an anti-suit injunction, in matters not concerning the Regulation rules, if the foreign proceedings have reached an advanced stage by the time an application is made, the English court may consider it appropriate to let the foreign proceedings determine the merits of the case. In the absence of an agreement between contracting parties to submit to the jurisdiction of a certain court or tribunal, an overall consideration under English law in applications of *lis pendens* is the interests of justice.

In the context of the Regulation, there is a uniform treatment of *lis pendens* by rigid rules in accordance with concepts developed by the civil law system.

4.2 IDENTICAL ACTIONS AS BETWEEN MEMBER STATES

When more than one jurisdiction basis is involved, the courts of two Member States may be seised of jurisdiction in the same matter at different times. The Recast Regulation governs *lis pendens* by Arts 29–32[35] under Section 9. *Lis pendens* between a Member State and a third State is dealt with for the first time by the Recast (see para 5, below).

Recital 21 of the Recast emphasises the purpose of *lis pendens*, which is to minimise the possibility of concurrent proceedings and to ensure that irreconcilable judgments will not be given in different Member States. It is intended to provide a clear and

34 See, later, *Gasser v MISAT*, CJEU (Case C-116/02) [2004] 1 Lloyd's Rep 222.

35 Previously under the Regulation, the equivalent Articles were 27–30 and under the Convention: Arts 21 and 22.

effective mechanism for resolving cases of *lis pendens* and related actions for the harmonious administration of justice.

Let us hope that this aim is achieved with the application of the Recast Regulation, as it has not been achieved so far.

Article 29 (previously 27) (*lis pendens*) provides:

(1) Without prejudice to Art 31(2) (relating to *lis pendens* in case of an exclusive jurisdiction agreement) where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.
(2) In cases referred to in paragraph 1, upon request by a court seised of the dispute, any other court seised shall without delay inform the former court of the date when it was seised in accordance with Art 32 (New).
(3) Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court.

4.2.1 'Same cause of action'

The general rule under the *lis pendens* provision has been that the proceedings brought in the courts of two Member States must involve *the same cause of action and the same parties*. Given the variety of legal systems within the EU, forms of legal action do vary, but, as the CJEU held in ***Gubisch v Guilio Palumbo***,[36] the proceedings in the two jurisdictions do not have to be literally identical. The question is whether the two actions are concerned with the same factual and legal matrix, which would lead to irreconcilable judgments. As will be seen in ***The Tatry***[37] (below), the CJEU clarified that the proceedings must have the same object and the same cause, meaning that they must have the same legal purpose (for example, the intended legal outcome, or the same end in view) and the same juridical basis, in the sense of facts and rules of law relied upon. In both of these cases, the 'same end in view' was liability.

The reason why, in such circumstances, the second action must be stayed was given in *Gubisch* and *The Tatry*; in practical terms, the result of refusing a stay would be a risk that a judgment given by the one court would not be recognised by the other, and vice versa.

By contrast, in ***Maersk Olie & Gas AS***,[38] where one action was about limitation of liability and the other about damages for loss, these actions did not have the same cause of action, because both the rule of law underlying each action and the object were different. The CJEU went on to explain that the 'legal rule' or 'rule of law' means the judicial basis upon which arguments as to facts will take place, so that, in investigating 'cause', the court looks to the basic facts (in dispute or not) and to rights and obligations of the parties to see if there is coincidence between them in the actions in the different jurisdictions. With regard to the 'object', the search is for 'the end the action has in view'.

36 Case 144/86 [1987] ECR 4861 (a case to enforce a contractual provision had the same cause of action as proceedings to annul the contract).

37 [1994] ECR I-5439, [1999] 2 WLR 181, at para 41; the CJEU confirmed what the Court of Appeal had held about the proceedings involving the same cause of action, despite the fact that the Rotterdam proceedings were only concerned with an application for a declaration of no liability.

38 Case C-39/02 [2004] ECR I-9657, [2005] 1 Lloyd's Rep 210; also see *Syndicae 980 v SINCO SA* [2008] IL Pr 49, not the same cause of action if the one is based on contract and the other on tort.

The decision of Cooke J in ***JP Morgan v Primacom***[39] is very interesting and worthy of note:

A loan facility agreement was subject to an English exclusive jurisdiction clause. There was a failure to pay interest under the agreement. Owing to concerns that the defendant was intending to dispose of its subsidiaries and dissipate its assets, the claimant issued English proceedings seeking: (a) an injunction to prevent such disposal without the prior consent of the claimant, as provided by the facility agreement; (b) specific performance of the agreement provisions obliging the defendant to give access to information and documents; (c) a declaration that the relevant provisions of the agreement as to interest were valid. The defendants had already issued proceedings in Germany seeking a declaration that the provisions of the facility agreement as to interest were unconscionable, immoral and unenforceable as a matter of public law in Germany. They applied to the English court to stay the English proceedings, on the basis that the German court was first seised.

The questions for the court were whether Art 27 or Art 28 of the Regulation applied; an analysis of both the 'object' and ' the legal rule 'of the two actions was made by Cooke J, who held with regard to the 'Declaratory proceedings' that: The object of the German and the English actions was identical inasmuch as the essential issue raised between them was the enforceability of interest; the legal rule of each was the same, namely that the validity or not of the provisions for interest was subject to English law, save that issues of public policy under domestic German law would also be considered in the German proceedings. Accordingly, notwithstanding differences in approach to the question of interest, the proceedings did involve the same cause of action within the meaning of Art 27.

With regard to the 'freezing injunction', neither the object nor the legal rule was coinciding with the German proceedings in which the enforcement of interest was challenged. Different issues arose, and different facts were relevant. Accordingly, there was no basis on which to stay the injunction proceedings.

Regarding the relief for 'specific performance', the judge also held that it did not have the same object or cause with the application of the defendant for a declaratory relief.

The English proceedings as to the main issues, which were identical with the German proceedings (both for declaratory reliefs in the reverse), were stayed. The applications for disclosure of information and freezing injunction were, obviously, in the class of protective measures.

In ***The Alexandros T***[40] (complex case mentioned later under jurisdiction agreements), the Court of Appeal stayed the English proceedings brought by marine insurers for declarations of no liability, because the causes of action and parties in England were essentially the same as those in Greece, and the Greek court was the court first seised. The Greek proceedings were about the reverse, claiming liability of insurers for defamation. Longmore LJ held that, to the extent that allegations made in England that the Greek parties were in breach of the settlement agreements or in breach of the exclusive jurisdiction clause, these were parasitic and dependent on the basic cause of action in England for a declaration of no liability. They could not proceed on their own right until the underlying question of the ambit of the settlement agreement, as a defence to the Greek action in tort, had been resolved.

39 [2005] 2 Lloyd's Rep 665.
40 [2012] EWCA Civ 1714.

In ***WMS Gaming Inc. v B Plus Giocolegale Ltd***,[41] Simon J held that the two sets of actions, one in Italy and the other in England, did not involve the 'same cause of action'. Neither the 'cause' nor the 'object' was the same (the one was based on a 'supply contract' and the other on a 'negotiations' claim). The 'cause' was not the same because, although the factual basis of the claim was the same, the rule of law was not. The 'object' was not the same because the respective proceedings had different views in end.

4.2.2 'Between the same parties'

The CJEU has held[42] that the term 'same parties' has an autonomous meaning, and that separate legal entities could be the same party.

4.2.2.1 In personam claims

In ***Kolden Holdings Ltd v Rodette Commerce Ltd***,[43] the CJEU held that, for the purposes of Art 27 of the Regulation, a legal entity would be regarded as 'the same party' as another legal entity, if the national court decided that the interests of the two legal entities were identical to one another in relation to the subject matter of the disputes. The test was whether a judgment against one entity would have the effect of *res judicata* against the other entity. *Res judicata* would encompass both the facts and the rule of law.

With regard to parent and subsidiary companies, however, caution was hailed by Simon J in ***WMS Gaming Inc. v B Plus Giocolegale Ltd***,[44] in which he held that, treating them as the same parties for the purposes of Art 27, would potentially expand Art 27 at the expense of Art 28.

4.2.2.2 In rem and in personam claims

It is by now trite law since the CJEU decision in ***The Tatry***[45] that, for the purposes of the *lis pendens* provisions, an English action *in rem* and an action *in personam* brought in another Member State are between the same parties. *The Tatry* and its historical background were extensively discussed in the previous editions of this book. For the purpose of this edition, it suffices to remind readers, briefly, of the basic issues:

The case was referred to the CJEU by the Court of Appeal. An earlier Court of Appeal decision had addressed the same question, in *The Deichland*. It had held that the action *in rem* really aimed against the person interested in defending the claim, who was being sued, from the time of the service.[46]

41 [2011] EWHC 2620 (Comm).
42 *Drouot v Assurances SA v Consolidated Metallurgical Industries*, Case C-351/96 [1998] ECR I-3075.
43 [2007] EWHC 1597.
44 [2011] EWHC 2620 (Comm).
45 [1994] ECR I-5439, [1995] 1 Lloyd's Rep 302, [1999] 2 WLR 181.
46 In the light of Art 30 of the Regulation, or Art 32 of the Recast, this ruling that the person 'was sued from the time of service' should be deemed overtaken by the new provision as to when a court is seised of a matter.

This was confirmed by the CJEU in *The Maciej Rataj (sub nom The Tatry)*,[47] which held that the decision of the ECJ in *Gubisch Maschinenfabrik KG v Palumbo*[48] made it clear that the terms used in Art 21 to describe the conditions characterising *lis pendens* must be interpreted independently from those laid down in the various national procedural rules. In arriving at that conclusion, the court laid particular emphasis on the aim in pursuit of which Art 21 was introduced, namely:

> in the interests of the proper administration of justice within the Community, to prevent parallel proceedings before the courts of different contracting States and to avoid conflicts between decisions which might result therefrom. Those rules are therefore designed to preclude, in so far as is possible and from the outset, the possibility of a situation arising such as that referred to in Article 27(3), that is to say the non-recognition of a judgment on account of its irreconcilability with a judgment given in a dispute between the same parties in the State in which recognition is sought.
>
> It follows that the distinction drawn by the law of a Contracting State between an action *in personam* and an action *in rem* is not material for the interpretation of Art 21.[49]

It further held that, where an action *in rem* subsequently continued both *in rem* and *in personam*, or solely *in personam* (according to the distinctions drawn by the national law of the contracting State), it did not cease either to have the same cause of action and the same object, or to be between the same parties as a previous action brought *in personam*.

On the scope of Art 57 of the Convention, the CJEU held that Art 57 (Art 71 of the Regulation) precluded the application of the provisions of the Convention only in matters governed by the specialised Convention. In these circumstances, when a specialised Convention contains certain rules of jurisdiction but no provision as to *lis pendens* or related actions, Arts 21 and 22 of the Convention would apply.[50]

4.2.2.3 'Res Judicata'

Subsequently, in *The Indian Grace (No 2)*,[51] the same issue was examined in the context of *res judicata* (s 34 of the CJJA 1982). It came before the House of Lords (for full discussion, see Chapter 4, above). Section 34 provides:

> No proceedings may be brought by a person in England and Wales or Northern Ireland on a cause of action in respect of which a judgment has been given in his favour in proceedings between the same parties, or their privies, in a court in another part of the UK or in a court of an overseas country, unless that judgment is not enforceable or entitled to recognition in England and Wales.

One of the three main issues was whether this section applied to bar the English proceedings, having regard to the fact that it was an action *in rem*. Clarke J (as he

47 [1999] 2 WLR 181, at para 14: *lis pendens* within the meaning of Art 21. (Sheen J at first instance had held that *in rem* proceedings did not involve the same cause of action with the declaratory proceedings in Rotterdam. The ship-owners only commenced those proceedings as a pre-emptive forum seeking. It is interesting to note that Sheen J, in both *The Linda* [1988] 1 Lloyd's Rep 175 and *The Kherson* [1992] 2 Lloyd's Rep 261, had decided that the parties of an action *in rem*, in which the defendant had acknowledged service, and of an action *in personam* brought in another contracting State, were the same, but after the acknowledgement of service. These decisions had been decided before the Court of Appeal had decided *The Tatry*.)

48 (Case 144/86) [1987] ECR 4861, at p 4874, para 8.

49 Op. cit., fn 47, at para 47 and [1995] 1 Lloyd's Rep 302, p 308.

50 Ibid, at para 25 and [1995] 1 Lloyd's Rep 302, p 307.

51 [1998] 1 Lloyd's Rep 1.

then was), deciding the case prior to the ECJ decision in *The Tatry* (above), held that it did not because, at the time when the action was brought, it was not between the same parties as the action *in personam* in India. The Court of Appeal reversed the decision and held that s 34 must have been intended to prevent the same cause of action being tried twice over between those who were in reality the same parties. The test under s 34 was satisfied, and the action was barred. On appeal, the House of Lords approved the CA decision, stating at p 10:

> For the purpose of s 34 an action *in rem* was an action against the owners from the moment that the Admiralty Court was seised with jurisdiction. The jurisdiction of the Admiralty Court was invoked by the service of the writ, or where a writ was deemed to be served, as a result of acknowledgment of the issue of the writ by the defendant before service. From that moment, the owners were parties to the proceedings *in rem* and s 34 was a bar to the action *in rem*.

However, since then, in the light of Art 30 of the Regulation, or 32 of the Recast, the ruling in *The Tatry* that the person 'was sued from the time of service' and the ruling in *The Indian Grace* that 'the jurisdiction of the Admiralty Court was seised, or invoked, from the service of the writ' should be deemed to have been overtaken by the new provision stating that a court is seised of a matter from the issue of the proceedings. The decision of the House of Lords in *Canada Trust* (4.2.3, below) puts the previous ruling to rest firmly.

4.2.3 When is a court seised of the proceedings?

The CJEU (Fourth Chamber) had held, in ***Zegler v Salinitri***,[52] that, for the purpose of Art 21 of the Convention, the court 'first seised' is the one before which the requirements for proceedings to become 'definitively pending' are first fulfilled. Such requirements are to be determined pursuant to the national law of the courts concerned.

However, as the national laws of Member States differ, inconsistency in determining when a court is first siesed was inevitable, particularly because the use of the word 'definitively pending' caused uncertainty. Bringing certainty was essential, and, therefore, when the Brussels Convention was replaced by the Regulation, Art 30 established uniformity as between Member States by providing that the date of the issue of the proceedings should be the date at which a court is seised (see, further, 4.2.4, below).

This Article is now Art 32 of the Recast Regulation and, in the same way as its predecessor, provides:

> (1) For the purpose of this Section 9 [i.e. *lis pendens* and related actions] a court shall be deemed to be seised:
>
> (a) at the time when the document instituting the proceedings, or an equivalent document, is lodged with the court, provided that the claimant has not subsequently failed to take the steps required to have service[53] on the defendant, or

52 Case 129/83 [1984] ECR, 2397; severely criticised by Lord Hoffmann in *Canada Trust v Stolzenberg (No 2)* [2002] 1 AC 1, at 18B to 19F.

53 In *WPP Holdings v Benatti* [2007] 1 WLR 2316, the Court of Appeal held that minor irregularities with service should not prevent the operation of Art 27. The service for the purpose of Art 30(2) of the Regulation (equivalent to Art 32(1)(a) of the Recast) was not suggested to have been ineffective for want of translation.

(b) if the document has to be served before being lodged with the court, at the time when it is received by the authority responsible for service, provided that the claimant has not subsequently failed to take the steps he was required to take to have the document lodged with the court.

(2) The court, or the authority responsible for service, shall note the date of the lodging of the document instituting the proceedings.

It follows that, in so far as *lis pendens* and related actions are concerned, this Article overrides previous decisions which decided that the time of service[54] was the time when the court was seised, and, inevitably, it must have affected the ruling of the CJEU decision in *The Tatry* (above) and that of the House of Lords in *Indian Grace* (above). In all cases, the date of the issue of the proceedings, or the lodging of the document with the court, should be the relevant date in determining whether the cause of action brought in two Member States is between the same parties.

It is undoubtedly essential to avoid the confusion caused by the use of different phrases in statutes or judgments; for example, 'action is brought', 'jurisdiction is invoked', the 'court is seised', which in effect should mean the same thing, namely the issue of the proceeding (the *seisin*).

The English courts have, in recent decisions, appreciated the confusion caused. For example, the Court of Appeal in ***Stribog v FKI***[55] (see 4.3, below) referred to the phrase 'proceedings are brought', in the context of Art 28, as meaning when the proceedings are instituted.

In the context of the Lugano Convention, the House of Lords, in ***Canada Trust v Stolzenberg***,[56] (Lord Hoffmann) held that: The concept 'sued' had been used in the Convention interchangeably with the concepts 'bring proceedings' and 'instituted proceedings' and accordingly it was to be interpreted as referring to the initiation of proceedings, which, under English law, was the issue of the writ. To interpret the concept 'sued' as referring to the date on which the proceedings were served would potentially pave the way for a defendant to evade service as soon as the existence of the proceedings came to his attention.

This is consistent with the House of Lords decision in ***Phillips v Symes***,[57] in which Lord Mance elaborated on the issue of when the court is seised and reviewed the decisions of the Court of Appeal in *Dresser v Falcongate*[58] and in *The Sargasso*.[59]

He concluded that the English court is definitively seised of proceedings from the date either of the issue or the freezing order. The date of *seisin* is also relevant for the purpose of establishing domicile.[60] The decisions in both *Dresser* and *The Sargasso*, he commented, generated considerable scope for pre-emptive forum shopping and were reached without consideration of the implications in multi-defendant proceedings (as shown at para 4.2.4, below).

54 *Dresser UK Ltd v Falcongate Freight Management Ltd (The Duke Yare)* (CA) [1991] 2 Lloyd's Rep 557, influenced by the reasoning of the Advocate General in *Zegler v Salinitri* (ibid); *The Sargasso* [1994] 2 Lloyd's Rep 6; Both were reviewed by Lord Mance in *Phillips v Symes* [2008] 1 Lloyd's Rep 344 saying, inter alia, that the Court of Appeal in *Dresser* never contemplated the rigid rule later laid down by the Court of Appeal in *Sargasso*.

55 [2011] 2 Lloyd's Rep 387.

56 [2002] 1 AC 1; it should be noted that Brandon J, in *The Monica S* (see Ch 4, above), was right on the issue of when the jurisdiction of the court is invoked or when proceedings are brought, when he held that it was the time of the institution of the proceedings, the issue of the writ.

57 [2008] 1 Lloyd's Rep 344, see paras 42–51.

58 [1991] 2 Lloyd's Rep 557.

59 [1994] 2 Lloyd's Rep 6.

60 See *Canada Trust Co v Stolzenberg* [2002] 1 AC 1 (HL)

In ***Kolden Holding v Rodette Commerce Ltd***,[61] in which the issue was whether the cause of action remained the same after the amendment to substitute a party (claimant) for another, it was held that the substitution had not altered the identity of the parties for the purpose of Art 27 of the Regulation (now 29), and, as the English court became seised from the date of the issue of the proceedings, it was the court first seised.

4.2.4 'Pending proceedings'

The issue of what 'pending proceedings' means arose first in ***Grupo Torras***.[62]

A Spanish company, G, and its English subsidiary, T, claimed damages against 22 defendants for conspiracy, and damages for breach of directors' duties. Application for a stay of the English proceedings was made by the defendants on basis of Art 16(2) of the Convention, because the matter concerned the decisions of organs of G which should be determined in Spain. It was argued that, according to Spanish law, Spanish proceedings were pending, and that the Spanish court had been seised first. Mance J at first instance held that:

> Although in any Contracting State the precise procedural formalities reflecting the concept of when proceedings are 'definitively pending' would depend on the national law and be selected by the national court, they must respect the general concept of a 'decisive, conclusive, final or definitive' litigational relationship between the court and the litigant.[63]
>
> . . . which court was first seised of such proceedings was to be decided by a simple test of chronological priority, ignoring any amendments of the cause of action or parties which might otherwise be treated under national law as having retrospective effect.[64]

The Court of Appeal, approving the decision, held: According to Spanish law, the proceedings before the Spanish court were not pending at the date on which the English proceedings had been commenced by service of writ. The English court was the court first seised of the matter.

As stated at 4.2.3, above, at that time, the service of proceedings was the date on which the proceedings were regarded as having commenced. A series of other decisions ensued in which the meaning of 'pending' was applied as determined by the procedural formalities of national law. In ***Molins plc v GB SpA***,[65] the action was not pending for the purpose of Art 21 when the Italian proceedings had not been served. In ***Andrea Mezario Ltd v Internationale Spedition***,[66] relating to the International Convention for the Carriage of Goods by Road 1956, Art 31(2), it was held that 'pending' means when the proceedings have been served. Further, in ***Tavoulareas v Tsavliris***,[67] the action was not pending for the purpose of Art 21 when the Greek proceedings had been served defectively.

Lord Mance had another opportunity to express his view on this issue, this time at the highest English court, in ***Phillips v Symes***[68] (see 4.2.3, above), and commented

61 [2008] 1 Lloyd's Rep 197.
62 [1995] 1 Lloyd's Rep 374; [1996] 1 Lloyd's Rep 7 (CA).
63 [1995] 1 Lloyd's Rep 374, at 418–420.
64 Ibid, at 418, col 2.
65 [2000] 2 Lloyd's Rep 234 (CA).
66 [2001] EWCA Civ 61; [2001] 1 All ER (Comm) 883.
67 [2004] EWCA Civ 48; [2004] 2 All ER (Comm) 221.
68 [2008] 1 Lloyd's Rep 344, see paras 42–51.

that the above cases were evidence of the problem created by *Dresser* and *The Sargasso*, following *Zegler v Salinitri*, and unintentionally generated a wide scope for pre-emptive forum shopping because it was thought then that the *seisin* of a court was determined by the procedural formalities of national law. Although he was restrained in *Phillip v Symes* from laying down a firm ruling, because the case was subject to the Lugano Convention, which, unlike the Regulation, did not have a definition of 'when a court is seised', he was inclined to adopt a general test that the 'issue of proceedings' was the relevant date of *seisin* under Art 21 of this Convention. He further said that this test has the advantage of offering a single, certain and easily ascertainable date.

It is clear from his criticisms of the previous decisions on the issue that the same test should be applicable to 'when proceedings are pending'. This is obviously necessary in order to determine when a court is seised. Lord Mance indicated that the matter, at least, merits further thought, because of serious problems that frequently arise in multi-defendant proceedings; for example, there may be cases in which some parties amend proceedings at a later date; would that have a retrospective effect, so that the actions may become the same and between the same parties, or even just related?

Authoritative support of applying the same test consistently to both 'when a court is seised' and 'when proceedings are pending' is found in ***Canada Trust v Stolzenberg***,[69] which criticised the rule in *Zegler* as causing undesirable results. In *Canada Trust* (4.2.3, above), Lord Hoffmann concluded that it would not be contrary to principle to hold that a defendant was sued when the proceeding started, namely upon its issue.

4.2.5 Power of the court first seised

The decision of the CJEU in *Gasser v MISAT* clarified what a court of a Member State should do, when it is either the court first or second seised. Whether or not the decision facilitates practical justice remains doubtful, but it aims to promote certainty and consistency as between Member States' court decisions. However, the adverse effects of this decision with regard to choice of court agreements and arbitration agreements have been ameliorated by the new provisions of the Recast Regulation.

Erich Gasser GmbH v MISAT Srl[70]

Gasser, registered in Austria, had for several years supplied children's clothes to MISAT, registered in Italy. A dispute arose under the contract and, in 2000, MISAT brought proceedings against Gasser in the Italian courts, seeking a declaration that the contract had been terminated and claiming damages for Gasser's breach of contract.

After eight months, Gasser brought an action against MISAT in the Austrian courts, seeking payment against outstanding invoices. He claimed that the court had jurisdiction because Austria was the place of performance of the contract (Art 5(1) of the Brussels Convention), and also that the Austrian court was the court designated by a 'choice of court' clause in the invoices sent by Gasser to MISAT, without the latter having raised any objection to it. Thus, Gasser argued that, in accordance with

69 [2002] 1 AC 1.
70 Case C-116/02 [2004] 1 Lloyd's Rep 222.

their practice and the usage prevailing in trade between Austria and Italy, the two parties had agreed to confer jurisdiction on the Austrian courts within the meaning of Art 17 of the Convention.

MISAT contested the jurisdiction of the Austrian court on the grounds that:

(a) he was domiciled in Italy (Art 2);
(b) there was no valid jurisdiction agreement; and
(c) he had already commenced proceedings in Rome in respect of the same dispute.

The Austrian court referred the matter to the European Court for a preliminary hearing on the following question: Whether the court second seised may review the jurisdiction of the court first seised, if the second seised court has exclusive jurisdiction pursuant to an agreement conferring jurisdiction under Art 17, or must the second seised court stay its proceedings according to Art 21, notwithstanding the agreement conferring jurisdiction?

Although *Gasser* did not involve English parties, the UK Government still submitted written observations on the issues raised. They submitted: (a) in cases of exclusive jurisdiction, the court second seised may derogate from Art 21 and proceed to judgment without waiting for the court first seised to determine that it had no jurisdiction;[71] (b) the court to which exclusive jurisdiction is conferred by agreement will, in general, be in a better position to rule as to the effect of that agreement by applying the substantive law of that Member State; (c) where a claimant has started proceedings in bad faith before a court without jurisdiction, with the aim of blocking proceedings before the courts of another contracting State, it may be viable for the court second seised to make an exception to Art 21, particularly if the court first seised has not decided the jurisdiction question within a reasonable time.[72]

The European Court declared that:

(a) The purpose of Art 21 was to prevent parallel proceedings taking place in courts of different contracting States so as to prevent unenforceability of judgments. Therefore, in order to give effect to this, Art 21 would have to be given a broad interpretation: From the clear terms of Art 21, it is apparent that, in a situation of *lis pendens*, the court second seised must stay proceedings of its own motion until the jurisdiction of the court first seised has been established and, where it is so established, must decline jurisdiction.
(b) It is for the court first seised to examine whether a 'choice of court' clause is duly incorporated into any contract and, if so, whether it should be applicable to the proceedings or not. In cases concerned with Art 17 agreements, it was always open to a defendant to enter appearance before the court first seised and decline to invoke the jurisdiction agreement.[73]
(c) Article 21 of the Convention is based clearly and solely on the chronological order in which the courts involved are seised. The court second seised is never in a

71 They relied on a previous CJEU decision in *Overseas Union Insurance* Case C-351/89 [1991] ECR I–1745, which concerned Art 16 (exclusive jurisdiction), as opposed to Art 17 (jurisdiction agreements), which was in issue in this case.

72 The CJEU refused to recognise this and ruled that issues relating to what amounts to reasonable time afforded no reason to derogate from Art 21.

73 The CJEU was also concerned to protect the weaker contracting party when jurisdiction clauses are incorporated into standard terms contracts by the stronger party.

better position than the court first seised to determine whether the latter has jurisdiction.

This ruling ignored the fact that the validity or not of a jurisdiction agreement would be best decided by the court of the country whose law is applicable to the agreement. It followed too rigid an approach and, as a result, encouraged litigants to embark upon 'abusive litigation tactics', as has, at last, been recognised during the recent review of the Regulation; a procedural race to seise a court's jurisdiction undermined the effect of the choice of court agreements.

In the Recast Regulation, respect for the parties' choice of court is recognised. In Recitals 19, 20, 21, 22 (see the Annex to this chapter), guidelines are given to the courts of Member States as to what they have to do in cases where the second seised court is the court designated by the parties' agreement to have exclusive jurisdiction. The designated court is permitted to decide on the validity of the agreement. Thus, an exception to the *lis pendens* rule is provided. The first seised court is required to stay its proceedings until such time as the designated court declares that it has no jurisdiction. This exception shall not, however, apply if there are conflicting choice of courts agreements in the contract (see more about jurisdiction agreements under para 8, below).

4.3 RELATED ACTIONS AS BETWEEN MEMBER STATES

A problem of irreconcilable judgments may also arise when multiple proceedings are brought in different Member States, which do not have the same cause of action, but they are related.

Article 30 (previously 28) provides:

(1) Where related actions are pending in courts of different Member States, any court other than the court first seised may stay its proceedings.
(2) Where the action in the court first siesed is pending at first instance, any other court may also, on the application of one of the parties, decline jurisdiction if the court first seised has jurisdiction over the action in question and its law permits the consolidation thereof.
(3) For the purpose of this Article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.

The court second seised has discretion either to stay its proceedings or to decline jurisdiction, as the case may be. Judicial definition of 'related actions' was given by the House of Lords in ***Sarrio SA v Kuwait Investment Authority***,[74] which was decided under Art 22 of the Brussels Convention.

There were two actions brought by the claimant: one in Spain (for a debt) and one in England for damages for negligent misstatements by the defendants. As the Spanish court was first seised, the defendants applied to the English court for a stay of the action on the basis of Art 22 of the Convention.

Mance J held that Art 22 applied and ordered the stay of the action. The Court of Appeal reversed the decision and held that the case was outside the scope of Art 22, because the primary issues of fact in the English proceedings were distinct from

74 [1998] 1 Lloyd's Rep 129 (HL).

those raised in the Spanish proceedings, and there was, thus, no risk of irreconcilable judgments. The House of Lords, reversing this decision, approved the decision of Mance J. Lord Saville stated:

> . . . The actions, to be related, must be 'so closely connected that it is expedient to hear and determine them together' to avoid the risk of irreconcilable judgments resulting from separate proceedings. To my mind these wide words are designed to cover a range of circumstances, from cases where the matters before the courts are virtually identical (though not falling within the provisions of Art 21) to cases where although this is not the position, the connection is close enough to make it expedient for them to be heard and determined together to avoid the risk in question.[75]

> . . . I am of the view that there should be a broad common sense approach to the question whether the actions in question are related, bearing in mind the objective of the article, applying the simple wide test set out in Art 22 and refraining from an over-sophisticated analysis of the matter. It seems to me that this is the approach adopted by Mr Justice Mance . . .[76]

In ***JP Morgan v Primacom*** (para 4.2.1, above), the judge held that, had the court not found that the declaratory proceedings in the English and German courts had the same cause of action for Art 27 of the Regulation to apply, it would have found that, although the two actions were connected, it would not be expedient to hear and determine them together to avoid the risk of irreconcilable judgments; thus, Art 28 would not apply to the declaratory proceedings. In ***Masri v Consolidated Contractors International***,[77] Burton J held that the proceedings in England and Greece did not involve the same cause of action for the purposes of the Regulation, but they were related proceedings, giving rise to a risk of irreconcilable judgments within Art 28, and the proper course was to stay the English action.

