

## **MEMORANDUM III**

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In this memorandum the existing sections of the Act are reflected in black print and the agreed changes are reflected in red print. Comments are reflected in green print and include comment on the more important topics in respect of which the Cape & Durban Committee agreed that no amendment should be made. **[Note: The proposed amendments have been underlined and comments on the proposed amendments are in italics]**

### **A. Amendments which have been agreed**

- 1 The introduction of a definition of ~~æ~~cargo in section 1(1) reading .

æCargo includes any goods carried or to be carried or which were or ought to have been carried in a ship.

*The Cape Chapter is happy with this suggestion provided the new proposed definition of a maritime claim requiring the claim to be one 'which by virtue of its nature is a maritime matter' is adopted. Obviously admiralty jurisdiction cannot extend to claims relating to goods simply because the goods at some time in the past were or ought to have been carried in a ship. The same proviso relates to other proposed extensions to the jurisdiction.*

- 2 **Section 1(1)(ee)**

The deletion of the words ~~æ~~marine or

*It was agreed that the reference to 'marine matter' in s 1(1)(ee) should be deleted. There is a category of matters which would fall within the description 'marine matters' which are distinct from those which are ordinarily considered to be maritime matters and which properly fall to be cognisable in admiralty. The use of the words 'marine or maritime' creates the impression that two categories are included and may lead to attempts to bring matters within the jurisdiction of the admiralty which should not be cognisable in admiralty.*

- 3 **Section 1(1)(e)**

~~æ~~Damage caused by a or to a ship, whether by collision or otherwise.

~~Damage caused whether by collision or otherwise by or to a ship, or part of a ship or to the whole or any part of the equipment, furniture or stores of a ship or by or to the whole of any part bunkers or cargo.~~

4 **Section 1(1)(j)**

~~Any charterparty or the use, hire, employment or operation of a ship, whether such claim arises out of any agreement or otherwise.~~

~~The use, hire, employment or operation of a ship or ships or part thereof, whether such claim arises out of any charterparty or other agreement or otherwise.~~

5 **Section 1(1)(v)**

The introduction of the word ~~‘cargo’~~ in the section so that it will now read -

~~The forfeiture of any ship or any cargo carried therein or the restoration of any ship or any such cargo forfeited.~~

6 **Section 1(1)(x)**

~~The distribution of a fund or any portion of a fund held or to be held by, or in accordance with the directions of, any court in the exercise of its admiralty jurisdiction, or any officer of any court exercising such jurisdiction.~~

~~The distribution of a fund or escrow money or any other money or property or any portion thereof constituting security furnished or held pursuant to .~~

- (i) any agreement between the parties arising out of or relating to a maritime claim;
- (ii) the provisions of this Act or the rules promulgated in terms thereof; or
- (iii) the direction of any court in the exercise of its admiralty jurisdiction or any officer of any court exercising such jurisdiction.

7 **Section 1(1)(bb)**

~~Wrongful or malicious proceedings in respect of or involving any property referred to in section 3(5) or the wrongful or malicious arrest, attachment~~

~~Wrongful or malicious proceedings including the wrongful or malicious arrest attachment~~

8 **Sections 1(2)(a)(ii) and 4(4)(d)**

The addition of the words or confirm after the words ~~found~~

9 **Section 2**

The substitution of the words High Court for the words ~~Supreme Court~~

10 **Section 3(4)**

The addition of a new section 3(4)(c) reading if the claim is for the vindication of the property to be arrested

11 **Section 3(5)**

The proposed section, as amended reads -

~~An~~ action in rem shall be instituted by the arrest within the area of jurisdiction of the court concerned of property of one or more of the following categories against or in respect of which the claim lies:

- (a) the ship or any part of the ship;
- (b) the whole or any part of the equipment, furniture stores or bunkers of a ship;
- (c) the whole or any part of the cargo;
- (d) the freight or passage money or any part thereof or a right in and to such freight or passage money;
- (e) any container or any part thereof, if the claim arises out of or relates to the use of that contained in or on a ship or the carriage of goods by sea or by water otherwise than in that container;
- (f) a fund or any part thereof.

