

SCOTTISH LAW COMMISSION
ARRESTMENTS OF SHIPS SECURING CLAIMS
AGAINST DEMISE CHARTERERS

CONSULTATION PAPER

March 1990

This Consultation Paper is published for comment and criticism and does not represent the final views of the Scottish Law Commission.

The Commission would be grateful if comments on this Consultation Paper were submitted by 30 June 1990. All correspondence should be addressed to:-

Mr N R Whitty
Scottish Law Commission
140 Causewayside
Edinburgh
EH9 1PR

(Telephone: 031-668 2131)

Note: In writing its Report with recommendations for reform, the Commission may find it helpful to refer to and attribute comments submitted in respect of this Consultation Paper. Any requests from respondents to treat all, or part, of their replies in confidence will, of course, be respected, but if no request for confidentiality is made, the Commission will assume that comments on the Consultation Paper can be used in this way.

SCOTTISH LAW COMMISSION
CONSULTATION PAPER
ARRESTMENTS OF SHIPS SECURING CLAIMS
AGAINST DEMISE CHARTERERS

Table of Contents

| | Para. | Page |
|---|-------|------|
| Preliminary | 1 | 1 |
| THE EXISTING LAW AND ITS BACKGROUND | | |
| The legislative background | 3 | 2 |
| Scots law before 1956 | 4 | 2 |
| English law before 1956 | 8 | 3 |
| The Brussels Arrest Convention of 1952 | | |
| The object of the Convention | 9 | 4 |
| Article 3 | 11 | 5 |
| Article 9 | 12 | 6 |
| The background to Article 3(4) | 13 | 7 |
| Implementation of Brussels Arrest Convention in Scotland | | |
| The Administration of Justice Act 1956 ss 47 and 48 | 17 | 10 |
| Classification of maritime claims | 18 | 10 |
| Interpretation of s 47(1)(a) of 1956 Act | 21 | 12 |
| Amendment of s. 47(1)(a) proposed by Discussion Paper No. 84 | 23 | 13 |
| Implementation of Brussels Arrest Convention by legislation in England and Wales | | |
| Section 21(4) of Supreme Court Act 1981 | 26 | 14 |
| Parliamentary background of section 21(4) of 1981 Act | 27 | 15 |
| PROPOSALS FOR REFORM | | |
| (1) Arrestment on the dependence of the particular ship in action against demise charterer | 29 | 18 |
| (2) Arrestment in execution of decrees in personam against demise charterers | 37 | 22 |
| (3) Arrestment to found jurisdiction | 40 | 23 |
| (4) Amendment of para (a) of section 47(2) of the Administration of Justice Act 1956 | 43 | 25 |
| (5) Section 47(1)(b) of the 1956 Act: the "sister ship" provision and demise charterer defenders | 43 | 27 |

| | Para. | Page |
|---|-------|------|
| (6) Supplementary issues as to judicial sale, equalisation of arrestments and ranking of creditors. | 48 | 27 |
| (a) Judicial sale | 49 | 29 |
| (b) Ranking on proceeds of judicial sale | 52 | 30 |
| (c) Equalisation of arrestments etc. | 56 | 32 |
| (d) Sequestration or liquidation of demise charterer | 60 | 34 |
| (e) Sequestration or liquidation of owner of ship | 65 | 36 |
| SUMMARY OF PROVISIONAL PROPOSALS AND QUESTIONS | | |
| <u>Appendix:</u> International Convention Relating to the Arrest of Seagoing Ships, signed at Brussels on May 10, 1952. | | 45 |

**CONSULTATION PAPER
ARRESTMENTS OF SHIPS SECURING CLAIMS
AGAINST DEMISE CHARTERERS**

Preliminary

1. In October 1989, the Law Society of Scotland made representations to us that consideration should be given to the introduction of legislation enabling a ship to be arrested on the dependence of an action in personam against the demise charterer of the ship. Reference was made to the fact that legislation in England and Wales¹ enables an action in rem enforcing a maritime claim in respect of a ship to be brought in the High Court or county court in a case where the person who would be liable on the claim in an action in personam is a demise charterer of the ship. At the time when these representations were made, our Discussion Paper No. 84 on Diligence on the Dependence and Admiralty Arrestments issued in December 1989 had been finalised and was in the course of being printed. It was therefore decided to issue the present Consultation Paper to a number of consultees so that so far as practicable consultation on the proposal of the Law Society of Scotland could proceed simultaneously with consultation on Discussion Paper No. 84.

2. In this Consultation Paper, we seek views on whether an arrestment of a ship should be competent on the dependence of an action in personam against a demise charterer of the ship, in a case where the ship is the particular ship with which the action is concerned. If it be accepted that such an arrestment on the dependence should be competent, the further questions arise whether an arrestment should also be competent to found jurisdiction, or in execution of a decree for payment, in such an

¹ Supreme Court Act 1981 s 21(4); County Courts Act 1984, s 28(4).

action, and whether consequential provisions are needed regulating judicial sale of the arrested ship and the ranking of creditors in competition with the arresting creditor.

THE EXISTING LAW AND ITS BACKGROUND

The legislative background

3. In order to explain the legislative background to the question whether an arrestment of a ship should be competent on the dependence of an action in personam against a demise charterer of the ship, it is necessary to traverse some of the ground already covered in our Discussion Paper No. 84, to which reference may be made.¹ At the risk of some repetition, that background is surveyed in the following paragraphs.

Scots law before 1956

4. In Scots law before the Administration of Justice Act 1956 came into force, there were two types of arrestments of ships:

- (a) an arrestment of a ship, or a share in a ship, on the dependence of an action in personam against the owner of the ship; and
- (b) an arrestment in rem of a ship in an Admiralty action in rem enforcing a maritime lien against the ship.

5. An arrestment of a ship, or a share in a ship, on the dependence of an action in personam was only competent if the defender in the depending action was the owner of the ship. The ship did not require to be the particular ship with which the

¹ Part III of Discussion Paper No 84 contains a description of the existing law on the arrestment of ships.

action in personam was concerned: a "sister ship" in the ownership of the defender could be arrested. (Probably the action in personam did not have to be an Admiralty action in personam enforcing a maritime claim).

6. The common law rule on the competence of arrestments of ships or shares in ships on the dependence was therefore consistent with the general rule of the law of diligence enforcing unsecured claims that a creditor cannot arrest or poind the property of A for B's debt.

7. An arrestment in rem of a ship enforcing a maritime lien could be used only against the ship which was subject to the maritime lien (and not against a "sister ship" in the same ownership as the ship affected by the maritime lien). But the ship affected by the maritime lien could be arrested in rem even if her ownership had changed hands since the date when the event (eg damage by the ship or salvage services rendered to the ship) occurred giving rise to the lien. This right to arrest in rem irrespective of ownership was, however, confined to the narrow class of maritime liens, which arise in only a few classes of maritime claims.¹

English law before 1956

8. In English law, the rules on arrests in rem enforcing a maritime lien were similar to the Scots rules on arrestments in rem. The English equivalent of a Scots arrestment on the dependence is, somewhat confusingly, also called an arrest in rem. Before 1956, an arrest in rem of a ship to enforce a personal maritime claim (as distinct from a maritime lien) could only be

¹ See para 19, head (2) below.

used against the particular ship with which the action was concerned and not a "sister ship" owned by the defendant.

The Brussels Arrest Convention of 1952

The object of the Convention

9. The law was changed both in Scotland and in England and Wales by the Administration of Justice Act 1956 which implemented, or purported to implement, the Brussels Arrest Convention of 1952.¹ The full text of the Convention is set out in the Appendix to this Consultation Paper.

10. The Brussels Arrest Convention sought to harmonise the narrow rules of English law and the wide rules of Scots law and other continental civil law systems by:

- (a) confining the right to arrest ships on the dependence or before judgment² to defined classes of maritime claim³; and
- (b) allowing the arrest of "sister ships" in some circumstances but not others.