There can be circumstances in which a claimant who has commenced proceedings in a court of a Member State (first seised) raises a particular matter in the same court, after another court of a Member State has been seised on the same or a related action. The unusual question that arose in ***Stribog v FKI Engineering***[78] was whether the particular matter raised after the initial proceedings had commenced should be taken into account when considering which court was seised first, for the purpose of deciding whether the actions were related under Art 28.

The judge, at first instance, did take the particular issue into account and, as a result, he did not stay the English proceedings, which had commenced after the German proceedings. On appeal, it was contended that there was no such rule or principle, and that the judge's reasoning was contrary to the language and purpose of Art 28. It was submitted that Art 28 was concerned with being deemed to be seised of actions, rather than of issues, and that the judge had erred in focusing on the particular issue.

The Court of Appeal, agreeing with these submissions, held: In considering an application for a stay under Art 28, the court had to decide which courts of two Member States were deemed to be seised of an action, not seised of a particular issue in an action.[79] The stay was granted. It is interesting to read the judgments of

75 [1998] 1 Lloyd's Rep 129 (HL), p 134.
76 Ibid, p 135.
77 [2011] EWHC 1780 (Comm).
78 [2011] 2 Lloyd's Rep 387 (CA).
79 Also, per Saville LJ in *The Happy Fellow* (see para 7.4, below): it is a misreading of Art 28 to ask which court is first seised of 'issues'.

Mummery LJ and Rix LJ, each adopting a different approach to reach the same conclusion. Whereas Mummery LJ went on, asking five questions before arriving at his conclusion, Rix LJ followed a more direct and practical approach. As Wilson LJ pointed out, whereas the former preferred to ask which court was first seised of a pending action before asking whether the actions were related, the latter preferred to ask the questions in the reverse order. There was no reason why the order mattered, but the position of Rix LJ seemed to reflect the terminology of Art 28 (para 133).

In a very complex case of fraud and conspiracy, ***Bank of Tokyo-Mitsubishi Ltd v Baskan Gida***,[80] involving many defendants, Turkish, Italian, French and German, proceedings were commenced first in Italy by Ferrero (one of the defendants in the subsequent English action), against one of the Turkish defendants (in relation to fraud allegedly committed by them) and against the lender bank (for a declaration of no liability under the loan). Subsequently, the bank commenced proceedings in England against the same Turkish defendants for fraud, and against Ferrero, for payment of contractual interest under the loan facility.

The English court, being second seised, held that the contractual claims in England against Ferrero should be stayed under Art 27 of the Regulation, until the first seised Italian court ruled on jurisdiction. There was a jurisdiction clause in the loan facility in favour of the Italian courts. Whether or not the Italian court had jurisdiction, it was for the Italian court to decide. Regarding the action in tort, the fraud had allegedly been committed in England, and the court had jurisdiction to hear the claims under Art 5(3) of the Regulation. Although the judge was reluctant to split the claims in such a way, he did so because the contractual and the tortious claims did not raise common issues and were not even closely connected for the purpose of Art 28.

5 MULTIPLE PROCEEDINGS BETWEEN MEMBER STATES AND THIRD STATES

One of the objectives of the review of the Regulation was to expand the remit of the Regulation to third States. The Commission's proposal[81] was more ambitious than what was adopted by the EU Parliament and Council, which is, in any event, an innovation, as is shown in Arts 33 and 34, below.

5.1 PENDING PROCEEDINGS IN A COURT OF A THIRD STATE – SPECIAL *LIS PENDENS* RULE

Article 33(1) provides that, in the event jurisdiction is based on Art 4 (domicile), or on Arts 7–9 (special jurisdiction) and proceedings are pending before a court of a third State at the time when a court in a Member State is seised of an action involving the same cause of action and the same parties as the proceedings in the court of the third State, the court of the Member State may stay the proceedings if:

80 [2004] 2 Lloyd's Rep 395.

81 See 'The Brussels I Review Proposal Uncovered', BIICL 2012: Borras A. 'The application of the Brussels I Regulation to defendants domiciled in third States'.

(a) it is expected that the court of the third State will give a judgment capable of recognition and, where applicable, of enforcement in that Member State; and
(b) the court of the Member State is satisfied that a stay is necessary for the proper administration of justice.

It further provides (33(2)) that the court of the Member State may continue the proceedings at any time if:

(a) the proceedings in the court of the third State are themselves stayed or discontinued;
(b) it appears to the court of the Member State that the proceedings in the court of the third State are unlikely to be concluded within a reasonable time; or
(c) the continuation of the proceedings is required for the proper administration of justice.

Under 33(3), the court of the Member State shall dismiss the proceedings if the proceedings in the court of the third State are concluded and have resulted in a judgment capable of recognition and, where applicable, of enforcement in that Member State.

Furthermore, under 33(4), the court of the Member State shall apply this Article on the application of one of the parties or, where possible under the national law, of its own motion.

In Recital 23 (see Annex of this chapter), an explanation for the need of this provision is said to be to provide a flexible mechanism allowing the courts of the Member States to take account of proceedings pending before the courts of third States.

Although this Article echoes some elements of the *forum non-conveniens* doctrine, it lacks its flexibility, it is vague and it also gives the impression of a paternalistic EU approach to justice.

It is presumed that a court of a third State will have jurisdiction on the basis of Arts 4 and 7–9 of the Regulation; the court of a Member State will have been seised of the same cause of action between the same parties, for example, either by reason of a jurisdiction agreement or by an arrest of a ship, or because it is the natural forum. However, if a court of a third State is seised second of jurisdiction, and a court of a Member State is seised first, there are no guidelines about respecting the choice of court agreement of a 'third' State, and this provision will undermine the parties' freedom of 'third State' choice of jurisdiction. Of course, not being bound by the Regulation, the court of the third State will continue its proceedings, and there will be a risk of irreconcilable judgments. In such cases, the English court has a mechanism under national law and it will apply principles of staying its proceedings (seen in Chapter 6, above).

Recital 24 provides some criteria as to what should be taken into account by a court of a Member State when considering 'proper administration of justice'. Some of these criteria are the same as in cases in which the English court would apply *forum non-conveniens*, such as what connections exist between the case, the parties, and the third State, what is the stage of the foreign proceedings, whether that court has exclusive jurisdiction, or whether or not that court can be expected to give judgment within a reasonable time.

What would be a 'reasonable time' (during which the proceedings in the court of the third State ought to be completed and judgment be given) could cause problems in practice. Besides, the provision can, potentially, cause offence to the court of the non-Member State, in particular, because no mention is made of 'comity' considerations.

It is envisaged that there will be no uniform application of this provision by the courts of different Member States, and, therefore, it would have been better to have adopted the doctrine of *forum non-conveniens*, which is well tested.

5.2 PENDING PROCEEDINGS IN A COURT OF A THIRD STATE – RELATED ACTIONS

Similar provision is set out in Art 34(1): in the event jurisdiction is based on Art 4 (domicile), or on Arts 7–9 (special jurisdiction) and proceedings are pending before a court of a third State at the time when a court in a Member State is seised of an action which is related to the action in the court of the third State, the court of the Member State may stay the proceedings if:

(a) it is expedient to hear and determine the related actions together to avoid the risk of irreconcilable judgments;
(b) it is expected that the court of the third State will give a judgment capable of recognition or enforcement in that Member State;
(c) the Member Sate is satisfied that a stay is necessary for the proper administration of justice.

Art 34(2) follows the same logic as Art 33(2) above. The court of the Member State may continue the proceedings at any time if:

(a) it appears to the court of the Member State there is no longer a risk of irreconcilable judgments;
(b) the proceedings in the court of the third State are themselves stayed or discontinued;
(c) it appears to the court of the Member State that the proceedings in the court of the third State are unlikely to be concluded within a reasonable time, or
(d) the continuation of the proceedings is required for the proper administration of justice.

Paragraphs 3 and 4 of this Article are the same as in Art 33 above.

Whether or not such an ambitious innovation will work smoothly in practice, and to what extent it may affect established case law, it will have to be seen in future cases. Possible effect on established law is seen under para 7, below.

6 ROLE OF SPECIALISED CONVENTIONS

The primary purpose of the EU jurisdiction regime is to prevent irreconcilable judgments and, therefore, its rules regulate what is to happen when multiple proceedings have commenced in more than one Member State, as seen earlier. But

clash of jurisdictions is inevitable owing to the existence of more than one jurisdictional bases. The Recast Regulation specifically refers to the relationship of the Regulation with other instruments in Chapter VII and confirms that it shall not affect any Conventions to which Member States are parties, in Arts 67–73.

It is further stated in Recital 35 that respect for international commitments entered into by the Member States means that this Regulation should not affect conventions relating to specific matters to which the Member States are parties.

Article 73 is new and very important in terms of clarifying the arbitration exception by providing that the Regulation shall not affect the application of the 1958 New York Convention, which applies to arbitral proceedings, recognition and enforcement of awards. This will be explained further under the arbitration exception (para 10, below).

6.1 INTERPRETATION OF ART 71

The same number of this Article has been kept in the Recast Regulation. It allows Conventions dealing with specific matters to take precedence over the primary jurisdiction basis of domicile, provided jurisdiction has properly been established under the rules of those Conventions; this is very important with regard to *in rem* proceedings.

The CJEU decided, in ***Nurnberger Allgemeine v Portbridge Transport International BV***,[82] that a court of a contracting State had jurisdiction under the CMR Convention via Art 57 of the Brussels Convention (the equivalent to Art 71). The CJEU interpreted Art 57(2)(a) as meaning that the court of a Member State in which a defendant (domiciled in another Member State) was sued could derive jurisdiction from a specialised Convention to which the first State was a party and that Convention contained rules on jurisdiction.

A more detailed interpretation was given by the CJEU to Art 71 in relation to Art 31(3) of the CMR in ***TNT Express Nederland BV v AXA Versicherung***.[83]

T had issued proceedings against X in the Netherlands concerning a dispute about a contract for the carriage of goods by road. X subsequently obtained judgment against T in Germany. T asked the Netherlands court to declare the judgment of the German court unenforceable because of the pending actions rule in Art 31(2) of the CMR; X argued that Art 35(3) of the Regulation meant that the Netherlands court could not review the German court's jurisdiction. The Supreme Court of the Netherlands asked the CJEU for a ruling on the interpretation of Art 71 and Art 31 of the CMR.

The CJEU held: (1) while it was apparent that Art 71 of the Regulation provided for the application of specialised Conventions, their application could not compromise the principles which underlay judicial co-operation in the EU and which were necessary for the sound operation of the internal market. It followed that the rules governing jurisdiction set out in specialised Conventions, including the pending actions rule, could be applied in the EU only to the extent that they were highly predictable, facilitated the sound administration of justice and enabled the risk of concurrent proceedings to be minimised. Applying the principle of mutual trust, the

82 Case C-148/03 [2005] 1 Lloyd's Rep 592.
83 Case C-533/08 [2010] ECR I-00000; [2010] IL Pr 35.

court held that the Regulation did not usually authorise one court of a Member State to review the jurisdiction of a court of another Member State. Therefore, Art 31(3) of the CMR could be applied in the EU only if it enabled the objectives of the free movement of judgments and of mutual trust in the administration of justice in the EU to be achieved under conditions, at least, as favourable as those resulting from the application of the Regulation. (2) As the CMR did not contain a clause conferring jurisdiction on the CJEU, the Court could only interpret Art 31 of the CMR if that was permitted under the Treaty on the Functioning of the European Union (TFEU) Art 267.

6.2 DELEGATION OF JURISDICTION BY ART 71 TO SPECIALISED CONVENTIONS

The Article provides that:

(1) This Regulation shall not affect any conventions to which Member States are parties and which, in relation to particular matters, govern jurisdiction or the recognition of judgments.
(2) With a view to its uniform interpretation, paragraph 1 shall be applied in the following manner:
   (a) This Regulation shall not prevent a court of a Member State, which is party to a convention on a particular matter, from assuming jurisdiction in accordance with that convention, even where the defendant is domiciled in another Member State which is not a party to that convention. The court hearing the action shall, in any event, apply Art 28 of this Regulation.
   (b) Judgments given in a Member State by a court in the exercise of jurisdiction provided for in a convention on a particular matter shall be recognised and enforced in the other Member States in accordance with this Regulation.

Where a Convention on a particular matter to which both the Member State of origin and the Member State addressed are parties lays down conditions for the recognition or enforcement of judgments, those conditions shall apply. In any event, the provisions of this Regulation which concern the procedure for recognition and enforcement of judgments may be applied.

Save for Art 24 of the Recast (exclusive jurisdiction) and subject to considerations of the validity and effect of a consensual jurisdiction under Art 25, the jurisdiction obtained on the bases of specialised Conventions via Art 71 prevails over other Regulation jurisdiction. However, since the decision in *Gasser*, if there are multiple proceedings in courts of Member States, the court whose jurisdiction is derived from Art 71 must be the court first seised. In addition, considering the exception to the *lis pendens* rule with regard to choice of court agreements under Art 25, provided the agreement is valid and there are no other conflicting exclusive jurisdiction clauses in the contract, preference will be given to the court of a Member State that is chosen to have jurisdiction, regardless of whether or not it is the first seised. The positive outcome of this is that the problems that arose in the past with regard to *The Bergen*[84] case are resolved, and there are certainty and clarity as to what the particular courts of the Member States will have to do.

84 [1997] 1 Lloyd's Rep 380.

Notwithstanding that Art 71 grants jurisdiction to a court of a Member State by permitting the application of the rules of other Conventions, the jurisdiction granted is 'Regulation jurisdiction'. There are many international Conventions with regard to maritime claims, which have jurisdiction provisions.[85]

The relevant conventions that are referred to below, for the purpose of Art 71 and Admiralty jurisdiction, are the Arrest Conventions 1952 and 1999, Art 7, and the Collision Convention 1952, Art 1.

6.2.1 Jurisdiction under the Arrest Convention 1952

It was seen in Chapter 4 that jurisdiction on the merits under this Convention may be invoked by Art 7, which, in so far as it is material here, provides:

> The courts of the country in which the arrest was made shall have jurisdiction to determine the case upon its merits . . . If the court within whose jurisdiction the ship was arrested has no jurisdiction to decide upon the merits, the bail or other security given in accordance with Art 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.

The way in which Art 7 of the Arrest Convention[86] can effectively be applied in order to surpass the domicile rule was shown in ***The Deichland***,[87] which was decided under Art 57 of the Convention and discussed in Chapter 4. The resumé of what the Court of Appeal decided is that the charterer, Deich, was being sued and that the *in personam* and *in rem* proceedings were between the same parties for the purpose of the application of the Brussels Convention. However, mere service of the writ, or provision of security, without arrest of the ship was not sufficient to establish jurisdiction under Art 7 of the Arrest Convention; Stuart-Smith LJ stated:

> If a plaintiff for some reason is determined to litigate in the English Admiralty Court he can easily secure this: either he arrests the ship, or he secures express agreement by the defendant owner or demise charterer to submit to the jurisdiction of the English court to avoid arrest, no doubt at the same time obtaining security. In the present case the plaintiffs did neither of these things.[88]

85 Arrest of Sea-going Ships Conventions 1952, 1999; Collision Convention 1952; Convention on Civil Liability for Oil Pollution Damage 1992 (Protocol 1996); Hague Rules 1924 and Hague–Visby Rules 1968; Hamburg Rules 1978; CMR Convention 1956; Rotterdam Rules 2009; Athens Convention 1974; Limitation of Liability Convention for Maritime Claims 1976; Law of the Sea Convention 1982; The Maritime Labour Convention (ILO) 2006.

86 A possible conflict between Art 7 of the Arrest Convention and Art 23 (or the new Art 25) of the Regulation is discussed in para 8, below. The CJEU decision in *Gasser v MISAT* dealt with the hierarchy between Arts 71 and 23, but the adverse effect of this decision is now ameliorated by the provisions of the Recast Regulation in so far as choice of court agreements are concerned (see para 8, below).

87 [1990] 1 QB 361.

88 Ibid, p 385.

6.2.2 The avoidance of the Deichland trap

The words of Stuart-Smith LJ provided sufficient guidance to lawyers in a subsequent case, ***The Anna H***,[89] in which the claimants took the appropriate steps to ensure that the English jurisdiction was properly invoked by arresting the ship as required under Art 7 of the Arrest Convention, despite the defendants' attempt to avoid that result by filing a caveat against arrest.

Hobhouse LJ said:[90]

> The two Conventions are to be read together. Their relationship is of the special to the general. Where special provision is made in the special convention, it shall govern. Where no special provision is made, the general provisions of the Judgments Convention apply. Accordingly, within its scope, the Arrest Convention governs the jurisdiction of the Admiralty Court and prevails over the provisions of the Judgments Convention. There is no reason to impose any implicit restriction on the effect of Art 57 . . . Further, it is clear that the intention is that the jurisdiction available under the Arrest Convention should be preserved and that it should continue to apply even though the owner of the ship may be domiciled in another Member State . . .
>
> The Arrest Convention, in the words of Mr Jennard and Professor Schlosser, 'prevails over' the Judgements Convention . . . [it] qualifies and must be read as part of the Judgements Convention. Any supposed difference of policy must be resolved in favour of the Arrest Convention . . . Article 57(2) expressly negatives the inference that the jurisdiction is to be excluded because 'the defendant is domiciled in another Contracting State'.

6.2.3 Submission to jurisdiction and bail

On the issue of submission to jurisdiction, Hobhouse LJ, in *Anna H* above, did not have to decide but he said, *obiter*, that, as a defendant can acknowledge service without always submitting to the jurisdiction, should he wish to challenge it, equally, he can put up bail, conditionally reserving the right to challenge jurisdiction.

However, the lodging of bail had been thought to be a clear submission to jurisdiction by Sheen J in ***The Prinsengracht***,[91] because it is an undertaking given to court. He held, on the facts of this case, that the defendants had clearly submitted to the jurisdiction of the court, not only by voluntarily acknowledging the issue of the writ at a time when no action was required of them, but also by putting up bail.

The ship-owners in this case fell into two traps: (a) acknowledging issue of the writ; and (b) putting up bail without protest. Apart from *obiter* comments by the Court of Appeal in *The Anna H*, that it is possible to put up bail under protest, reserving the right to challenge jurisdiction, there are two first instance decisions (*The Anna H* by Clarke J and the *The Prinsengracht*) upholding the view that, by lodging a bail bond, the defendant submits to jurisdiction. It seems, however, that bail can be put up under protest.

89 [1995] 1 Lloyd's Rep 11; this case has been extensively analysed in the previous editions of this book.

90 [1995] 1 Lloyd's Rep 11, pp 18, 20.

91 [1993] 1 Lloyd's Rep 41.

6.2.4 The Arrest Convention 1999

Under the Arrest Convention 1999, Art 7 has been amended, so that the issues discussed in the above cases will be of no significance if the 1999 Arrest Convention is enacted into English law. Article 7(1) gives jurisdiction to a court of a place where either the arrest has been made or security is provided in lieu of arrest, unless the parties validly agree, or have validly agreed, to submit to the jurisdiction of another State, which accepts jurisdiction. However, by para (2), the court which is given jurisdiction, either by arrest or by provision of security to obtain release of the ship, will have power to refuse to exercise that jurisdiction if the law of that State allows it, and the court of another State accepts jurisdiction. The Arrest Convention 1999 will be more in line with the provisions of the Collision Convention 1952, discussed next.

6.2.5 Jurisdiction under the Collision Convention 1952

Article 1 of the Collision Convention states that an action for collision between seagoing vessels can only be introduced:

(a) before the court where the defendant has his habitual residence or a place of business; or
(b) before the court of the place where arrest had been effected of the defendant ship or of any other ship belonging to the defendant which can be lawfully arrested, or where arrest could have been effected and bail or other security had been furnished; or
(c) before the court of the place of the collision when the collision has occurred within the limits of a port or in inland waters.

Article 3 provides that any counterclaims arising out of the same collision can be brought before the court having jurisdiction over the principal action (as per Art 1).

The best illustration of this is provided by ***The Po***:[92] A collision occurred in Rio de Janeiro, at anchor, between *The Po*, Italian, and *The Bowditch*, an American ship belonging to the US Navy (claimants), who commenced proceedings in Brazil by arresting *The Po*. An undertaking was provided by the P&I club for her release. The proceedings in the Brazilian court were discontinued, and, subsequently, they commenced proceedings in England by issuing a writ *in rem* when the vessel was in Southampton. To prevent her arrest, the P&I club put up security for the second time, and the owners reserved the right to challenge the jurisdiction of the English court on the ground of *forum non-conveniens* (this issue is discussed below, under para 7).

They claimed that they should be sued in Italy. As the ship was not actually arrested, because security was provided, this case was distinguished from *The Deichland* on the ground that it was a case decided on Art 7 of the Arrest Convention, the wording of which is stricter than the wording of Art 1 of the Collision Convention. The court had jurisdiction.

92 [1991] 2 Lloyd's Rep 206.

7 BAN OF *FORUM NON-CONVENIENS*[93]

Subject to the changes brought by the Recast Regulation to *lis pendens* (i.e. exception with regard to jurisdiction agreements and expansion – by a special rule – to third States) the decision in *Gasser* clarified the application of principles with regard to *lis pendens* and related actions, but not all issues of conflict of jurisdictions were resolved.

As seen in Chapter 6, above, the doctrine of *forum non-conveniens*, which is a common law concept, is not known to continental legal systems.[94] In matters coming within the Convention or the Regulation, English courts did, in the past, apply the doctrine by virtue of Art 4 of the Convention or the Regulation, when the defendant was not domiciled in a Member State. The court was exercising its discretion to stay its proceedings in favour of another forum which would be more appropriate on the ground of *forum non-conveniens*.

However, the blow to this flexible approach, which has been applied for the interests of justice, came by the CJEU decision in *Jackson v Owusu* (see below).

Article 4 has become Art 6 in the Recast Regulation, and the only difference in the new Article is that the Member State in question under para 2 below will have to notify the Commission of its rules of jurisdiction which would apply when Art 6 is applicable.

Art 6 expressly states that:

(1) If the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall, subject to Article 18(1) (consumers jurisdiction), Article 21(2)(jurisdiction for employers) and Articles 24 (exclusive jurisdiction) and 25 (exclusive jurisdiction agreement) be determined by the law of that Member State.
(2) As against such a defendant, any person domiciled in a Member State may, whatever his nationality, avail himself in that State of the rules of jurisdiction there in force, and in particular those of which the Member States are to notify the Commission pursuant to point (a) of Art 76(1), in the same way as the nationals of that Member State.

Logically, as Art 6 permits the court of a Member State – in a case where the defendant is not domiciled in a Member State – to apply its own law, and assuming that that court is in the UK, the doctrine of *forum non-conveniens* should apply, provided the specific Regulation rules mentioned in Art 6 are not involved. This provision, as compared with its predecessor Art 4, has been improved by specifically referring to the Regulation rules which, if applicable, will not permit the national law of the Member State to apply.

However, the application of the *forum non-conveniens* principle may be undermined by the new *lis pendens* rule that is adopted in the Recast Regulation in so far as conflict of jurisdictions arises as between a court of a Member State and a court of a 'third State', seen under para 5, above.

The scenarios in the following paragraphs show situations presenting conflict of jurisdictions.

93 About the principles and the application of the doctrine, including forum shopping, see Ch 6, para 4, above.

94 Lord Goff explained, in *Airbus v Patel* [1998] 1 Lloyd's Rep 631, the different approaches between the civil law systems and the common law systems in this respect; see Ch 8, below.

7.1 DEFENDANT DOMICILED IN A MEMBER STATE – NATURAL FORUM A THIRD STATE

In ***Owusu v Jackson***,[95] the CJEU ruled out the possibility of a contracting State[96] declining its jurisdiction founded on Art 2 of the Convention in favour of a non-contracting State jurisdiction, on the ground of *forum non-conveniens*. It held that: Application of the doctrine of *forum non-conveniens* tended to undermine the legal protection of people domiciled in the European Community[97] and, in the context of the Convention, worked against the uniform application of its rules on jurisdiction. The practical difficulties resulting from geographical considerations in the instant case were not sufficient to call into question the mandatory nature of the jurisdictional rule in Art 2.

The case concerned a defendant, Mr Jackson (J) domiciled in the UK, who had let his villa in Jamaica to the claimant, Mr Owusu (O), a British national domiciled in the UK. The contract had provided that O would have access to a private beach, which was owned and occupied by a management company in Jamaica (M). While staying at the villa, O waded into the sea and dived into the water. He struck a sand bank and, as a result, fractured his vertebra and was rendered a tetraplegic. He claimed damages against J in the English court for personal injury on the ground of breach of contract. He also sued the Jamaican management company, M, in tort, in England. J applied for a stay of the proceedings on the ground that Jamaica was the appropriate forum. O argued that Art 2 applied, so it removed the power of the court to stay its proceedings. The judge refused to stay the proceedings and, on appeal by J to the Court of Appeal, the case was referred to the CJEU. The question put to the court was this: Would it be inconsistent with the Convention, where a claimant contends that jurisdiction is founded on Art 2, for a court of a contracting State to exercise a discretionary power, available under its national law, to decline to hear proceedings brought against a person domiciled in that State in favour of the courts of a non-contracting State: if (a) the jurisdiction of no other contracting State was in issue; (b) the proceedings had no connecting factors with any other contracting State?

The CJEU confirmed that the Convention precluded a court of a contracting State from declining its jurisdiction conferred on it by Art 2,[98] on the ground of *forum non-conveniens*, which – if allowed – would undermine the predictability of the rules of jurisdiction laid down by the Convention and, hence, it would undermine legal certainty.

Thus, being consistent with its previous judgments in *Gasser*[99] and *Turner*,[100] the CJEU emphasised the importance of the principles of legal certainty and uniform application of the rules across all Member States by rejecting the proposal that Art 2 could be derogated from by applying the doctrine of *forum non-conveniens*. Article 2 was mandatory in nature, and there could be no derogation from it except in cases

95 Case C-281/02, [2005] 1 Lloyd's Rep 452.

96 The phrase 'contracting States' was used under the Convention, while under the Regulation it is 'Member States'.

97 It is 'Union' under the Regulation.

98 See also *Besis SA v Wasserreinigungbau Alfred Kretzschmar GmbH & Co KG* Case C–256/00 [2002] ECR I-1699.

99 See para 4.2.4, above.

100 See further, Ch 8.

expressly provided for by the rules of the Convention. Further, the CJEU expressly declared the decision of the Court of Appeal in *Re Harrods (Buenos Aires)*,[101] in which the doctrine of *forum non-conveniens* had been applied in similar circumstances, to be bad law.

The CJEU also stated that, although the doctrine was only applicable in a limited number of contracting States, the objective of the Convention was precisely to lay down common rules to the exclusion of national rules.

However, what the CJEU appears to have done by this decision is to extend the remit of the EU jurisdiction regime beyond the bounds of EU States, thus expressing an underlying intention to regulate, indirectly, the jurisdiction of non-Member States. Here, the competing court that had jurisdiction was in Jamaica, because the property where the accident happened was there, the accident occurred there, and the managing company of the property, which was sued in tort, was established there.

Prior to this decision, it was understood that the EU jurisdiction regime would only regulate the jurisdiction of Member States and resolve conflicts if proceedings were brought in two Member States. But the Court stated: 'Article 2 applies to circumstances involving relationships between the courts of a single Contracting State and those of a non-Contracting State, rather than only the courts of a number of Contracting States'.

This was the prelude to the ambition of the EU to extend the rules of the Regulation beyond the EU borders to non-Member States, as seen under para 5, above. In view of this infamous decision, which shocked the legal circles, the reform of the Regulation now provides, under Arts 33 and 34, some specific rules as to how such conflicts can be resolved. But these specific rules do not leave much room for flexibility and the application of pure *forum non-conveniens* principles, as commented under para 5, above. For a court of a Member State to consider that a court of a non-Member State might have jurisdiction, perhaps under a jurisdiction agreement, or, in any event, because it may be more appropriate, there have to be pending proceedings in that court of the non-Member State.

7.2 PROCEEDINGS IN A THIRD STATE AND IN A MEMBER STATE

It would seem from ***Ferrexpo AG v Gilson Investments Ltd***[102] that the ruling in *Jackson* did not deter the English court from applying *forum non-conveniens*. However, the defendant in this case was not domiciled in a Member State; the court distinguished *Owusu v Jackson* and exercised its discretion to stay proceedings brought in England, which commenced after the proceedings in the Ukrainian court were pending, in relation to a dispute regarding ownership of shares in a Ukrainian mining company. The object of the proceedings was the validity of the resolutions of the company's general meetings and of entries in a public register in Ukraine; the rule of exclusive jurisdiction would be applicable if the proceedings were between two

101 [1992] Ch 72.

102 [2012] 1 Lloyd's Rep 588, the defendant companies, which were incorporated in England, applied for a declaration that the court had no jurisdiction and should set aside the proceedings brought by the claimant, a Swiss company.

Member States. The court decided that Art 22 (exclusive jurisdiction) of the Regulation had a reflexive application, and the proceedings involved issues that were matters for determination by the Ukrainian court.

Once the Recast Regulation is applicable, this situation will come within Arts 33 or 34. The facts are interesting and relevant to considering what the court might do in the future, if it were asked to apply these Articles of the Recast Regulation (see under para 5, above).