12 **Section 3(8)**

~~Subject to the provisions of section 5(2)(d), property shall not be arrested or attached and security therefore shall not be given more than once in respect of the same maritime claim by the same claimant.~~

13 **Section 3(10)(a)(ii)**

~~Any property deemed in terms of subparagraph (i) to have been arrested or attached, shall be deemed to be released and discharged therefrom if no further step in the proceedings, whether such proceedings are in the Republic or elsewhere with regard to a claim by the person concerned, is taken within one year of the giving of security or undertaking, unless there is no further step that can be taken by such person during such period or such other time as the court directs.~~q

*The words 'or such other time as the court directs' were suggested by the Durban Chapter instead of the words 'or as the court otherwise directs' which was suggested by the Cape Chapter. Apart from this the Chapters are in agreement.*

14 **Section 4(1)**

~~Subject to the provisions of this Act and the provisions of the Supreme Court Act 1959 (Act 59 of 1959) and the rules made under section 43 of that Act shall mutatis mutandis apply in relation to proceedings in terms of this Act except insofar as those rules are inconsistent with the rules referred to in subsection (2).~~q

~~Subject to the provisions of this Act, the provisions of the Supreme Court Act 1959 (Act 59 of 1959), and the rules made under section 6 of the Rules Board for Courts of law (Act 107 of 1985) shall mutatis mutandi apply in relation to proceedings in terms of this Act except insofar as those rules are inconsistent with the Admiralty Jurisdiction Rules as published in Government Notice R571 contained in Gazette No. 17926 of 18 April 1997 as amended from time to time.~~q

15 **Section 4(4)(b) and (c)**

~~(b)~~ A court may make an order for the attachment of property not within the area of jurisdiction of the court at the time of the application or of the order, and such an order may be carried into effect when that property comes within the area of jurisdiction of the court.

(c) Subject to the provisions of section 3(3) .

(i) a court may make an order or the arrest or attachment, to found jurisdiction, of property not within the area of jurisdiction of the court if .

(aa) (aaa) that property is in the Republic or is likely to come into the Republic after the making of the order; and

(bbb) no court in the Republic otherwise has jurisdiction in connection with the claim or can otherwise acquire such jurisdiction by an arrest or attachment to found jurisdiction;  
or

(bb) other property within the area of jurisdiction of the court has been or is about to be arrested or attached to found jurisdiction in connection with the same claim;

(ii) any such order may be executed and any arrest or attachment pursuant thereto effected at any place in the Republic as contemplated in section 26(1) of the Supreme Court Act, 1959 (Act 59 of 1959);

(iii) the arrest or attachment which shall found the relevant jurisdiction of the court ordering the arrest or attachment.

~~(a)~~ A court may make an order for the arrest or attachment of property not within the area of jurisdiction of the court at the time of the application for the order, if such property is likely to come into the jurisdiction of the court after the make of the order, and such an order may be carried into effect when that property comes within the jurisdiction of the court.

~~(b)~~ Subject to the provisions of section 3(3):

~~(i)~~ A court may make an order for the arrest or attachment, to found or confirm the jurisdiction of that court, of property not within the area of jurisdiction of the court, but which is in the Republic or is likely to come into the Republic after making the order, if no court in the Republic otherwise has jurisdiction in connection with the claim or can otherwise acquire such jurisdiction by an arrest or an attachment to found or confirm jurisdiction.

~~(ii)~~ A court may further make an order for the arrest or attachment of property not within the area of the jurisdiction of the court but which is in the Republic or is likely to come into the Republic after making the order to provide security or additional security for the claim, if other property within the jurisdiction of the court has been or is about to be arrested or attached to found or to confirm jurisdiction in connection with the same claim.