It is generally recognised that, unfortunately, the Brussels Arrest Convention is not well drafted and its meaning is unclear at least

¹ International Convention Relating to the Arrest of Seagoing Ships, signed at Brussels on May 10, 1952.

² Article 1, para 2, provides that "arrest" means "the detention of a ship by judicial process to secure a maritime claim, but does not include the seizure of a ship in execution or satisfaction of a judgment".

³ The maritime claims are set out in Article 1, para 1.

insofar as it relates to the subject matter of this Consultation Paper.

Article 3

11. Article 3(1) of the Brussels Arrest Convention provides:

"Subject to the provisions of para. (4) of this Article and Article 10, a claimant may arrest either the particular ship in respect of which the maritime claim arose, or any other ship which is owned by the person who was, at the time when the maritime claim arose, the owner of the particular ship, even though the ship arrested be ready to sail; but no ship, other than the particular ship in respect of which the claim arose, may be arrested in respect of any of the maritime claims enumerated in Article 1(1)(o), (p) or (q)".

Paras (o), (p) and (q) of Article 1(1) are discussed at para.19 below. Para. (4) of Article 3 provides:

"When in the case of a charter by demise of a ship the charterer and not the registered owner is liable in respect of a maritime claim relating to that ship, the claimant may arrest such ship or any other ship in the ownership of the charterer by demise, subject to the provisions of this Convention, but no other ship in the ownership of the registered owner shall be liable to arrest in respect of such maritime claims.

The provisions of this paragraph shall apply to any case in which a person other than the registered owner of a ship is liable in respect of a maritime claim relating to that ship".

The expression "maritime claim" refers to the list of claims set out in Article 1.

Article 9

12. If the provisions of Article 3(1) are read in isolation, they might be construed as meaning that the particular ship in respect of which a maritime claim arises may be arrested, whether or not the defender is owner of the ship, for those provisions do not expressly require that the defender must be owner of the ship at the time of arrest nor do they refer to any other link between the defender and the ship. Some commentators adopt that construction of the Arrest Convention.¹ Article 3(1) has to be read however in conjunction with Article 9 which provides:

"Nothing in this Convention shall be construed as creating a right of action, which, apart from the provisions of this Convention, would not arise under the law applied by the Court which had seisin of the case, or of creating any maritime liens which do not exist under such law or under the Convention on Maritime Mortgages and Liens, if the latter is applicable".(emphasis added).

¹ See eg D C Jackson Enforcement of Maritime Claims (1985) p 75, where with reference to the English provisions of the Administration of Justice Act 1956, the learned author observes: "The prerequisite that the person liable in personam should be the beneficial owner at the time the action was brought was clearly contrary to the Arrest Convention so far as the liability to arrest was concerned. In effect, the Convention provides simply that the ship in respect of which the claim arose may be arrested, whoever is liable in respect of the claim, and there is no reference to ownership or any other link at the time the action is brought".

To allow an arrest of a ship in respect of every maritime claim specified in Article 1 irrespective of who owns the ship would in effect be to transform every such claim into a maritime lien. The travaux preparatoires of the Convention disclose that the Finnish Branch of the International Maritime Committee made the fundamental point that Article 3(1) "might be construed so as to permit a claimant to arrest the particular ship in respect of which he alleges that a maritime claim arises, even after the ownership of the vessel has passed to a third party, although the maritime claim does not give rise to a maritime lien ("privileges maritimes)".¹ In response, the Rapporteurs commented that what is now Article 9 was intended to deal with the matter (albeit that it may not be effective to do so under some systems of law).²

The background to Article 3(4)

13. The travaux preparatoires also disclose that the inclusion of what is now Article 3(4) in the Convention was due to a rule of law obtaining in the Netherlands and Norway under which "law proceedings" on maritime claims must in some cases be instituted against the "operator" of a ship and not against the registered owner, since the "operator" and not the owner is personally

¹ International Maritime Committee, Bulletin No 105, Naples Conference 1951 (1952) p 126. At ibid p 111, the Finnish Branch of the Committee pointed out that the Draft Convention had not considered the problem that under some systems of law "where the owner of the ship is not personally liable, arrest cannot be granted, except where the arrest is connected with a maritime lien on the ship...".

² Ibid, pp 126 - 127. The Rapporteurs suggested an amendment which was never made. That amendment was "to leave to the 'lex fori arresti' the question whether a ship which has passed into the ownership of a third party is liable to arrest".

liable.¹ It was further stated that "after due consideration, the majority of the International Commission felt that it was necessary to provide for this point only in connection with a Charter by Demise".² The reason was not stated but was presumably that a charterer by demise is in the position of a "temporary owner" assuming all liabilities relating to the employment of the ship.

14. The last sentence of what is now Article 3(4) appears to have been added in response to further representations by the Netherlands representatives who commented that the last sentence "is necessary as under Netherlands law in many cases including collision and salvage, not the legal owner as such or the registered owner as such are liable, but the "reeder" ie the person who appointed the Master and there are other cases possible, in which the Master is not the legal servant of the legal owner or registered owner".³

15. We are not alone in finding the last sentence of Article 3(4) difficult to interpret. For example, it provoked a difference of opinion in the Court of Appeal in an English case, the Span Terza,⁴ reported in 1982 but construing the Administration of Justice Act 1956, not the Supreme Court Act 1981. The issue in that case turned on the meaning of "charterer" in the Administration of Justice Act 1956, s 3(4). The majority⁵ thought that the words in Article 3(4) were far wider than s.3(4) because these words did not include the limitation of any such person as the charterer, but the majority did not find the Convention of assistance in construing s. 3(4). Donaldson L J thought that "charterer" in s. 3(4) meant demise charterer. He pointed out

¹ International Maritime Committee, Bulletin No 5, Naples

² Conference, 1951 p 3.

³ Ibid p 4.

⁴ Ibid p 60.

⁵ [1982] 1 Ll L R 225. The decision was reached on an ex parte application determined as a matter of urgency and apparently had to be used with caution as a precedent.

⁵ Sir David Cairns, at ibid, p 227; Stephenson L J concurring.

that Article 3(4) "is not only somewhat eccentrically drafted, but eccentrically laid out in the paper" since "this extraordinary final sentence" of Article 3(4) "is set out into the margin, suggesting that it applies to the whole article, whereas it plainly does not from its own internal wording"¹. He continued²:

"I do not regard that [scil. the final sentence of Article 3(4)] as providing any authority whatever for extending the word "charterer" to "non owner-like charterers" - in other words, beyond the scope of the demise charterer. I think it refers to mortgagees in possession of a ship, and possibly to salvors, because it must be remembered that under most traditional ship mortgage deeds it is possible for a mortgagee to enter into possession of a ship and to trade the ship as his own; he does not thereby become the owner of the ship, but he does become a quasi-owner in exactly the same way as, or analogously to the position of, the demise charterer. So we get, in the section itself, s. 3(4), consistently, as I think, with that concept, the owner, which is par. (1) of art. 3; we get the demise charterer which is sub-par. (4) of art. 3; and we get a person in possession or in control of the ship, which is the tailpiece to par. (4) of art. 3".

16. If the final sentence of Article 3(4) means that the main provision of Article 3(4) is to apply not only to charters by demise but also to cases where there is no charter by demise, it seems to cover time and voyage charterers and persons temporarily in control or possession of the ship at the time when the claim arose and to allow an arrestment (and eventual sale) of the ship even though the registered owner is not liable under the maritime claim. Although the registered owner is not so liable, he will ex hypothesi lose his property. Such an interpretation would seem to introduce a new species of maritime lien and a wide breach of the general rule that a creditor cannot arrest and sell A's property for B's debts. There is the further difficulty that

¹ Ibid at p 230.

² Ibid at p 231.

if Article 9 can be invoked so as to preclude the creation by the final sentence in Article 3(4) of maritime liens, it is difficult to see what that final sentence does in fact mean.

