

**AMENDMENTS TO THE ACT: MATTERS NOT YET THE SUBJECT OF AGREEMENT  
BETWEEN THE DURBAN AND CAPE CHAPTERS**

**MEMORANDUM II AS REVISED**

1 The Heavy Metal

It has been suggested that the majority decision in *The Heavy Metal* was incorrect, that the view taken in the minority decision was the correct one and, perhaps, preferable from a policy point of view. This was raised at the meetings of the Cape Chapter. The Cape Committee had been divided on this issue, but only a small minority at the chapter meetings supported the view that we should legislate so as to make the minority view applicable. The majority were of the view that we should not do so. The view was that the shipping world was bedevilled by owners who hid their identity and operated under a cloak of secrecy, and that the majority judgment was a welcome step towards greater transparency.

2 The Accrual of the *in rem* security

The Durban committee drew attention to the provisions of s 1(2)(a)(iii) and s 3(5) and raised the question of whether the charge created under an action *in rem* attached to the res from the time of the issue of summons or only accrued after an arrest has been made. It does not appear that either s 1(2)(a)(iii) or s 3(5) are conclusive in this regard.

Since the decision in **The Monica S** (1967) 2 Lloyds Rep 113 it has been established English law - at least until the decision in **The Indian Grace (No 2)** (1998) 1 Lloyds Rep 1 - that the charge or security interest accrues against the res from the moment the writ is issued. The result is that the charge is enforceable against the res from that time, even if the res is in the hands of a *bona fide* purchaser. The better view is that the decision in **The Indian Grace No 2** that, for the purposes of s 34 of the Civil Jurisdiction & Judgments Act 1982, the admiralty jurisdiction in an action *in rem* is invoked when the writ is served, has not affected the decision in **The Monica S**. Nevertheless, English law does appear to be in a state of some uncertainty.

In regard to insolvency it appears that in English law if insolvency supervenes after issue of the writ but before arrest, the action *in rem* does not continue unless the court exercises a discretion to allow the action to continue. In our law, of course, the action does not continue unless an arrest is made prior to the intervention of insolvency.

In **The Monica S** Brandon J considered the conflicting *dicta* in the previous cases as to the time when the charge accrues - the institution of the action or the arrest of the res. He

considered that there was a preponderance of authority in favour of the former view. Mandaraka-Sheppard, *Modern Admiralty Law* 80 discusses the previous cases and casts doubt on the proposition that such a preponderance existed. In any event Brandon J relied, in addition, on the wording of the English Administration of Justice Act 1956.

What all this shows is that English law does not provide any convincing reason in principle in favour of the view that the charge accrues in respect of third parties from the date of the institution of the action as opposed to the date of arrest. Thus as far as our law is concerned, the question can be approached without a bias in favour of English law. One would prefer to see some logical consistency in our law. For the purposes of insolvency the charge accrues on arrest. All things being equal, the charge should attach to the *res* for all purposes at the same time. Either the charge in respect of third party rights should accrue on arrest as in the case of insolvency, or the charge should, in all cases, accrue when the writ is issued. This position should prevail unless there are compelling policy reasons to the contrary.

There are two conflicting policy considerations. If the relevant date is the issue of process, this may assist the creditor in obtaining security for his claim. On the other hand the innocent purchaser may be burdened with liens of which he is unaware. Should he also be burdened with a right of action against his property of which both he and the debtor (the seller of the *res*) may be unaware? Although Brandon J favoured the protection of the creditor rather than the *bona fide* third party, it can certainly be argued that there are equally cogent reasons why the secret and indelible effect of the maritime lien should not to this extent attach to a statutory right *in rem* to the detriment of *bona fide* third parties.