(iii) Any such order may be executed and any arrest or attachment pursuant thereto effected at any place in the Republic as contemplated in section 26(1) of the Supreme Court Act, 1959 (Act 59 of 1959).q

*The thinking which gave rise to this amendment is the following:*

*It was our view that the original section was confusing and needed to be recast in the manner set out above to give effect to what we thought the section sought to achieve. Although the section is obscure, it seems that sections 4(4)(b), 4(4)(c)(i)(aa) and 4(4)(c)(i)(bb) were intended to deal with three different situations. Section 4(4)(b) deals with the situation where property has not yet come within the court's jurisdiction but is expected to do so and subsequently does so. Section 4(4)(c)(i)(aa), on the other hand, appears to deal with the situation where property is not within the court's jurisdiction but is in the Republic or is likely to come into the Republic, but is still outside the court's jurisdiction. Our assumption is that the purpose of section 4(4)(c)(i)(bb) appears to be to enable a court ordering, or which has ordered, an arrest or attachment for jurisdictional purposes, to order the arrest or attachment of property not within its jurisdiction to 'top up' the security obtained by the original arrest or attachment made for jurisdictional purposes, or to obtain a security arrest in terms of section 5(3).*

*It seems to us that the words 'to found jurisdiction' (which we think should read 'to found or confirm jurisdiction') in the preamble are appropriate as a preamble to section 4(4)(c)(i)(aa). On this basis the section appears to us to be concerned with the bringing of an action and the securing of jurisdiction by arrest or attachment, and not with any question or an arrest or attachment to 'top up' security or to make a security arrest.*

*On the other hand, the words 'to found jurisdiction' in the preamble are not appropriate when applied to section 4(4)(c)(i)(bb). That section is, we presume, dealing with a situation where a court has or is about to arrest or attach property in an action in rem or has or is about to attach property in an action in personam. What the court can in addition do in terms of the section, is to order a security arrest or an arrest or attachment in terms of section 5(2)(d) to supplement the original security obtained by the arrest or attachment for jurisdictional purposes. In any event, whether or not our assumption is correct, we think that the section should be amended to reflect that assumption. The words "to found jurisdiction' simply do not belong if our view of the purpose of section 4(4)(c)(i)(bb) is correct.*

*The agreed proposal is that the distinction between claims which may be or have been brought in the Republic and those which have been or may be brought elsewhere and the requirement that special circumstances must exist in respect of the latter, should be done away with. Consequently it is proposed that the existing section 5(5)(a)(iv) should be omitted. It is also proposed that provision should be made for the hearing of evidence on commission. The proposed section 5(a)(i) thus reads as follows:*

*~~If~~ it appears to the court to be necessary or desirable for the purpose of determining any maritime claim, or any defence to any such claim, which has been or may be brought before a court, arbitrator or referee in the Republic or elsewhere, make an order for the examination, testing or inspection by any person of any ship, cargo, documents or any other thing and for the taking of the evidence of any person on commission or otherwise.*

*I would, in addition, suggest the inclusion of the words brought before a court or any other person or body of persons rather than the words 'brought before a court, arbitrator or referee.'*

*In our view, there is no sufficient justification to seek to distinguish between the application of the section to proceedings within the Republic and proceedings elsewhere and to provide for the necessity of the existence of 'special circumstances' in respect of the latter. The purpose of preventing the loss of what might be vital evidence should apply wherever the proceedings take place.*

*In **The las Mamas** 2002 (6) SA 150 (C) at 57, Thring J agreed with the view taken in **The Askania Nova** (1997 SCOSA E6 (SECLD)) that the purpose of requiring exceptional circumstances where proceedings are to take place outside the Republic is to ensure that no inroads are made into the practice of another jurisdiction. The Act, however, permits the more drastic procedural inroad of allowing an arrest to provide security for, inter alia, proceedings outside the Republic. The foreign procedural rules may not envisage such an arrest to provide security and may even sanction some other practice relating to the provision of security. Given the power to arrest to provide security for foreign proceedings there would seem to be little justification for refusing to allow evidence to be preserved in respect of such proceedings. The foreign jurisdiction will ultimately determine how such evidence is to be dealt with in accordance with its own procedural rules.*

This has been altered by the deletion of the words ~~if it is agreed~~ and the inclusion in their place of the words ~~in the event of there being an agreement between the parties.~~ The opening words of the section would thus read -

~~A~~ court may stay any proceedings in terms of this Act in the event of there being an agreement between the parties concerned that the matter in dispute be referred to arbitration.