The substantive proceedings involved a dispute regarding F's shareholding in a Ukrainian mining company (O). G had been shareholders in O and, in 2011, brought proceedings in Ukraine against O to restore their shareholders' interest, based on the alleged invalidity of resolutions passed at shareholders' meetings. The Ukrainian court ordered that F be joined as a respondent and adjourned the proceedings. F brought proceedings in England seeking declaratory relief regarding its ownership of shares in O. It challenged the jurisdiction of the Ukrainian court, stating that it was concerned about unfair treatment if the litigation were to be heard in Ukraine, and because it considered it important that the ownership dispute was resolved quickly and by an English court in whom the investment community would have trust and confidence. F further stated that, if it obtained the appropriate declaratory relief, it would seek an anti-suit injunction to restrain the Ukrainian hearing. F submitted that there was a real risk of injustice given the practice in Ukraine of 'raiding', the taking control of businesses by unlawful means, which was made possible by corruption and a lack of judicial independence.

Would such evidence be sufficient to enable the English court (being second seised) to determine not to stay its proceedings on the ground of 'proper administration of justice', as is provided by Arts 33 and 34 of the Recast Regulation? The trend, in recent years, is that quite a number of such cases come before the English courts for better justice.

7.3 DEFENDANT DOMICILED IN A THIRD STATE – PROCEEDINGS IN TWO MEMBER STATES

As Art 6 (previously 4) of the Recast Regulation permits the application of national laws, if the defendant is not domiciled in a Member State, and supposing the English court is first seised of a matter, and a court of another Member State is second seised, English national law should be applied. The doctrine of *forum non-conveniens* was also expressed in s 49 of the CJJA 1982,[103] which provided:

> Nothing in this Act shall prevent any court in the UK from staying, sisting, striking out or dismissing any proceedings before it, on the ground of *forum non-conveniens* or otherwise, where to do so is not inconsistent with the 1968 Convention or as the case may be the Lugano Convention.

In its most liberal interpretation, what would not be inconsistent with the Convention or Regulation, in the light of the *Owusu* case, would be that s 49 might apply only in cases where the defendant is not domiciled in a Member State and

103 In the light of the Recast Regulation, the CJJA 1982 s 49 would need to be amended.

where other Regulation rules, such as the provision of exclusive jurisdiction, and those in relation to consumers, employment and insurance contracts, do not apply.

Applying a strict civil law interpretation, however, and considering the tenor of the recent decisions of the CJEU, it seems that the doctrine of *forum non-conveniens* may be excluded altogether, even if the defendant is not domiciled in a Member State.

Following the ruling in *Gasser*, it seems fairly certain so far that, if the competing court is within a Member State, the first seised court has to determine whether or not it has jurisdiction, rather than decline its jurisdiction in favour of the court of another Member State, which may even happen to be the natural forum. The procedure of resolving conflicts when there is *lis pendens* or related actions between Member States is set in stone by *Gasser*. However, this decision presupposes that the courts of two Member States are seised of jurisdiction.

In this connection, it should be noted that a caution to litigants had (even prior to the decisions in *Casser* and *Owusu*) been given by Professor Schlosser in his report,[104] in that they should not waste their time and money risking that the court concerned may consider itself less competent than another, and the choice of the plaintiff should not be weakened by considerations of *forum non-conveniens*.[105]

Let us consider the extent to which the doctrine may or may not be applicable in the following scenario. The factual background of *The Sarrio* case illustrates how the English courts approached this issue under Art 22 (related actions) of the Convention.

The Sarrio[106]

The defendants (KIA) were established in Kuwait and, through various subsidiaries, controlled a Spanish company, Grupo Torras (GT), and its subsidiaries. GT was involved in the business of paper packaging. Sarrio (S), a Spanish company, decided to sell off its own special paper business to a subsidiary of GT, Torraspapel (T). Part of the agreement was, inter alia, that S would buy shares in T and other subsidiaries of GT, and they were also given a 'put option' to require GT to buy back the shares in T from S. Having exercised the 'put option', S made a loss out of the deal, because GT did not pay the agreed value and went into receivership, and the subsidiary's value fell sharply.

S filed proceedings in Spain against KIA, claiming sums, which GT, the Spanish subsidiary company of KIA, had failed to pay under the 'put option'. Subsequently, S brought two identical actions in England, claiming damages in tort for negligent misstatement made orally during the negotiations which induced it to enter into contracts with these companies controlled by KIA. KIA applied for a stay of the action on the basis of Arts 21 and 22 of the Convention, and on *The Spiliada* doctrine of *forum non-conveniens*. It was not disputed that KIA was not domiciled in a contracting State.

104 On the accession of Denmark, Ireland and the UK to the Brussels Convention [1979] OJ C 59, p 71.

105 However, both Mance J, in *The Sarrio* [1998] 1 Lloyd's Rep 129 (HL), and Clarke J, in *The Xin Yang* case [1996] 2 Lloyd's Rep 217 (see later), interpreted this to mean that the discouragement by Professor Schlosser regarding the application of *forum non-conveniens* was only relevant in the context of jurisdiction exercised on pure Convention grounds under Arts 2 or 3, where the Convention lays down a scheme which does not apply to defendants not domiciled in a Convention State.

106 [1997] 1 Lloyd's Rep 113 (CA); [1998] 1 Lloyd's Rep 129 (HL).

S contended that, where the choice of forum was between two contracting States, the English court had no power to apply the common law principles of *forum non-conveniens* (FNC), even *when* a defendant is domiciled outside the EC. Mance J[107] rejected this contention and enunciated the principle that, where a defendant is not domiciled in a contracting State, pure Convention rules do not apply, and jurisdiction depends upon national rules, as per Art 4 of the Convention and section 49 of the CJJA 1982.[108] Applying FNC, he stayed the proceedings.

On appeal, Evans LJ approved this analysis but, unlike the judge, he did not allow the stay of the English proceedings on the ground that the actions were not related. Upon application of Art 22, however, the House of Lords restored the judge's decision and, because the Spanish court had been seised first, it declined jurisdiction under Art 22(2). It did not have to consider whether the court had discretion under Art 4 to consider principles of *forum non-conveniens*, as applied by national law in appropriate cases, because the issue of jurisdiction was resolved on the basis of Art 22.

Post-Gasser, the result of this decision would, today, be consistent with the decision of the CJEU in *Gasser*.

In this context, it should follow that *forum non-conveniens* principles do not come into the equation in cases in which two Member States are seised of jurisdiction, but instead the *lis pendens* rule, as stated in *Gasser*, will apply.

7.4 DEFENDANT DOMICILED IN A THIRD STATE – NATURAL FORUM A MEMBER STATE

In the light of *Gasser* and *Jackson*, how would *The Xin Yang*[109] and the decisions below be decided today? Would the reform of the Regulation affect the outcome?

In ***The Xin Yang***, the natural forum was the Netherlands where the collision occurred with a moored ship. Damage was caused to both vessels and to the jetty. The owners of the moored ship arrested a sister ship of *The Xin Yang* in England, claiming damages. Subsequently, the defendant commenced limitation proceedings in the Netherlands and applied to stay the English action on the basis of *forum non-conveniens*. Proceedings had also commenced in the Netherlands by the owners of the jetty, who arrested *The Xin Yang* to obtain security for damages to the jetty.

Clarke J (as he then was) stayed the English liability action in favour of the Netherlands, although the English court was first seised. The judge considered that, as the parties were not domiciled in a contracting State, and as neither Art 16 (exclusive jurisdiction) nor Art 17 (jurisdiction agreements) of the Convention applied, the court was not prevented by pure Convention rules (such as Arts 2 and 3) from staying the proceedings on the ground of *forum non-conveniens*. Like Mance J in *Sarrio*, he relied on Art 4.[110] As English law includes principles of *forum non-*

107 [1996] 1 Lloyd's Rep 650.
108 Ibid, at p 654.
109 [1996] 2 Lloyd's Rep 217.
110 The House of Lords in *Sarrio* did not have to consider Art 4 because it found that Art 22 of the Convention applied. The Court of Appeal, in *Haji-Ioannou v Frangos* [1999] 2 Lloyd's Rep 337, was in favour of applying Art 4 in a hypothetical case, where the foreign court is not in a contracting State, but it did not have to decide the point.

conveniens, he said, there was no sound basis for holding that the Convention intended to restrict the court in the exercise of its jurisdiction to stay the action on those grounds, whether or not the alternative forum was the court of a contracting State.[111] The sensible place, the judge said, for the determination of the quantum between the various claimants would be in the Dutch limitation proceedings. Thus, the appropriate forum for the liability and limitation issues was the place of the collision.

It would not be surprising if the reasoning of the judge in this decision was not viewed favourably and be regarded as being against *Gasser* by the CJEU today. But it would be most likely that an English court, or even a court of another Member State, would (as the first seised court) determine to decline jurisdiction in favour of the Netherlands on the ground of either the *lis pendens* or related actions rules, and not on the ground of the doctrine of *forum non-conviniens*.

Similar issues arose in ***The Happy Fellow***.[112]

The Happy Fellow and *The Darfur* collided near the mouth of the Seine. *Darfur* was arrested at Le Havre by the owners of *The Happy Fellow*. Seven other French claimants also issued proceedings there. Subsequently, the time charterers of *The Darfur* issued proceedings in England against the owners of this ship, claiming indemnity. A few days later, a limitation action commenced in England by the owners of *The Darfur*, naming as defendants the time charterers and all the other parties who were proceeding in France. A stay of the limitation action in England in favour of the French court was allowed upon application of the operators of *The Happy Fellow*, on the ground that the actions 'were related', and Art 22 of the Convention should apply.

The Court of Appeal[113]approved the judge's decision that the French court would conclude it should deal with limitation issues as well. It disregarded the fact that, before the appeal, the owners of *The Darfur* – hoping to influence the court in exercising its discretion to refuse the stay of the English limitation action – admitted liability in the French proceedings.

The English court, being the second seised, followed the correct approach (which would be followed today) to stay its proceedings or decline jurisdiction in favour of the French court (being the first seised and the natural forum) on the ground of related actions.

7.5 LIMITATION OF LIABILITY ACTIONS – DEFENDANT DOMICILED IN A THIRD STATE

Invariably, litigants pre-empt an action for limitation of liability (the limitation action) in the court of a State of their preference. If that court is in a Member State and is first seised, *Gasser v MISAT* will not apply, because the liability and limitation actions do not have the same cause of action. Thus the rule of *lis pendens* will not apply, as the CJEU decided in ***Maersk Olie & Gas v Firma M De Haan & W De Boer***,[114] by holding that: Such actions do not involve the same cause of action nor the same subject matter for the purpose of Art 21 of the Convention (which was applicable at the time of the institution of the relevant proceedings), because the action for damages

111 [1992] 1 Lloyd's Rep 204, p 220.
112 [1997] 1 Lloyd's Rep 130 and [1998] 1 Lloyd's Rep 13 (CA).
113 [1998]1 Lloyd's Rep 13.
114 [2005] 1 Lloyd's Rep 210.

is sought to have the defendant declared liable, while the application to limit liability is designed to ensure, in the event that the person is declared liable, that such liability would be limited.

The legal rule that forms the basis of each claim is different. For this reason, the *lis pendens* rule of Art 21 (now Art 29 of the Recast Regulation) did not apply. Therefore, a decision ordering the establishment of a limitation of liability fund was a judgment within the meaning of the Convention, and it could not be refused recognition in another Member State. It is for the court in which enforcement is sought to determine whether notification of the limitation action was effected in the due and proper form and in sufficient time.

The facts were simple. Maersk suffered loss by the damage to its pipeline in Denmark caused by a fishing trawler belonging to the defendant ship-owner, who made an application to limit its liability in the Netherlands, the place of registration of the ship. The court made an order fixing the amount of liability, and the decision was notified to Maersk by telex. Later, Maersk brought an action in Denmark claiming damages and appealed against the decision of the Dutch court on the ground of no jurisdiction. Maersk lost in the appeal and it had not submitted a claim in the limitation fund. In the absence of any claims, the fund lodged was returned to the ship-owner! The Danish court decided that, being the court second seised, it had to decline jurisdiction in accordance with Art 21, but Maersk appealed, and reference was made to the ECJ.

It should be noted that proceedings for limitation of liability are different from proceedings seeking a declaration of no liability. The latter has the same cause of action as the proceedings in relation to liability issues, as was decided in *The Tatry*.

Litigants will appreciate what change this decision has brought to limitation of liability actions, which have frequently provided an opportunity for forum shopping. The CJEU, however, stated that its conclusion on Art 21 did not, in principle, preclude the application of Art 22, and that applications for limitation of liability are sufficiently closely connected with the liability proceedings as to be capable of being regarded as related within the meaning of Art 22(2), with the result that the court second seised may stay its proceedings. In this case, the court did not have to decide this point, because the limitation proceedings had been definitively terminated in the absence of any claims submitted by injured parties, and the lodged fund was returned to the ship-owner.

The fact that the limitation proceedings were terminated in this case, unfortunately, deprived the court from the opportunity of considering Art 6A of the Convention (Art 7 of the Regulation) and Art 9 of the Recast, below.

Art 9 provides that:

> Where by virtue of this Regulation a court of a Member State has jurisdiction in actions relating to liability arising from the use or operation of a ship, that court, or any other court substituted for this purpose by the internal law of that Member State, shall also have jurisdiction over claims for limitation of such liability.

This is linked to the issue of related actions. Obviously, it would be sensible, if both liability and limitation actions were decided by the same court for, at least, it would save legal costs, unless, of course, the party seeking to limit liability admits liability, in which case there will only be one court decision.

This Article, which has remained unchanged, presupposes that a court of a Member State has jurisdiction in the liability action by virtue of the Regulation. 'Use or

operation of a ship' includes liability for any maritime claims; if a collision occurs in a Member State, its courts will be the natural forum for the liability action. But if, prior to any liability action commencing at the natural forum, the relevant ship, or a sister ship, is arrested at another Member State, or security is provided there, its court will have jurisdiction by virtue of Art 71, which confers jurisdiction to such court via Art 1 of the Collision Convention. That court will be first seised in the liability action.

Applying Art 9 of the Regulation, one way to interpret the phrase 'that court, or any other court substituted for this purpose by the internal law of that Member State' may be that the court first seised has discretion to consider by applying its internal law whether the natural forum may be more appropriate for the liability action. But the natural forum may have been second seised of the limitation action. Article 9 seems to allocate jurisdiction for both the liability and the limitation action to one court of a Member State, which has jurisdiction for the liability action. The meaning of this may be that having both actions before the same court would be the obvious thing to do to save costs; or it may mean that the actions shall not be split.

However, the CJEU, on *Mearsk Olie* (see above), decided that, as the object of such actions is not the same, there cannot be irreconcilable judgments if different courts decide liability and limitation. Logically, there should be no need to have both actions determined by the same court. Even if the liability and limitation actions are considered to be closely related for the purpose of Art 30 of the Recast (related actions) it would not, necessarily, be expedient to determine them together, as there would not be a risk of having irreconcilable judgments.

The effect of this decision seems to be that Art 9 (which is the same as the previous provision) is of no significance, and that even the technical application of the *lis pendens* rule pursuant to *Gasser* would not be necessary because there will be no risk of having irreconcilable judgments if the liability and limitation actions are decided by different courts of Member States.

8 PROROGATION OF JURISDICTION

Section 7 of the Regulation provides for prorogation of jurisdiction. One method is by the agreement of the parties to a contract (paras 8.1, 8.2, below) and the other is by entering unconditional appearance in the court of a Member State where proceedings have commenced (para 8.3, below). As the law currently applicable until 10 January 2015 is as provided by Art 23, a brief summary of it is necessary before the new Art 25 of the Recast Regulation is explained under 8.2, below.

8.1 CHOICE OF COURT AGREEMENTS UNDER ART 23 OF THE REGULATION

The task of interpretation under this Article of the Regulation became easier than it was under Art 17 of the Convention. Art 23 provides expressly that a choice of jurisdiction by the parties shall be exclusive, unless the parties agreed otherwise. Since *Gasser v MISAT*, it has been for the court first seised to determine whether Art 23 applies and whether the agreement is valid, effective and exclusive (contrast Art 25 of the Recast Regulation below).

Article 23 provides, in particular:

> (1) If the parties, one or more of whom is domiciled in a Member State, have agreed that a court or the courts of a Member 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 jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. Such an agreement conferring jurisdiction shall be either: (a) in writing or evidenced in writing, or (b) in a form which accords with practices which the parties have established between themselves, or (c) in international trade or commerce in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.
> . . .
> (3) Where such an agreement is concluded by parties, none of whom is domiciled in a Member State, the courts of other Member States shall have no jurisdiction over their disputes unless the court or courts chosen have declined jurisdiction.

Article 23 applies when two conditions are satisfied: first, the agreement is between parties, one or more of whom is domiciled in a Member State; and, second, the agreement is that a court of a Member State shall have jurisdiction. Both conditions shall be examined by the court first seised,[115] and Member States are not entitled to set their own additional requirements.[116]

In determining whether a forum clause is '*an agreement conferring jurisdiction*' within the ambit of Art 23, the court has to treat these words as an independent concept and not simply as referring to the national law of one or other of the Member States.[117]

Jurisdiction under Art 23 conferred by the agreement of the parties has been held to be mandatory[118] if (a) the requirements of the Article are fulfilled, (b) the agreement is valid and effective covering the scope of the dispute, and (c) the parties intended that the court chosen shall have exclusive jurisdiction. The effect of this is that the agreed jurisdiction should be given precedence over other jurisdiction bases provided by the Regulation,[119] except the exclusive jurisdiction provided under Art 22.

In some types of contract, such as insurance policies, there is a reason for providing for non-exclusive jurisdiction and whether or not the jurisdiction is non-exclusive will depend on the context of the particular case.[120]

Court decisions concerning Articles 23 and 27 predating *Gasser*, which were analysed in the previous edition, are omitted because of the strict application of the *lis pendens* rule.

8.2 CHOICE OF COURT AGREEMENTS UNDER ART 25 OF THE RECAST

With the aim to enhance the effectiveness of the choice of court agreements of the parties to a contract in order to respect parties' autonomy, one main reason of the

115 *Coreck Maritime GmbH v Handelsveem BV* [2000] ECR I-9337.
116 *Elefanten Schu GmbH v Jacqmain* [1981] ECR 1671.
117 *Powell Duffryn plc v Petereit* [1992] ECR I-1745.
118 *Lafarge Plasterboard Ltd v Fritz Peters & Co. KG* [2000] 2 Lloyd's Rep 689.
119 Per Rix J (as he then was) in *Hough v P & O Containers Ltd* [1999] QB 834 (dealing with precedence of Art 17 over Art 6(2)).
120 See, for example, *Evialis SA v SAIT and Others* [2003] 2 Lloyd's Rep 377.

review of the Regulation was to improve Art 23, so that it comes more into line with the Hague Convention on Choice of Court Agreements 2005.[121]

Article 25 has brought three very important changes: (a) it no longer requires that one of the parties to the agreement must be domiciled in a Member State; (b) the validity of the agreement shall be determined by the law of the Member State whose court is designated to have jurisdiction; (c) the choice of court agreement shall be treated as independent of the other terms of the contract, and its validity cannot be contested on the ground that the contract is not valid (separability). In particular, Art 25 provides:

(1) If the parties, regardless of their domicile, have agreed that a court or the courts of a Member 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 jurisdiction, unless the agreement is null and void as to its substantive validity under the law of that Member State.
Such jurisdiction shall be exclusive unless the parties have agreed otherwise. The agreement conferring jurisdiction shall be either:
(a) in writing or evidenced in writing;
(b) in a form which accords with practices which the parties have established between themselves; or
(c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.
(2) Any communication by electronic means which provides a durable record of the agreement shall be equivalent to 'writing'.
(3) [New, relating to trusts]
(4) [New regarding trusts]
(5) An agreement conferring jurisdiction which forms part of a contract shall be treated as an agreement independent of the other terms of the contract.
The validly of the agreement conferring jurisdiction cannot be contested solely on the ground that the contract is not valid. [New]

Recital 19 of the Recast Regulation provides that the autonomy of the parties to a contract, other than an insurance, consumer or employment contract, where there is limited autonomy, should be respected, subject to the exclusive grounds of jurisdiction laid down in this Regulation. Thus, Art 25 jurisdiction is subject to jurisdiction derived from the aforesaid rules of the Regulation.

The most important change is that the validity of the agreement is to be determined by the law of the court chosen by the parties to have jurisdiction, instead of the first seised court.

Similarly with Art 23, Art 25 is prescriptive in two respects, giving prominence to the parties' agreement: (a) if the parties 'have agreed' a court, that court shall have jurisdiction, unless the agreement is null and void; (b) such jurisdiction shall be exclusive, unless the parties 'have agreed' otherwise.

8.2.1 Conditions of application

Unlike in the previous provisions (Art 17 of the Convention, or Art 23 of the Regulation), under Art 25 of the Recast Regulation, the domicile of the parties is

121 The Hague Convention requires: (a) a written or otherwise reproducible agreement; (b) the chosen court is located in a contracting State; (c) the law of the chosen court determines validity of agreement; (d) the court of another contracting State to stay its proceedings.

irrelevant. The only connecting factor is that the court chosen is in a Member State.

The agreement should be enforced when:

(a) there is consensus between the parties about a court of a Member State to have jurisdiction;
(b) the agreement is valid[122] in its substance under the law of that Member State;
(c) the form is in writing, or evidenced in writing, or is in accord with the practices of the parties, or the usage of a particular trade.

It is prescribed that such *agreement conferring jurisdiction* shall be exclusive unless the parties have agreed otherwise. It should still be the law under this Article, as it is under Art 23, that, in determining whether a 'forum' clause is an agreement conferring jurisdiction, the court has to treat these words as an independent concept and not simply as referring to the national law of the Member State.[123]

8.2.1.1 Consensus

The phrase 'the parties have agreed' indicates that the court will examine first whether there was consensus (that is, intention to be bound).[124] In the same way as under the present Art 23, Art 25 does not seem to require the court to make an investigation as to whether or not other elements, which are regarded as essential to the formation of a binding contract under its national law, are met. 'Consensus' requires a claimant to show that a defendant has clearly and distinctly consented to the alleged jurisdiction agreement.[125] This has also been the position under Arts 17 of the Convention and 23 of the Regulation.[126] Consensus formed between the parties is to be expressed in accordance with the strict requirements as to form laid down therein.[127]

For example, in ***Cube Lighting & Industrial Design Ltd v Afcon Electra Romania***,[128] the claimant had failed to demonstrate that it could be established, clearly and precisely, that the alleged jurisdiction agreement was the subject of consensus between the parties and, for that reason alone, the English court lacked jurisdiction under Art 23 of the Regulation. The person claiming that the English court had jurisdiction had to show a 'good arguable case' that the relevant requirements had been satisfied.[129] A detailed analysis of the evidence led to the conclusion that the evidence fell far short of establishing even an argument, let alone 'the much better of the argument', that there had been a consensus regarding

122 See, further, Ch 6, para 6, above, examining case law with regard to validity of arbitration agreements.

123 *Powell Duffryn plc v Petereit* [1992] ECR I-1745.

124 Case C-24/76, *Estasis Salotti di Colzani Aimo and Gianmario Colzani v RUWA* [1976] ECR 1831, has remained good law and is applied in other cases; see *Cube Lighting & Industrial Design Ltd v Afcon Electra Romania SA* [2011] EWHC 2565 (Ch).

125 *Bols Distilleries v Superior Yachts* [2006] UKPC 45; *Powell Guffryn v Petereit*, Case C-214/89 [1992] ECR I-1745; *Joint Stock Co. Aeroflot Russian Airlines v Berezovsky & Others* [2012] 1 Lloyd's Rep 56.

126 For further views, see J Hill and A Chong, *International Commercial Disputes, Commercial Conflict of Laws in English Courts* (4th edn, Hart, 2010) para 5.3.38ff.

127 *Fracesco Benincasa v Dentalkit Srl* (Case C-269/95) [1997] ECR I-3767; [1997] IL Pr 559.

128 [2011] EWHC 2565 (Ch).

129 *Canada Trust Co. v Stolzenberg (No 2)* [1998] 1 WLR 547 applied and *Bols Distilleries BV v Superior Yacht Services Ltd* [2006] UKPC 45, [2007] 1 WLR 12 considered; see also *USB AG and Another v HSH Nordbank AG* [2008] 2 Lloyd's Rep 500: the jurisdiction clause did not cover the dispute set out in the New York complaint. USB had to show a good arguable case that the English court had jurisdiction under Art 23.

jurisdiction. Overall, it was very difficult to accept that two parties who were in heavy negotiations at the relevant time would have entered into a free-standing jurisdiction agreement to override anything they subsequently discussed or agreed, and it was equally difficult to believe that they would have done so informally.

The same position had been held for the interpretation of Art 17 of the Convention in ***Berghoefer v ASA SA***;[130] the CJEU held in this case that the first paragraph of Art 17 had to be interpreted as meaning that the formal requirements set out are fulfilled, if it is shown that: (a) the jurisdiction was conferred by an oral agreement dealing expressly with that point, (b) a written confirmation of that agreement by one of the parties was received by the other, and (c) the latter raised no objection.

Considering this case, the Privy Council held, in ***Bols Distilleries v Superior Yacht***,[131] the fact that a draft agreement included a jurisdiction clause could not be evidence that the parties had agreed on the jurisdiction referred to in the draft. Although it was clear that the various drafts of the agreement included the Gibraltar jurisdiction clause, there was nothing in the evidence to suggest that the clause itself was ever discussed and agreed in meetings, emails or telephone calls. There was nothing to show clearly and precisely that the jurisdiction clause in the sponsorship agreement was a written confirmation of a prior oral agreement on jurisdiction, rather than just a term in a contract to be agreed. The fact that B did not object to the jurisdiction clause did not bring the instant case within the ambit of the *Berghoefer* case. S had not shown that it had a better argument than B, on the available material, that the court had jurisdiction on that basis.

In ***Aeroflot – Russian Airlines v Berezovsky***,[132] Floyd J, applying the above case and *Powell Duffryn*, held that:

> The test of showing 'a good arguable case' required 'Services' to show that it had a much better argument than Aeroflot that, on the material available, the requirements of art 23(1) were met and that it could be established, clearly and precisely, that the clause conferring jurisdiction on the court was the subject of consensus between the parties.

Applying these principles, Hamblen J held in ***Polskie v Rallo Vito***[133] that, in a case where a party alleged that it had never accepted the clause, the court's task was to determine if there was sufficient consensus between the parties as a question of fact, without recourse to any rules of national law. It was sufficient for a party to agree to standard terms that contained a jurisdiction clause.

8.2.1.2 Validity

Article 25 expressly states that 'the chosen court shall have jurisdiction, unless the agreement is null and void as to its substantive validity under the law of that Member State' (and not under the law of the court first seised – see under *lis pendens*). An agreement would be null and void automatically if, for example, there was no capacity,

130 *Berghoefer GmbH & Co. KG v ASA SA* (221/84) [1985] ECR 2699.

131 [2006] UKPC 45; [2007] 1 WLR 12; see further an example of no consensus to be bound in *Hyundai Merchant Marine Co. Ltd v Americas Bulk Transport Ltd (The Pacific Champ)* [2013] EWHC 470 (Comm) concerning a recap for a possible sub-charter purporting to include an arbitration agreement.

132 [2012] EWHC 1610 (Ch); the court applied the principle derived from the CJEU in *Powell Duffryn*; see under 'Form' below.

133 [2010] 1 Lloyd's Rep 384.

or no authority to agree, or the identity of the parties was different from the parties alleged to have agreed, or there was illegality.

However, the drafting of this Article is likely to give rise to arguments: first, what is meant by 'substantive validity'? Would it require application by the chosen court of its substantive law of contract principles to determine substantive validity? The word 'substantive' was not in the previous Articles.

Second, although the text does not refer to 'voidable', but only to 'void', would the court examine whether or not the agreement was entered into due to duress, or inducement, or mistake in order to determine 'substantive' validity? Such issues would, arguably, be likely to affect the parties' consensus, if the meaning of consensus required an examination of the principles applicable by the substantive contract law of the chosen court (but see *Polskie v Rallo Vitto* above, at 8.2.1.1). As the predecessors to Art 25 did not specifically refer to 'substantive validity', there is no authority yet on this issue. However, the draftsman, by omitting the word 'voidable', may have intended to exclude, at the stage of examining the application of Art 25, an examination of issues that might undermine the uniform application of rules. This may be so because the intention of the Recast Regulation is to prevent the undermining of a choice of court agreement by possible spurious arguments raised by a party who wishes to avoid the enforcement of the jurisdiction agreement. If such an interpretation is correct, it is submitted that an examination of issues that the agreement might have been voidable could still be examined when the case is decided on its merits.

Third, would the court apply, through its conflict of laws rule, the law applicable to the agreement, if it is not its own law? Recital 20 of the Recast refers to the law of the Member State whose court is designated in the agreement, including the conflict of laws rules of that Member State.

However, jurisdiction clauses are procedural in nature, so their 'effective' validity would not be dependent on an exercise in choice of law. One looks at the form – that is the writing, if it is done with consciousness or seriousness in accepting the jurisdiction of a court.[134] See further CJEU cases below, under 'form'.

Although signing is not a formal requirement under the Article, without consensus, the agreement will be null or void. So 'consensus' is inextricably linked to both the form and to examining substantive validity. Once consensus is proved on the evidence, that should be enough. When it is contended that what appears to be, prima facie, an agreement in writing was brought about by some vitiating factor, such as illegality, or no capacity, or no authority to agree, there will be a question of substantive, or effective, validity to be addressed.

The issue of a vitiating factor arose in ***Antonio Gramsci v Recoletos***[135] (pre-reform case), which is a very good example of the complexities that can arise in practice. The applicant (L) challenged the jurisdiction of the English court to determine the claims against him. The claimants (G) were beneficial owners of the Latvian Shipping Company. They brought proceedings against five offshore companies alleging a fraudulent scheme by which those companies had chartered vessels from G at less than the market rate and then sub-chartered them at the market rate and kept the difference for themselves. The English court had jurisdiction in

134 Adrian Briggs: views expressed at the event of the London Shipping Law Centre: 'Reform of the Brussels I Regulation' held on 1 November 2012; see also *Francesco Benincasa v Dentalkit Srl* and *Powell Duffryn*, below, under 8.2.1.3.