Moreover, the purpose of an arrest *in rem* is to obtain jurisdiction over the property and to obtain security for the claim. Neither purpose is achieved unless an arrest is made. The security interest is entirely contingent - unless an arrest is made the creditor obtains no security. In these circumstances it seems artificial to state that the security interest attaches to the *res* from the moment a writ is issued. Admittedly, the charge created by the maritime lien is also contingent on arrest, but the lien is an exceptional legal phenomenon and has always been regarded as *sui generis*. Furthermore, in the *Jute Express* 1992(3) SA 9 (SLA) it was held that the effect of s 3(5) is to make it clear that an arrest is an essential requirement of the action *in rem*. This too is supportive of the argument that the charge only accrues on arrest. If, however, there is doubt as to the construction of the Act and the effect of s 3(5) the question arises whether we should legislate to give effect to the above jurisprudential considerations or alternatively to make it clear that the issue of summons is the relevant date or whether this aspect should be left for the courts to decide.

In regard to policy considerations the question arises as to whether there is a compelling need to protect the creditor at the expense of the *bona fide* purchaser of the *res*? Should the creditor or should the innocent third party be protected? The purchaser of the *res* can seek to protect himself by indemnities, but these may well not protect him. He can also presumably conduct a search to see if any writs have been issued prior to the search. However, in a great many cases, arrest follows shortly after the issue of process and there is very little additional advantage accruing to the creditor in these circumstances if the relevant date is the issue of summons rather than arrest.

On the other hand it may be contended that if - as seems probable - the other jurisdictions which have inherited English admiralty law have adopted the decision in **The Monica S**, we should do likewise.

Different views were expressed by the members of the Cape Committee and it was felt that in view of this we should hesitate before deciding to legislate to provide that the security interest in an action *in rem* attaches to the property from the time of the arrest. At the Cape Chapter meeting views were also divided, but the majority favoured the view that if the Act was not clear the Act should be amended to make the date of the arrest the relevant date.

### 3 The definition of a maritime claim: section 1(1) of the Act

The Cape Chapter has suggested that the definition should be amended to include the underlined words

~~%~~maritime claim+means claim which by reason of its nature is a maritime matter and which is a claim for, arising out of or relating to  $\bar{o}$  +

The reason for this proposal is that a literal construction of some of the heads of jurisdiction . more particularly the new extensions to the jurisdiction . would lead to an absurdity, namely the exercise of admiralty jurisdiction to a claim having no or only a tenuous maritime connection. Thus on a literal construction, if while a container was being constructed it caused physical damage to a workman, the resulting claim would fall within the admiralty jurisdiction. Again, if the proposed definition of cargo is adopted, if a claim arose in respect of goods which at some distant time in the past were goods which were or ought to have been carried in a ship, the claim would fall within the admiralty. Both the Durban and Cape Committees agreed that the proposed amendment was needed.

Stephen Mullins is against the view taken by the Committees and in his view the proposed amendment:

~~%s~~ effectively removing an extension to the definitions of maritime claim contained in the existing subsection (ee) and adding an unnecessary qualification and potentially a limitation to the definition+

We don't know whether or not the Durban Chapter shares this view. The Cape Committee and Chapter do not. The proposed definition and s 1(1)(ee) are dealing with different things. The former introduces a qualification in respect of the listed heads of jurisdiction; the latter is dealing with ~~%any other matter+~~not listed and envisages other claims which by reason of their nature or subject matter should fall within the jurisdiction. The proposed amendment does not qualify s 1(1)(ee). It is, in fact, entirely consistent with it.

The Cape Chapter remains in favour of the proposed amendment.

#### 4 Section 1(1)(a), (b), (c) and (d) of the Act

The suggestion is that these paragraphs should be amended in each case to include a reference to the equipment, furniture or stores of a ship and bunkers, cargo, containers and freight. On reflection this is poor drafting. Claims relating to containers are covered in more general terms in a proposed new s 1(1)(h) in which reference is simply made to ~~%any container+~~. This is clearly wider than and would comprehend the reference to a container in s 1(1)(a), (b), (c) and (d). Moreover claims relating to equipment, bunkers etc might properly fall to be dealt with in admiralty even where the claim does not relate to questions of ownership, charges or damage.