The Administration of Justice Act 1956, ss. 47 and 48
(Implementing the Brussels Convention in Scotland)

17. It is notable that the provisions of sections 47 and 48 of the Administration of Justice Act 1956, which implemented the Brussels Convention in Scotland, do not make any express reference to a charterer by demise or any other charterer or person in possession and control of the ship. Section 47(1) provides:

"Subject to the provisions of this section and section fifty of this Act, no warrant issued after the commencement of this Part of this Act for the arrest of property on the dependence of an action or in rem shall have effect as authority for the detention of a ship unless the conclusion in respect of which it is issued is appropriate for the enforcement of a claim to which this section applies, and, in the case of a warrant to arrest on the dependence of an action, unless either-

- (a) the ship is the ship with which the action is concerned, or
- (b) all the shares in the ship are owned by the defender against whom that conclusion is directed".

Classification of maritime claims

18. It will be seen that section 47(1) refers to claims to which section 47 applies. These are the maritime claims set out in section 47(2). Section 47(2) defines the claims by reference to their subject matter in 19 paragraphs (paras. (a) to (s)). These

correspond to the list of maritime claims in Article 1 of the 1952 Convention.

19. It is convenient for present purposes to sub-divide the categories of claim set out in section 47(2) into the following three categories.

- (1) The first category is the claims mentioned in paras (a) to (o) of section 47(2) the 1956 Act. These may be enforced by an arrestment of a ship on the dependence if the conditions of s 47(1) are satisfied.
- (2) The second category consists of such of the claims mentioned in section 47(2) of the 1956 Act as are or may be directed to the enforcement of a maritime lien. These are para (a) (insofar as it relates to damage done by a ship); para (b) (insofar as it relates to loss of life or personal injury in consequence of the wrongful act, neglect or default of the owners etc); para (c) (salvage); para (h) (bottomry bond); para (n) (liability for payment of wages of master or crew); and para (o) (master's disbursements). We are not concerned with arrestments in rem enforcing maritime liens in this Consultation Paper.
- (3) The third category consists of paras (p) to (s) of section 47(2) of the 1956 Act which relate to claims arising out of disputes as to ownership, disputes between co-owners; mortgages; and forfeiture or condemnation. These paragraphs correspond to paras (o), (p) and (q) of Article 1(1) of the Brussels Arrest Convention, with the exception of para (s) of section 47(2) (forfeiture and condemnation)

which was added by the 1956 Act and had no counterpart in the Convention. Special provisions apply to these categories. They are enforceable by a special kind of arrestment in rem under s 47(3)(b) (whether or not there is a maritime lien) irrespective of ownership. We are not concerned with these special arrestments in rem in this Consultation Paper. If a pecuniary claim in personam arises out of disputes in those categories, the claim is enforceable by arrestment on the dependence under s. 47(1) and s. 47(3)(a).

20. We are therefore concerned in this Consultation Paper with the question whether an arrestment should be competent on the dependence of an action in personam against a demise charterer where the action in personam falls into any of paras (a) to (s) of section 47(2), but not with arrestments in rem.

Interpretation of s. 47(1)(a) of 1956 Act

21. It would be possible to construe section 47(1)(a) as permitting arrestment on the dependence of a ship with which the action is concerned (if the claim is specified in s. 47(2)) irrespective of whether the defender in the depending action is owner. Indeed this is the way in which Lord Chancellor Hailsham construed the provision in a debate on an English Bill in the House of Lords as noted below.¹

22. There is no Scottish reported decision upholding this wide interpretation and we doubt whether the Scottish courts would adopt it. It seems to us much more likely that the Scottish courts would adopt a narrower interpretation on the lines of that outlined by Mr Ian G Inglis in the following passage² and for the reasons which he gives:-

¹ See para 27.

² Ian G Inglis "Scotland", article in Kaw Yun-Ping *et al*, Arrest of Ships -4; The People's Republic of China, Nigeria, Oman, Scotland 71 at pp 87-88.

"Unless there is a maritime lien or quasi lien¹ it is incompetent under the general law to arrest anything which does not belong to the defender at the time of such arrest. Where, however, the defender is part owner of a ship and that ship is the ship with which the action is concerned then that ship may be arrested even if the defender only owns one out of the 64 shares in it. [citing William Batey & Co Exports Ltd v. Kent 1987 SLT 557 affg. 1985 SLT 490]. The wording of section 47(1) is by no means clear but it is submitted that if it is considered in the light of the pre-1956 law this is the only sensible meaning that can be given to it. If section 47(1)(a) is read literally and in isolation from the common law position it would allow a ship to be arrested if it did not belong to the defender at all just because it was the ship with which the action was concerned. This would give the status of a maritime lien to every claim encountered in section 47(2) which would be an absurd result".

Amendment of s. 47(1)(a) proposed by Discussion Paper No. 84

23. In Discussion Paper No. 84,² we accepted this argument and proposed³ that paragraph (a) of section 47(1) should be amended to make it clear that an arrestment is competent under that paragraph only if the defender is, at the time of the execution of the arrestment, the owner of a share or shares in the ship with which the action is concerned.

24. We adhere to the proposal. The question with which this Consultation Paper is now concerned is whether section 47(1)(a)

¹ By a "quasi lien" is meant a right enforceable by arrestment in rem under s. 47(3)(b) of the 1956 Act which relates only to the narrow class of claims mentioned in paras. (p) to (s) of s. 47(2); ie the third category described in para. 19 above.

² Discussion Paper No 84 on Diligence on the Dependence and Admiralty Arrestments (1989) para 3.60.

³ Ibid, Proposition 32(2) (para 3.64).

should be amended to allow an arrestment on the dependence where the defender is not the owner, but a demise charterer, of the ship with which the action is concerned.

Implementation of Brussels Arrest Convention of 1952 by legislation in England and Wales

25. The Brussels Arrest Convention of 1952 was implemented in England and Wales originally by sections 1 to 3 of the Administration of Justice Act 1956 which were consolidated by the Supreme Court Act 1981 with amendments. Corresponding provision is made for the county courts¹ but it is necessary here to refer only to the 1956 and 1981 Acts.

Section 21(4) of Supreme Court Act 1981

26. Insofar as the Scottish provisions in section 47(1) of the 1956 Act allow an arrestment of a ship on the dependence of an action in personam enforcing a claim mentioned in paras (a) to (o) of section 47(2), the corresponding provision in English legislation is subsection (4) of section 21 of the Supreme Court Act 1981. That subsection provides:

"In the case of any such claim as is mentioned in section 20(2)(e) to (r), where

- (a) the claim arises in connection with a ship; and
- (b) the person who would be liable on the claim in an action in personam ("the relevant person") was, when the cause of action arose, the owner or charterer of, or in possession or in control of, the ship,

¹ Now consolidated as County Courts Act 1984, s 28(4).

an action in rem may (whether or not the claim gives rise to a maritime lien on that ship) be brought in the High Court 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". (emphasis added).

This subsection re-enacts with amendments section 3(4) of the Administration of Justice Act 1956. The principal amendment is the addition of the words underlined referring to a demise charterer. Paras (e) to (r) of section 20(2) correspond to paras (a) to (o) of the Scottish provisions in section 47(2) of the 1956 Act.

Parliamentary background of section 21(4) of 1981 Act

27. The original English provisions in section 3(4) of the 1956 Act had required two links to be made between the person liable in personam and the ship concerned in the claim. The person who would be liable in the action in personam had to be:

- (i) at the time when the cause of action arose the owner or charterer or person in possession or control of the ship; and
- (ii) at the time when the action was brought the owner of the ship.