135 [2012] 2 Lloyds Rep 365; see also *A. Gramsci v Lembergs* [2013] 2 Lloyds Rep 295 (CA).

respect of that claim, because the charter-parties provided for English jurisdiction. G obtained judgment against the offshore companies in respect of the diverted profits. They also sought to make L and another individual (S) liable for the diverted profits, on the basis that they, along with others, used the offshore companies as a device for the purposes of diverting the profits, and that the court could pierce the corporate veil and hold them jointly and severally liable with the offshore companies. In the case of S, the court held that there was a good arguable case that the veil of incorporation should be pierced, with the result that S was to be regarded as a party to the charter-parties and the jurisdiction clauses in them. L submitted (a) that there was no good arguable case that he was a beneficial owner and controller of the offshore companies; (b) it was not permissible to treat him as a party to the charter-parties by piercing the corporate veil; (c) he had not agreed to English jurisdiction within Regulation 44/2001 Art 23.

Teare J held that there was no good arguable case that the English court had jurisdiction over an individual who was said to be an owner and controller of offshore companies involved in a fraudulent chartering scheme. The decision that S could be made party to the charter-parties by piercing the corporate veil had been overruled by the Court of Appeal, and that decision was binding in the instant case, so that there could be no good arguable case that L was party to the jurisdiction clauses; it was not permissible to pierce the corporate veil and treat him as a party to charter-parties containing English jurisdiction clauses,[136] and he had not agreed or submitted to English jurisdiction within Regulation 44/2001 Art 23. If the agreement, or consensus, necessary for Art 23 to operate could be shown without a formal contract on the basis of some public willingness to agree to English jurisdiction, there was no arguable case that L had demonstrated such willingness in the instant case. On the evidence adduced by G, L had induced them to contract with the offshore companies on terms that included an English jurisdiction clause, but there was no evidence that L had himself expressed or indicated any willingness that claims against him should be tried in England.

This decision shows that, to bind a third party to a jurisdiction agreement, clear willingness on the part of that party to be so bound must be shown. It also shows that such a burden is very difficult to discharge when issues of piercing the corporate veil are involved.

In ***Aeroflot – Russian Airlines v Berezovsky***,[137] the argument was that, although the agreement was signed, the signatory was misled. The evidence was that officers of Aeroflot had read the document and signed it, but Aeroflot argued that it had agreed to it under a misconception that the document had been reviewed by its legal department, which – Aeroflot submitted – was a pre-condition. The court held that even if these facts were established, they would not show that Aeroflot had not agreed

136 Following the CA decision in *VTB Capital plc v Nutritek International Corp.* [2012] EWCA Civ 808; [2012] 2 Lloyd's Rep 313: in which it was held that it would be contrary to principle and authority to hold that where the court pierced the corporate veil it could find that those who had misused the corporate structure were parties to the company's contracts; see also the Supreme Court decision [2013] UKSC 5, in which, by majority, it was decided not to pierce the corporate veil and therefore it did not have to decide the issue decided by the CA, above, although Lord Clarke, being in minority, expressed the wish to re-examine the issue in future cases of binding non-parties to contracts entered into by the company, the veil of which may be pierced; see Chs 4 and 6, above.

137 [2012] EWHC 1610 (Ch); the court applied the principle derived from the CJEU in *Powell Duffryn*; see under 'Form' below.

to the clause. A unilateral requirement, such as the precondition described above, did not negate awareness of, or intention to be bound by, the clause.

Briefly on the facts, as far as the jurisdiction clause was concerned, Aeroflot had entered into an Advisory Mandate with Forus Services under which 'Services' was to give advice to Aeroflot on investments and financing. The agreement was subject to Swiss law, and the place of jurisdiction was Lausanne. Other agreements contained conflicting dispute resolution clauses, which are examined under arbitration agreements, in Chapter 6, above.

The English court declined jurisdiction in favour of Switzerland. Interpreting Art 23 of the Regulation, Floyd J, applying the principles derived from *Bolts Distilliers* and *Powell Duffryn* (above) held that: the evidence did not show that Aeroflot did not agree to the jurisdiction clause. Services had much the better of the arguments that the jurisdiction clause was enforceable.

The CJEU, in ***Coreck Maritime GmbH v Handelsveem BV***,[138] had previously decided on Art 17 of the Convention that: for a jurisdiction clause to be valid, the identity of the chosen forum did not necessarily have to be apparent solely from the wording of the clause, if it could be ascertained from the surrounding circumstances, namely from a statement in the clause of objective factors forming the basis of the parties' choice of forum. The purpose of Art 17 was to protect the wishes of the parties and was based on a recognition of their independent will to a contract in deciding which court would have jurisdiction to settle disputes that fell within the Convention and were not otherwise excluded. A jurisdiction clause within a bill of lading would also be enforceable as against a third party successor to the bill of lading, if under the applicable national law he had also succeeded to the rights and obligations of the shipper. It would be inferred from this case that national law will apply to ascertain the identity of the parties to the jurisdiction ageement for the purpose of validity.

It is clear from the cases decided in the context of Arts 17 and 23 that, in determining the validity of the jurisdiction agreement, the courts examine the evidence to ascertain whether or not there was consensus (that is, intention to be bound by it), which is also relevant to whether or not the agreement was null or void, and whether the formalities were observed. As the intention of the Review of the Regulation is to facilitate the easier enforcement of jurisdiction agreements by the application of uniform rules, it follows that, when the validity of a choice of court agreement is examined under Art 25 of the Recast, the court will go through the same process. For the purpose of the uniform enforcement of the choice of court agreements, it would be undesirable if the courts of Member States applied different principles in the interpretation of Art 25 by introducing concepts from their substantive contract law, which can be diverse. It would be even more undesirable and time consuming if conflict of laws rules were to be applied in the event the law governing the jurisdiction agreement is not the same law as the law of the chosen court.

Once the jurisdiction agreement is declared valid by the court, its judgment will be enforceable in other Member States, as was decided by the CJEU considering Arts 32–35 of the Brussels I Regulation in *Krones AG v Samskip GmbH*.[139] (See para 12, below.)

138 (C-387/98) [2000] ECR I-9337.
139 Case No C-456/11, 15 November 2012.

8.2.1.3 Form

The agreement conferring jurisdiction shall be in writing, or equivalent to writing; electronic communications of a durable record shall be equivalent to writing. All that is required is that an oral agreement be '*evidenced in writing*'. There is no need for the agreement to be signed.[140] The practice of the parties or a usage of a trade of which the parties are aware would be an acceptable form.

In ***Francesco Benincasa v Dentalkit Srl*** ,[141] the CJEU emphasised that Art 17 of the Convention sets out to designate, clearly and precisely, a court in a contracting State that is to have exclusive jurisdiction in accordance with the consensus formed between the parties, which is to be expressed in accordance with the strict requirements as to form laid down therein. The legal certainty which that provision seeks to secure could easily be jeopardised if one party to the contract could frustrate that rule of the Convention simply by claiming that the whole of the contract was void (as regards the form), on grounds derived from the applicable substantive law.[142]

The court further held that a jurisdiction clause, which serves a procedural purpose, is governed by the provisions of the Convention, whose aim is to establish uniform rules of international jurisdiction. In contrast, the substantive provisions of the main contract in which that clause is incorporated, and likewise any dispute as to the validity of that contract, are governed by the *lex causae* determined by the private international law of the State of the court having jurisdiction.

As regards the formalities, the CJEU further held, in ***Powell Duffryn plc v Petereit***,[143] that it is for the national court[144] to interpret the clause conferring jurisdiction invoked before it, in order to determine which disputes fall within its scope. The Court emphasised that it is the form that it is important for the relevant article to apply.

A clause conferring jurisdiction on the courts of a contracting State to entertain disputes between a company and its shareholders, inserted into the statutes of such company, constituted an agreement conferring jurisdiction within the meaning of Art 17 of the Brussels Convention. Irrespective of the manner of acquisition of the shares, the formal requirements laid down in Art 17 must be considered to be complied with in regard to any shareholder, where the clause conferring jurisdiction was contained in the statutes of the company and those statutes were lodged in a place to which the shareholder may have access, or were entered in a public register. The requirement that a dispute must arise in connection with a particular legal relationship within the meaning of Art 17 is satisfied if the clause conferring jurisdiction in the statutes of a company may be interpreted by the national court as referring to the disputes between the company and its shareholders as such.

140 *Polskie v Rallo Vito* [2009] EWHC 2249 (Comm); [2010] 1 Lloyd's Rep 384, the judge applied *Powell Duffryn plc v Petereit* (C-214/89) [1992] ECR I-1745; [1992] ILPr 300.

141 (Case C-269/95) [1997] ECR I-3767; [1997] IL Pr 559.

142 Under Art 25(5), the choice of court agreement is treated as independent of the other terms of the main contract, and its validity cannot be contested solely on the ground that the main contract is not valid.

143 (C-214/89) [1992] ECR I-1745.

144 Although, at that time, the national court was the court first seised with jurisdiction, under the Recast Regulation it will be the court designated with jurisdiction which will examine the validity of the agreement.

Under Art 25 of the Recast Regulation, it will be up to the court designated with jurisdiction to interpret the clause conferring jurisdiction and determine whether or not the formalities are complied with and whether the dispute is covered by the choice of court agreement.

8.2.2 Exception to the general rule of *lis pendens*

Under the amended Regulation, both the substantive validity and the formalities of the agreement are for the designated court to determine, which is a very welcome reform.

Prior to the amendment of the Regulation, the required conditions were to be examined by the court first seised,[145] and other Member States were not entitled to set their own additional requirements.[146]

A recent decision of the Court of Appeal exemplifies the difficulties caused by the rigidity of this *lis pendens* rule when there is a jurisdiction agreement. In ***Starlight Shipping Co. v Allianz Marine & Aviation Versicherungs AG and others (The Alexandros T)***,[147] the ship-owner (Starlight) and the managers (OME) claimed under the insurance policy, governed by English law, an indemnity for the total loss of the ship. The English court was the agreed choice of jurisdiction. The case settled shortly before trial, and, pursuant to Tomlin orders, the insurers paid the full amount of the claim, and the proceedings were stayed. In the light of certain accusations that had been made by the insurer against the assured during the English proceedings about alleged scuttling, one important clause of the Tomlin orders was that the assured would hold the insurers harmless, and it also provided for exclusive English jurisdiction in case of disputes arising in relation to compliance with the orders. After three years, Starlight and OME (and others) commenced proceedings in Greece in tort against the insurers for malicious falsehoods made in Greece by the insurers relating to the circumstances in which the vessel had been lost, claiming substantial damages for losses suffered.

The insurers, in turn, issued applications in the original English proceedings (which had remained stayed pursuant to the Tomlin orders), claiming damages for breach of the settlement agreement and for breach of the jurisdiction clause, as well as a declaration that they were not liable because those non-contractual claims had been compromised by the settlement agreements. In addition, they issued new proceedings claiming similar relief.

The Court of Appeal, reversing the judgment of Burton J, held that the English proceedings involved the same cause of action and the same parties as the Greek proceedings, and that the Greek court had been seised first in relation to them. Thus, the English proceedings were stayed in favour of the Greek proceedings under Art 27 of the Regulation.

The Greek Court, being the first seised, in this case, will construe the jurisdiction clause as agreed in the Tomlin orders and decide whether or not the Greek action should be stayed on the basis of Art 23. This odd result, created by *Gasser*, is aimed to be avoided by the reform.

145 *Coreck Maritime GmbH v Handelsveem BV* [2000] ECR I-9337; *Gasset v Missat* Case C-116/02 [2004] 1 Lloyd's Rep 222.

146 *Elefanten Schu GmbH v Jacqmain* [1981] ECR 1671.

147 [2012] 1 Lloyd's Law Rep 162, Burton J; [2012] EWCA 1714 Civ.

In order to enhance the effectiveness of exclusive choice of court agreements and to avoid abusive litigation tactics, Recital 22 provides that it is necessary to provide an exception to the general rule of *lis pendens* where concurrent proceedings involving the same cause of action and the same parties may commence in the courts of two Member States.

In such a case, the court first seised should be required to stay its proceedings as soon as the designated court has been seised and until such time as the latter court declares that it has no jurisdiction under the exclusive choice of court agreement. It is emphasised that the designated court has priority, unless there is a situation of conflicting exclusive choice of court agreements.

Furthermore, Recital 20 of the Recast Regulation emphasises that questions of substantive validity of the agreement should be decided in accordance with the law of the Member State whose court is designated to have jurisdiction, including the conflict of laws rules of that Member State. It should be noted that Art 25, itself, does not mention conflict of laws rules. It was discussed under 'validity', above, para 8.2.1.2, that, as jurisdiction clauses are procedural, the legal certainty of Art 25 could be jeopardised, if reference was made, via conflict of laws, to the substantive law governing the contract (see also *Francesco Benincasa v Dentalkit Srl*, 8.2.1.3, above).

8.2.3 Conferring jurisdiction

As seen earlier, the term 'conferring jurisdiction' is an independent concept, not dependent on the law of national courts for its interpretation. Article 25 prescribes that a choice of court agreement confers exclusive jurisdiction on the designated court, provided it is valid and meets the formalities prescribed by the Article. It would seem that, provided these conditions are met, there would be no need to apply rules of construction to ascertain whether or not the agreement is meant by the parties to be exclusive. However, if it appears that there are conflicting exclusive choice of court agreements in the contract, the rules of construction of the designated court would apply to ascertain whether one or both clauses were meant by the parties to be exclusive, and, if they are, the exception to the *lis pendens* rule shall not apply.

Cases in which a jurisdiction clause in a contract designates jurisdiction to a court that is meant by the parties as an option to be exercised only by the one party, but there is also another jurisdiction clause binding upon the other party,[148] have become quite common. If such clauses are regarded to be conflicting,[149]the exception to the *lis pendens* rule (above) will not apply. It is envisaged that there will be issues of clash of jurisdictions, whereupon one party to a contract will commence proceedings in the court that, he alleges, has exclusive jurisdiction, and the other will commence in the court that, he believes, has exclusive jurisdiction.

Naturally, once the Recast Regulation becomes applicable in 2015, there will be decisions on the interpretation of Art 25. But the problems with regard to jurisdiction agreements, which were created by *Gasser v Misat*, will, hopefully, not arise again under the Recast Regulation.

148 E.g. *RBS plc v Highland Financial Partners LP* [2012] EWHC 1278(Comm).

149 For an example of conflicting clauses see: *Royal Bank of Canada v Cooperatieve Centrale BA* [2004] 1 Lloyd's Rep 471, which provided for submission to the English court but also contained a waiver of objections to any proceedings brought in a foreign court.

8.3 ENTERING AN APPEARANCE

Under Section 7, Art 26 of the Recast Regulation (previously Art 24), this rule is preserved and provides that, apart from jurisdiction derived from the provisions of this Regulation, a court of a Member State before which a defendant enters an appearance shall have jurisdiction. This rule shall not apply where appearance was entered to contest jurisdiction, or where another court has exclusive jurisdiction by virtue of Art 24 of this Regulation.

This rule reinforces the defendant's right to elect whether or not to submit to the jurisdiction of the court in which it has been sued.

The Article further provides that, in cases of insurance, or consumer, or employment contracts, the court shall ensure that the defendant (insured, or consumer, or employee) is informed of his right to contest the jurisdiction of the court and of the consequences of entering or not entering an appearance.

8.4 CHOICE OF COURT OF A NON-MEMBER STATE

The Regulation does not apply to such agreements. Colman J, in ***Konkola Copper Mines plc v Coromin***,[150] held that the English court would apply its own domestic law to exercise its discretion to stay its proceedings in favour of a foreign (non-Member State) jurisdiction clause, unless a good cause is shown not to do so. The judge also decided, after careful consideration of the *Jackson v Owusu* case, that the CJEU in that case did not disturb the approach of the *El Amria*, as confirmed by *Donohue v Armco* (seen in Chapter 6), as this particular issue had not been addressed in *Jackson*. The English court would not be compelled by Council Regulation 44/2001 Art 2, or the Lugano Convention 1988 Art 2, to hold that it had no jurisdiction to stay proceedings against reinsurers domiciled in England and Switzerland on the basis of a jurisdiction clause conferring jurisdiction on the courts of Zambia, a non-contracting State.

Similarly, it was held in ***Winnetka Trading Corp. v Julius Baer International Ltd***[151] that the Regulation was not applicable to proceedings in Guernsey commenced pursuant to a choice of court agreement. Distinguishing the decision in *Jackson*, the court said this case was concerned with arguments relating to *forum non conveniens*, rather than exclusive jurisdiction clauses. The terms of Art 2 could not deprive competent parties of their autonomy in agreeing which court should have jurisdiction to determine their disputes.

However, as seen under para 5 above, these decisions may be, indirectly, affected by the new approach of the Recast Regulation to regulate concurrent proceedings commenced in a third State (which might be seised because of a choice of court agreement), and proceeding are commenced afterwards in a court of a Member State. Just watch this space!

150 [2005] 2 Lloyd's Rep 555.
151 [2008] EWHC 3146 (Ch).

9 EXCLUSIVE JURISDICTION

Article 24 of the Recast (Art 22 of the Regulation) under Section 6 is concerned with exclusive jurisdiction and it is another departure from the domicile rule. The following courts shall have exclusive jurisdiction, regardless of domicile:

1 in proceedings that have as their object rights *in rem* in immovable property or tenancies of immovable property, the courts of the Member State in which the property is situated . . .;
2 in proceedings that have as their object the validity of the constitution, the nullity or the dissolution of companies or other legal persons or associations of natural or legal persons, or of the validity of the decisions of their organs, the courts of the Member State in which the company, legal person or association has its seat; in order to determine that seat, the court shall apply its rules of private international law;
3 in proceedings that have as their object the validity of entries in public registers, the courts of the Member State in which the register is kept . . .

Paragraph 4 is concerned with the jurisdiction for patents (where they are to be deposited or registered); and paragraph 5 provides for the jurisdiction of courts with regard to enforcement of judgments.

Article 27 prescribes that, where a court of a Member State has been seised in a matter to which Art 24 applies, it shall declare of its own motion that it has no jurisdiction.

Article 31 deals with exclusive jurisdiction of several courts: where actions come within the exclusive jurisdiction of several courts, any court other than the court first seised shall decline jurisdiction in favour of that court.

10 THE ARBITRATION EXCEPTION

Although arbitration has always been excluded from the Convention and the Regulation, litigants found ways to undermine arbitration by initiating court proceedings in a Member State, in breach of the arbitration agreement. Proceedings in a court of another Member State seeking the enforcement of arbitration would trigger the *lis pendens* rule. Moreover, protection of the arbitration became impossible with the prohibition of anti-suit injunctions by *The Front Comor* decision of the ECJ (as will be seen in Chapter 8). A situation of abuse of process by litigation tactics resulted in inefficient parallel court proceedings, irreconcilable decisions and additional costs and delays.

The review of the Regulation sought to rectify the position, as seen below, although the adopted position in the Recast Regulation does not sufficiently protect arbitration, and – it is submitted – it is not likely to prevent wasted litigation.

Article 1(2)(d) of the Recast Regulation preserves the arbitration exception. The EU Parliament and Council did not accept the original proposal of the Commission to have a partial exception of arbitration. At the end, there was a compromise by the adoption of Art 73 (giving precedence to the New York Convention over the Regulation) and by the Recitals (which purport to provide guidelines to courts).

Recital 12 provides:

(1) This Regulation should not apply to arbitration. Nothing in this Regulation should prevent the courts of a Member State, when seised of an action in a matter in respect of which the parties have entered into an arbitration agreement, from referring the parties to arbitration, from staying or dismissing the proceedings, or from examining whether the arbitration agreement is null and void, inoperative or incapable of being performed, in accordance with their national law.

Unfortunately, this guidance encourages a court seised of jurisdiction in a civil and commercial matter – which the parties have agreed to refer to arbitration – to continue with the proceedings and examine whether or not the arbitration agreement is valid. Obviously, the adoption of such a position will not deter litigants from using abusive litigation tactics, which has been one of the aims of the reform. The recommendation made in the Heidelberg report to refer such matter to the court of the arbitration seat was not followed.

It is unfortunate that the opportunity to adopt a firmer view by not permitting a court other than the court of the seat of the arbitration to determine questions of validity was missed.

However, Recital 12 further provides that:

(2) The ruling of the court seised on the validity of the arbitration agreement should not be subject to the rules of recognition and enforcement laid down in this Regulation, regardless of whether the court decided on this as a principal issue or as an incidental question.

This guidance aims to counteract the effect of the first paragraph seen above, while, had the court of the seat been delegated to resolve issues of the validity of the agreement, the risk of a clash of jurisdictions would have been avoided.

To make matters even more complex, Recital 12 further provides:

(3) On the other hand, where a court of a Member State, exercising jurisdiction under this Regulation or under national law, has determined that an arbitration agreement is null and void, inoperative or incapable of being performed, this should not preclude that court's judgment on the substance of the matter from being recognised or, as the case may be, enforced in accordance with this Regulation.

Unfortunately, the reform did not follow, in this particular respect, the CJEU ruling in *Van Uden* (see Chapter 8, below), where it was pronounced that, where the parties have validly excluded the jurisdiction of the courts in a dispute arising under a contract and have referred that dispute to arbitration, there are no courts of any State that have jurisdiction as to the substance of the case for the purposes of the Convention.

One wonders what is the benefit of the above Recital in the wider scheme of things, which is to avoid clashes of jurisdiction and, in particular, considering the remaining of Recital 12, below:

(4) This should be without prejudice to the competence of the courts of the Member States to decide on the recognition and enforcement of arbitral awards in accordance with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10 June 1958 ('the 1958 New York Convention'), which takes precedence over this Regulation.

While the review recognised that the New York Convention takes precedence, and, since the final decision was to keep arbitration outside the scope of the Regulation,

it is assumed that the remaining paragraph of Recital 12, below, was drafted for clarification purposes following the reasoning of the CJEU in *Marc Rich* (see Chapter 8, below).

> (5) This Regulation should not apply to any action or ancillary proceedings relating to, in particular, the establishment of an arbitral tribunal, the powers of arbitrators, the conduct of an arbitration procedure or any other aspects of such a procedure, nor to any action or judgment concerning the annulment, review, appeal, recognition or enforcement of an arbitral award.

Since by Art 73 of the Recast Regulation, the Regulation shall not affect the application of the New York Convention, which shall have precedence over it, para 3 of the Recital, above, would seem to be superfluous. Perhaps, the only reason for permitting a judgment of a court of a Member State on the substance of the matter to be enforceable under the Regulation may be in a situation where arbitration proceedings are not completed by the issue of an award, should it be decided by the tribunal that the agreement was invalid and, therefore, it did not have jurisdiction.

Otherwise, Recital 12 para 3 creates an undesirable potential conflict when a judgment of the court seised of the matter is issued first and is submitted for enforcement prior to the publication of the award. It seems senseless to allow, in this way, an unnecessary conflict, where parties may still pursue litigation despite the arbitration. The only possible solution would be for the losing party to do nothing until the award is published and for the arbitral tribunal to speed up the publication of the award!

Unfortunately, the reform by the Recast Regulation provides only a partial solution to a clash between arbitration and parallel court proceedings, the effect of which is that *The Front Comor* is not part of history. The problems that surround the arbitration exception and the prohibition of anti-suit injunctions are seen in Chapter 8, below.

11 PROTECTIVE MEASURES

Article 31 is replaced by Art 35 of the Recast Regulation providing:

> Applications may be made to the courts of a Member State for such provisional, including protective, measures as may be available under the law of that State, even if the courts of another Member State or an arbitral tribunal have jurisdiction as to the substance of the matter.

11.1 APPLICATION AS BETWEEN COURTS OF MEMBER STATES

Unlike the draft proposed Article, which intended to extend provisional measures ordered by a court of a Member State, even if a court of any State would have jurisdiction as to the substance, the application of the adopted Article, above, is limited as between courts of Member States. This limitation, however, should not preclude a court of a Member State from applying its national law as to protective measures where the substantive proceedings are within the jurisdiction of a court of a non-Member State.

The requirement under the predecessor to Art 35 that the jurisdiction of a court of another Member State on the substance of the matter should be derived from the

Regulation is omitted. Thus, provisional or protective measures can be issued, even in cases in which the court of another Member State has jurisdiction that does not necessarily derive from the Regulation.

11.2 LIMITATIONS OF ART 35

Recital 33 clarifies that, where provisional or protective measures are ordered by a court having jurisdiction as to the substance of the matter, their free circulation should be ensured under this Regulation. However, it is also stated that the defendant must have been summoned to appear for the order to be recognised and enforced under the Regulation, unless the measure is served on the defendant prior to enforcement, but recognition and enforcement of such measures should not be precluded under national law.

The intention seems to be to limit the enforcement of ex parte orders, and that includes freezing orders, unless the defendant is summoned to appear, or is served with the order prior to enforcement. As seen in Chapter 3, above, in applications for freezing orders, the English court has discretion, in emergency situations, where there is a high risk of dissipation of assets, to allow an ex parte order to be enforced.

Furthermore, Recital 33 considerably limits the remit of the previous provisions for protective measures under the Convention (Art 24) and under the Regulation (Art 31). It is stated in the last para of Recital 33 that, if the court of a Member State ordering the measures does not have jurisdiction as to the substance of the matter, the effect of such measures should be confined, under this Regulation, to the territory of that Member State. See, further, Art 2 of the Regulation, under para 12, below.

This, presumably, means that such measures will not be enforceable outside the territory of the relevant Member State under the Regulation rules, but they should be enforceable outside the territory under the national law of that Member State. Otherwise, it would be senseless to obtain the measures, particularly, if such measures concern the freezing of assets of a defendant.

11.3 THE VAN UDEN STATUS

The CJEU had held, in ***The Van Uden***,[152] that Art 31 of the Regulation can be used for the purpose of obtaining provisional measures, even where proceedings on the substance or the dispute have already been, or may be, commenced before arbitrators, regardless of the place of such arbitration. It pointed out that, as provisional measures do not concern arbitration, they are parallel rather than ancillary to arbitration.

As the exclusion of arbitration is maintained in the Recast Regulation, and Art 35, unlike its predecessor, expressly includes that protective measures can be ordered when an arbitral tribunal has jurisdiction on the substance of the matter, the *Van Uden* ruling is, luckily, undisturbed (see further about this case in Chapter 8, below).

152 Case C-391/95 [1998] ECR I-7091.

12 RECOGNITION AND ENFORCEMENT OF JUDGMENTS

One of the major reasons for the reform of the Regulation has been to abolish exequatur in order to facilitate the free movement and easy enforcement of judgments as between Member States. The model that seems to have been adopted is the same as is under the Foreign Judgments (Reciprocal Enforcement) Act 1933.

The reasons are explained in the Recitals; in particular, Recital 26 provides: Mutual trust in the administration of justice in the Union justifies the principle that judgments given in a Member State should be recognised in all Member States, without the need for any special procedure. In addition, the aim of making cross-border litigation less time consuming and costly justifies the abolition of the declaration of enforceability prior to enforcement in the Member State addressed. As a result, a judgment given by the courts of a Member State should be treated as if it had been given in the Member State addressed. See, further, Recitals 26–31 in the Annex to this chapter.

Article 36 provides:

1 A judgment given in a Member State shall be recognised in the other Member States without any special procedure being required.
2 Any interested party may, in accordance with the procedure provided for in sub-s (2) of s 3, apply for a decision that there are no grounds for refusal of recognition as referred to in Art 45.

Article 2 defines 'judgment' for the purpose of the Regulation as meaning:

any judgment given by a court or tribunal[153] of a Member State, whatever the judgment may be called, including a degree, order, decision or writ of execution, as well as the determination of costs or expenses by an officer of the court.

Courts or tribunals, for the purpose of the Regulation, include courts or tribunals common to several Member States (Recital 11).

Article 2 further provides that, for the purpose of Chapter III of the Regulation, 'judgment' includes provisional, including protective, measures ordered by a court or tribunal that, by virtue of this Regulation, has jurisdiction as to the substance of the matter. It does not include a provisional, or protective, measure that is ordered by such a court or tribunal without the defendant being summoned to appear, unless the judgment containing the measure is served on the defendant prior to enforcement.

153 The word 'tribunal' does not include an arbitration tribunal: Burton J, in *CMA CGM SA v HMD Ltd* [2008] EWHC 2791 (Comm), at para 45. The judge also held in this case (*obiter*), at para 46, that:

> If the judgments Regulation does not apply to an arbitration tribunal, then arbitration tribunals are not obliged to recognise foreign judgments, even if UK courts are so obliged, and to that extent the Arbitrators [in this case] were right not to be persuaded by the beguiling argument that arbitrators are applying English law, and if English law requires recognition of a foreign judgment then the arbitrators must recognise the foreign judgment. This argument does not differentiate between substantive and procedural law. Of course arbitrators will apply English law, but they would not then be bound by the procedural requirement, if it be imposed only on a court, to recognise a foreign judgment, stopping it from considering the facts underlying that judgment.

With the simplification of enforcement of Member States' judgments, there will be no need to consider how a judgment is categorised by the law of a Member State, although that issue was already resolved by the CJEU in ***Krones AG v Samskip GmbH***[154] (in the context of Art 32 of the current Regulation), where it was held that the principle of mutual trust would be undermined, if a court of a Member State could refuse to recognise a judgment by which a court of another Member State declined jurisdiction on the basis of a jurisdiction clause.

Article 52 enhances the position by providing that, 'under no circumstances may a judgment given in a Member State be reviewed as to its substance in the Member State addressed'.

The public policy issue, which was a condition to recognition and had created problems[155] under Art 34(1) of the Regulation (because different Member States hold a different view about what is regarded as a public policy matter under their national law), is no longer a requirement. Many other problems are solved by the abolition of exequatur. Further detailed provisions can be found in Chapter III of the Recast Regulation, comprising four sections and Articles 36–57.

In view of facilitating the speed of enforcement of judgments by abolishing exequatur, it is envisaged that post-judgment protective measures may not be necessary.