In view of the Cape Committee sections 1(1)(a), (b), (c), (d) and (e) should be left as they are. A new section can be added reading:

~~%the~~ whole or any part of the equipment, furniture or stores of a ship, bunkers, cargo, freight and passage money+

This is subject to the retention of the proposed amendment to the definitions of a maritime claim referred to in para 3 above.

#### 5 Section 1(1)(h) and 1(1)(i) of the Act

While not of any great significance we think that the retention of the words ~~%or~~ any agreement for or relating to such carriage+in s 1(1)(h) and the retention of the similar words in s1(1)(i) might give rise to some confusion. Similar words are not included in respect of other heads of jurisdiction such as towage, pilotage, salvage, general average, construction and repair of a ship, etc. The words ~~%arising out of+~~ or ~~%elating to%~~are surely wide enough to include agreements relating to the carriage of goods and containers. We accordingly think that these words should be deleted.

6 Section 1(1)(m) of the Act

This section reads as follows:

~~the~~ supplying of goods or the rendering of services for the employment, maintenance, protection or preservation of a ship+

The proposed new s 1(1)(m) reads:

~~the~~ supplying of goods to, or the rendering of services for or in relation to a ship, crew, cargo, equipment, furniture, stores or bunkers on board a ship.+

The section in its original form was obviously intended to comprehend the necessities claim.

The first aspect of the proposed change is to substitute the words ~~in~~ relation to a ship for the words ~~for~~ the employment, maintenance, protection or preservation of a ship+. The 1952 Arrest Convention and the English Supreme Court Act 1981 refers to goods supplied to the ship for her ~~operation~~ or maintenance+. The Australian and New Zealand Acts use the same words. Our Act . presumably in the interests of clarity . uses more words to cover what is conveyed by the phrase ~~operation and maintenance~~+. Thus the Convention, the English, the Australian and New Zealand legislation and our Act all limit the maritime claim in question in substantially the same way in conformity with the existing law relating to necessities. In **The Emerald Transporter** 1985 (2) SA 452 (D) at 457 reliance was placed both on English and American authorities for the view that services for the benefit of the owner rather than the ship do not constitute necessities, and would not fall within s 11(1)(c)(v) of the Act which refers to ~~goods~~ or services to or in relation to a ship for the employment, maintenance, protection or preservation thereof+. the same words as appear in section 1(1)(m) . thus limiting the claim to one for necessities.

There does not appear to be any good reason to depart from the language of s 1(1)(m). Moreover, the deliberate change of language might give rise to the view that the proposed amendment was designed to broaden the scope of the original section so as to include, for example, claims not constituting necessities. While it may be argued that the words ~~in~~ relation to a ship+ sufficiently convey the same meaning as the original words, why create doubt where none existed. It is surely preferable to stick to the original language as this is the language used in s 11(1)(c)(v). Moreover the words in question (both in the Arrest Convention and comparable jurisdictions and in our Act) have served to demarcate the dividing line between domestic and admiralty jurisdictions. If the goods and services were for the maintenance etc of the ship, the claim could be brought in admiralty. If the goods or services were for the benefit of the owner and not the ship, the claim did not fall within the jurisdiction of the admiralty. This distinction has been a fundamental principle of admiralty

jurisdiction and has been recognised and retained in comparable jurisdiction in English speaking maritime states.

Secondly the proposed amendment seeks to include goods or services for crew, cargo, equipment, furniture, stores and bunkers on board a ship. If these services are necessary for the employment of the ship, they will constitute necessities and will be included in the original s 1(1)(m). If goods/services are, for example, supplied solely for the benefit of the owner do not constitute an admiralty claim, why are we seeking to make goods/services supplied to the crew cognisable in admiralty? If a crew member purchases a diamond for his wife, a claim for non-payment is clearly not cognisable in admiralty. But if victuals are supplied for the crew this is necessary for the operation (employment) of the ship and the claim is not only cognisable in admiralty but can be prosecuted *in rem* against the ship. The same reasoning applies to cargo, equipment, furniture, stores or bunkers. The enumeration of specific items is neither necessary nor complete. All goods and all services (e.g. survey, lighterage and stevedoring services) . not necessarily those in relation to cargo etc . are recoverable as claims in admiralty provided they are necessary for the maintenance or operation (employment) of the ship.