In the Bill which became the Supreme Court Act 1981, as originally introduced, clause 21(3) provided that in respect of the claims set out in what are now paras (e) to (r) of section 20(2), "being a claim which arises in connection with a ship... an action may be brought in the High Court against that ship". It will be seen that clause 21(3) removed entirely the links between the person liable in personam and the ship concerned in the claim. In the House of Lords debates, this provision was strongly criticised by Lord Diplock¹, who was briefed by various shipping and maritime law organisations. Lord Diplock observed that, although British policy had hitherto been concerned to oppose any extension of maritime liens, clause 21(3) would have had the effect of converting the claims in paras (e) to (r) of clause [section] 20(2) into maritime liens. He remarked that, for example, cargo claims and charter party claims under paras (g) and (h) of clause [section] 20(2) are not recognised in many countries as maritime liens and continued:

"These claims for cargo losses or damage - claims under charter parties - represent ordinary, simple contract debts. The effect of Clause 21(3), as it stands at present, is to convert these into secret charges, lasting six years and thus, possibly, through more than one change of ownership of the vessel, which may be very large indeed. Compared with other maritime liens, whose duration is generally short - one year or, possibly, only one voyage - these will, as I say, continue unless the subsection is amended, to last six years....

I venture to suggest that a Bill of this kind, which is concerned with jurisdiction and with practice and procedure, is no place in which to make so fundamental an alteration in the substantive law and, without close discussion and consideration, to make a change in what, hitherto, has been the commercial policy of this country in this field".

¹ H L Debs 1980-81, vol 418, cols 1308 - 1310.

The Lord Chancellor (Hailsham) replied¹ that English law did not yet conform to the Brussels Arrest Convention and the object of the clause was to make it do so: "I add, again somewhat plaintively, that Scottish law does conform with the Brussels Convention". This latter remark is a reference to the wide interpretation of section 47(1)(a) of the 1956 Act criticised at para 22 above.

28. The offending provision was amended in the House of Commons by substituting what is now section 21(4) of the 1981 Act. The Solicitor General for England and Wales (Sir Ian Percival) observed²:

"I choose my words carefully, It is a matter of some doubt exactly what the convention requires. Some say that we have adopted the provisions fully, and some say that we have not. The convention is not entirely clear on the point, but it appears to allow for the arrest of ships in respect of a wide variety of classes of claim, including those mentioned in clause 20(2)(e) to (r), regardless of the identity of the owner".

He said that after consultation the Government had decided not to proceed with the changes for the time being and further remarked³:

"Although it is nearly 30 years since the Brussels Arrest Convention was concluded, there is as yet no kind of uniformity of international practice on this matter, so that there is no question of this country being out of line by not making these changes. I stress that, too. It would be a different matter if we were out of line after all these years with everybody else's implementation and interpretation of the convention".

¹ Ibid col 1310.

² HC Debs 1980-81 Standing Committee B, First Sitting, 3 June 1981, col 28.

³ Idem.

The Solicitor General then explained why what is now subsection (4) of section 21 of the 1981 Act was extended to include charterers by demise¹:-

"As I have indicated, in cases where there is no maritime lien, a plaintiff may bring his action in rem against the ship only if the person who would be liable on the claim in personam is the owner at the time when the action is started. For many purposes a charterer by demise is in the same position as an owner, unlike other charterers he employs his own crew and is for all practical purposes in complete control of the ship. Moreover, demise charters are usually for long periods. Those who have been consulted agree that it would be a small but useful improvement in the present law if demise charterers were placed on the same footing as owners, so that if the person who would be liable in personam on a claim is the demise charterer of the ship in question, the action can be brought against that ship even if it changed owners since the cause of action arose. The new subsection (5) of clause 21 [now section 21(4)] accordingly incorporates that feature".

PROPOSALS FOR REFORM

(1) Arrestment on the dependence of the particular ship in action against demise charterer

29. From the foregoing somewhat complicated background certain factors emerge.

30. First, the Brussels Arrest Convention of 1952 is very ambiguous in some respects but the first part of Article 3(4) makes it clear that it was intended that it should be competent to arrest a ship on the dependence of an action in personam against a demise charterer where the ship is the particular ship with which the action is concerned. Since Scots law does not

¹ Ibid, col 29.

conform to the Convention in that respect, there is a very strong argument that it should be amended to conform to that extent. The Convention in its preamble declared that the Contracting States "recognised the desirability of determining by agreement certain uniform rules relating to the arrest of seagoing ships". This seems to us to impose an international obligation to conform as closely as possible to the Convention insofar as the provisions of the Convention are clear and unambiguous.

31. Second, to allow an arrestment on the dependence of every maritime claim mentioned in Article 1 of the 1952 Convention (1956 Act, s. 47(2), paras. (a) to (o)) would conform to the wide interpretation of the Convention especially Article 3(1) and the final sentence of Article 3(4) but that wide interpretation does not take account of Article 9 which is often overlooked and which was intended to prevent the creation of new maritime liens not recognised in national systems of law.¹ We do not think that the wide interpretation of the Convention is sufficiently clear and unambiguous to warrant legislation which would have the effect of transforming all the claims in section 47(2) of the 1956 Act into maritime liens.

32. Third, to allow an arrestment on the dependence of the particular ship with which an action in personam is concerned where the defender is the demise charterer would harmonise Scots law with English law as set out in section 21(4) of the Supreme Court Act 1981. The provisions of section 21(4) were enacted after consultation with British shipping interests who approved the extension to demise charterers. We think that an international Convention introducing uniform rules should normally be implemented in Scots law in the same way as in the laws of other

¹ See para 12 above.

parts of the United Kingdom, unless there are special considerations, eg. relating to the distinctive character of Scots law, which indicate that uniformity is not appropriate. We have not identified such special considerations in the present context, but we invite views on that matter.

33. We are aware that there are a number of arguments of principle or policy which might be advanced against the proposed amendment of the law. First, the proposal would breach a fundamental principle of Scots law that an unsecured creditor cannot execute diligence against the property of A for B's debt. Scots law has got rid of such provisions in the context of poinding for rates.¹ The proposal might therefore be regarded as retrograde. If the proposal had been applied to a contract of hiring of moveables, it would probably be regarded as unacceptable. Second, the proposal creates difficulties in competitions between creditors and in insolvency proceedings which, other things being equal, would be best avoided.

34. In our view, however, since the United Kingdom has sought to implement the Convention by statute and subsequently ratified it, the issue of principle should be regarded as foreclosed and the main task now is to consider what provisions are necessary to give practical effect in Scots law to the relevant provisions of the Convention and to avoid the creation of unnecessary anomalies. We would nevertheless mention the point that the true owner of the ship or his advisers would be aware at the time when the

¹ See Local Government (Scotland) Act 1947, s 47(2) as originally enacted and Glasgow Corporation v Midland Household Stores Ltd 1967 SLT (Sh Ct) 22. Compare Local Government (Scotland) Act 1947 s 247 as substituted by Debtors (Scotland) Act 1987, Sch 4, para 1, as read with Sch 5 (poinding procedure under summary warrant).

owner entered into the charter party that in English law, and in future Scots law, an arrest or arrestment of the ship would be competent to secure a claim in personam against the charterer. The possibility of arrestment would be a known risk.

35. The foregoing reform should clearly apply to the maritime claims specified in paras (a) to (o) of section 47(2) of the 1956 Act, subject to one modification of para (a) to which we revert at para. 43 below. There is however a question whether the reform should apply also to the maritime claims mentioned in paras (p) to (s) of section 47(2). The corresponding provisions of the English Act of 1981 are paras (a) (b) (c) and (s) of section 20(2) and in relation to them section 21(2) of the 1981 Act provides that an action in rem may be brought against the ship or property in connection with which the claim or question arises. In the Scottish Act of 1956, on the other hand, subsection (3)(a) of section 47 makes it clear that if a conclusion appropriate for the enforcement of a claim specified in paras (p) to (s) of section 47(2) is pecuniary, an arrestment on the dependence is competent. If a claim (such as is mentioned in s 47(2)(q)) arose out of a dispute as to possession of a ship which is under the control of a demise charterer, and the claim includes for example a pecuniary conclusion for damages for wrongful detention of possession, it presumably ought to be possible to arrest the ship on the dependence. This suggests that the proposed reform should apply to paras (p) to (s) of s 47(2).