ANNEX
THE RECITALS OF THE RECAST REGULATION

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 67(4) and points (a), (c) and (e) of Article 81(2) thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee,

Acting in accordance with the ordinary legislative procedure,

Whereas:

Recital 1: On 21 April 2009, the Commission adopted a report on the application of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and

154 ECJ, Case No C-456/11, 15 November 2012.

155 Public policy was confined by the CJEU in *Krombach v Bambeski* (Case C -7/98) [2000] ECR I-01935 to situations where recognition or enforcement of a judgment delivered in another contracting State would be at variance to an unacceptable degree with the legal order of the State in which enforcement is sought, in as much as it infringes a fundamental principle. The infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought or of a right recognised as being fundamental within that legal order.

enforcement of judgments in civil and commercial matters. The report concluded that, in general, the operation of that Regulation is satisfactory, but that it is desirable to improve the application of certain of its provisions, to further facilitate the free circulation of judgments and to further enhance access to justice. Since a number of amendments are to be made to that Regulation it should, in the interests of clarity, be recast.

Recital 2: At its meeting in Brussels on 10 and 11 December 2009, the European Council adopted a new multiannual programme entitled 'The Stockholm Programme – an open and secure Europe serving and protecting citizens'. In the Stockholm Programme the European Council considered that the process of abolishing all intermediate measures (the exequatur) should be continued during the period covered by that Programme. At the same time the abolition of the exequatur should also be accompanied by a series of safeguards.

Recital 3: The Union has set itself the objective of maintaining and developing an area of freedom, security and justice, inter alia, by facilitating access to justice, in particular through the principle of mutual recognition of judicial and extra-judicial decisions in civil matters. For the gradual establishment of such an area, the Union is to adopt measures relating to judicial cooperation in civil matters having cross-border implications, particularly when necessary for the proper functioning of the internal market.

Recital 4: Certain differences between national rules governing jurisdiction and recognition of judgments hamper the sound operation of the internal market. Provisions to unify the rules of conflict of jurisdiction in civil and commercial matters, and to ensure rapid and simple recognition and enforcement of judgments given in a Member State, are essential.

Recital 5: Such provisions fall within the area of judicial cooperation in civil matters within the meaning of Article 81 of the Treaty on the Functioning of the European Union (TFEU).

Recital 6: In order to attain the objective of free circulation of judgments in civil and commercial matters, it is necessary and appropriate that the rules governing jurisdiction and the recognition and enforcement of judgments be governed by a legal instrument of the Union which is binding and directly applicable.

Recital 7: On 27 September 1968, the then Member States of the European Communities, acting under Article 220, fourth indent, of the Treaty establishing the European Economic Community, concluded the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, subsequently amended by conventions on the accession to that Convention of new Member States ('the 1968 Brussels Convention'). On 16 September 1988, the then Member States of the European Communities and certain EFTA States concluded the Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters ('the 1988 Lugano Convention'), which is a parallel convention to the 1968 Brussels Convention. The 1988 Lugano Convention became applicable to Poland on 1 February 2000.

Recital 8: On 22 December 2000, the Council adopted Regulation (EC) No 44/2001, which replaces the 1968 Brussels Convention with regard to the territories of the Member States covered by the TFEU, as between the Member States except Denmark. By Council Decision 2006/325/EC, the Community concluded an agreement with Denmark ensuring the application of the provisions of Regulation (EC) No 44/2001 in Denmark. The 1988 Lugano Convention was revised by the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, signed at Lugano on 30 October 2007 by the Community, Denmark, Iceland, Norway and Switzerland ('the 2007 Lugano Convention').

Recital 9: The 1968 Brussels Convention continues to apply to the territories of the Member States which fall within the territorial scope of that Convention and which are excluded from this Regulation pursuant to Article 355 of the TFEU.

Recital 10: The scope of this Regulation should cover all the main civil and commercial matters apart from certain well-defined matters, such as maintenance obligations which are excluded following the adoption of the Council regulation (EC) No 4/2009 of 18 December 2008.

Recital 11: For the purpose of this Regulation, courts or tribunals of the Member States should include courts or tribunals common to several Member States and judgments given by such courts should be recognised and enforced in accordance with this Regulation.

Recital 12: This Regulation should not apply to arbitration. Nothing in this Regulation should prevent the courts of a Member State, when seised of an action in a matter in respect of which the parties have entered into an arbitration agreement, from referring the parties to arbitration, from staying or dismissing the proceedings, or from examining whether the arbitration agreement is null and void, inoperative or incapable of being performed, in accordance with their national law.

A ruling given by a court of a Member State as to whether or not an arbitration agreement is null and void, inoperative or incapable of being performed should not be subject to the rules of recognition and enforcement laid down in this Regulation, regardless of whether the court decided on this as a principal issue or as an incidental question.

On the other hand, where a court of a Member State, exercising jurisdiction under this Regulation or under national law, has determined that an arbitration agreement is null and void, inoperative or incapable of being performed, this should not preclude that court's judgment on the substance of the matter from being recognised or, as the case may be, enforced in accordance with this Regulation. This should be without prejudice to the competence of the courts of the Member States to decide on the recognition and enforcement of arbitral awards in accordance with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10 June 1958 ('the 1958 New York Convention'), which takes precedence over this Regulation.

This Regulation should not apply to any action or ancillary proceedings relating to, in particular, the establishment of an arbitral tribunal, the powers of arbitrators, the conduct of an arbitration procedure or any other aspects of such a procedure, nor to any action or judgment concerning the annulment, review, appeal, recognition or enforcement of an arbitral award.

Recital 13: There must be a connection between proceedings to which this Regulation applies and the territory of the Member States. Accordingly, common rules of jurisdiction should, in principle, apply when the defendant is domiciled in a Member State.

Recital 14: A defendant not domiciled in a Member State should in general be subject to the national rules of jurisdiction applicable in the territory of the Member State of the court seised.

However, in order to ensure the protection of consumers and employees, to safeguard the jurisdiction of the courts of the Member States in situations where they have exclusive jurisdiction and to respect the autonomy of the parties, certain rules of jurisdiction in this Regulation should apply regardless of the defendant's domicile.

Recital 15: The rules of jurisdiction should be highly predictable and founded on the principle that jurisdiction is generally based on the defendant's domicile. Jurisdiction should always be available on this ground save in a few well-defined situations in which the subject-matter of the dispute or the autonomy of the parties warrants a different connecting factor. The domicile of a legal person must be defined autonomously so as to make the common rules more transparent and avoid conflicts of jurisdiction.

Recital 16: In addition to the defendant's domicile, there should be alternative grounds of jurisdiction based on a close connection between the court and the action or in order to facilitate the sound administration of justice. The existence of a close connection should ensure legal certainty and avoid the possibility of the defendant being sued in a court of a Member State which he could not reasonably have foreseen. This is important, particularly in disputes concerning non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation.

Recital 17: The owner of a cultural object as defined in Article 1(1) of Council Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State should be able under this Regulation to initiate proceedings as regards a civil claim for the recovery, based on ownership, of such a cultural object in the courts for the place where the cultural object is situated at the time the court is seised. Such proceedings should be without prejudice to proceedings initiated under Directive 93/7/EEC.

Recital 18: In relation to insurance, consumer and employment contracts, the weaker party should be protected by rules of jurisdiction more favourable to his interests than the general rules.

Recital 19: The autonomy of the parties to a contract, other than an insurance, consumer or employment contract, where only limited autonomy to determine the courts having jurisdiction is allowed, should be respected subject to the exclusive grounds of jurisdiction laid down in this Regulation.

Recital 20: Where a question arises as to whether a choice-of-court agreement in favour of a court or the courts of a Member State is null and void as to its substantive validity, that question should be decided in accordance with the law of the Member State of the court or courts designated in the agreement, including the conflict-of-laws rules of that Member State.

Recital 21: In the interests of the harmonious administration of justice it is necessary to minimise the possibility of concurrent proceedings and to ensure that irreconcilable judgments will not be given in different Member States. There should be a clear and effective mechanism for resolving cases of *lis pendens* and related actions, and for obviating problems flowing from national differences as to the determination of the time when a case is regarded as pending. For the purposes of this Regulation, that time should be defined autonomously.

Recital 22: However, in order to enhance the effectiveness of exclusive choice-of-court agreements and to avoid abusive litigation tactics, it is necessary to provide for an exception to the general *lis pendens* rule in order to deal satisfactorily with a particular situation in which concurrent proceedings may arise. This is the situation where a court not designated in an exclusive choice-of-court agreement has been seised of proceedings and the designated court is seised subsequently of proceedings involving the same cause of action and between the same parties. In such a case, the court first seised should be required to stay its proceedings as soon as the designated court has been seised and until such time as the latter court declares that it has no jurisdiction under the exclusive choice-of-court agreement. This is to ensure that, in such a situation, the designated court has priority to decide on the validity of the agreement and on the extent to which the agreement applies to the dispute pending before it. The designated court should be able to proceed irrespective of whether the non-designated court has already decided on the stay of proceedings.

This exception should not cover situations where the parties have entered into conflicting exclusive choice-of-court agreements or where a court designated in an exclusive choice-of-court agreement has been seised first. In such cases, the general *lis pendens* rule of this Regulation should apply.

Recital 23: This Regulation should provide for a flexible mechanism allowing the courts of the Member States to take into account proceedings pending before the courts of third States, considering in particular whether a judgment of a third State will be capable of recognition and enforcement in the Member State concerned under the law of that Member State and the proper administration of justice.

Recital 24: When taking into account the proper administration of justice, the court of the Member State concerned should assess all the circumstances of the case before it. Such circumstances may include connections between the facts of the case and the parties and the third State concerned, the stage to which the proceedings in the third State have progressed by the time proceedings are initiated in the court of the Member State and whether or not the court of the third State can be expected to give a judgment within a reasonable time.

That assessment may also include consideration of the question whether the court of the third State has exclusive jurisdiction in the particular case in circumstances where a court of a Member State would have exclusive jurisdiction.

Recital 25: The notion of provisional, including protective, measures should include, for example, protective orders aimed at obtaining information or preserving evidence as referred to in Articles 6 and 7 of Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights. It should not include measures which are not of a protective nature, such as measures ordering the hearing of a witness. This should be without prejudice to the application of Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters.

Recital 26: Mutual trust in the administration of justice in the Union justifies the principle that judgments given in a Member State should be recognised in all Member States without the need for any special procedure. In addition, the aim of making cross-border litigation less time-consuming and costly justifies the abolition of the declaration of enforceability prior to enforcement in the Member State addressed. As a result, a judgment given by the courts of a Member State should be treated as if it had been given in the Member State addressed.

Recital 27: For the purposes of the free circulation of judgments, a judgment given in a Member State should be recognised and enforced in another Member State even if it is given against a person not domiciled in a Member State.

Recital 28: Where a judgment contains a measure or order which is not known in the law of the Member State addressed, that measure or order, including any right indicated therein, should, to the extent possible, be adapted to one which, under the law of that Member State, has equivalent effects attached to it and pursues similar aims. How, and by whom, the adaptation is to be carried out should be determined by each Member State.

Recital 29: The direct enforcement in the Member State addressed of a judgment given in another Member State without a declaration of enforceability should not jeopardise respect for the rights of the defence. Therefore, the person against whom enforcement is sought should be able to apply for refusal of the recognition or enforcement of a judgment if he considers one of the grounds for refusal of recognition to be present. This should include the ground that he had not had the opportunity to arrange for his defence where the judgment was given in default of appearance in a civil action linked to criminal proceedings. It should also include the grounds which could be invoked on the basis of an agreement between the Member State addressed and a third State concluded pursuant to Article 59 of the 1968 Brussels Convention.

Recital 30: A party challenging the enforcement of a judgment given in another Member State should, to the extent possible and in accordance with the legal system of the Member State addressed, be able to invoke, in the same procedure, in addition to the grounds for refusal provided for in this Regulation, the grounds for refusal available under national law and within the time-limits laid down in that law.

The recognition of a judgment should, however, be refused only if one or more of the grounds for refusal provided for in this Regulation are present.

Recital 31: Pending a challenge to the enforcement of a judgment, it should be possible for the courts in the Member State addressed, during the entire proceedings relating to such a challenge, including any appeal, to allow the enforcement to proceed subject to a limitation of the enforcement or to the provision of security.

Recital 32: In order to inform the person against whom enforcement is sought of the enforcement of a judgment given in another Member State, the certificate established under this Regulation, if necessary accompanied by the judgment, should be served on that person in reasonable time before the first enforcement measure. In this context, the first enforcement measure should mean the first enforcement measure after such service.

Recital 33: Where provisional, including protective, measures are ordered by a court having jurisdiction as to the substance of the matter, their free circulation should be ensured under this Regulation. However, provisional, including protective, measures which were ordered by such a court without the defendant being summoned to appear should not be recognised and enforced under this Regulation unless the judgment containing the measure is served on the defendant prior to enforcement. This should not preclude the recognition and enforcement of such measures under national law. Where provisional, including protective, measures are ordered by a court of a Member State not having jurisdiction as to the substance of the matter, the effect of such measures should be confined, under this Regulation, to the territory of that Member State.

Recital 34: Continuity between the 1968 Brussels Convention, Regulation (EC) No 44/2001 and this Regulation should be ensured, and transitional provisions should be laid down to that end. The same need for continuity applies as regards the interpretation by the Court of Justice of the European Union of the 1968 Brussels Convention and of the Regulations replacing it.

Recital 35: Respect for international commitments entered into by the Member States means that this Regulation should not affect conventions relating to specific matters to which the Member States are parties.

Recital 36: Without prejudice to the obligations of the Member States under the Treaties, this Regulation should not affect the application of bilateral conventions and agreements between a third State and a Member State concluded before the date of entry into force of Regulation (EC) No 44/2001 which concern matters governed by this Regulation.

Recital 37: In order to ensure that the certificates to be used in connection with the recognition or enforcement of judgments, authentic instruments and court settlements under this Regulation are kept up-to-date, the power to adopt acts in accordance with Article 290 of the TFEU should be delegated to the Commission in respect of amendments to Annexes I and II to this Regulation. It is of particular importance that the Commission carry out appropriate consultations during its preparatory work, including at expert level. The Commission, when preparing and drawing up delegated acts, should ensure a simultaneous, timely and appropriate transmission of relevant documents to the European Parliament and to the Council.

Recital 38: This Regulation respects fundamental rights and observes the principles recognised in the Charter of Fundamental Rights of the European Union, in particular the right to an effective remedy and to a fair trial guaranteed in Article 47 of the Charter.

Recital 39: Since the objective of this Regulation cannot be sufficiently achieved by the Member States and can be better achieved at Union level, the Union may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union (TEU). In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve that objective.

Recital 40: The United Kingdom and Ireland, in accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland, annexed to the TEU and to the then Treaty establishing the European Community, took part in the adoption and application of Regulation (EC) No 44/2001. In accordance with Article 3 of Protocol No 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, annexed to the TEU and to the TFEU, the United Kingdom and Ireland have notified their wish to take part in the adoption and application of this Regulation.

Recital 41: In accordance with Articles 1 and 2 of Protocol No 22 on the position of Denmark annexed to the TEU and to the TFEU, Denmark is not taking part in the adoption of this Regulation and is not bound by it or subject to its application, without prejudice to the possibility for Denmark of applying the amendments to Regulation (EC) No 44/2001 pursuant to Article 3 of the Agreement of 19 October 2005 between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

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CHAPTER 8

ANTI-SUIT INJUNCTIONS

1 INTRODUCTION

In most contracts, the parties agree to refer any disputes that might arise under and in connection with the contract either to an arbitral tribunal, or to a court of a country of their choice. Invariably, however, one of the parties may commence proceedings in a court in breach of the arbitration agreement, or in a court other than the chosen one.

In such a case, the other party has a right to elect either to waive the breach and submit itself to the jurisdiction in which the proceedings have commenced, or to apply to the English court for an anti-suit injunction, provided the rules of the Regulation, as seen in Chapter 7, above, do not apply. For example, aside from specific provisions, the rules will apply once proceedings in the courts of two Member States have commenced. There must be a connection between proceedings to which the Regulation applies and the territory of the Member States. Accordingly, common rules of jurisdiction should, in principle, apply when the defendant is domiciled in a Member State (Recital 13 of the Regulation, Annex to Chapter 7, above).

In 2004 (*Turner* case[1]) and in 2005 (*Front Comor*[2]), the CJEU prohibited anti-suit injunctions in cases in which the Regulation applies, even where there is a breach of an arbitration agreement, on the basis of the principle that, once the proceedings involve the courts of Member States, there should be mutual trust between them. Such an approach was considered as interfering, particularly, with the function of arbitration because, from the inception of the Brussels Convention and the Regulation, arbitration has been exempted from the jurisdictional rules of the EU regime and,

1 *Turner v Grovit* [2004] 2 Lloyd's Rep 169.

2 *West Tankers Inc. v RAS Riunione Adriatica di Sicurta (The Front Comor)* [2005] 2 Lloyd's Rep 257, which leapfrogged the Court of Appeal to the House of Lords [2007] 1 Lloyd's Rep 391 (HL), and was then referred to the ECJ on this point; *Allianz SpA v West Tankers Inc. (The Front Comor)* Case C-185/07 [2009] 1 Lloyd's Rep 413.

hence, it is outside its scope.[3] As seen in Chapter 7, although one of the aims of the review of the Regulation was to clarify matters relating to arbitration, the prohibition of anti-suit injunctions as between the courts of Member States remains unaltered. The complications arising from such a stance are shown later in this chapter.

Subject to the above significant limitation, an anti-suit injunction can be granted where, in the discretion of the court, the applicant shows that he has a legal right[4] based on a promise not to be sued in the foreign proceedings, or in court at all.

The remedy for breach of such a promise has, at common law, been either a stay of the English proceedings (at the court's discretion), if the breach concerns a foreign jurisdiction agreement (see Chapter 6, above), or an anti-suit injunction, if there is a breach of an English jurisdiction agreement, or arbitration agreement, when damages are not considered to be an adequate remedy.

The purpose of this chapter, is: first, to review the position of anti-suit injunctions, taking into account the prohibition placed upon the jurisdiction of the English court to restrain proceedings brought in another Member State of the Regulation; second, to examine the circumstances in which the injunction may still be granted. Thus, this chapter, in comparison with the second edition of this book, has been rewritten to incorporate the changes.

1.1 NATURE AND SCOPE

An anti-suit injunction is an order to restrain a litigant from continuing court proceedings on the ground, primarily, that the English court, or an arbitral tribunal,[5] has jurisdiction in the matter.

Even when there is no breach of an English jurisdiction, or arbitration agreement, but the pursuit of foreign proceedings amounts to an abuse of process, the English courts consider applications for anti-suit injunctions in the interests of justice, provided respect is shown to the jurisdiction of the foreign court (known as the comity factor). Therefore, the court exercises its discretion with caution, as will be seen under para 4.3, below. Thus, certain principles have been established.[6]

3 The Court of Appeal, in *Through Transport Mutual Insurance Association (Eurasia) Ltd v New India Insurance Co., Ltd (The Hari Blum)* [2005] 1 Lloyd's Rep 67, had decided that, as arbitration was excepted from the scope of the Convention (and, hence, the Regulation), an application for an anti-suit injunction to restrain proceedings brought in breach of a binding arbitration agreement was within the arbitration exception.

4 *British Airways v Laker Airways* [1985] AC 58 (HL).

5 E.g. *The Angelic Grace* [1995] 1 Lloyd's Rep 87; applied in *STX Pan Ocean Co., Ltd v Woori Bank* [2012] 2 Lloyd's Rep 99: A time charterer was entitled to an anti-suit injunction to enforce the London arbitration clause in the charter and restrain pursuit of proceedings in South Korea; *Transfield Shipping Inc. v Chiping Xinfa Huayu Alumina Co., Ltd* [2009] EWHC 3629 QB: In deciding whether to grant an anti-suit injunction, the court had to be satisfied that there was a high degree of probability that the parties had properly concluded an arbitration agreement not to litigate elsewhere; *Midgulf International Ltd v Groupe Chimiche Tunisien* [2009] 2 Lloyd's Rep 411: M applied to the English court for the appointment of an arbitrator. G issued proceedings in Tunisia for a declaration that there was no arbitration agreement between the parties. M obtained an anti-suit injunction ex parte on notice, and G challenged the court's jurisdiction to grant an anti-suit injunction. In the circumstances, the just and appropriate course was, on case management grounds, to order a speedy trial of the issue whether a contract contained a London arbitration clause, and to continue an anti-suit injunction only until such time as that issue was determined; considered in *REC Wafer Norway AS v Moser Baer Photo Voltaic Ltd* [2010] EWHC 2581 (Comm).

6 *Airbus Industrie v Patel* [1998] 1 Lloyd's Rep 631; *Donogue v Armo Inc* [2002] 1 Lloyd's Rep 425, p 432.

The principal aim of the injunction is to resolve clash of jurisdictions in order to prevent irreconcilable judgments and to enforce the parties' agreement with regard to their choice of court or tribunal. The English court has jurisdiction to grant injunctions on the basis of s 37 of the Supreme Court Act 1981, which provides: 'The High Court may by an order . . . grant an injunction . . . in all cases in which it appears to the court to be just and convenient to do so'.

1.2 COMMON LAW VERSUS CIVIL LAW REGIME

By way of background to anti-suit injunctions, an important distinction must be made between the European civil jurisdiction regime and the common law system. Lord Goff summarised the salient features of the respective approaches of each system in ***Airbus v Patel***:[7]

> This part of the law is concerned with the resolution of clashes between jurisdictions. Two different approaches to the problem have emerged in the world today, one associated with the civil law jurisdiction of continental Europe and the other with the common law world. Each is the fruit of a distinctive legal history and also reflects, to some extent, cultural differences . . . On the continent of Europe, in the early days of the European Community, the essential need was seen to be to avoid any such clash between member states of the same community. A system, developed by distinguished scholars, was embodied in the Brussels Convention, under which jurisdiction is allocated on the basis of well-defined rules. The system achieves its purpose, but at a price. The price is rigidity and rigidity can be productive of injustice. The judges of this country . . . have to accept the fact that the practical results are, from time to time, unwelcome. This is, essentially, because the primary purpose of the Convention is to ensure that there shall be no clash between the jurisdictions of member states of the Community.
>
> In the common law world, the situation is precisely the opposite. There is, so to speak, a jungle of separate, broadly based, jurisdictions all over the world . . . But the potential excesses of common law jurisdictions are generally curtailed by the adoption of the principle of *forum non-conveniens* – a self-denying ordinance under which the court will stay (or dismiss) proceedings in favour of another clearly more appropriate forum . . . The principle, which has no application as between states which are parties to the Brussels Convention . . . has become widely accepted throughout the common law world . . . and appears to have been adopted in Japan, a country whose system has been much influenced by German law . . . The principle is directed against cases being brought in inappropriate jurisdiction and so tends to ensure that, as between common law jurisdictions, cases will only be brought in a jurisdiction which is appropriate for their resolution. The purpose of the principle is therefore different from that which underlies the Brussels Convention. It cannot, and does not aim to, avoid all clashes between jurisdictions; indeed, parallel proceedings in different jurisdictions are not of themselves regarded as unacceptable. In that sense, the principle may be regarded as an imperfect weapon; but it is both flexible and practicable and, where it is effective, it produces a result which is conducive to practical justice. It is however dependent on the voluntary adoption of the principle by the State in question; . . . if one State does not adopt the principle, the delicate balance which the universal adoption of the principle could achieve will to that extent break down.

The interpretation of the Regulation by the CJEU in ***Turner v Grovit***[8] (see under 3.1, below) has significantly impacted on the common law rules and, instead of flexibility in the approach of resolving clashes of jurisdiction, it has favoured certainty. In addition, the CJEU declared, in ***Erich Gasser GmbH v MISAT Srl***,[9] that the

7 *Airbus Industrie v Patel* [1998] 1 Lloyd's Rep 631, at p 636, per Lord Goff.
8 [2004] ECR I-3565, [2004] 2 Lloyd's Rep 169.
9 [2003] ECR I-14693, [2004] 1 Lloyd's Rep 222 (see Ch 7, above).

rules of resolving *lis pendens* are clearly provided in the Convention and must be strictly applied by the courts of Member States. The CJEU made it clear in *Turner* that an anti-suit injunction cannot be granted, because Art 27 trumps Art 23;[10] with the review of the Regulation, see Chapter 7, a new provision regulating *lis pendens* in the event of a choice of court agreement ameliorates the effect of these decisions, but, still, anti-suit injunctions are not permitted when courts of Member States are involved in the proceedings.

Furthermore, as seen in Chapter 7, the CJEU, in ***Jackson v Owusu***,[11] further curtailed the discretion of the English court to apply *forum non-conveniens* principles when the defendant is domiciled in a Member State, even if the competing natural forum is in a non-Member State.

1.3 ISSUES WITH ANTI-SUIT INJUNCTIONS

By way of background, the major issues the courts have had to grapple with, on applications for an anti-suit injunction, have been: (a) whether interference with the foreign court would be justified, in a sense that the injunction might be considered as impeaching the jurisdiction of the foreign sovereignty;[12] (b) whether the injunction would be in breach of rules of public policy of that State;[13] and (c) whether it would be against the provisions of the Human Rights Convention.[14]

The conventional view has been that such an injunction operates only *in personam*, so that the English courts have never regarded themselves as interfering with the jurisdiction of the foreign court.

However, the Court of Appeal, in *Philip Alexander Securities v Bamberger*,[15] was sceptical about anti-suit injunctions and held that the practice of the courts in England to grant injunctions to restrain a defendant from prosecuting proceedings in another country may require reconsideration.[16]

As it happened, the CJEU has now resolved this dilemma by stating that such injunctions are forbidden as between courts of Member States of the Convention or the Regulation for they undermine the mutual trust between such courts.

2 THE LAW PRIOR TO *TURNER* AND *THE FRONT COMOR*

Prior to explaining how the law developed to its current status, it is important to refer, by way of a historical background, to the principles that were applicable by the English court when an application for an anti-suit injunction was made.

10 The numbers of these Articles have been changed by the recast Regulation, as seen in Ch 7, above.

11 [2005] ECR I-1383, [2005] 1 Lloyd's Rep 452 (see Ch 7).

12 *Philip Alexander Securities v Bamberger* [1997] IL Pr 73.

13 *Akai Pty Ltd v People's Insurance Co.* [1998] 1 Lloyd's Rep 90.

14 *OT Africa Line v Hijazy (The Kribi)* [2001] 1 Lloyd's Rep 76: the anti-suit injunction was not unlawful under s 6 of the Human Rights Act 1998; Art 6 did not provide that a person was to have an unfettered choice of tribunal in which to pursue or defend his civil rights. If the Article were to be given that broad reading, then, taken to its logical conclusion, it would mean that the whole of the Brussels Convention jurisdiction scheme would itself be incompatible with a person's Art 6 rights, if the forum designated by the Convention's rules were contrary to the litigant's choice of court.

15 [1997] IL Pr 73 (see under 2.2 below).

16 Ibid, per Leggatt LJ at para 48.

2.1 CASES OF BREACH OF AN ARBITRATION AGREEMENT

Following the decision of the Court of Appeal in ***The Angelic Grace***,[17] the injunction to enforce a London arbitration agreement used to be granted in all cases, and the court had limited discretion not to grant it, unless there had been a good reason not to do so.

A good reason not to grant it was narrowly interpreted. It included proof that:

(a) the foreign court would stay execution of the judgment on ground of the New York Convention concerning the Recognition and Enforcement of Arbitral Awards 1958;[18]
(b) the arbitration provision in the parties' contract did not create a binding agreement to arbitrate in London;[19]
(c) there had been submission to the foreign jurisdiction; or
(d) there had been delay in applying for an injunction.

These principles still apply in cases that do not fall within the scope of the Regulation[20] (see 4.2.2), therefore, ***The Angelic Grace*** is briefly mentioned here.

It concerned a dispute between owners and charterers under a charter-party that provided for arbitration in London. The owners pre-empted proceedings in England (suspecting that the charterers might proceed in Italy, despite the arbitration clause) and applied to court for a declaration that all claims and cross-claims were subject to arbitration in London. Then the owners commenced arbitration. As expected, the charterers commenced proceedings in Italy and submitted to the English jurisdiction only for the purpose of the court's determination of the scope of the arbitration agreement. Despite the final decision of the court that all claims and cross-claims were within the arbitration agreement, the charterers continued the proceedings in Italy. Against this background, Rix J (as he then was) granted the anti-suit injunction, and the Court of Appeal upheld it, stating:

> The time has come to lay aside the ritual incantation that this is a jurisdiction which should only be exercised sparingly and with great caution. There have been many statements of great authority warning of the danger of giving an appearance of undue interference with the proceedings of a foreign court. Such sensitivity to the feeling of a foreign court has much to commend it where the injunction is sought on the ground of *forum non-conveniens* or on the general ground that the foreign proceedings are vexatious or oppressive but where no breach of contract is involved . . . but in my judgment there is no good reason for diffidence in granting an injunction to restrain foreign proceedings on the clear and simple ground that the defendant has promised not to bring them.[21]

17 [1995] 1 Lloyd's Rep 87.

18 The French court was not willing to stay its proceedings in favour of the English arbitration clause in *Toepfer v Société Cargill* [1998] 1 Lloyd's Rep 379. The issue concerned the interpretation of Art 1(4) of the Brussels Convention, which excluded arbitration from the Convention, and the question was whether an injunction could be obtained to restrain the French court from continuing its proceedings on the ground that the French proceedings constituted a breach of the arbitration agreement. This was referred to the ECJ, but the case was, in the meantime, settled.

19 *Philip Alexander Securities & Futures Ltd v Bamberger* [1997] IL Pr 73 (CA); see under 2.2 below.

20 E.g. see fn 5, supra.

21 Op. cit. fn 17, at 96, Millett LJ.

Were this case to be decided today, the Italian court, being second seised, should stay its proceedings until the English court determined its jurisdiction, or declared whether or not the arbitration agreement was valid (see Chapter 7, above).