The Cape Committee and Chapter are, for the above reasons, firmly against meddling with s 1(1)(m) of the Act. The draftsman got it right in the first place.

#### 7 Section 1(1)(o) of the Act

Flowing from the above it was noted that s 1(1)(o) does not refer simply to disbursements ~~on~~ account of a ship+but includes the words ~~for~~ the owner or charterer of a ship+. The master's claim for disbursements has a close connection and may overlap with the claim for necessities (compare Thomas, Maritime Liens para 342) and is underpinned by the notion of the interests of the ship. Thus Thomas para 342 defines the master's disbursement as a disbursement ~~on~~necessary in the interests of the vessel. In para 344 the author states that ~~only~~ an expense ~~o~~ which inures to the operational benefit of the ship .. may be characterised as a disbursement.

The 1952 Arrest convention refers to disbursements ~~on~~ behalf of a ship or her owner. The English Administration of Justice Act 1956, the English Supreme Court Act 1981 and the comparable Australian and New Zealand legislation, however, all refer only to disbursements made ~~on~~ account of a ship. This deviation from the Arrest Convention is significant and is consistent with the approach in admiralty in regard to the nature of a disbursement. If the intention was to abrogate the existing law and include the recovery of payments which are not necessary for the operational benefit of the ship, a payment not recoverable as a necessary may be recoverable via the back door as a disbursement. The words ~~on~~ account

of the owner or charterer undermine the thread which has consistently run through English admiralty law, namely, that in order for the admiralty to have jurisdiction the goods, services or disbursements must relate to the maintenance or operation of the ship. If they do not, and they inure, for example, solely for the benefit of the owner, the domestic law must be resorted to.

There does not appear to be any good reason why we should mess with established principle and deviate from the existing concept of a disbursement.

At the second Cape Chapter meeting it was decided without dissent that the words ~~or the~~ owner or charterer of a ship in s 1(1)(o) should be deleted.

#### 8 The proposed s 1(1)(p)

At the Cape Chapter meetings it was decided without dissent that s1(1)(p) should be deleted.

The following are the reasons supporting this decision.

- 8.1 The reference to payments or disbursements in s 1(1)(p) is redundant. Section 1(1)(o) refers to payments or disbursements made by any other person and there is no need to refer to payments or disbursements which may be made by the specific persons referred to in s 1(1)(p).
- 8.2 In respect of the reference to the remuneration of agents and brokers rendering services to the ship, the rendering of such services is governed by the existing s 1(1)(m) of the Act. Any person who renders services for the employment, maintenance etc of a ship falls within the section and there is no need to refer in s 1(1)(p) to services rendered by the particular persons referred to therein. This can only create confusion. Why should agents and brokers be mentioned and not stevedores, surveyors and others? If the services do not qualify as services for the employment, maintenance etc of a ship, but fall to be categorised as services rendered to the owner or other person they are not cognisable in admiralty. Section 1(1)(ee) of our Act provides an escape valve. If the claim is not a necessary it might still fall within the jurisdiction of the admiralty court if the section can successfully be invoked.
- 8.3 In regard to the reference to disbursements in respect of cargo, equipment, furniture, stores or bunkers, if it is felt that this should be specifically dealt with such disbursements should constitute an addition to s 1(1)(o) where it would not be limited to disbursements made by agents or brokers but would relate to such disbursements made by ~~any person~~. However, we are not in favour of doing so. Disbursements made in respect of which the ship owner is liable in regard to the loading, unloading or packing of cargo or containers or the purchase of bunkers, equipment or stores would

almost always be necessary for the employment of the ship and would be covered by the meaning which attaches to the phrase ~~on~~ account of the ship. If, on the other hand, the disbursement is made on behalf of the owner of the bunkers, equipment or stores or a container, the claim for reimbursement would not constitute a claim cognisable in admiralty unless s 1(1)(ee) could be invoked.