*The reason for this change is that, as pointed out by Shaw QC in his Admiralty Jurisdiction at 54, the use of the present tense 'if it is agreed' appears to limit the application of the section to agreements entered into after proceedings have been instituted. There does not seem to us to be any reason why the section should be so limited.*

18 **Section 7(5)**

The Substitution of the words ~~High Court~~ for the words ~~Supreme Court~~ and the substitution of the words ~~Supreme Court of Appeal~~ for the words ~~Appellate Division of the Supreme Court~~

19 **Section 12 & 13**

The substitution of the words ~~High Court~~ for the words ~~Supreme Court~~

20 **Section 14**

~~This Act shall not derogate from the jurisdiction which a magistrates' court has under sections 131, 136 and 151 of the Merchant Shipping Act 1951.~~

This Act shall not serve to confer admiralty jurisdiction on the magistrates' court, but shall not derogate from the jurisdiction which a magistrates' court has under the provisions of any other statute and a magistrates' court shall not be deprived of jurisdiction in any matter merely by reason of the fact that such a matter is a maritime claim in terms of this Act.

**B. Proposed amendments not adopted by the Durban and Cape Committees**

21 **The proposal that the associated ship provisions in s 3(6) and 3(7) should be extended to include property other than a ship**

21.1 *The associated ship provisions in the Act were introduced to deal with the proliferation of single ship companies whose only asset would constantly be on the move*

*throughout the world and who could seek to keep that asset beyond the limits of any jurisdiction in which an arrest was likely. These provisions were designed to prevent ship owners using this stratagem to prevent recovery by creditors.*

21.2 *In relation to cargo, freight and bunkers, a charterer can, be contracting with the owner in the name of Company A (an empty shell) and ensuring that the cargo carried, freight and bunkers are held by different companies, similarly frustrate the owner's recovery against the chartering company. In the case of a voyage charterparty it may be that the only available asset against which recovery can be made by the owner against the charterer for breaches of the charterparty are the cargo on board or the freight. Similarly, in time charters, the charterer's only assets available for recovery may be the bunkers on board or the freight. Thus by the stratagem of employing companies other than the chartering company to own cargo, freight and bunkers, the chartering company can frustrate the owner's prospects of recovery. It is therefore true that the extension of the associated ship provisions to other property will in such instances enhance the creditor's prospects of recovery.*

21.3 *Notwithstanding the above we are against this proposal. Our associated ship jurisdiction is already considerably wider in its scope than the English sister ship provisions and the 1952 Brussels Arrest Convention. The associated ship provisions, moreover, comprise an inroad into the well established rule that the corporate veil will only be lifted where there has been an element of fraud or other improper conduct. It is not possible to cater for all the stratagems that may be adopted by debtors to avoid creditors obtaining satisfaction of their claims. While the exceptional procedure relating to associated ships can be justified on the basis of the widespread practice in the shipping world of resorting to one ship companies, we do not think that it should be extended in the manner suggested and we think that there are policy reasons why we should not do so. We believe that the fact that the odd rogue charterer or others may be caught in the legislative net proposed is an insufficient reason for extending our law so radically.*

21.4 *Moreover, although the existing associated ship provisions will frequently seriously inconvenience and even prejudice innocent third parties, the proposed extension of including maritime property other than ships will considerably broaden the ambit of this inconvenience or prejudice to such third parties. For example, a third party ship owner could have his vessel detained by reason of the arrest of the bulk cargo on board, if that cargo is owned by someone who also happens to own cargo (or even merely a*

container) about which there is a minor squabble, and which is on another vessel, or perhaps not even on a vessel at all.