36. We propose:

**Section 47(1)(a) of the Administration of Justice Act 1956
(which permits an arrestment, on the dependence of an**

action in personam enforcing a claim mentioned in s. 47(2), of the ship with which the action is concerned) should be amended so as to permit an arrestment on the dependence of such an action where, at the time of the execution of the arrestment, the defender is the demise charterer of the ship.

(Proposition 1)

(2) Arrestment in execution of decrees in personam against demise charterers

37. Section 47 of the Administration of Justice Act 1956, insofar as it concerns arrestments connected with actions and claims in personam, applies only to arrestments on the dependence and not to arrestments in execution.¹ The purpose of section 47 was to restrict arrestment on the dependence of ships and such restrictions could presumably be justified because arrestments on the dependence are only provisional measures securing alleged debts which may ultimately be found not to be due. Arrestments in execution are not affected by the restrictions in the 1956 Act and ought not to be because in their case the debt has been found by the court to be due.

38. Our proposal to allow an arrestment on the dependence of the particular ship with which the action is concerned, if chartered by demise by the defender, differs from the existing provisions of the 1956 Act, section 47, insofar as it widens rather than restricts the scope of arrestments of ships competent under the common law. But if arrestments against demise charterers

¹ This conforms to Article 1, para 2 of the Brussels Arrest Convention quoted at para 10, fn 2 above.

are to be competent on the dependence, then for the sake of consistency they should also be competent in execution. We suppose that, in practice, most arrestments of ships connected with actions in personam are likely to be executed on the dependence rather than in execution, but there may be some cases where a ship comes within the jurisdiction only after decree and is then arrested.

39. We propose therefore:

Where a decree for payment is granted against the demise charterer of a ship in an action to enforce a claim specified in section 47(2) of the Administration of Justice Act 1956, being an action and claim concerned with that ship, it should be competent to enforce the decree by the arrestment and judicial sale of that ship in execution of that decree notwithstanding that the owner of the ship is not also liable under the decree.

(Proposition 2).

(3) Arrestment to found jurisdiction

40. We think it should be made clear by statute that the creditor of a demise charterer may arrest to found jurisdiction in the same circumstances as he could arrest on the dependence in terms of Proposition 1. Otherwise the amendment proposed in Proposition 1 might be ineffective in practice.

41. We are aware that arrestment to found jurisdiction is nowadays regarded as an internationally unacceptable and

exorbitant ground of jurisdiction in the normal case, and for that reason is precluded by Article 3 of the European Judgments Convention as a general ground of jurisdiction. This provision does not, however, apply to arrestments of ships. Thus Article 57 of the European Judgments Convention provides that that Convention does not affect conventions to which the Contracting States are parties and this saving is generally considered as including a reference to the Brussels Arrest Convention of 1952.¹ Moreover the rules allocating jurisdiction to the different parts of the United Kingdom² and the rules for the assumption of jurisdiction by the Scottish courts in cases not covered by the European Judgments Convention³ both allow the arrestment of a ship to found jurisdiction in Admiralty causes.

42. We propose:

It should be competent for the creditor of a demise charterer to arrest a ship to found jurisdiction in an Admiralty action against the demise charterer in the circumstances in which an arrestment on the dependence would be competent in terms of Proposition 1 above.

(Proposition 3).

¹ Jenard Report, p 59; Schlosser Report, p 150; Anton Civil Jurisdiction in Scotland (1984) para 3.35.

² Civil Jurisdiction and Judgments Act 1982, Sch 5, para 7.

³ Ibid, Sch 9, para 6.

(4) Amendment of para (a) of section 47(2) of the Administration of Justice Act 1956

43. In considering the Scots and English legislation, we have identified one matter which is not confined to actions against demise charterers, but may be conveniently dealt with here. The foregoing proposals would apply inter alia to the maritime claims specified in para (a) of section 47(2) of the 1956 Act, which refers to "damage done or received by any ship". The corresponding provisions in the Supreme Court Act 1981 s. 20(2) are para. (d) referring to "any claim for damage received by a ship" and para (e) referring to "any claim for damage done by a ship". Claims under para (d) for damage received by a ship constitute the one category of claim in section 20(2) which is not enforceable under s. 21 by action in rem. The 1981 Act thereby gave legislative effect to the decision of the House of Lords in The Eschersheim¹ which held that a plaintiff could not invoke Admiralty jurisdiction by an action in rem against his own ship.

44. It seems extremely doubtful whether the Scottish provisions in section 47(1), as read with section 47(2)(a), of the 1956 Act would ever be construed as permitting the pursuer to arrest his own ship on the dependence. On the other hand, if the pursuer cannot arrest his own ship, it is difficult to see what is the legal effect of the words "or received" in para (a) of section 47(2). The list of claims in s 47(2), unlike the list in the English provisions in s 20(2) of the 1981 Act, are not used for the purpose of defining Admiralty causes, since such causes are defined in Scotland by RC 135. It is therefore suggested that to clarify the

¹ [1976] 1 WLR 430; [1976] 2 Lloyd's Rep 1; also reported sub nom The Jade [1976] 1 All ER 920 (HL).

law, the words "or received" in s. 47(1)(a) of the 1956 Act should be repealed.

45. A consequential problem would then be raised. In Discussion Paper No. 84,¹ we proposed that Admiralty causes in Scots law should in future be defined by reference to the list of claims in the 1956 Act, s. 47(2). The question therefore arises whether an action based on damage received by a ship should be an Admiralty cause although that ship (as distinct from the ship doing the damage) cannot be arrested. If the damage were to be done by another ship, the unrepealed provisions of para (a) would enable the action to be brought as an Admiralty cause. In Discussion Paper No 84, we argued that it seems "anomalous and pointless to preserve as Admiralty causes in terms of RC 135 actions in which Admiralty arrestments in rem or on the dependence of ships and other maritime property is not competent because they are not actions to enforce a claim specified in section 47(2) of the 1956 Act".² This reasoning suggests that damage received by a ship should not be a test for an Admiralty cause, but we seek views on this conclusion.

46.

- (1) In para (a) of section 47(2) of the Administration of Justice Act 1956, the words "or received" should be repealed.
- (2) On the assumption that, as proposed in Discussion Paper No 84, Proposition 26(1) (para 3.15), Admiralty causes in

¹ Discussion Paper No 84, Proposition 26(1) (para 3.15).

² Ibid, para 3.13.

Scotland will in future be defined by reference to the list of claims in the 1956 Act, s 47(2), claims arising from "damage received by a ship" should not be included in the new definition of Admiralty causes.

(Proposition 4).

(5) Section 47(1)(b) of the 1956 Act: the "sister ship" provision and demise charterer defenders

47. Under section 47(1)(b) of the 1956 Act, where the defender in an Admiralty action is the demise charterer of the particular ship with which the action is concerned, a "sister ship" owned by the demise charterer may be arrested on the dependence provided that the demise charterer owns all the shares in the ship at the time of the arrestment. The same result would follow where the defender is not the owner eg the time or voyage charterer or was in possession and control of the particular ship with which the action is concerned. Since in all these cases, there is no breach of the principle that a creditor cannot arrest the property of A for B's debts, no amendment of the law is needed. It seems that similar rules apply in English law in terms of s. 21(4) (ii) of the Supreme Court Act 1981.¹

(6) Supplementary issues as to judicial sale, equalisation of arrestments and ranking of creditors

48. Insofar as the arrestment of a ship by a creditor of the demise charterer has the effect of prohibiting the removal of the

¹ See Jackson, Enforcement of Maritime Claims (1985) pp 79 80, who discusses the construction of s 21(4)(ii).

ship from her anchorage, it does not appear that any practical difficulty would arise requiring legislation. An arrestment, however, has other legal effects which may well require express regulation by statute. These relate to:

- (a) in a judicial sale at the instance of the arresting creditor of the demise charterer, the definition of the proprietary interest to be conveyed by such a sale (see para 49 below);
- (b) in a process of ranking on the proceeds of a judicial sale of the ship (outside sequestration or liquidation), whether at the instance of the arresting creditor of the demise charterer, or another creditor (eg. of the true owner), or a mortgagee exercising his power of sale (see para 52 below);
- (c) the ranking of an arrestment at the instance of a creditor of the demise charterer under the rules for the equalisation of arrestments etc. outside insolvency proceedings (see para 56 below);
- (d) the ranking of such an arrestment in the sequestration or (far more likely) liquidation of the demise charterer (see para 60 below);
- (e) the ranking of such an arrestment in the sequestration or (far more likely) liquidation of the true owner (see para 65 below).