2.2 ISSUES OF RECOGNITION AND ENFORCEMENT OF AN ANTI-SUIT INJUNCTION

The English courts had been reticent before granting an anti-suit injunction against parties domiciled in the European Union, even before *The Turner* and *The Front Comor*, because the injunction would be considered as being an infringement of foreign sovereignty[22] (as mentioned above under 1.3). Such concern was first expressed in the ***Philip Alexander Securities & Futures Ltd v Bamberger***.[23]

Brokers in futures and options appealed against the dismissal of their applications against six German nationals, who were former customers, for injunctions and declarations that their customer agreements, which included arbitration agreements, were valid.

At first instance, although Mance J (as he then was) thought that it was an appropriate case to grant an injunction, he felt that it was not appropriate to grant it at this stage of the proceedings.

On appeal by the defendant, the Court of Appeal held that the rules to which the agreements were subject gave customers the right to elect to arbitrate. But, as some customers had not so elected, their case could only be litigated. Consequently, the arbitration agreement would be considered by a contracting State of the New York Convention, in this case Germany, to be inoperative. Different factual situations can give different results.[24]

Leggatt LJ commented (at para 48) that:

> The practice of the courts in England to grant injunctions to restrain a defendant from prosecuting proceedings in another country may now require reconsideration. The conventional view is that such an injunction operates only *in personam*, with the consequence that the English courts do not regard and never have regarded themselves as interfering with the exercise by the foreign court of its jurisdiction. In cases where the defendant does not live in England and does not have assets here such an injunction is unlikely to be enforceable except by the foreign court recognising and giving effect to it or, where it refuses to do so, by the English court refusing to recognise the foreign court's order made without such recognition. Where the foreign court regards such injunctions as an infringement of its sovereignty and refuses to permit them to be served, the English court is in a quandary. In cases concerning the European Union what would best meet the predicament is a directive defining the extent of the recognition which the orders of the courts of each Member State are entitled to receive from the courts of other Member States.

It was clear in this case that the German court was offended and took the view that there was no obligation to stay its proceedings under the New York Convention on the basis of the consumer laws being applied in Germany by reason of which the

22 But Lord Hobhouse had observed in *Turner v Grovit* [2002] 1 WLR 107 (HL), before he referred it to the ECJ (see 3.1 below), that such a view of anti-suit injunctions is based on a misunderstanding.

23 *Philip Alexander Securities & Futures Ltd v Bamberger* [1997] IL Pr 73, [1996] CLC 1757.

24 *Alfred Toepfer International v Molino Boschi* [1996] 1 Lloyd's Rep 510.

citizens had the right, as consumers, to come to German courts. For these reasons, the Court of Appeal regarded it inappropriate to grant the anti-suit injunction.

However, this case was distinguishable from the run-of-the-mill cases, but, since there is a complete ban of anti-suit injunctions within the EU, there is no need for further discussion.

2.3 THE ARBITRATION EXCEPTION AND *LIS PENDENS*

The issue of the arbitration exception from the Brussels Convention arose first in ***Toepfer International GmbH v Cargill France SA***,[25] which reached the CJEU, but, unfortunately, the matter was settled, and no decision was pronounced on the issue.

Despite a GAFTA London arbitration clause, one of the parties brought emergency proceedings in France. Subsequently, the claimant commenced proceedings in England for a declaration that the defendants were in breach of the arbitration agreement, and also sought an anti-suit injunction to restrain the defendants from continuing the French proceedings. The defendants asserted that, by virtue of Art 21 of the Brussels Convention, the English court, being second seised, should stay its proceedings, and the claimant, in turn, relied on Art 1(4) of the Convention, arguing that arbitration was outside the scope of the Convention. Although, at first instance, Colman J decided in favour of the claimant, Phillips LJ (as he then was) in the Court of Appeal referred the matter to the CJEU on the following questions:

1 Did the exception in Art 1(4) of the Brussels Convention extend to proceedings commenced before the English court seeking: (a) a declaration that the commencement and continuation of the proceedings before the French court constitutes a breach of an arbitration agreement; (b) an injunction restraining the appellants from continuing the proceedings before the French court in breach of the arbitration agreement?
2 If not, would such proceedings constitute the same cause of action as the cause of action before the French court, so as to require the English court to stay its proceedings pursuant to Art 21 of the Convention?

The opportunity of getting answers to these questions from the CJEU was lost owing to the settlement, but, in any event, these are now part of history.

Phillips LJ had proposed that, when the New York Convention 1958 on recognition and enforcement of foreign arbitral awards applies, it requires (by Art 11.3) the court of a contracting State to refer the parties to arbitration, when an action is commenced in disregard of a binding arbitration clause.[26] The reform of the Regulation has partly solved this problem by giving precedence to the New York Convention over the Regulation in relation to the enforcement of the award given pursuant to a valid arbitration agreement (as seen in Chapter 7, above).

25 [1998] 1 Lloyd's Rep 379.
26 Ibid, p 386.

2.4 THE ARBITRATION EXCEPTION PRIOR TO *THE FRONT COMOR*

2.4.1 Extent of the exception

The Atlantic Emperor[27] is very important because, despite the subsequent decisions of the CJEU, which in effect limited the extent of the arbitration exception, it has had fundamental influence upon the outcome of the reform of the Regulation (seen in Chapter 7, above).

On the facts, Marc Rich claimed damages for contamination of cargo bought from Impianti (Italian) under an FOB contract which provided for arbitration in London. Impianti denied liability and commenced proceedings in Italy for a declaration of no liability. Marc Rich commenced arbitration in London; Impianti failed to appoint its arbitrator; Marc Rich issued an originating summons for the appointment of an arbitrator and obtained leave from the English court to serve it out of the jurisdiction. Impianti applied to set aside the order on the ground that there was no valid arbitration agreement and, hence, the dispute fell within the Brussels Convention. Hirst J held that the Convention did not apply. The matter proceeded to the Court of Appeal, which referred the matter to the CJEU for a preliminary ruling. The primary question for the CJEU was: did the arbitration exception in Art 1(4) of the Convention extend: (a) to any litigation or judgment, and, if so, (b) did it extend to litigation or judgment where the initial existence of an arbitration agreement was in issue?

The CJEU held, in 1992, that:

1 by excluding arbitration from the scope of the Convention on the ground that it was already covered by international conventions, the contracting parties intended to exclude arbitration in its entirety, including proceedings brought before national courts; the appointment of an arbitrator by a national court was a measure adopted by the State as part of the process of setting arbitration proceedings in motion, and such a measure came within the sphere of arbitration and was covered by the exclusion contained in Art 1(4) of the Convention;
2 in order to determine whether a dispute fell within the scope of the Convention, reference had to be made solely to the subject matter of the dispute; if, by virtue of its subject matter, such as the appointment of an arbitrator, a dispute fell outside the scope of the Convention, the existence of a preliminary issue which the court had to resolve in order to determine the dispute could not, whatever that issue might be, justify application of the Convention;
3 the fact that a preliminary issue was related to the existence or validity of the arbitration agreement did not affect the exclusion from the scope of the Convention of a dispute concerning the appointment of an arbitrator; and
4 the answer to question (a) was that Art 1(4) of the Convention had to be interpreted as meaning that the exclusion provided for was extended to litigation pending before a national court concerning the appointment of an arbitrator, even if the existence or validity of an arbitration agreement was a preliminary issue in litigation.

27 *Rich (Marc) & Co. AG v Società Italiana Impianti PA (The Atlantic Emperor)* [1992] 1 Lloyd's Rep 342.

Despite the statement in this judgment that the arbitration exclusion was broad, the subsequent CJEU decision in *Gasser* (see Chapter 7) seriously affected this decision.[28] After *Gasser*, the Italian court, which in *The Atlantic Emperor* was first seised, would have to determine its jurisdiction and decide about the validity or not of the arbitration clause; the English court, which was second seised, would have to stay its proceedings until the determination of jurisdiction by the Italian court.

The Recast Regulation (once it becomes applicable in 2015) adopts the reasoning of the CJEU in *The Atlantic Emperor* and provides, in Recital 12 (see Chapter 7, above), that the Regulation should not apply to any action or ancillary proceedings relating to, in particular, the establishment of an arbitral tribunal, the powers of arbitrators, the conduct of an arbitration procedure etc.

2.4.2 Is an anti-suit injunction an ancillary measure?

Subsequent to the *Gasser* and *Turner* decisions, but prior to *The Front Comor*, various questions were raised by leading English practitioners and academics at various events held by the London Shipping Law Centre. For example, could an application for an anti-suit injunction be regarded as ancillary to arbitration, so as to be included in the exception from the Regulation?

Some guidance on these issues was gleaned from ***Van Uden Maritime BV v Firma Deco-Line***,[29] which was referred to the CJEU, but it was not directly concerned with this question.

This concerned Art 24 of the Convention and an application for an interim relief.

It should be borne in mind that Art 24 of the Convention applies (as does Art 35 of the Recast Regulation) even if a court of another contracting State has jurisdiction as to the substance of the case, provided that the subject matter of the dispute falls within the scope *ratione materiae* of the Convention, which covers civil and commercial matters. Article 24 may confer jurisdiction on the court hearing the application, even where proceedings have been, or may be, commenced on the substance of the case, and even where those proceedings are to be conducted before arbitrators. This last paragraph is not included in Art 35 of the Recast, probably because the exclusion of arbitration has been clarified (see Chapter 7).

On the facts of the *Van Uden*, VUM, a shipping company established in the Netherlands, had agreed to provide space on cargo vessels for use by DL, a company established in Germany, in return for the payment of charter hire. Disputes were to be referred to arbitration in the Netherlands. VUM, claiming that DL had not paid certain invoices, began arbitration proceedings in the Netherlands and also applied to the court there for an interim payment on the basis that DL had not been diligent in appointing arbitrators and that the non-payment of invoices was affecting its cash flow. The Dutch court made a reference to the CJEU for a preliminary ruling as to whether a court had jurisdiction to hear an application for interim relief under the Brussels Convention 1968 Art 5(1) or Art 24. DL contended that, as the parties had provided that any dispute would be referred to arbitration, interim proceedings were also excluded from the scope of the Convention. Two arguments were put forward, in this regard, predicated on opposite interpretations of Art 1(4) of the Convention.

28 See commentary on Anti-suit injunctions and Arbitration, *The Front Comor*: LMCLQ May 2006 166 by Professor J Hill.

29 [1998] ECR 7091, or [1999] QB 1225; Schlosser report [1979] OJ C 59/71, at p 93, paras 64, 65.

The first, put forward by DL, the UK Government and the German Government, was that the interim relief sought was ancillary to arbitration and, hence, excluded from the Convention. The second, put forward by VUM and the Commission, suggested that the scope of that exclusion should not be stretched too far.

The Advocate General, far from being convinced that the application for interim relief was ancillary to arbitration, agreed with the Commission and VUM, in that the exclusion of 'arbitration' from the scope of the Convention did not cover the circumstances of this case.

The CJEU held that, where the parties have validly excluded the jurisdiction of the courts in a dispute arising under a contract and have referred that dispute to arbitration, there are no courts of any State that have jurisdiction as to the substance of the case for the purposes of the Convention. It is only under Art 24 that a court may be empowered under the Convention just for the purpose of ordering provisional or protective measures.

The court further held that Art 24 cannot be relied upon to bring within the scope of the Convention provisional or protective measures relating to matters which are excluded from it.[30] Under Art 1(4) of the Convention, arbitration is excluded from its scope. By that provision, the contracting parties intended to exclude arbitration in its entirety, including proceedings brought before national courts.[31] In line with the court's judgment in *Marc Rich* (above), it was held that proceedings ancillary to arbitration, such as the appointment or dismissal of arbitrators, the fixing of the place of arbitration, or the extension of the time limit for making awards, are excluded from the scope of the Convention.

Regarding provisional measures, it held that they are not, in principle, ancillary to arbitration proceedings but are ordered in *parallel* to such proceedings and are intended as measures of support. They concern, not arbitration as such, but the protection of a wide variety of rights. Their place in the scope of the Convention is thus determined, not by their own nature, but by the nature of the rights which they serve to protect. Referring to its previous decision in *Reichert v Dresdner Bank*, the Court defined 'provisional and protective measures' within the meaning of Art 24 of the Convention. They are measures that, in matters within the scope of the Convention, are intended to preserve a factual or legal situation so as to safeguard rights the recognition of which is otherwise sought from the court having jurisdiction.

The Court, finally, held that the interim relief sought in this case for interim payment was not considered to be a provisional measure within the meaning of Art 24, nor ancillary to the arbitration exception.

As the issue whether or not an anti-suit injunction could be considered as ancillary or even parallel to arbitration was not a question before the court, no inference could be drawn either way from the ratio of *Van Uden*. The CJEU avoided entering into a wider argument as to the extent of the arbitration exception other than following its previous ruling in *Marc Rich*. It specifically defined protective measures as being required to protect a wide variety of rights and as determined not by their own nature but by the nature of the rights they serve to protect.

30 *De Cavel v de Cavel* (Case 143/78) [1979] ECR 1055, p 1067, para 9.

31 *Marc Rich & Co. AG v Società Italiana Impianti PA* (Case C-190/89) [1991] ECR I–3855, pp 3900–3901, para 18.

Whether or not an anti-suit injunction was within the scope of the Convention came before Aikens J (as he then was) in ***The Ivan Zagubanski***,[32] a case involving a London arbitration clause incorporated into the bill of lading from the charter-party. The cargo interests, some of whom were domiciled in Convention countries, having lost their cargo owing to an explosion on the ship, commenced proceedings in Marseilles. The ship-owners applied to the English court for a declaration of the validity of the arbitration clause and also for an anti-suit injunction to restrain the claimants from continuing the proceedings in France. The claimants challenged the jurisdiction of the court to grant an anti-suit injunction against a party domiciled in a Convention State.

It was held by Aikens J that the English proceedings for an anti-suit injunction were outside the scope of the Convention, because their principal focus, or essential subject matter, was to enforce the arbitration agreement and, thus, it was within the arbitration exception of Art 1(4) of the Convention. He arrived at this conclusion by relying on *The Atlantic Emperor* and on the *Van Uden* decisions.

Had it not been for *The Front Comor*, which followed afterwards (see below), this would be an obvious and sensible answer, as derived particularly from the *Van Uden*, and an anti-suit injunction could, arguably, be classed as a protective measure, being parallel to arbitration, aiming to protect the legal right to arbitrate.

However, as seen below, questions as to whether such a relief is ancillary or parallel to arbitration are now academic.

3 PROHIBITION OF ANTI-SUIT INJUNCTIONS

In view of the reform of the Regulation, which will be applicable from 2015 and aims to enhance the effectiveness of the choice of court agreements (see Chapter 7, para 8, above), the revised Regulation will affect the order of priority given to the courts of Member States, namely: instead of the first seised court deciding on the validity or not of the agreement, it will be the chosen court. In particular, Art 25 provides that the chosen court shall have jurisdiction, unless the agreement is null and void as to its substantive validity under the law of that Member State.

3.1 THE GENERAL BAN AS BETWEEN EU MEMBERS' COURTS

Turner v Grovit[33]

Mr Turner, a solicitor, was domiciled in the UK and was employed by the Chequepoint Group of companies controlled by Mr Grovit. He originally worked for them in London and was then transferred to Spain in 1997. He resigned in 1998 and brought proceedings before the Employment Tribunal in London for constructive dismissal, alleging that he was the victim of efforts to implicate him in illegal conduct. He was awarded damages. Chequepoint brought proceedings against him in Spain

32 [2002] 1 Lloyd's Rep 106.
33 Case C-159/02, *Turner v Grovit* [2004] 2 Lloyd's Rep 169.

for alleged negligence. The conflict of jurisdiction was between the English court (which would have jurisdiction on the basis of Turner's domicile) and the Spanish court.

Objecting to the jurisdiction of the Spanish court, Mr Turner applied to the High Court in London for an anti-suit injunction, seeking to prevent the continuation of the Spanish proceedings on the ground that they were vexatious. There was no jurisdiction clause in the contract. The injunction was granted and was upheld by the Court of Appeal, on the ground that the Spanish proceedings were brought in bad faith in order to vex Mr Turner in the pursuit of his case before the Employment Tribunal. This had the effect of discontinuing the Spanish proceedings. Chequepoint disputed the authority of the English court to issue the anti-suit injunction and appealed to the House of Lords.[34] Although Lord Hobhouse was inclined to think that the grant of the injunction was justified, because there was unconscionable conduct in this case, he referred the matter to the CJEU to rule on the issue. He observed, however, that the terminology of 'anti-suit' injunction is misleading, because it fosters the impression that the order is addressed to the foreign court, whereas, in fact, the intention of the injunction is to restrain the party which is before the foreign court on the basis of its wrongful conduct and binds only that party *in personam*.

Both Mr Turner and the UK Government defended the use of anti-suit injunctions to proceedings which were covered by the Convention on the following grounds: first, an injunction does not encroach upon the jurisdiction of a foreign court, as it is addressed to an individual who brings proceedings in bad faith; second, the fact that an anti-suit injunction is a procedural mechanism of national law, and the Convention does not regulate on procedural matters, means that there is no conflict in its operation; and, third, an anti-suit injunction helps to meet the Convention's objectives, as it works to minimise the risk of conflicting decisions and avoid a multiplicity of proceedings.

However, the CJEU ruled that the use of anti-suit injunctions runs counter to the mutual trust which the Member States gave to each other's legal systems and institutions.[35] Within the principle of mutual trust, it is inherent that the rules of jurisdiction laid down in the Convention are able to be applied and interpreted with equal authority by each Member State's courts. For this reason, the Convention itself does not permit the jurisdiction of a court to be reviewed (save in a few exceptional cases concerning the recognition of judgments) by the court of another Member State, even in cases where the litigant was acting in bad faith. Moreover, an anti-suit injunction undermines a foreign court's jurisdiction to determine a dispute, which cannot be justified by reference to the fact that such an injunction is indirect and intends to guard against abuse. Finally, the court held that the use of an anti-suit injunction to determine a jurisdictional dispute is seen as rendering ineffective the *lis alibi pendens*[36] rules under the Convention.[37]

34 [2002] 1 WLR 107.

35 Op. cit. fn 33, para 24. This echoes the reasoning of the ECJ in *Erich Gasser GmbH v MISAT Srl* (Case C-116/02) [2004] 3 WLR 1070; [2004] 1 Lloyd's Rep 222. For a detailed outline of this case, see Ch 7.

36 See, further, Ch 7.

37 In *Deaville v Aeroflot Russian International Airlines*, France and England were involved, and although, at the time the case was decided, anti-suit injunctions were not forbidden, the judge did not grant the injunction for reasons of comity towards the French court. Brice QC, acting as the judge in the case, said

In ***Erich Gasser GmbH v MISAT Srl*** (seen in Chapter 7), the CJEU held that, in cases involving the same cause of action and the same parties, the court second seised, even if it is the forum chosen by the parties by a jurisdiction agreement, must stay its proceedings until the court first seised determines its jurisdiction, even if it takes inordinate delay to rule on its jurisdiction.

The effect of *Gasser* and *Turner*, however (as seen in Chapter 7, above), is ameliorated by the Recast Regulation, under which the court of a Member State designated with jurisdiction will determine the validity of the choice of court agreement and its jurisdiction, whether or not it is first or second seised, as an exception to the *lis pendens* rule. Consequently, the effect of the Recast Regulation will be that the overinflated balloon of the ban of anti-suit injunctions will burst from 2015.

3.2 BREACH OF AN ARBITRATION AGREEMENT – *THE FRONT COMOR*

Prior to this case, it had been thought that anti-suit injunctions to restrain a party from breaking its agreement to arbitrate would not be caught by the Regulation rules, as arbitration is exempted from its scope.

In ***The Front Comor***,[38] the ship, owned by West Tankers (WT), collided with a pier of an oil refinery in Syracuse, Sicily, owned by ERG Petroli (ERG), who was the charterer of the ship. The charter provided that ERG would hold WT harmless and contained a London arbitration clause. The insurers of ERG paid up to the policy limits for the repairs of the pier, and ERG commenced arbitration in London for the uninsured sum against WT. The insurers of ERG issued proceedings in Italy against WT, exercising subrogation rights to recover the sum paid under the policy.

The issues of liability in both the proceedings in Italy and the arbitration were substantially the same. WT obtained an interim injunction from the English court to restrain the insurers from maintaining the Italian proceedings; they further applied to the Italian court and sought a stay of its proceedings.

One of the issues in the present context was whether the arbitration exception of Art 1(2)(d) of the Regulation encompassed the anti-suit injunction.

Colman J[39] granted the injunction and held that, as regards injunctions sought to restrain a breach of jurisdiction clauses, they are no longer permissible following *Turner v Grovit*, but the reasoning in that decision is inapplicable to anti-suit injunctions in respect of cases involving breach of an arbitration agreement, which falls outside the scope of the Regulation. The judge found support in the decision of the Court of Appeal in *The Hari Blum*,[40] which confirmed the exclusion of arbitration. In view of

it was more appropriate to let the French court determine its own jurisdiction. Comity required a policy of non-intervention. Were the case to be decided today, the result would be the same, but on the basis of applying both *Turner v Grovit* and *Gasser v MISAT*, as the French court was first seised.

38 *Allianz SpA v West Tankers Inc. (The Front Comor)* Case C-185/07 [2009] 1 Lloyd's Rep 413; [2009] 1 AC 1138.

39 [2005] EWHC 454 (Comm); [2005] 2 Lloyd's Rep 257.

40 *Through Transport Mutual Insurance Association (Eurasia) Ltd v New India Assurance Co., Ltd* (*The Hari Blum*) [2005] 1 Lloyd's Rep 67. This case concerned the loss of containerised cargo in transit, shipped under a through bill of lading issued by Borneo Maritime, which eventually filed bankruptcy proceedings. The claim was paid by the insurers of the cargo owner, New India, who became assignees of the claim against the carrier. The insurers of the carrier for cargo liability were Through Transport Mutual (the club) whose terms with their assured contained a London arbitration clause. Because of the bankruptcy

The Hari Blum, the issue in *The Front Comor* leapfrogged the Court of Appeal to the House of Lords.

The House of Lords,[41] which referred the question to the CJEU, stressed the importance of considering the practical reality of arbitration as a method of resolving commercial disputes, which is excluded from the scope of the Regulation. In the opinion of Lord Hoffman, as much as the courts of Member States should trust each other in matters in which the Regulation applies, they should equally trust the arbitrators, or the court exercising supervisory jurisdiction, to make orders requiring the parties of a binding arbitration agreement to arbitrate and not to litigate.

The Advocate General Kokott[42] expressed the view that the 'arbitration' exception in Article 1(2)(d) of the Regulation did not apply if the substantive subject matter of the dispute fell within the scope of the Regulation.

The CJEU[43] reached the same conclusion that, for a court in a Member State to grant an anti-suit injunction restraining a person from commencing or continuing proceedings before the courts of another Member State, on the ground that such proceedings would be contrary to an arbitration agreement, was incompatible with the Regulation.

It concluded (para 31) that the Italian court should not be deprived of its jurisdiction to consider the validity of the arbitration agreement, otherwise a party would only have to assert the existence of an arbitration agreement to thwart the jurisdiction of the court first seised to determine its jurisdiction.

Pending the hearing of the CJEU, the arbitration in *The Front Comor* (*ERG v WT)* continued, and the insurers, against their wishes, were joined as co-claimants, and the arbitrators made orders following the same line of argument as Colman J had when he granted the injunction. After the issue of the opinion of the Advocate General, the arbitrators issued a further partial award dismissing the claims of ERG and the insurers against WT, which was followed by a third partial award exonerating WT from any liability. The award was published on 12 November 2008, and the CJEU issued its judgment on 10 February 2009, whereupon WT had an award in their favour and outstanding proceedings in Italy, which could not be restrained.

of the carrier, New India commenced proceedings against the club in Finland under Finnish law, which gave the claimant the right to proceed directly against the defendant's liability insurer. The club sought a declaration from the English court that New India was bound to pursue any claim in arbitration, because the substance of the claim was one to enforce against the club the right of indemnity that was available to the carrier, the assured. In support of the arbitration agreement, the club also sought an anti-suit injunction to restrain the Finnish proceedings. Moore-Brick J granted the anti-suit injunction. The Court of Appeal (Lord Woolf LCJ, and Clarke and Rix LJJ) ordered the discharge of the anti-suit injunction, but held that the English court was not obliged to stay its proceedings under Art 27 of the Regulation, because the matter was not within the Regulation. It was open to the court to consider whether the arbitration exception applied, even if it was the second seised. It further held that the judge was right to hold that the proceedings were outside the scope of the Regulation, because the principal focus of the matter was arbitration, which included, among other things, ancillary assistance to arbitration proceedings. Thus, it concluded that both a declaration that the arbitration agreement was valid and an injunction to restrain proceedings in courts in breach of a binding arbitration agreement were within the exception.

41 [2007] UKHL 4; [2007] 1 Lloyd's Rep 391.

42 [2008] 2 Lloyd's Rep 661; [2009] ECR I-663.

43 *Allianz SpA v West Tankers Inc. (The Front Comor)* Case C-185/07 [2009] 1 Lloyd's Rep 413; [2009] 1 AC 1138.

3.3 THE AFTERMATH OF *THE FRONT COMOR*

Since this decision, attempts were made to circumvent its negative effect on the arbitration choice.

The aim of the Regulation to achieve certainty in jurisdictional matters among Member States was undermined by the very decisions of the CJEU. The unavoidable result was to encourage a new race by litigants in attempting to seise the jurisdiction of a court of a Regulation Member State so that they were first in time. This, in turn, caused the inevitable waste of legal costs, either because a party wished to retain the jurisdiction that had been agreed, or because of the existence of a more appropriate forum for the particular dispute.

English lawyers and the courts have been inventive in fighting back a battle started by the EU regime itself, which imposed a rigid philosophy of the civil law systems, tending to overlook what would be best in the interests of justice and the avoidance of unnecessary litigation costs. Many cases since 2009 exemplify this situation, some of which deserve attention.

3.3.1 Declaratory relief by way of an award and enforcement as judgment

Subsequently to *The Front Comor*, the anti-suit injunction, which had been issued by Colman J, was discharged, and the insurers continued the proceedings in Italy, despite the arbitral tribunal's third final award, in which it was declared that WT was under no liability to ERG and their insurers in respect of the collision.

On a without notice application by WT, Simon J ordered that they should be permitted, pursuant to s 66(1) of the Arbitration Act (AA) 1996, to enforce the declaratory award in their favour and to enter judgment against ERG and the insurers in terms of the award pursuant to s 66(2), to the effect that WT were under no liability to the charterers, ERG or their insurers. Field J, in ***West Tankers Inc. v Allianz SpA (The Front Comor)***,[44] dismissed an application by the insurers to set aside the order of Simon J. He held that, where the victorious party's objective in obtaining an order under s 66(1) and (2) was to establish the primacy of a declaratory award (by virtue of Art 34 of the Regulation) over an inconsistent judgment, the court had jurisdiction to make a s 66 order.

The insurers appealed, arguing that a declaratory judgment, especially a negative declaratory judgment, was incapable of being 'enforced in the same manner as a judgment to the same effect' within s 66.

The Court of Appeal[45] held that, at common law, a party to an arbitration who had obtained a declaratory award in his favour could bring an action on the award, and the court, if it thought appropriate, could make a declaration in the same terms. The purpose of s 66 of the AA 1996 was to provide a simpler alternative route to bringing an action on the award. In an appropriate case, the court could give leave for an arbitral award to be enforced in the same manner as might be achieved by an action on the award and so give leave for judgment to be entered in the terms of the award.

44 [2011] EWHC 829 (Comm); [2011] 2 Lloyd's Rep 117.
45 [2012] EWCA Civ 27; [2012] 1 Lloyd's Rep 398.

It should be noted that, at the time of writing, an attempt by WT to have the award recognised and enforced in Italy under the New York Convention 1958 was contested. Nevertheless, the strength of this solution (to issue the declaratory award of no liability and enforce it under s 66 by way of a judgment) is that it should give rise to *issue estoppel* or to *res judicata*.

The trend of obtaining a declaratory award continued, and Beatson J, in ***African Fertilizers and Chemicals NIG Ltd (Nigeria) v BD Shipsnavo GmbH (The Christian D)***,[46] analysed why a declaratory award could be enforced as a judgment under s 66 of the AA 1996, rejecting the defendants' argument that it could not be because it does not specify a sum to be paid.

As it happened, under the Recast Regulation, by Art 73 and Recital 12, the solution given to these problems is that the New York Convention 1958 on the enforcement of awards will have precedence over the Regulation. Moreover, Recital 12 provides that the Regulation should not apply to any action or judgment concerning, inter alia, recognition or enforcement of an arbitral award.

3.3.2 Awarding equitable damages for breach of the obligation to arbitrate

The arbitrators in *The Front Comor* dealt with further matters that were outstanding, namely the right of WT to seek damages from the insurers for breach of the arbitration clause and an indemnity by way of a declaratory award against any damages the Italian court might award.

They issued an award by majority in favour of the insurers. The critical question was whether the principle of effective judicial protection protecting the insurers' right to sue WT in Italy under Art 5(3) was one which bound the tribunal so as to prescribe its jurisdiction to grant damages for breach of the obligation to arbitrate or an indemnity. Analysing the decision of the CJEU in *The Front Comor*, the majority view of the arbitrators was that the ruling by the court meant that the insurers had the right under European law to bring proceedings in Syracuse. Accordingly, it seemed to them that a decision by the tribunal that the insurers did not have that right would be impossible to sustain, if the matter was tested again before the European Court. And this was so, they thought, despite the specific provision in Art 1(2)(d). Consequently, they were driven to the conclusion that Community law would not allow an arbitral tribunal, although it exercised a parallel jurisdiction, to cross the divide and in effect 'punish' a party for pursuing a course that the European Court itself had approved.