- 8.4 In regard to the reference to the remuneration of the services of agents or brokers in respect of cargo, equipment, furniture, stores, bunkers or containers, if the ship owner is personally liable in respect of such services and if they were services necessary for the employment etc of the ship, such remuneration would be recoverable under the existing s 1(1)(m). If they were not, or if the remuneration was due to some person other than the ship owner, the claim for remuneration would only qualify as a maritime claim if it qualified as such in terms of s 1(1)(ee). The further objection remains: why do s 1(1)(p)(i) and (ii) refer only to the remuneration of agents and brokers in respect of their services and not that of other persons such as surveyors or stevedores etc?
- 8.5 In regard to the reference to the acts or omissions of agents or brokers in respect of ships, cargo etc in respect of claims for breach of mandate by owners, these are claims which fall to be dealt with by the courts in the exercise of their ordinary jurisdiction unless s 1(1)(ee) can be invoked. Again, why are only agents or brokers referred to? What about the acts or omissions of others which give rise to claims?
- 8.6 In regard to the remuneration of brokers in regard to services in respect of charters, sales, or ~~any~~ other agreement unless these services fall within the existing s 1(1)(m) or s 1(1)(ee) they should not be included within admiralty jurisdiction. In regard to insurance this is covered by s 1(1)(u).
- 8.7 It does not seem that the remuneration of or the acts or omissions of legal and other advisers should ordinarily constitute maritime claims. This is not the case in English or Australian law and I doubt whether it is so in other jurisdictions - advisers are rendering services to the owner and not to the ship. In any event, in exceptional cases, s 1(1)(ee) could be invoked.
- 8.8 Section 1(1)(p)(iv) is similarly largely redundant having regard to the provisions of the existing s 1(1)(m), unless s 1(1)(p)(iv) was intended to cover work which cannot be characterised as work for the employment maintenance, protection or preservation of the ship, cargo etc. If it was so intended we refer to the observations above. In any event, if it was intended to cover work or services other than work or services for the employment, maintenance etc of the items mentioned, why not simply omit those words in the proposed s 1(1)(m)? This would, for reasons given above, be quite

untenable and serves to demonstrate the confusing effect that this would have on the existing established law.

## 9 Wreck

The Cape Committee had assumed that the definition of a ship did not include wreck and consequently recommended that s 3(5) of the Act should be amended to include a reference to wreck. This assumption may not have been correct. The definition of a ship includes the words "any vessel used or capable of being used on the sea" Staniland The Law of South Africa First Reissue Vol 25 Part 2 para 54 points out that the word "used" is neither limited to the present or past tense and thus includes both. If so, wreck of a ship would be included in the definition of a ship. If it is thought that the definition is not sufficiently clear, this can easily be remedied by using the words "which is or has been used" instead of the word "used". Moreover the reference to equipment, furniture, stores, bunkers, and cargo is qualified by the words "any part thereof" which would cover the wreck of these items. Having regard to this it seems unnecessary to amend s 3(5) to include a reference to wreck.

If, however, it is nevertheless felt that s 3(5) should contain a specific reference to "wreck" then it would seem necessary to introduce a definition of wreck to cover the wreck of the items referred to in this section. The Durban Chapter has apparently suggested this definition:

"wreck includes any ship or a portion of a ship lost, abandoned, stranded or in distress."

The Cape Committee thinks that we should include "wreck" in s 3(5) and feels that a more comprehensive definition is required. We suggest the following definition:

"any ship, the equipment, furniture, stores of a ship, cargo and containers of a ship or any part thereof, lost, abandoned, stranded or in distress found on or in the sea or on the shores of the sea."