(a) Judicial sale

49. In the case of a judicial sale of a ship arrested to secure the debt of the demise charterer, the difficulty would arise of defining what proprietary interest in the ship the creditor is entitled to sell given that sale implies the passing of ownership and the demise charterer is ex hypothesi not the owner of the ship or of any of the 64 shares therein. It seems to us to be implicit in the Brussels Arrest Convention that the creditor of the demise charterer should be entitled to sell the interests of the owners of the 64 shares in the ship and to account to those owners for any surplus proceeds of sale. Accordingly we invite views on whether an express provision to that effect should be enacted.

50. In many cases a judicial sale may be avoided by a judicial recall or extra-judicial "release" of the arrestment on the defender or debtor providing security. We considered whether it should be provided that the right of the creditor of the demise charterer should be limited to a right to arrest without power of sale. We consider however that the Brussels Arrest Convention presupposes that an arrest carries with it a power of sale, and that some provision is needed for the case where the arrestment is not recalled or "released". We accordingly reject that option.

51.

In the case of a judicial sale of a ship at the instance of a creditor of the demise charterer who has arrested the ship, should it be expressly provided by statute that the creditor is entitled to sell the interests of the owners of

all the shares in the ship and is bound to account to those owners for any surplus arising in the net proceeds of the sale?

(Proposition 5).

(b) Ranking on proceeds of judicial sale

52. A competition could conceivably arise between the proposed new form of arrestment attaching a demise chartered ship to secure a maritime claim against the demise charterer concerning that ship and an arrestment of the ship by a creditor of the owner.

53. Since under existing law an arrestment of a corporeal moveable is not competent where the debtor is not the owner, there is no direct precedent in the existing law for resolving a competition between say an arrestment against a demise chartered ship at the instance of a creditor of the demise charterer, and an arrestment of the ship at the instance of a creditor of the owner. On the other hand, the analogy of the existing law on competitions between diligences by the creditors of the seller of goods and diligences by the creditors of the purchaser of goods may suggest a solution. Thus Graham Stewart¹ observes that a competition between a pouncing creditor of the seller and an arresting creditor of the purchaser would be determined by the rules of priority applicable to such diligences.² In other words, the fact that the debtor in each diligence is not the same person is disregarded. A competition between arrestments is determined by priority of the date of executing the arrestment where the debtor in each case is the same person, disregarding the date of

¹ Diligence (1898) p 146.

² These rules are set out in Graham Stewart Diligence p 159 ff.

the furthcoming or the warrant of sale or of the sale itself.¹ It seems likely therefore, on the analogy of the rule stated by Graham Stewart that the same criterion of preference would apply to a competition between arrestments of a demise chartered ship at the instance of a creditor of the demise charterer and a creditor of the owner.

54. Other competitions on the proceeds of a sale, eg. with a mortgagee of a ship could conceivably arise. It is however normal legislative practice to leave questions of ranking to be regulated by existing common law principles and, in this case, it might be very difficult indeed to frame rules of ranking which would be comprehensive and uncomplicated and avoid unintended consequences. On the whole we suggest that this matter should be left to be developed by the common law but invite views.

55.

Subject to Propositions 7 to 9 below, is it desirable to make express provision by statute regulating competitions between an arrestment of a ship at the instance of a creditor of the demise charterer on the one hand and, on the other, an arrestment at the instance of a creditor of the true owner or any other rights over the ship of creditors of the owner or persons (such as mortgagees) deriving right from him?

(Proposition 6).

¹ Ibid pp 137-141.

(c) Equalisation of arrestments etc

56. The rules on the equalisation (pari passu ranking) of arrestments and poindings under the Bankruptcy (Scotland) Act 1985, Sch 7, para 24, apply to arrestments of ships.¹ These rules provide for the pari passu ranking of arrestments and poindings executed, and of claims for equalisation made, within a statutory period of 60 days before and 4 months after the constitution of the apparent insolvency of the debtor who owns the arrested or poinded property. The rules are very complicated and in our Discussion Paper No. 79 we suggested that they should be repealed.² If as we have proposed, a ship can be arrested for the demise charterer's debt, further difficulties could conceivably arise since there might be a constitution of the apparent insolvency of the demise charterer and a constitution of the apparent insolvency of the owner of the ship.

57. To allow creditors of the demise charterer other than the arresting creditor to rank on the proceeds of sale of the owner's ship would extend the effects of the Brussels Arrest Convention unduly. Furthermore the rules of equalisation are designed to promote fair sharing of the fruits of diligences on the property of their owner and the demise charterer is not the owner. For these two reasons, we suggest that the rules of equalisation should not apply on the constitution of the apparent insolvency of the demise charterer.

¹ Harvey v McAdie (1888) 4 Sh Ct Rep 254; Munro v Smith 1968 SLT (Sh Ct) 26.

² Discussion Paper No 79 on Equalisation of Diligences (1988) Part II.

58. There remains the question of whether or how the rules of equalisation (if they are not repealed) should apply on the constitution of the apparent insolvency of the owner of the ship in a case where the creditor of the demise charterer has arrested the ship within the statutory period. We suggest that the creditors of the owner should be entitled to rank on the proceeds of a judicial sale at the instance of the demise charterer but that the creditor of the demise charterer should not be entitled to rank on the proceeds of any other diligence on other property belonging to the owner of the ship. These provisional proposals may however be superseded by the repeal of the rules on equalisation which is under consideration.

59. We propose:

- (1) If the rules for equalisation of diligences on apparent insolvency under the Bankruptcy (Scotland) Act 1985, Sch. 7, para. 24 are not repealed as provisionally proposed in our Discussion Paper No. 79, the following provisions should be enacted.
- (2) The rules of equalisation should not apply to an arrestment of a ship at the instance of a creditor of the demise charterer on the constitution of the apparent insolvency of the demise charterer.
- (3) On the constitution of the apparent insolvency of the owner of the ship:
 - (a) the creditors of the owner of the ship should be entitled to rank pari passu under the equalisation rules

on the fruits of an arrestment and sale at the instance of a creditor of the demise charterer; but

- (b) the creditor of the demise charterer should not be entitled, by virtue of these rules, to rank on the proceeds of any other diligence on other property of the owner of the ship.

(Proposition 7).

(d) Sequestration or liquidation of demise charterer

60. The next question to be considered is whether, if a ship chartered by demise is arrested to secure a maritime claim against the demise charterer concerning that ship, the ship should be treated as included in the estate of the demise charterer on his sequestration under bankruptcy legislation or, if a company (likely to be the usual case), its liquidation? The effect of including the ship in the estate of the demise charterer on his sequestration or liquidation would be to enable the other creditors of the demise charterer to satisfy their debts out of the proceeds of sale of the ship.

61. If that principle were to be accepted, then it would seem to follow that the arrestment of the demise chartered ship should also be rendered ineffectual on the sequestration or liquidation of the demise charterer if executed within 60 days prior to the date of sequestration or commencement of the winding up.¹

62. In our view, to make the ship available to satisfy the claims of all the creditors of the demise charterer, including all

¹ Bankruptcy (Scotland) Act 1985, s 37(4) and (5); Insolvency Act 1986, s 185.

non-maritime claims which having nothing to do with the ship or any other ship, would be regarded as an unforeseen result of the implementation of the Brussels Arrest Convention, a main purpose of which was to limit attachment of ships to particular classes of maritime claim. Arrestment of ships to satisfy a maritime claim by a creditor of the demise charterer is already anomalous, and to extend the provisions to allow attachment of the ship to satisfy non-maritime claims would simply make the anomaly worse.