21.5 *In the light of the above, the Durban and Cape Committees were against the extension of the associated ship provisions so as to introduce the concept of associated property extending beyond ships. In our view, neither the fact that section 3(5) contemplates actions in rem against cargo, bunkers, freight etc nor the fact that in the abstract it may be said that there is no reason in principle to distinguish between a ship and other maritime property provides any sufficient warrant for so doing.*

22 **The proposal that s 7(1) be amended to empower the court to order that any security already established in an action in rem remain valid for the foreign proceedings in respect of which a stay of proceedings has been granted in terms of s 7(1)(b)**

22.1 *It seemed to the Committee that there were two answers to this proposal.*

22.2 *Firstly, where security has been obtained by means of an arrest or attachment and a stay has thereafter been granted, it does not seem to us that the security already obtained lapses by reason of the stay (cf *The Paz* 1984 (3) SA 261 (N) at 267 A-M). Presumably the security will not be lost.*

22.3 *Secondly, the court in any event already has the power to make this or any other similar order in terms of section 5(2)(c) of the Act. There can be no doubting the wide discretion conferred by section 5(2)(c) of the Act. There are a number of different conditions that may be attached to orders made in respect of section 7(1)(a) and 7(1)(b). For example, where the court stays proceedings it may only be prepared to do so on condition that security is tendered or put up in the foreign jurisdiction (cf *The Atlantic Star* [1973] 2 All E R 175 at 182 a-b; *The Achillers* 1992(1) SA 324(N) at 3401-341B) or that security already obtained in the arrest stand as security so that the Plaintiff's security is not lost. So too, a court may in particular circumstances not be prepared to decline to exercise its jurisdiction or stay proceedings unless the party seeking such an order undertakes not to rely on prescription / time bar in the jurisdiction in which the matter is to be heard. (*The Spiliada* [1987] 1 Lloyds Rep 1 at 17-18). It seems to us to be undesirable to legislate specifically in regard to particular powers when the court already has a wide discretion to make any order it deems fit in the interests of justice.*

22.4 *There was no specific response from the Durban Committee to the above and it has been assumed that the Durban Committee is happy with the above reasoning.*

23 **The proposal that a s 10A(4)(c) should be inserted empowering the court to make an order as to when a claim proved in terms of s 10A(4)(a) 'shall be deemed to have arisen.'**

23.1 *In the case of a claim subject to a suspensive condition the proposed deeming provision seems to us to be inappropriate, as the relevant claim will surely arise (if it does so timeously, i.e. before any cut off date set by the court) when the condition is fulfilled, a binding obligation has come into existence and the claimant has performed, or tendered performance of, his side of the bargain.*

23.2 *So too, in the case of a resolutive condition, pending the fulfilment of the condition the contract will be fully operative and both parties must perform their obligations. In terms of the **Forum Victory** decision the claim would therefore arise, for example, when the relevant goods are delivered or the relevant services are rendered. See **The Forum Victory** 2001 (3) SA 529 (SCA).*

23.3 *An example of a claim which is voidable would be a contract induced by a misrepresentation (innocent or fraudulent) which does not give rise to a mistake in the mind of the innocent party so fundamental as to vitiate consent. Where the misrepresentation has not resulted in the contract being void ab initio the innocent party may stand by the contract or claim rescission and must make this election within a reasonable time. See **Allen v Sixteen Stirling Investments (Pty) Ltd** 1974 (4) SA 164 (D) at 169-71 and **Bowditch v Peel and Magill** 1921 AD 561 at 572-3. If the claimant is the representee he will only be claiming against the fund if he has elected to stand by the contract and has performed, or tendered performance of, his own obligations or if (in the case of a fraudulent misrepresentation) he has rescinded the contract and is claiming damages. Where the claimant is the representor he will presumably only have a claim if he has performed, or tendered performance of, his own obligations and is claiming the payment for which the contract provides.*

23.4 *In none of the above situations should a need arise for the court to deem a claim to have arisen at any particular stage. The question of when a particular claim arose will be determined by the relevant facts and the principles laid down in the **Forum Victory** decision. There certainly seems to us to be no call for vesting the court with a discretion to deem a claim to have arisen at a time which may possibly differ from the time when the claim actually arose.*

23.5 *It accordingly seemed to us that there is no warrant for the suggested amendment to section 10A(4) of the Act and that the proposed consequential amendment to subsection (6) of the present draft s 11 should also fall away.*

14 May 2007