The Cape Committee holds the view that we should in addition introduce a maritime claim reading "wreck"

## 10 Section 1 (3) of the Act

This section provides:

"For the purposes of an action *in rem*, a charterer by demise shall be deemed to be, or to have been, the owner of the ship for the period of the charter by demise."

This section was included in the Act by s 10 of the Sea Transport Documents Act 65 of 2000. As far as we know this provision was never considered by the MLA.

It has been agreed by the Durban and Cape Committees that this section is unsatisfactory.

Whereas section 21(4) of the English Supreme Court Act of 1981 provides simply that an action *in rem* may be brought against an owner or demise charterer of a ship thus allowing actions against both, we believe the new deeming provision gives rise to the following anomalous problem: Although the contrary may perhaps be arguable, it seems that the ordinary meaning of the deeming provision is that, for the purposes of an action *in rem* and for as long as the demise charterer is deemed to be the owner of the vessel (i.e. for the period of the charter by demise) the true owner must, by operation of law, be deemed not to be the owner. The result is that, for the duration of the demise charter period, a creditor of the true owner of the vessel will not be able to proceed against it *in rem* although he would still be able to attach it in an action *in personam*. Such an anomalous result is clearly unsatisfactory. In order to make the position clear the Durban and Cape Chapters agreed that s 1(3) be amended to read as follows:

~~For~~ the purpose of an action *in rem* a charterer by demise shall be deemed to be, or to have been, the owner of the ship for the period of the charter by demise in relation to any maritime claim in respect of which the demise charterer is personally liable and which maritime claim arises from the employment of the ship by such chartererq

Subsequently, however, because of perceived difficulties created by what has been referred to as the ~~double deemer~~q it was suggested that the section should read as follows:

- ~~(a)~~ Subject to the provisions of s 1(3)(b) for the purposes of an action *in rem* a charterer by demise shall be deemed to be the owner of the ship for the period of the charter by demise.
- (b) Subsection (a) above shall also apply to arrests *in rem* effected pursuant to subsection 3(6), save where the plaintiff relies on the deeming provision in subsection 3 (7) (c).
- (c) Subsection (a) above shall not prevent the arrest of a ship subject to a charter by demise in respect of a claim against the owner of that ship.q

But as I understand it, both the Durban and Cape Committees hold the view that there is no problem relating to a ~~double deemer~~q If this view is endorsed by the chapters, we suggest that the proposed s 1(3) should read as follows:

~~(a)~~ For the purposes of an action *in rem*, a charterer by demise shall be deemed to be, or to have been, the owner of the ship for the period of the charter by demise in relation to any maritime claim in respect of which the demise charterer is personally liable and which maritime claim arises from the employment of the ship by such charterer.

(b) The provisions of (a) above shall not prevent the arrest of a ship subject to a charter by demise in respect of a claim in respect of which the owner is personally liable.

### 13 Section 3 (6) of the Act

It was proposed that the underlined words should be added to s 3(6) so that the section would read as follows:

~~Subject to the provisions of subsection (9), an action *in rem*, other than such an action in respect of a maritime claim contemplated in paragraphs (a) and (c) of the definition of maritime claim and in respect of a maritime claim for arising out of or relating to the possession or delivery of a ship, may be brought by the arrest of an associated ship instead of the ship in respect of which the maritime claim arose or a ship as described in subsection 3 (7)(b).g~~

Prior to the amendment of the Act, claims relating to the ownership or possession of a ship were excluded from the provisions of s 3(6). The Act, as amended in 1992, did not repeat this exclusion. We originally thought that the exclusion should be reintroduced. Hence the proposed amendment set out above.

Darryl Cooke, however, pointed out that the reason for the exclusion of claims for ownership and possession does not apply to claims for damages arising out of the non-performance of claims for ownership, possession etc and it was accordingly suggested that the above underlined words ~~arising out of or relating to~~ should be omitted so that such claims are not excluded from the operation of the section.