63. If (as we believe) the demise chartered ship should not be available to satisfy the claims of the general body of the demise charterer's creditors, the question arises of how the debt secured by the arrestment of the ship is to be treated in the sequestration or liquidation of the demise charterer? We consider that, unlike an ordinary arrester, the creditor should not surrender the ship for sale by the trustee in bankruptcy or liquidator but would first satisfy his debt so far as practicable out of the proceeds of sale of the ship (as a secured creditor may do). If necessary he would then rank as an unsecured creditor for any balance of the debt in the sequestration or liquidation.

64. We propose:

- (1) Where a ship chartered by demise is arrested to secure a maritime claim against the demise charterer, and the demise charterer's estate is then subject to sequestration or liquidation, the ship should not be treated as comprised in that estate for the purposes of the sequestration or liquidation.

- (2) The arresting creditor should be entitled to satisfy his claim in whole or in part from the proceeds of sale of the ship, and to rank as an unsecured creditor for any unpaid balance in the sequestration or liquidation.

(Proposition 8).

(e) Sequestration or liquidation of owner of ship

65. A competition could conceivably arise between, on the one hand, the proposed new form of arrestment attaching a demise chartered ship to secure a maritime claim against the demise charterer concerning that ship and, on the other hand, the trustee in the owner's sequestration or, in the far more usual case where the owner of the ship is a company, the liquidator of the company.

66. Various options are possible and we put forward the following tentatively for comment and criticism. First, we suggest that where the arrestment at the instance of the demise charterer has priority over the claims of the creditors of the owner, the creditor of the demise charterer should be entitled to insist in his diligence and proceed to a judicial sale. The court which granted the warrant of arrestment would determine the question of priority if the priority were disputed. Where however the arrestment at the instance of the demise charterer did not have priority because for example of a prior arrestment by a creditor of the owner of the ship, the ship should be treated as subject to the liquidation or sequestration and the creditor of the demise charterer should rank on the proceeds of sale of the arrested ship as if he were a creditor of the owner, except that

he would, of course, claim any deficiency from the demise charterer and would not rank for that deficiency in the liquidation or sequestration on the other assets of the owner.

67. Another novel problem which would arise is whether the provisions for the rendering ineffectual of arrestments and poindings executed within 60 days prior to the sequestration or liquidation of the true owner¹ should apply in relation to an arrestment executed within that period at the instance of the creditor of the demise charterer. The justification for these rules is to achieve fair sharing of the bankrupt's estate among the general body of his unsecured creditors, but it is not self-evident that that justification applies where the arrestment is at the instance of a creditor of the demise charterer. We suggest that the 60 day rule should apply, in the sequestration or liquidation of the owner, to the arrestment by the creditor of the demise charterer only if a creditor of the owner has priority over that arrestment.

68. We propose:

- (1) (a) Where in the sequestration or liquidation of the owner of a ship an arrestment at the instance of a creditor of the demise charterer has priority over the claims of the creditors of the owner, the creditor of the demise charterer should be entitled to insist in his diligence and proceed to a judicial sale notwithstanding the liquidation or sequestration of the owner of the ship.

¹ Bankruptcy (Scotland) Act 1985, s 37(4) and (5); Insolvency Act 1986, s 189.

(b) In the event of a dispute as to that priority, the court which granted the warrant for arrestment should determine that dispute.

(c) In any other case, the ship should be treated as subject to the liquidation of the owner or sequestration of the owner's estate. The creditor of the demise charterer should claim his preference (if any) in the liquidation or sequestration from the proceeds of sale of the ship but from no other asset of the owner.

(2) In the liquidation of the owner of the ship or the sequestration of his estate, the rules for the rendering ineffectual of prior arrestments and poindings under the provisions of the Bankruptcy (Scotland) Act 1985, s. 37(4) and (5) and the Insolvency Act 1986, s 189, should apply to an arrestment of the ship at the instance of a creditor of the demise charterer, only if (apart from those provisions) a creditor of the owner has in relation to the ship priority over the arrestment at the instance of the demise charterer.

(Proposition 9).

SUMMARY OF PROVISIONAL PROPOSALS AND QUESTIONS

Note Attention is drawn to the notice at the front of this Consultation Paper concerning confidentiality of comments. If no request for confidentiality is made, we shall assume that comments submitted in response to this Consultation Paper may be referred to or attributed in our subsequent report.

Arrestment on the dependence of the particular ship in action against demise charterer

1.

Section 47(1)(a) of the Administration of Justice Act 1956 (which permits an arrestment, on the dependence of an action in personam enforcing a claim mentioned in s. 47(2), of the ship with which the action is concerned) should be amended so as to permit an arrestment on the dependence of such an action where, at the time of the execution of the arrestment, the defender is the demise charterer of the ship.

(Para. 36)

Arrestment in execution of decrees in personam against demise charterers

2.

Where a decree for payment is granted against the demise charterer of a ship in an action to enforce a claim specified in section 47(2) of the Administration of Justice Act 1956, being an action and claim concerned with that

ship, it should be competent to enforce the decree by the arrestment and judicial sale of that ship in execution of that decree notwithstanding that the owner of the ship is not also liable under the decree.

(Para. 39)

Arrestment to found jurisdiction

3.

It should be competent for the creditor of a demise charterer to arrest a ship to found jurisdiction in an Admiralty action against the demise charterer in the circumstances in which an arrestment on the dependence would be competent in terms of Proposition 1 above.

(Para. 42)

Amendment of para (a) of section 47(2) of the Administration of Justice Act 1956

4.

- (1) In para (a) of section 47(2) of the Administration of Justice Act 1956, the words "or received" should be repealed.
- (2) On the assumption that, as proposed in Discussion Paper No. 84, Proposition 26(1) (para. 3.15), Admiralty causes in Scotland will in future be defined by reference to the list of claims in the 1956 Act, s. 47(2), claims arising from

"damage received by a ship" should not be included in the new definition of Admiralty causes.

(Para. 46)

Judicial sale

5.

In the case of a judicial sale of a ship at the instance of a creditor of the demise charterer who has arrested the ship, should it be expressly provided by statute that the creditor is entitled to sell the interests of the owners of all the shares in the ship and is bound to account to those owners for any surplus arising in the net proceeds of the sale?

(Para 51)

Ranking on proceeds of judicial sale

6.

Subject to Propositions 7 to 9 below, is it desirable to make express provision by statute regulating competitions between an arrestment of a ship at the instance of a creditor of the demise charterer on the one hand and, on the other, an arrestment at the instance of a creditor of the true owner or any other rights over the ship of creditors of the owner or persons (such as mortgagees) deriving right from him?

(Para 55)

Equalisation of arrestments

7.

- (1) If the rules for equalisation of diligences on apparent insolvency under the Bankruptcy (Scotland) Act 1985, Sch. 7, para. 24 are not repealed as provisionally proposed in our Discussion Paper No. 79, the following provisions should be enacted.
- (2) The rules of equalisation should not apply to an arrestment of a ship at the instance of a creditor of the demise charterer on the constitution of the apparent insolvency of the demise charterer.
- (3) On the constitution of the apparent insolvency of the owner of the ship:
 - (a) the creditors of the owner of the ship should be entitled to rank pari passu under the equalisation rules on the fruits of an arrestment and sale at the instance of a creditor of the demise charterer; but
 - (b) the creditor of the demise charterer should not be entitled, by virtue of these rules, to rank on the proceeds of any other diligence on other property of the owner of the ship.

(Para 59)

Sequestration or liquidation of demise charterer

8.