WT obtained leave to appeal against the award under s 69 of the AA 1996. ***West Tankers Inc. v Allianz SpA***[47] came before Flaux J. The issue was whether the arbitral tribunal is deprived of jurisdiction to award equitable damages for breach of an obligation to arbitrate by reason of EU law.

Flaux J held that the CJEU expressly recognised that the Regulation did not apply to decisions of arbitral tribunals, and that the tribunal might reach decisions regarding the scope of the agreement to arbitrate and the merits of the case which might be inconsistent with the decision of the Italian court, without falling foul of any principle

46 [2011] EWHC 2452 (Comm).
47 [2012] EWHC 854 (Comm); [2012] 2 Lloyd's Rep 103.

enshrined in the Regulation. Arbitration fell outside the Regulation, and an arbitral tribunal was not bound to give effect to the principle of effective judicial protection. As such, he held, the majority of the tribunal was wrong to conclude that it did not have jurisdiction to make an award of damages for breach of the obligation to arbitrate or for an indemnity. Although the tribunal was bound to apply EU law, as part of English law, it would only have to apply the principle of effective judicial protection if it was engaged and, in the instant case, it was not. The principle of effectiveness and effective judicial protection was not free-standing but existed to protect rights under EU law, which, in the instant case, were the rights of the insurers under Art 5(3) to commence court proceedings against an alleged tortfeasor in the courts of the place where the harmful event occurred. That right was only engaged before courts of the Member States, not before arbitral tribunals. If the tribunal did not have to give effect to the right under Art 5(3), then there was no reason why it did not have jurisdiction to grant equitable damages or an indemnity.[48] The appeal was allowed.

The decision has wider implications. Whereas the courts of Member States are bound by the principle of mutual trust, arbitral tribunals are not.

3.3.3 Discord between court judgments of Members States

As a result of the decisions of the CJEU, mentioned in the preceding paragraphs, ***The Wadi Sudr***[49] is an example of impulsive litigation in an attempt to seise a favourable court and avoid an arbitration agreement. The Court of Appeal held that, although the arbitration proceedings fell outside the Regulation by virtue of Art 1(2)(d), a Regulation judgment could give rise to an issue estoppel in the same way as in any other proceedings.

Cargo of coal was carried on the ship from Indonesia to Spain under Congenbill form bills of lading that purported to incorporate the arbitration clause from the charter-party. The standard Congenbill provided: 'Law and Arbitration clause' of the 'charterparty dated as overleaf', but no date was given. There were three charter-parties: a head time charter, a sub-time charter and a voyage charter-party.

It was necessary to discharge the cargo short of destination in south-east Spain (Carboneras) owing to damage to the vessel's rudder. The cargo interests were determined to issue proceedings in Spain, because Spanish law provides for absolute liability of the carrier, who would not be able to raise the defence of due diligence under the HVR. They applied for a warrant to arrest the vessel in Spain, and, on the same day, the owners commenced proceedings in the English court for a declaration of no liability in an attempt to seise the court first. A few days later, the Spanish court granted the arrest, and security was provided for the vessel's release. A judgment or order of a competent court or tribunal in any jurisdiction would trigger payment under the security.

The ship owners challenged the jurisdiction of the Spanish court on the ground that the dispute was subject to a London arbitration agreement. The cargo interests disputed both the arbitration clause and the jurisdiction of the English court. The owners applied to the Spanish court for a stay of the proceedings on the ground that the English court was first seised. They also commenced arbitration and applied to

48 Ibid, at paras 27, 53, 54, 61, 62, 64, 68.
49 [2009] EWCA Civ 1397; [2010] 1 Lloyd's Rep 193.

the English court for another declaration that the dispute with the cargo interests was subject to an arbitration agreement.

In the meantime, the Spanish court held that no arbitration clause was incorporated into the bill of lading and, in any event, the owners had waived their right to rely on the arbitration clause by commencing the English court proceedings. However, as it was thought that the English court was first seised, the Spanish court stayed its proceedings on the merits.

All these proceedings took place between January and October 2008, without any substantive outcome to resolve the dispute. One can guess the amount of the legal costs incurred. There were appeals to the Court of Appeal against the various first instance judgments.

On the issue whether or not the arbitration clause was incorporated in the bill of lading, Gloster J held that it was, and that the judgment of the Spanish court to the contrary on the same issue was not binding in arbitration proceedings on the basis that the proceedings fell within the exclusion of arbitration under Art 1(2)(d) of the Regulation.

The Court of Appeal held that the Commercial Court had erred in holding that the Spanish judgment was not binding in arbitration proceedings. A preliminary ruling regarding the applicability of an arbitration clause in proceedings in which the main subject of the proceedings was within the Regulation was itself to be categorised as within the Regulation.[50]

In the light of this decision and the decision of *The Front Comor*, tribunals and judges have been presented with difficult questions to answer:

(a) Issue estoppel: It has been suggested that arbitrators would not be bound by procedural English law to recognise a Regulation judgment, because the Judgment Regulation does not apply to an arbitration tribunal, even if the UK courts are so obliged (see *obiter* comments by Burton J in ***CMA CGM SA V HMD LTD***[51]). However, the Court of Appeal in *The Wadi Sudr* suggested (*obiter*) that arbitrators, bound to apply English law, would have to consider under ordinary principles whether a judgment gave rise to issue estoppel.[52]

(b) Breach of the *lis pendens* rule: It could be argued that, if the Spanish court was second seised,[53] whereupon it would be obliged by the *lis pendens* rule to stay its proceedings (*Gasser v Missat*), its judgment issued in breach of the rule should not be capable of being enforced. There is no guidance from the CJEU, nor in

50 *Allianz SpA (formerly Riunione Adriatica di Sicurta SpA) v West Tankers Inc.* (C-185/07) [2009] 1 AC 1138; [2009] ECR I – 663, applied.

51 [2008] EWHC 2791 (Comm) referred to on Chs 6 and 7 above.

52 Op. cit. fn 49 at para 56.

53 The English court, in fact, was not first seised; it did not have jurisdiction by virtue of Art 23 of the Regulation, as was wrongly pleaded. The Court of Appeal commented that:

> NNC commenced the Commercial Court action and sought to serve the proceedings without leave of the court on the basis that there was a clause in the contract giving the English court jurisdiction. That plea was made at a time when [the] solicitor acting for NNC did not have the relevant voyage charter. But his information was that the voyage charter contained a London arbitration clause, not as was pleaded in the Commercial Court action that there was a term providing for the English court to have jurisdiction . . . To allow NNC to amend in order to make the case that they deliberately did not make and, indeed, which is inconsistent with the case that they first made, in order to enable them to preserve a first seised status, is to my mind simply unacceptable.

the Regulation, as to what should happen if the court second seised does not stay its proceedings, which, in practical terms, amounts to non-compliance with the *lis pendens* rule.

(c) Public policy issue: For a judgment to be reviewed on grounds of public policy, the infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought, or of a right recognised as being fundamental within that legal order.[54]

However, once the Recast Regulation (see Chapter 7) is applicable, these problems will go away.

The New York Convention is given precedence over the Regulation for the enforcement of the award. A possible judgment of a court of an EU Member State that an arbitration agreement is null and void and incapable of being enforced should not be subject to the new rules of recognition and enforcement under the Regulation. But the recitals of the Regulation further provide that the judgment of that court on the substance of the matter should be able to be recognised or enforced under the Regulation. This does not pose a risk of an issue estoppel, as such judgment should not affect arbitration proceedings, but a risk that such judgment may be issued prior to the award and will be easily enforced because the procedural requirements on recognition and enforcement have been lifted. A possible solution to this should be speed in the arbitration proceedings, and, if one party who wishes to avoid an early award procrastinates, then the arbitrators have powers under the AA 1996 to make appropriate procedural orders. Also, it should be borne in mind that court proceedings – seeking the aid of the court in arbitration matters, such as seen in *Marc Rich (Atlantic Emperor)* at 2.4.1, above – are excluded from the Regulation.

3.3.4 A new trend for an anti-arbitration injunction

An interesting issue arose in ***Claxton Engineering Services v TXM***,[55] which concerned an application for an anti-arbitration injunction. English court proceedings had commenced pursuant to an English jurisdiction clause, but the defendant contested them on the ground of an alleged Hungarian arbitration clause in the contract. On the application by the claimant, the court issued an anti-arbitration injunction to prevent the arbitration proceeding in Hungary. The argument that, after *The Front Comor*, the court had no jurisdiction to grant an injunction against arbitral proceedings taking place in a Regulation Member State was rejected, and Hamblen J held that *The Front Comor* and the Regulation applied to court proceedings not to arbitration proceedings, because arbitration did not fall within the scope of the

54 It is clear from the European Court of Justice's decision in *Krombach v Bamberski* (Case C-7/98) [2000] ECR I–01935 that public policy was confined within strict limits. It can be envisaged only where recognition or enforcement of the judgment delivered in another contracting State would be at variance – to an unacceptable degree – with the legal order of the State in which enforcement is sought, inasmuch as it would infringe a fundamental principle. In order for the prohibition of any review of the foreign judgment as to its substance to be observed, the infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought, or of a right recognised as being fundamental within that legal order.

55 [2011] EWHC 345; [2011] 1 Lloyd's Law Rep 510.

Regulation, Art 1(2)(b). Therefore, the court had jurisdiction to grant the anti-arbitration injunction.

However, the court also held that an anti-arbitration injunction would only be granted in exceptional circumstances, and it would usually be necessary to establish that the applicant's legal or equitable rights had been infringed or threatened by the continuation of the arbitration, or that its continuation would be vexatious, oppressive or unconscionable. Gloster J had held, in the same case earlier,[56] that the contract was subject to an English exclusive jurisdiction clause. The proceedings brought by the defendant were a clear breach of that contractual agreement. Moreover, the claimant's legal right was of a nature that the English courts had recognised,[57] and it was generally appropriate to enforce it by way of injunctive relief, unless there were strong reasons for not giving effect to the exclusive jurisdiction clause.

By contrast, in ***Electrim SA v Vivendi Universal SA (No 2)***,[58] there was an unusual battle between two arbitration centres. Electrim applied for an injunction under s 37 of the SCA 1981 to restrain Vivendi from pursuing the LCIA arbitration until the determination of the ICC arbitration in Geneva. Aikens J (as he then was) refused the application and held that Elektrim failed to establish that a legal or equitable right had been infringed, or that the continuance of the LCIA arbitration would be vexatious or unconscionable. The judge did not reject the argument that the court had jurisdiction to grant an anti-arbitration injunction under s 37, although he refrained from exploring the question, generally, but given the comments of the Court of Appeal in *Cetelem v Roust Holdings SA (2005)*,[59] he assumed there was such jurisdiction.

4 ANTI-SUIT INJUNCTIONS OUTSIDE THE SCOPE OF THE REGULATION

Two broad categories of anti-suit injunctions are compared here, which fall outside the scope of the Regulation, in the sense that they do not involve the rule of *lis pendens* or related proceedings brought between two Member States of the Regulation or, in so far as it is still applicable, the Lugano Convention.

For convenience, the first category is labelled 'the contract cases', which are concerned with breach of a jurisdiction or an arbitration agreement. The second category is the 'non-contract cases', where an injunction may be granted in the interests of justice to restrain 'unconscionable' conduct, provided consideration is given to the issue of 'comity', that is, respect to the foreign court.

56 [2011] 1 Lloyd's Rep 252: a Hungarian buyer and an English seller did not contract on the buyer's terms containing an agreement for arbitration in Hungary, but rather the buyer by its conduct accepted a counter-offer put forward by the seller deleting the arbitration agreement and incorporating an exclusive English law and jurisdiction clause.

57 *Donohue v Armco Inc.* [2002] 1 Lloyd's Rep 425 and *Sebastian Holdings Inc. v Deutsche Bank AG* [2011] 1 Lloyd's Rep 106 (see, further, Ch 7, above).

58 [2007] 2 Lloyd's Law Rep 8.

59 [2005] EWCA Civ 618, [2005] 1 WLR 3555.

4.1 GENERAL PRINCIPLES

The principles, as derived from leading authorities and applicable, generally, in both categories of anti-suit injunction application, were set out concisely by Smith J in ***Royal Bank of Canada v Cooperatieve Centrale***:[60]

Briefly, a Canadian bank, R, appealed against the refusal of an anti-suit injunction to restrain US proceedings brought against it by C, a Netherlands-based business, alleging breach of an English jurisdiction agreement. The issues before the court were (a) whether the 'non-exclusive' jurisdiction clause contained in the agreement should be construed as giving England the status of 'primary forum' for resolving any dispute arising under the agreement, and (b) whether a term should be implied into the agreement entitling either party to insist that a trial take place in the English courts, such that B's conduct in seeking to have the US proceedings determined first was a breach of contract or otherwise oppressive.

The Court of Appeal approved the considerations applied by Smith J at first instance, quoted at para 29,[61] who referred to other leading authorities, stating:

> The following considerations, as it seems to me, are applicable in a case such as the present, where the same issues are being litigated between the same parties both in this country and in foreign proceedings.
>
> (i) Under English law, a person has no right to be sued in a particular forum, domestic or foreign, unless there is some specific factor that gives him that right, but a person may show such a right if he can invoke a contractual provision conferring it on him or if he can point to clearly unconscionable conduct (or the threat of unconscionable conduct) on the part of the party sought to be restrained.[62]
> (ii) There will be such unconscionable conduct if the pursuit of foreign proceedings is vexatious or oppressive or interferes with the due process of this court.[63]
> (iii) The fact that there are such concurrent proceedings does not in itself mean that the conduct of either action is vexatious or oppressive or an abuse of court, nor does that in itself justify the grant of an injunction.[64]
> (iv) However, the court recognises the undesirable consequences that may result if concurrent actions in respect of the same subject matter proceed in two different countries: that 'there may be conflicting judgments of the two courts concerned' or that there 'may be an ugly rush to get one action decided ahead of the other in order to create a situation of *res judicata* or issue estoppel in the latter'.[65]
> (v) The court may conclude that a party is acting vexatiously or oppressively in pursuing foreign proceedings and that he should be ordered not to pursue them if (a) the English court is the natural forum for the trial of the dispute; and (b) justice does not require that the action should be allowed to proceed in the foreign court, and more specifically that there is no

60 [2003] EWHC 2913: approved by the Court of Appeal: [2004] 1 Lloyd's Rep 471 at para 8; see also *Seismic Shipping v Total E & P UK plc (The Western Regent)* [2005] 2 Lloyd's Rep 54 and [2005] 2 Lloyd's Rep 359 (CA), see 4.3.2, below.

61 [2004] 1 CLC 170.

62 *Turner v Grovit* [2002] CLC 463; [2002] 1 WLR 107 , at para 25, per Lord Hobhouse.

63 *South Carolina Insurance Co. v Assurantie Maatschappij 'de zeven Provincien' NV* [1987] AC 24 at p 41D; *Glencore International AG v Exter Shipping Ltd* [2002] EWCA Civ 528; [2002] CLC 1090, at para 42.

64 *Société Nationale Industrielle Aerospatiale v Lee Kui Jak* [1987] AC 871 at p 894C, *Credit Suisse First Boston (Europe) Ltd v MLC (Bermuda) Ltd* [1999] CLC 579 at p 596, *Airbus Industrie GIE v Patel* [1998] CLC 702 at pp 708–709; [1999] 1 AC 119 at p 133G–H.

65 *The Abidin Daver* [1984] AC 398, at pp 423H–424A, per Lord Brandon.

advantage to the party sought to be restrained in pursuing the foreign proceedings of which he would be deprived and of which it would be unjust to deprive him.[66]

(vi) In exercising its jurisdiction to grant an injunction, 'regard must be had to comity and so the jurisdiction is one which must be exercised with caution'.[67] Generally speaking, in deciding whether or not to order that a party be restrained in the pursuit of foreign proceedings, the court will be reluctant to take upon itself the decision whether a foreign forum is an inappropriate one[68].

The Court of Appeal, dismissing the appeal, held that (1) the non exclusive jurisdiction clause expressly contemplated parallel proceedings and could not be construed as giving the English courts primacy in any conflict arising from the prospect of virtually simultaneous trials in parallel proceedings;[69] and (2) consequently, the implied term contended for by R would be inconsistent with the express terms of the jurisdiction clause, and C's pursuit of the US action to hearing and judgment would not be a breach of contract. Although entitled to intervene if the alternative proceedings had become oppressive during their course, or had been conducted oppressively, the court would require stronger grounds than those suggested by the facts of the present case.[70] Mere convenience could not count as a special reason.[71]

4.2 THE CONTRACT CASES

In circumstances in which neither party is domiciled in an EU country, nor are the competing courts situated in EU Member States, the principles established in *The Aeakos*[72] remain good law with regard to actions brought in breach of an English exclusive jurisdiction agreement, or an arbitration agreement. The court has discretion whether or not to grant an anti-suit injunction.

4.2.1 Anti-suit injunction for breach of a jurisdiction agreement

4.2.1.1 Principles

A few decisions are mentioned here to show how the principles have evolved. In the early 1980s, an anti-suit injunction to restrain foreign proceedings in breach of an English exclusive jurisdiction clause would be granted if (a) the foreign proceedings were vexatious and oppressive, in the sense that there was no ground whatever for bringing the foreign proceedings; and (b) the party seeking the injunction would not be adequately protected by an award in damages.[73]

66 *Société Aerospatiale v Lee Kui Jak*, op. cit. fn 64, at pp 895D and 896F/G.

67 *Airbus Industrie GIE v Patel*, op. cit. fn 64, at p 708; 133F.

68 *Turner v Grovit*, op. cit. fn 33, at para 25.

69 Cf. *Sabah Shipyard (Pakistan) Ltd v Pakistan* [2002] EWCA Civ 1643 which was distinguished.

70 *Société Nationale Industrielle Aerospatiale (SNIA) v Lee Kui Jak* [1987] AC 871 applied.

71 E.g. *Sabah Shipyard (Pakistan) Ltd v Islamic Republic of Pakistan* [2003] 2 Lloyd's Rep 571, in which the Court of Appeal granted the injunction to restrain the proceedings in Pakistan commenced as a pre-emptive strike to prevent proceedings in the agreed jurisdiction, England.

72 *Continental Bank v Aeakos Naviera SA* [1994] 1 Lloyd's Rep 505 (CA) (see Ch 6).

73 *The Lisboa* [1980] 2 Lloyd's Rep 546, in which Italian proceedings had been brought in breach of the English jurisdiction agreement. This case would today fall within the European Union category, and an anti-suit injunction would be prohibited.

The reference to 'vexatious and oppressive' was made again in ***Sohio Supply Co. v Gatoil (USA) Inc.***,[74] in which Staughton LJ held that to proceed in the foreign court in breach of a contract, which provides for an exclusive English jurisdiction, may well in itself be vexatious and oppressive in a given case.[75] Then there was *The Aeakos* in 1994.

The principles were reaffirmed and refined in ***A/S D/S Svendborg v Wansa***,[76] which involved a breach of an English jurisdiction agreement, and the injunction was granted.[77] Clarke J (as he then was) approved by the Court of Appeal, held that, where there is an exclusive jurisdiction clause, the parties should be held to their bargain, and the court would grant the injunction if: (a) the application for an injunction has been made promptly, and (b) there exists no good reason to deny the injunction (such as delay or voluntary submission to the jurisdiction of the foreign court).

This decision shows that the courts are not concerned with proof of 'vexatious and oppressive' foreign proceedings by the applicant for an anti-suit injunction when there is a breach of a jurisdiction agreement. The conduct of the other party in bringing foreign proceedings may be vexatious in itself. It is for that party to prove a '*good or strong reason*' for the court not to give effect to the exclusive jurisdiction clause, or not to grant the injunction.

These principles were confirmed by the House of Lords in ***Donohue v Armco***,[78] which represents current law.[79] On the facts of the case, the injunction was not granted to restrain the proceedings in New York because there was proof of a strong reason for not giving effect to the English exclusive jurisdiction clause. The reason was that the defendants were victims of fraudulent conspiracy. In the circumstances, the interests of justice would be best served in one forum, which was New York, rather than continue partly in England and partly in New York. The decision demonstrates that the court's primary consideration should be how the interests of justice would be best served, rather than seeking proof by the applicant of vexatious and oppressive conduct on the part of the other party who commenced foreign proceedings.

Whether or not lawyers still plead vexatious and oppressive conduct, such conduct should not be, automatically, presumed by the mere fact of the commencement of the foreign proceedings in breach of the choice of court agreement.[80]

74 [1989] 2 Lloyd's Rep 588 (CA), p 592.

75 The Texan court, in this case, was not obliged to decline jurisdiction in the face of the parties' agreement to sue in England.

76 *A/S D/S Svendborg v Wansa* [1996] 2 Lloyd's Rep 559, p 570, affirmed [1997] 2 Lloyd's Rep 87 (CA).

77 Similarly, in *Akai v People's Insurance Co.* [1998] 1 Lloyd's Rep 90, the judge was in favour of giving effect to the jurisdiction agreement by an injunction, unless to do so would be contrary to public policy.

78 [2002] 1 Lloyd's Rep 425.

79 See, further, *OT Africa Line Ltd v Magic Sports Wear Corp.* [2005] 1 Lloyd's Rep 252 and [2005] 2 Lloyd's Rep 170 (CA), in which the injunction was granted. The English action was retained pursuant to an exclusive jurisdiction clause, and the anti-suit injunction against cargo interests (including their insurers) who pursued their claim against the carriers in Canada was not discharged. The Canadian statute providing for local jurisdiction was not a good reason for the court not to give effect to the contractual jurisdiction.

80 See also *REC Wafer Norway v Moser Baer Photo Voltaic Ltd* [2010] EWHC 2581: the claimant, REC, applied for an anti-suit injunction to restrain the defendant from continuing the Indian proceedings, asserting that such proceedings were vexatious and oppressive. It was decided that it was appropriate to grant such an order, as the bank guarantees in the case were governed by English law, and England was the forum the parties had chosen. In deciding whether to exercise its discretion, the court found that damages would be inadequate as a remedy, and there was no unreasonable delay on the part of REC.

4.2.1.2 The court's discretion

It would make matters easier for the court to exercise its discretion if the jurisdiction agreement was exclusive. That would require that the parties must have intended it to be exclusive and to preclude parallel proceedings elsewhere, unless there was some special reason. In recent years, the courts have examined whether or not sophisticated commercial parties intended to have an exclusive jurisdiction forum to the exclusion of any other forum.

For example, in ***Highland Crusader Offshore v Deutsche Bank***,[81] in which the defendant had started proceedings in Texas despite the English jurisdiction agreement, it was pleaded and the judge stated that bringing these proceedings was a vexatious act, unless there were exceptional circumstances that were not foreseeable at the time of the contract.

He was overruled by the Court of Appeal, which restated the key applicable principles, summarised below:

(a) Under English law, the court may restrain a defendant over whom it has personal jurisdiction from instituting or continuing proceedings in a foreign court when it is necessary in the interests of justice to do so.
(b) It is too narrow to say that such an injunction may be granted only on grounds of vexation or oppression, and the courts have refrained from giving a comprehensive definition of the term. The prosecution of parallel proceedings in different jurisdictions is undesirable, but not necessarily vexatious or oppressive.
(c) An anti-suit injunction always requires caution, because it involves interference with the process of the foreign court, but an injunction to enforce an exclusive jurisdiction clause governed by English law is not regarded as a breach of comity because it merely requires a party to honour his contract; different judges operating under different legal systems may legitimately arrive at different answers, without occasioning a breach of customary international law or manifest injustice. But the stronger the connection of the foreign court with the parties and the subject matter of the dispute, the stronger the argument against intervention.
(d) By contracting for non-exclusive jurisdiction, parties had to have anticipated and accepted the possibility of some parallel proceedings, and the court was to

81 [2009] EWCA Civ 725; [2009] 2 Lloyd's Law Rep 617; see further *The Marielle Bolten* [2009] EWHC 2552 (Comm); [2010] 1 Lloyd's Rep 648, which shows how far litigants can be inventive, but to the cost of their clients if they cannot be restrained! The claimant ship-owners (W) sought an anti-suit injunction against the defendant cargo insurers (E) in respect of proceedings commenced by E in Brazil against third parties. W were the owners and demise charterers of a vessel that was entered in a shipping pool. The vessel was time chartered by the pool to charterers (V). V sub-chartered the vessel to sub-charterers (B). The vessel then loaded cargoes in Brazil for carriage to the Dominican Republic and Texas. Bills of lading were issued. They were governed by English law, contained an exclusive English jurisdiction clause and were subject to the Hague Rules. The vessel grounded off the Dominican Republic; she was refloated, and the cargo was discharged in the Dominican Republic or on-carried to the United States undamaged. W declared general average. E commenced proceedings against W in the Dominican Republic, and W commenced English proceedings seeking general average and salvage charges and injunctive and declaratory relief on grounds that the proceedings in the Dominican Republic were in breach of the exclusive jurisdiction clauses in the bills of lading. The proceedings both in England and the Dominican Republic were stayed by consent. E then commenced proceedings in Brazil against W, V, B, W's P&I insurers and the vessel's manager. The claims in Brazil, where the Hague Rules did not apply, alleged that all the defendants were strictly liable for breach of their contractual obligations as maritime carriers. Flaux J granted the anti-suit injunction.

exercise its discretion in deciding whether or not to grant an anti-suit injunction. It does not follow that an alternative forum is necessarily inappropriate or inferior. The court has discretion, and there is flexibility.

4.2.1.3 Is the agreed jurisdiction exclusive?

In ***RBS plc v Highland Financial Partners LP***,[82] Burton J (who had been overruled in the case, above) held that the following clause was an exclusive jurisdiction clause: 'The issuer irrevocably agrees that the courts of England shall have jurisdiction to hear and determine any suit, action or proceedings, and to settle any disputes, which may arise out of or in connection with this deed.'

However, it was exclusive in so far as the issuer was concerned, even though the word 'exclusive' was not used. The contract also provided that the other party to the contract (the bank) had a right to bring proceedings in any court of competent jurisdiction. The bank applied for an anti-suit injunction to restrain the proceedings in Texas brought by the issuer. As the issuer was bound by the exclusive jurisdiction clause to proceed in England, there were no comity considerations in not granting the injunction, but the court, in exercising its discretion, refused to grant it for other reasons.

There was a non-exclusive jurisdiction in ***Royal Bank of Canada v Cooperatieve Centrale BA***[83] (seen under 4.1), which provided for submission to the English court, but also contained a waiver of objections to any proceedings brought in a foreign court; that court was New York.

In ***Oceanconnect Ltd v Angara Maritime Ltd (The Fesco Angara)***,[84] an anti-suit injunction could not be supported on the basis that proceedings brought in the United States for a maritime lien had breached an exclusive English jurisdiction clause in an escrow agreement. The agreement had been entered into by the parties to secure the release of the vessel subject to that lien and not to determine the appropriate jurisdiction for determination of the substantive underlying claim.

More complex questions arise when there is a jurisdiction clause and an arbitration clause in the contract; unusual, but it happens. The claimants (insurers) in ***Sul America Cia Nacional de Seguros SA v Enesa Engenharia SA***[85] applied for an anti-suit injunction to prevent the defendants (insured) from bringing proceedings in Brazil in reliance on an exclusive jurisdiction clause in favour of Brazil in the insurance contract, on the ground that the parties had agreed to resolve disputes in London arbitration. The contract also provided for mediation. The injunction was granted ex parte; the order was continued by Cook J on an application inter parties. The insured argued before the judge that they were not bound to arbitrate, because the arbitration agreement was governed by the law of Brazil, under which it could be invoked only with their consent. They also argued that the right to refer disputes to arbitration arose only after the requirements of the condition to refer the dispute to mediation, provided in the contract, had been satisfied. Such requirements were not satisfied, and, in any event, the scope of the arbitration clause was limited to disputes about the quantum of the insurers' liability.

82 [2012] EWHC 1278 (Comm).
83 [2004] 1 Lloyd's Rep 471.
84 [2010] EWCA Civ 1050; [2011] 1 Lloyd's Rep 399.
85 [2012] EWCA Civ 638; [2012] 1 Lloyd's Rep 671 (see also Ch 6, above).

The issues raised were: (a) which was the proper law of the arbitration agreement, and (b) how could a conflict between the court choice and the arbitration agreement be resolved? The judge[86] held that the arbitration clause was governed by English law, even though the policy was not, and it covered the dispute. It also prevailed over the jurisdiction provision.

On appeal, the Court of Appeal agreed. (On the issue of how the law governing the arbitration agreement is to be determined, see Chapter 6, above.)

4.2.2 Breach of an arbitration agreement

The general principles were set down by the Court of Appeal in *The Angelic Grace* (see 2.1, above). The court has jurisdiction under s 37 of the SCA 1981 and sections 2(3) and 44 of the AA 1996, unless a good reason is shown not to do so. Relevant considerations include: whether the grant of the injunction would unjustly deprive the defendant of advantages in the foreign forum; whether the grant of the injunction would enable all disputes between all parties to take place in the same forum; and whether there were arbitration proceedings on foot or in prospect.[87] The fundamental test, which is emphasised in recent decisions for the grant of an anti-suit injunction in all cases, is whether it is in the interests of justice to do so, and, in doing so, it will consider whether or not the foreign proceedings were dressed up for the purpose of evading the arbitration agreement.[88] The applicant has to show to a high degree of probability that there is a contractual right to arbitrate the dispute in question.[89] The arbitration clause is to be construed broadly (*FionaTrust*).[90]

There have been a number of recent decisions where there was a breach by one party to an arbitration agreement bringing proceedings in the courts of a non-EU Member State.

In ***Midgulf International Ltd v Groupe Chimique Tunisien***,[91] it was held that it is a repudiatory conduct by one of the parties to the arbitration agreement to ask a foreign court to declare that there is no such agreement. Even if the action does not, technically, amount to a breach of the English contract, the court can restrain a defendant from instituting or continuing proceedings in a foreign court when it is necessary in the interests of justice to do so. In ***Shashoua v Sharma***,[92] an anti-suit injunction to prevent a party from pursuing proceedings in the courts of a non-EU Member State on the basis of the parties' agreement to arbitrate in London was not inconsistent with Regulation 44/2001 or the New York Convention 1958.