However, as pointed out by Darryl, the proposed ss 1(1)(a) and (c) are themselves introduced by the words ~~arising out of or relating to~~. In the circumstances it originally seemed to us that s 3(6) should rather remain unaltered and be numbered ~~3(6)(a)~~ and a new s 3(6)(b) should be inserted excluding claims for the ownership or possession of a ship from the operation of s 3(6)(a). On reflection, however, the Cape Committee thinks that the section can stay as it is. Claims for specific performance in relation to ownership or possession are in any event not possible against associated ships.

14 The proposed s 3(7)(b):

It was pointed out in relation to s 3(6) of the Act that the guilty ship may be moved from the ownership of the company that owned it at the time when the claim arose to the ownership of another company controlled by the same person or entity. It would seem at least arguable that the guilty ship, under different ownership but under the same control, cannot be arrested as an associated ship.

The Durban and Cape Committees agreed that the section should be amended to make it clear that the guilty ship could be arrested in these circumstances. The draft which was suggested reads as follows:

~~Where~~ the ownership of a ship in respect of which a cause of action has arisen is thereafter transferred by the owning company to another company, and both companies are controlled by the same personality, the ship may be arrested as if it were an associated ship.q

This formulation was rightly criticised by Stephen Mullins and it became clear that a different formulation was necessary. Stephen suggested something along these lines:

~~A~~ ship may be arrested as an associated ship notwithstanding that it is the ship in respect of which the maritime claim arose.q

The Cape Chapter was, however, not happy with this formulation and the following formulation is suggested:

~~if~~ the ownership of a ship at the time when the claim arose has become vested in another owner who is the owner of the same ship at the time when the action is commenced, and if both owners are or were controlled at the relevant times by the same person, then the ship may be arrested as if it were an associated ship.q

15 Section 5(2) of the Act

The Durban Chapter has suggested adding the following to s 5(2):

- ~~(h)~~ appoint any person or body for the assessment of fees and costs and the manner in which such fees and costs are to be assessed;
- (i) make such order as would avoid a circuitry or multiplicity of actions;
- (j) make such other order as the court deems appropriate.q

However, the proposed s 5(2)(h) is covered by the general powers referred to in the existing s 5(2)(e) and there seems no purpose in limiting the court's powers to fees and costs. Unless it is considered that this limitation is necessary we suggest that we should rather amend the existing s 5(2)(e) to read:

~~order~~ that any matter pending or arising in proceedings before it be referred to an arbitrator, referee or any person or body of persons for decision or report and may provide for the appointment, remuneration or powers of such person or body, and make such further order thereanent as it deems fit.q

The proposed s 5(2)(i) is also unnecessary. Firstly, our courts have the inherent power to regulate their own procedure. Secondly, Admiralty Rule 25 seems wide enough to empower the court to make any such order. Moreover, under s 7(1) of the Act, a court may decline to exercise jurisdiction in respect of any matter on the ground that to do so would result in a multiplicity of proceedings. The proposed s 5(2)(j) was not originally discussed. Is it right to give the court a blank cheque to make any order it deems fit without in any way limiting that power or indicating in respect of what subject matter the order may be given? The Cape Committee is of the view that the proposed s 5(2)(j) should not be included.

#### 16 Section 11(5)(e)

This section which deals with the ranking of claims *inter se* provides that

~~claims~~ mentioned in paragraph (e) of subsection 4 shall, among themselves, rank in their priority according to law.q

The problem is that there is no ~~law~~ that regulates the ranking of any such liens other than the well established but discretionary order of priorities recognised by English law. But if s 6 of the Act is amended as proposed, English law will not be compulsorily applicable. In these circumstances it may be better if the section were to read

~~claims~~ mentioned in paragraph (e) of subsection 4 shall, among themselves, rank in such order as the court may prescribe.q

English law will clearly be persuasive.

Cape Committee

22 January 2008