In ***Joint Stock Asset Management Co Ingosstrakh – Investments v BNP Paribas SA***,[93] the Court of Appeal affirmed the principle that the right of a party to an arbitration to be protected from vexatious foreign proceedings brought by the other

86 [2012] EWHC 42 (Comm); [2012] 1 Lloyd's Rep 275.

87 *The Angelic Grace* [1995] 1 Lloyd's Rep 87; *Continental Bank NA v Aeakos Compania Naviera SA* [1994] 1 Lloyd's Rep 505; *Donohue v Armco Inc.* [2002] 1 Lloyd's Rep 425.

88 *Joint Stock Asset Management Co. v BNP Paribas SA* [2012] 1 Lloyd's Rep 649; *Mahotra v Mahotra* [2012] EWHC 3020 (Comm) or [2013] 1 Lloyd's Rep 285.

89 *Transfield Shipping Inc. v ChipingXinfaHuayu Alumina Co., Ltd* [2009] EWHC 3629 (QB); *Stonehouse v Jones* [2012] EWHC 1089 (Ch); *Mahotra v Mahotra* [2012] EWHC 3020 (Comm).

90 [2008] 1 Lloyd's Rep 254.

91 [2010] EWCA Civ 66.

92 [2009] EWHC 957 (Comm).

93 [2012] EWCA Civ 644.

party seeking to deprive it of the benefit of the arbitration agreement raised a serious issue to be tried. The validity of the bank guarantee, which was the subject of the Russian proceedings in this case, was an issue that was expressly made subject to the arbitration agreement in the guarantee. The court further held: Once it was appreciated that the bank was seeking by an anti-suit injunction to restrain parties acting in concert from subverting the valid English arbitration agreement binding on one of them, there was a serious issue to be tried that Russian companies were colluding in bringing proceedings in Russia, and an interim anti-suit injunction was properly granted to restrain pursuit of those proceedings.

Insurers too should be aware that they may find themselves implicated in the tort of procuring a breach of an arbitration agreement.

In ***The Duden***,[94] a cargo insurer's conduct, knowledge and intent, in using an arrest as a means of trying to force the ship-owner to accept Senegalese jurisdiction, was such as to make the insurer liable for the accessory tort of procuring the cargo receivers' breach of the London arbitration clause in the contract of carriage. There was an express agreement for London arbitration. Applying the *Kallang*,[95] the court held that, if a party sought to use a foreign arrest for purposes beyond obtaining reasonable security for an arbitration claim, he would be in breach of the express agreement. The anti-suit injunction was granted.

A declaratory and injunctive relief was granted, with certain limitations, by Burton J in ***Aes Ust Kamenogorsk***,[96] who dismissed a jurisdictional challenge. He did not find that it was necessary for the applicant to show that the conduct of the defendant was vexatious, if the meaning given to it was more than that the claimant had been 'vexed'. He was satisfied that the applicant, AESUK, was entitled to rely on the arbitration clause and, consequently, to the relief of restraining a breach of it by an anti-suit injunction.

In ***STX Pan Ocean Co., Ltd v Woori Bank***,[97] Flaux J granted an anti-suit injunction to the time charterer to enforce the London arbitration clause and restrain pursuit of proceedings in South Korea. There had been no delay in making the application, and damages were manifestly an inadequate remedy. Similarly, in ***Alexandros T***,[98] Cooke J granted the anti-suit injunction to restrain the continuation of the proceedings brought by the cargo interests (for the loss of the cargo carried on board the ship) in China, because they were bound by the arbitration clause incorporated in the bill of lading.

Once an injunction has been granted, the burden is on the party wishing it to be lifted to show why it should not be upheld (***Sul America Cia Nacional de Seguros SA v Enesa Engenharia SA***[99]). As seen earlier, the injunction was obtained to

94 [2009] 1 Lloyd's Rep 145; see also wrongful arrest/detention damages in Ch 5.

95 [2009] 1 Lloyd's Rep 124: a cargo insurer's conduct, knowledge and intent, by seeking to use the arrest of a vessel in Senegal as a means of achieving Senegalese jurisdiction, were such as to make it liable for the accessory tort of procuring the cargo receiver's breach of the London arbitration clause in the contract of carriage (see, further, Ch 5, above, on wrongful arrest).

96 [2010] EWHC 772 (Comm); upheld by the CA [2011] EWCA Civ 647 and by the SC [2013] UKSC 35, which rejected the argument that the negative aspect of an arbitration agreement was only enforceable when the arbitration was on-going or proposed. The anti-suit injunction was not inconsistent with the AA 1996.

97 [2012] EWHC 981 (Comm) [2012] 2 Lloyd's Rep 99.

98 *Starlight Shipping v Tai Pink Insurance (The Alexandros T)* [2008] 1 Lloyd's Rep 230.

99 [2012] EWHC 42; [2012] 1 Lloyd's Rep 275.

enforce an agreement to arbitrate in London. The Court of Appeal[100] affirmed the decision, and the case is important because it draws attention to rules of construction of conflicting agreements in the contract about jurisdiction and arbitration agreements, as well as a purported mediation agreement,[101] which was held to be unenforceable.

When an arbitration agreement is not properly incorporated into the contract, the English courts would not interfere with the foreign proceedings.[102] An example of the validity of an arbitration clause being disputed by one party to it, who brought proceedings in another forum, was dealt with by the English court in ***The XL Insurance v Owens Corning***.[103] Toulson J held that, by stipulating for arbitration in London under the provisions of the AA 1996, the parties chose English law to govern the matters that fell within those provisions, including the formal validity of the arbitration clause and the jurisdiction of the arbitral tribunal. It is for the arbitral tribunal to rule on the validity of the agreement and its jurisdiction in the event of challenge, unless the matter is referred to the court. He granted the injunction restraining the party in breach of the putative arbitration agreement from continuing with litigation it had commenced in Delaware.

With regard to commencing proceedings in a foreign court to obtain security for a claim that is subject to London arbitration, the court clarified, in ***The Kallang***,[104] that an English court will not restrain a party to an English arbitration clause from arresting the vessel in another jurisdiction where the sole purpose of the arrest is to provide security for the English arbitration. However, the defendants in this case were not simply seeking security, but, rather, were using the arrest as a way to frustrate the English arbitration and attempt to force Senegalese jurisdiction.

4.2.3 Discretion of the judge in 'contract cases'

Discretion varies in degree depending on the circumstances of a case. Comity has a smaller role to play in these cases than in cases in which there is no jurisdiction agreement. The courts tend to uphold party autonomy and regard that the true role of comity in such cases is to ensure that the parties' agreement is respected, unless there is a sufficiently strong reason not to do so (*OT Africa Line Ltd v Magic Sports Wear Corp.*[105]).

4.3 THE 'NON-CONTRACT CASES'

This category is concerned with applications for anti-suit injunctions where there is no breach of either a choice of court agreement or an arbitration agreement. Therefore, the issue of interference with foreign courts has been an acute problem. For this reason, the first hurdle for the applicant to overcome is to show sufficient interest or connection with the English jurisdiction for the English court even to consider the application.

100 [2012] EWCA Civ 638; [2012] 1 Lloyd's Rep 671.
101 Ibid, at paras 27, 29, 30, 35 and 36, per Lord Neuberger MR, see Ch 6.
102 *American International Specialty Lines Insurance Co. v Abbott Laboratories* [2003] 1 Lloyd's Rep 267.
103 [2000] 2 Lloyd's Rep 500.
104 [2006] EWHC 2825 (Comm); [2007] 1 Lloyd's Law Rep 160.
105 Op. cit. fn 79.

4.3.1 Historical development

In the early 1980s and prior to the *Aerospatiale* case (below), there were two House of Lords' decisions[106] that had determined the issue of granting an anti-suit injunction in cases where there was no breach of a jurisdiction agreement on the basis of *forum non-conveniens* principles, but the jurisdiction was exercised with caution.

The doctrine of *forum non-conveniens* applied only if there were two alternative fora (the 'alternative fora' subcategory) having jurisdiction for a particular claim, one of which was England.

Different criteria applied where there was only a single foreign forum (the 'single forum' subcategory) whose court had competent jurisdiction to determine the merits of a particular claim.

In ***British Airways v Laker***,[107] Lord Scarman expounded that the English court would only interfere to restrain the foreign proceedings if the conduct of the claimant was so unconscionable and unjust that, in accordance with English principles of a 'wide and flexible' equity, such conduct could be seen to be an infringement of an equitable right of the applicant. This equitable right not to be sued abroad, he said, arose only if the inequity was such that the English court ought to intervene to prevent injustice. He further said that such cases of anti-suit injunction must be few, because the court should be guided by caution.

On the facts of this 'single forum' case, Laker had sued BA in the US courts for protection of their trading interests. An anti-suit injunction, applied for in the English court by BA to restrain those proceedings, was refused because Laker's conduct was not unconscionable.

In ***Société Nationale Industries Aerospatiale v Lee Kui Jak***,[108] which is mentioned here for the purposes of distinction between the 'single forum' and the 'alternative fora' subcategories, the facts were briefly these:

A helicopter, built in France and operated by a Malaysian company, crashed in Brunei, and a businessman was killed. His widow sued both the Malaysian company and the French manufacturer in the court of Brunei. In addition, she sued the French manufacturers in France (where the action was later discontinued) and, also, sued both defendants in Texas, under the law of which punitive damages and strict liability apply. The Texas court had jurisdiction over the manufacturers because they carried on business there. The widow's action against the Malaysian company in Brunei was settled eventually, but the French manufacturers issued a contribution notice on the Malaysian company in Brunei. The French manufacturers accepted service of a writ issued in Brunei by the owners and insurers of the helicopter seeking an indemnity.

In the meantime, their application to the Texas court for a stay in favour of Brunei on the ground of *forum non-conveniens* was dismissed, despite their undertaking to protect the rights of the plaintiff – which she would have if the action continued in Texas. The widow had also agreed that she would not pursue punitive damages and strict liability in Texas. In these circumstances, the Court of Appeal of Brunei

106 *Castano v Brown & Root* [1981] AC 557 and *British Airways v Laker Airways* [1985] AC 58.
107 [1985] AC 58, p 95.
108 [1987] AC 871.

dismissed the appeal by the French against the refusal by the lower court to grant an anti-suit injunction and held that the Texas court had become the appropriate forum, having regard to the advancement of the proceedings there.

On appeal to the Privy Council, Lord Goff, examining the historical development of the court's jurisdiction with regard to anti-suit injunctions, declined to apply *forum non-conveniens* principles. He thought that such principles were only appropriate to applications for a stay of proceedings. The mere fact that Brunei was the natural forum was not enough, of itself, to justify the grant of an injunction. It would only be granted to prevent injustice, which, in the context of this case, meant that the Texas proceedings must be shown to be vexatious or oppressive.

The elements of vexation or oppression, however, had in this case been neutralised by the plaintiff's agreement not to pursue punitive damages or strict liability in Texas. On the other hand, the fact that the defendant had undertaken to preserve the rights of the plaintiff (obtainable in Texas) in the Brunei proceedings was a factor in favour of Brunei. Therefore, as the advantage the plaintiff would have had in Texas would have been maintained in Brunei, a possible element of injustice to her had been eliminated.

At the end, the most important factors in favour of granting the injunction against the Texas proceedings were the claims for contribution and indemnity brought in Brunei. Had the Texas proceedings continued, there would have been multiplicity of actions. For this reason, the injunction was granted.

4.3.2 Modern approach: 'Ends of justice' and 'comity'

Lord Goff, in *Airbus v Patel*, clarified the principle with regard to alternative fora cases, as he had previously formulated it in the *Aerospatiale* case. For the first time, he imposed limitations to the granting of the injunction upon both categories, the alternative fora and the single forum cases, on grounds of comity.

Airbus v Patel[109]

The aeroplane in this case belonged to Indian Airlines, which flew from Bombay to Bangalore; it struck the ground and caught fire on landing at its destination. Ninety-two passengers died. The London families of British citizens carried on board (four died and four were injured) sued Airbus in Texas. The defendants sought an injunction from the English court to restrain those proceedings on the ground that they were vexatious and oppressive. Colman J refused to grant it. The Court of Appeal granted it, mainly because India was the natural forum. Applying *forum non-conveniens* principles, it regarded Texas as a non-appropriate forum.

The House of Lords reversed the decision of the Court of Appeal and laid down the new formula to be applied to applications for anti-suit injunctions in such cases. Therefore, since this case, there is one general, non-rigid rule applicable to both the alternative fora and the single forum cases, namely: (a) there must be a sufficient interest or connection between the action and England for an intervention with the

109 [1998] 1 Lloyd's Rep 631.

foreign court by an anti-suit injunction to be considered (the comity requirement); and (b) such an intervention must be for the ends of justice.[110]

Lord Goff set out the guidelines for the court's approach with regard to comity in each case. In particular:

(a) In the alternative fora cases, where England is the natural forum and the jurisdiction of a foreign court has been invoked, there is sufficient interest to justify an intervention by the English court in order to protect its jurisdiction. On this basis, there would be no infringement of comity. Thus, the court will examine only whether the interests of justice are served, taking into account the claimant's advantage there and the possible loss of advantage for the defendant in the natural forum. It will also consider whether any possible oppression in the foreign court was neutralised. It will seek to ascertain what the foreign court will be likely to do. Would the foreign court stay its proceedings itself, observing judicial comity?
(b) In the single forum cases, where there is only one foreign court having jurisdiction, but the jurisdiction of another foreign court is invoked, the question for the English court, when an application for an anti-suit injunction is made, is this: could the English court be asked to guard the jurisdiction of the single forum by issuing an anti-suit injunction? In this situation, consideration of comity is paramount. At first glance, an intervention by the English court would be inconsistent with comity. Therefore, the court should proceed in two stages. At the first stage, it will examine whether there is sufficient interest or connection with England, which warrants the court's intervention for the ends of justice. Such a connection could be established if the transaction was made here,[111] or there were grounds of public policy. If there is no connection or sufficient interest, the matter will be closed at the first stage by refusing the injunction. If, on the other hand, there is such a connection, the comity requirement will be satisfied, as it would be if England was the natural forum in the alternative fora cases. Then, the court will proceed to the second stage, during which it will examine whether the foreign proceedings against which the injunction is sought are oppressive. If they are, an injunction will be granted, because to allow them to continue would be against the ends of justice.[112]

In a subsequent decision of the Court of Appeal, ***The Western Regent***,[113] limitation of liability proceedings were commenced in England (the limitation action) in respect of collision liability, and the liability action was commenced in Texas. The collision occurred in the Shetlands, North Sea.

Upon an application by S for an anti-suit injunction to restrain the Texas proceedings, the court held that the Texas liability proceedings were not unconscionable, although US law did not follow the 1976 Limitation Convention, and refused to grant

110 Generally speaking, Lord Goff said, injustice can occur when the foreign proceedings are vexatious and oppressive, and, as he had said in the *Aerospatiale* case, these terms, historically, have had different meanings. From the tenor of his judgment in the *Airbus* case, however, he seemed to prefer no reference to these terms.

111 *Midland Bank plc v Laker Airways Ltd* [1986] QB 689.

112 These approaches are inferred from the conclusion of the analysis by Lord Goff [1998] 1 Lloyd's Rep 631, p 642.

113 [2005] 2 Lloyd's Rep 359.

the anti-suit injunction. Considerations of comity played an important part in the decision. The essential touchstone for the grant of an anti-suit injunction in this case was whether there had been unconscionable conduct or the threat it.[114]

In the instant case, the Texan proceedings had not been brought in breach of contract. The claimant was not acting unconscionably. As a matter of comity, it was for the Texan court to consider what steps to take in the light of the decree, and whether it should be recognised or enforced. The limitation decree did not qualify the claimant's right to bring liability proceedings in Texas, so that it was not unconscionable for him to proceed in Texas. That remained so, even on the assumption that he could not enforce in England a judgment for a larger amount obtained in Texas than the amount allowed under the Limitation Convention. The English limitation proceedings were not stayed. (See, further, Chapter 14, Vol 2.)

In ***Star Reefers Pool Inc. v JFC Group Co. Ltd***,[115] the Court of Appeal, overturning the decision of the lower court, held that the judge's conclusion that the Russian proceedings were commenced with a view to frustrating the determination of the dispute in England was unjustified. When the claim was commenced in Russia, there had been no valid proceedings in England. The defendant had not promised to litigate or arbitrate in England. It was possible that an earlier judgment in Russia would interfere with Star Reefers' attempt ultimately to enforce an English judgment obtained in default against the defendant in Russia.

Moreover, an English judgment in which the defendant had not participated would presumably not constitute any *res judicata* or estoppel in Russia. The defendant had a juridical advantage in the Russian court, namely the application of Russian rather than English law to the substance of the parties' dispute. Unless that juridical advantage could be said to be hopelessly and cynically invoked, it was a legitimate advantage. It was hard to see that a party could be said to be acting unconscionably when it sought a legitimate juridical advantage in a foreign court.

The judge took no account of considerations of comity, and that was an error in the exercise of his discretion. Considerations of comity should have caused the English court to pause long and hard before granting an injunction. An injunction was not necessary and was not in the interests of justice. The weakness of the case concerning vexatious conduct, combined with the caution prompted by considerations of comity, should lead to the result that an anti-suit injunction ought not to have been granted. The appeal was allowed.

By contrast, in ***Cadre SA v Astra Asigurari SA***,[116] in which the defendant, despite the decision of the English court that England was the natural and appropriate forum for the case, continued to seek the determination of the dispute in Romania without any good reason, an anti-suit injunction was granted, and the court disapproved indulgence in forum shopping.

114 *Royal Bank of Canada v Cooperatieve Centrale Raiffeisen-Boerenleenbank BA* [2004] EWCA Civ 7 considered.

115 [2012] 1 CLC 294.

116 [2006] 1 Lloyd's Rep 560.

4.4 HYBRID CASES

A good example of a situation where there is a mixture of 'contract' and 'non-contract' cases is ***Bouygues v Caspian (sub nom BOS-400)***.[117] It is a paradigm case of numerous proceedings and court orders, which were issued in two jurisdictions, England and South Africa.

A French company, Bouygues, the owners of the tow, *BOS-400*, engaged the services of the tug, *Tigr*, (owned by Caspian, a Russian company). As the tug was under time charter to Ultisol, managed by a Dutch company, the towage contract was between Bouygues and Ultisol and provided for English jurisdiction. While the tow was approaching Cape Town, the tow lines parted in stormy conditions, and it was driven ashore on the rocks, becoming a total loss. Bouygues claimed damages against Ultisol, Caspian and the Cape Town port authority, Portner. Proceedings were brought in both England and South Africa.

Ultisol applied for an anti-suit injunction to restrain Bouygues from proceeding in South Africa, and Clarke J (as he then was) granted the injunction, while such an injunction was refused to Caspian by Morison J. Both Caspian and Ultisol issued third-party notices to join Portner, the port authority, in the English proceedings. Colman J refused to set aside the third-party notices on application by Portner. Rix J (as he then was) granted a declaration sought by Ultisol and Caspian to limit their liability in England, where the 1976 Limitation Convention applies, whereas the 1957 Convention is applicable in South Africa. Walker J (as he then was) refused to set aside the anti-suit injunction granted by Clarke J and to stay the limitation proceedings. There were appeals against all of these orders.

The Court of Appeal discharged the anti-suit injunction, set aside the third-party proceeding against Portner and stayed the liability proceedings in England, in the light of a change of circumstances, in that the action against Portner in South Africa had substantially been advanced ('the Portner factor'). Also, the fact that Morison J had refused an anti-suit injunction to Caspian against Bouygues radically altered the possibilities of multiplicity of proceedings, with its attendant risk of conflicting decisions. Thus, the argument that Bouygues should be kept to its contractual bargain with Ultisol was counterbalanced. Therefore, the anti-suit injunction obtained by Ultisol against Bouygues was discharged for a good reason – being widely interpreted – which was the existence of proceedings in South Africa involving the same issues and facts and also other parties not bound by a contractual jurisdiction. The Portner factor constituted a special countervailing factor, which weighed heavily in favour of discharging the anti-suit injunction.

The English liability proceedings were stayed on the ground that South Africa was the natural forum for the determination of the liability issues, while the limitation action, which was considered quite separate from the liability actions, was maintained in England.

117 [1998] 2 Lloyd's Rep 461.

4.5 'INTERESTS OF JUSTICE' – A PREFERABLE CONCEPT

Historically, since the nineteenth century, serious consideration had been given by the English courts to whether or not foreign proceedings were brought to oppress the defendant.

Thus, in most decisions concerning either anti-suit injunctions or stay of proceedings (Chapter 6), proof that the proceedings brought in a particular forum were vexatious and oppressive would lead the judge to exercise discretion in favour of granting the anti-suit injunction, or against the stay of the English proceedings upon an application for a stay in favour of another forum.

However, in the cases concerning stay of proceedings on the ground of another forum being the more appropriate, the term 'vexatious and oppressive' was effectively abolished by the House of Lords in the *Macshannon*[118] case. This was because of the moral connotations attached to these words and the difficulty for the defendant to prove that there was something wrong in the character of the plaintiff.

In considering the granting of an anti-suit injunction, various examples of 'vexatious and oppressive' conduct were given by the judges in various authorities, depending on the context of a particular case. For example:

(a) In *The Angelic Grace*,[119] it was said that it would be 'vexatious and oppressive' to allow the contract breaker to persist with the breach of contract where damages would be an inadequate remedy.
(b) In *Toepfer v Société Cargill*,[120] it was said that it would be 'vexatious and oppressive' if the party, who was in breach of an arbitration agreement, was allowed to continue the foreign proceedings. This would be so if there was no proof that the foreign court would stay its proceedings under the mandatory provisions of the New York Convention 1958.
(c) In both *Estonian Shipping Ltd v Wansa*[121] and *Akai Pty Ltd v People's Insurance Co Ltd*,[122] the public interest was balanced against the interest of the parties. It was explained by the court that it would be 'vexatious and oppressive' if multiple proceedings were allowed where the plaintiff resorted to the foreign court in order to evade important policies of the English jurisdiction;
(d) In the context of the Texas cases, the fact that the Texas jurisdiction was so wide and extra-territorial, so as to be contrary to accepted principles of international law, was 'vexatious and oppressive'.
(e) If it was shown that the claim in the foreign court was bound to fail, then the making of such a claim could be seen to be frivolous and vexatious (although a case of this kind was thought to be rare).[123]

However, in the seminal decisions of Lord Goff, *Aerospatiale* and *Patel* (above), in which he adopted a modern approach to anti-suit injunctions, he explained that,

118 *Macshannon v Rockware Glass Ltd* [1978] 1 All ER 625 (see Ch 6).
119 [1994] 1 Lloyd's Rep 168.
120 [1998] 1 Lloyd's Rep 379.
121 [1997] 2 Lloyd's Rep 183.
122 [1998] 1 Lloyd's Rep 90.
123 *Shell v Coral* [1999] 2 Lloyd's Rep 606.

although the words 'vexatious and oppressive' could have different meanings in different contexts, he was inclined, in the *Patel* case, to agree, albeit *obiter*, with Judge Sopinka in the *Amchem* case, cited in his judgment, who preferred to use the 'ends of justice' test instead of 'vexatious and oppressive'. Various considerations are taken into account by the court to determine 'the ends of justice' in each case.

The difference between the two terminologies is important, because proof of vexatious and oppressive conduct can be misunderstood and used to place a heavy burden on the applicant (Chapter 6).

However, as seen under 4.2.1, above, the courts, in the last two decades, have not been concerned with proof by the applicant of 'vexatious and oppressive' conduct by the other party. The conduct in bringing foreign proceedings may be vexatious in itself, but the courts require that party to prove a '*good or strong reason*' for the court not to grant the injunction.

The legal principles have become clearer in recent years, as confirmed by a number of important decisions, and there is emphasis on the interests of justice in all cases.[124] The questions for the court are: (a) whether the ends of justice would be met by the grant of the injunction, (b) whether it would be unconscionable to allow the continuation of the foreign proceedings, and (c) what degree of caution must be exercised (which is a consideration of comity).

4.6 THE IMPORTANCE OF COMITY IN ALL CASES

As has been shown, comity is part of the general principle limiting the jurisdiction of the court to exercise its jurisdiction in considering an anti-suit injunction application, mainly in the non-contract cases. However, comity has also been considered in cases where there has been a breach of a choice of court agreement. In straightforward cases judges have said there is little mileage in a 'ritual incantation' of the doctrine of comity.[125] In other circumstances, particularly when there is a question of validity of an arbitration clause under foreign law, comity may require caution.[126] Furthermore, considerations of comity grew in importance the longer the foreign suit continued, and the more the parties and the judge had engaged in its conduct and management.[127]

In cases that are within the ambit of the jurisdictional rules of the Brussels I Regulation, the concept of comity is looked at in terms of the mutual trust between Member States.

124 *Airbus v Patel* [1998] 1 Lloyd's Rep 631; *Donohue v Armco* [2002] 1 Lloyd's Rep 425; *Seismic Shipping v Total (The Western Regent)* [2005] 2 Lloyd's Rep 359.

125 As pointed out by the Court of Appeal in *The Angelic Grace* [1995] 1 Lloyd's Rep 87 (CA), per Millett LJ, p 96.

126 This point was explained by Rix J in *Credit Suisse v MLC* [1999] 1 Lloyd's Rep 767, p 781.

127 *Royal Bank of Canada v Cooperatieve Centrale* [2004] 1 Lloyd's Rep 471 (involving a non-exclusive English jurisdiction clause and proceedings in New York that were quite advanced).

5 PRACTICAL CONSIDERATIONS AND RISK MANAGEMENT

It is now firmly settled by the CJEU that anti-suit injunctions are prohibited where the rules of the Regulation apply and regulate *lis pendens*.[128] However, as explained in the first part of this chapter, the tweaking of the *lis pendens* rule in cases of breach of a choice of court agreement and the clarification of the extent of the non-application of the Regulation rules to arbitration aim to resolve the problems that arose in the past, which gave rise to anti-suit injunctions and culminated in the ban of them in so far as the Convention or the Regulation rules apply.

Even if the matter does not concern the jurisdiction of Member States to the Regulation, litigants should be cautious before they apply for an anti-suit injunction to prevent the incurrence of unnecessary costs.[129]

There must be a balancing act of the advantages and disadvantages, before an application for an anti-suit injunction is made, and promptness in issuing the application, if the circumstances favour such a procedure, is an important factor, as has been shown in the cases discussed. The injunction may not be needed, if an alternative protection is available to the aggrieved party, such as if it is possible to resist the enforcement of the foreign judgment obtained in breach of a jurisdiction agreement.

Caution must be exercised, particularly, when there have been related multiple actions in various jurisdictions. Interference in such cases may be justified, if there are reasons of justice to restrain the foreign proceedings and determine the related actions in England,[130] or to stay the English proceedings in favour of the natural forum, despite a jurisdiction agreement, particularly when there are parties in the foreign proceedings not bound by any jurisdiction agreement.[131]

The rule in *Airbus v Patel* is sound and straightforward. The basic principle enunciated in the *Patel* case is based on both respect for the other court's jurisdiction (comity) and the ends of justice. The court makes an inquiry, first, as to whether there is a connection with England and, if there is, it then examines whether the foreign proceedings – against which the injunction is sought – are unconscionable. If they are, it will grant the injunction for the purpose of serving the ends of justice.

128 Even prior to these decisions of the CJEU, the German courts were reluctant to recognise anti-suit injunctions issued by the English courts, as they were considered an infringement of the foreign court's sovereignty; commentary by Harris, J, 'Enforcement of an English anti-suit injunction' (1997) CJQ 283, pp 283–289. However, this view was strongly rejected by the English courts, because the injunction aims to restrain the person from pursuing his case in the foreign court, although it affects the foreign court indirectly, and, for this reason, the jurisdiction is exercised with caution: *Société Nationale Industries Aerospatiale v Lee Kui Jak* [1987] AC 871, per Lord Goff.

129 *Akai v People's Insurance Co.* [1998] 1 Lloyd's Rep 90, per Thomas J (on breach of an English jurisdiction clause by proceedings in Australia, the defendant applied for an anti-suit injunction in the Singaporean court instead of England. Although the injunction was granted later by the English court, Akai was ordered to indemnify the other party for its expenses to defend the Singaporean injunctive proceedings).

130 See, e.g., *A/S D/S Svendborg v Wansa* [1996] 2 Lloyd's Rep 559, where the Sierra Leone proceedings were restrained because of evidence that the party proceeding there was boasting that he could manipulate the legal system in Sierra Leone to obtain justice in his favour.

131 BOS-400 [1998] 2 Lloyd's Rep 461; *Credit Suisse First Boston (Europe) Ltd v MLC (Bermuda) Ltd* [1999] 1 Lloyd's Rep 767.

In considering the ends of justice, the following is a non-exhaustive list of factors that have been considered to be relevant: (a) whether the foreign forum is acting oppressively by not staying its proceedings;[132] (b) whether its rules are against international rules of justice[133] or public policy;[134] (c) whether there is unconscionable conduct in the pursuit of the foreign proceedings;[135] or (d) whether in the competing forum there are related actions that must be tried together.[136]

Such factors are also considered by the courts, to some extent, in appropriate cases concerning breach of an English jurisdiction agreement.

This chapter and Chapter 7 covered new ground. There will be more exciting decisions in the coming years, particularly after the Recast Regulation becomes applicable in 2015, but these will be matters for the fourth edition of this book.

132 As shown in the cases referred to above; see also *General Star International Indemnity v Stirling Cooke Brown Reinsurance Brokers Ltd* [2002] EWHC 3.

133 As in *Société Nationale Industries Aerospatiale v Lee Kui Jak* [1987] 1 AC 871 (PC).

134 *Akai v People's Insurance Co.* [1998] 1 Lloyd's Rep 90, but public policy varies between legal systems.

135 *Glencore International AG v Exter Shipping Ltd* [2002] 2 All ER (Comm) 1.

136 Bos-400 [1998] 2 Lloyd's Rep 461.

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