- (1) Where a ship chartered by demise is arrested to secure a maritime claim against the demise charterer, and the demise charterer's estate is then subject to sequestration or liquidation, the ship should not be treated as comprised in that estate for the purposes of the sequestration or liquidation.
- (2) The arresting creditor should be entitled to satisfy his claim in whole or in part from the proceeds of sale of the ship, and to rank as an unsecured creditor for any unpaid balance in the sequestration or liquidation.

(Para. 64).

Sequestration or liquidation of owner of ship

9.

- (1) (a) Where in the sequestration or liquidation of the owner of a ship an arrestment at the instance of a creditor of the demise charterer has priority over the claims of the creditors of the owner, the creditor of the demise charterer should be entitled to insist in his diligence and proceed to a judicial sale notwithstanding the liquidation or sequestration of the owner of the ship.

(b) In the event of a dispute as to that priority, the court which granted the warrant for arrestment should determine that dispute.

(c) In any other case, the ship should be treated as subject to the liquidation of the owner or sequestration of the owner's estate. The creditor of the demise charterer should claim his preference (if any) in the liquidation or sequestration from the proceeds of sale of the ship but from no other asset of the owner.

- (2) In the liquidation of the owner of the ship or the sequestration of his estate, the rules for the rendering ineffectual of prior arrestments and poindings under the provisions of the Bankruptcy (Scotland) Act 1985, s. 37(4) and (5) and the Insolvency Act 1986, s 189, should apply to an arrestment of the ship at the instance of a creditor of the demise charterer, only if (apart from those provisions) a creditor of the owner has in relation to the ship priority over the arrestment at the instance of the demise charterer.

(Para. 68).

**INTERNATIONAL CONVENTION RELATING TO THE ARREST
OF SEAGOING SHIPS, SIGNED AT BRUSSELS, ON MAY 10, 1952**

The High Contracting Parties,

Having recognised the desirability of determining by agreement certain uniform rules of law relating to the arrest of seagoing ships, have decided to conclude a Convention for this purpose and thereto have agreed as follows:—

ARTICLE 1

In this Convention the following words shall have the meanings hereby assigned to them:—

- (1) "Maritime Claim" means a claim arising out of one or more of the following:—
 - (a) damage caused by any ship either in collision or otherwise;
 - (b) loss of life or personal injury caused by any ship or occurring in connexion with the operation of any ship;
 - (c) salvage;
 - (d) agreement relating to the use or hire of any ship whether by charterparty or otherwise;
 - (e) agreement relating to the carriage of goods in any ship whether by charterparty or otherwise;
 - (f) loss of or damage to goods including baggage carried in any ship;
 - (g) general average;
 - (h) bottomry;
 - (i) towage;
 - (j) pilotage;
 - (k) goods or materials wherever supplied to a ship for her operation or maintenance;
 - (l) construction, repair or equipment of any ship or dock charges and dues;
 - (m) wages of Masters, Officers, or crew;
 - (n) Master's disbursements, including disbursements made by shippers, charterers or agents on behalf of a ship or her owner;
 - (o) disputes as to the title to or ownership of any ship;
 - (p) disputes between co-owners of any ship as to the ownership, possession, employment or earnings of that ship;
 - (q) the mortgage or hypothecation of any ship.
- (2) "Arrest" means the detention of a ship by judicial process to secure a maritime claim, but does not include the seizure of a ship in execution or satisfaction of a judgment.
- (3) "Person" includes individuals, partnerships and bodies corporate, Governments, their Departments, and Public Authorities.
- (4) "Claimant" means a person who alleges that a maritime claim exists in his favour.

¹

See International Conventions on Maritime Law, Treaty Series No 47 (1960) Cmnd. 1128.

ARTICLE 2

A ship flying the flag of one of the Contracting States may be arrested in the jurisdiction of any of the Contracting States in respect of any maritime claim, but in respect of no other claim; but nothing in this Convention shall be deemed to extend or restrict any right or powers vested in any Governments or their Departments, Public Authorities, or Dock or Harbour Authorities under their existing domestic laws or regulations to arrest, detain or otherwise prevent the sailing of vessels within their jurisdiction.

ARTICLE 3

(1) Subject to the provisions of paragraph (4) of this Article and of Article 10, a claimant may arrest either the particular ship in respect of which the maritime claim arose, or any other ship which is owned by the person who was, at the time when the maritime claim arose, the owner of the particular ship, even though the ship arrested be ready to sail; but no ship, other than the particular ship in respect of which the claim arose, may be arrested in respect of any of the maritime claims enumerated in Article 1, (1) (o), (p) or (q).

(2) Ships shall be deemed to be in the same ownership when all the shares therein are owned by the same person or persons.

(3) A ship shall not be arrested, nor shall bail or other security be given more than once in any one or more of the jurisdictions of any of the Contracting States in respect of the same maritime claim by the same claimant: and, if a ship has been arrested in any one of such jurisdictions, or bail or other security has been given in such jurisdiction either to release the ship or to avoid a threatened arrest, any subsequent arrest of the ship or of any ship in the same ownership by the same claimant for the same maritime claim shall be set aside, and the ship released by the Court or other appropriate judicial authority of that State, unless the claimant can satisfy the Court or other appropriate judicial authority that the bail or other security had been finally released before the subsequent arrest or that there is other good cause for maintaining that arrest.

(4) When in the case of a charter by demise of a ship the charterer and not the registered owner is liable in respect of a maritime claim relating to that ship, the claimant may arrest such ship or any other ship in the ownership of the charterer by demise, subject to the provisions of this Convention, but no other ship in the ownership of the registered owner shall be liable to arrest in respect of such maritime claims.

The provisions of this paragraph shall apply to any case in which a person other than the registered owner of a ship is liable in respect of a maritime claim relating to that ship.

ARTICLE 4

A ship may only be arrested under the authority of a Court or of the appropriate judicial authority of the Contracting State in which the arrest is made.

ARTICLE 5

The Court or other appropriate judicial authority within whose jurisdiction the ship has been arrested shall permit the release of the ship upon sufficient bail or other security being furnished, save in cases in which a ship has been arrested in respect of any of the maritime claims enumerated in Article 1, (1) (o) and (p). In such cases the Court or other appropriate judicial authority may permit the person in possession of the ship to

continue trading the ship, upon such person furnishing sufficient bail or other security, or may otherwise deal with the operation of the ship during the period of the arrest.

In default of agreement between the parties as to the sufficiency of the bail or other security, the Court or other appropriate judicial authority shall determine the nature and amount thereof.

The request to release the ship against such security shall not be construed as an acknowledgment of liability or as a waiver of the benefit of the legal limitation of liability of the owner of the ship.

ARTICLE 6

All questions whether in any case the claimant is liable in damages for the arrest of a ship or for the costs of the bail or other security furnished to release or prevent the arrest of a ship, shall be determined by the law of the Contracting State in whose jurisdiction the arrest was made or applied for.

The rules of procedure relating to the arrest of a ship, to the application for obtaining the authority referred to in Article 4, and to all matters of procedure which the arrest may entail, shall be governed by the law of the Contracting State in which the arrest was made or applied for.

ARTICLE 7

(1) The Courts of the country in which the arrest was made shall have jurisdiction to determine the case upon its merits if the domestic law of the country in which the arrest is made gives jurisdiction to such Courts, or in any of the following cases, namely:—

- (a) if the claimant has his habitual residence or principal place of business in the country in which the arrest was made;
- (b) if the claim arose in the country in which the arrest was made;
- (c) if the claim concerns the voyage of the ship during which the arrest was made;
- (d) if the claim arose out of a collision or in circumstances covered by Article 13 of the International Convention for the unification of certain rules of law with respect to collisions between vessels, signed at Brussels on 23rd September, 1910:⁽¹⁾
- (e) if the claim is for salvage;
- (f) if the claim is upon a mortgage or hypothecation of the ship arrested.

(2) If the Court within whose jurisdiction the ship was arrested has not jurisdiction to decide upon the merits, the bail or other security given in accordance with Article 5 to procure the release of the ship shall specifically provide that it is given as security for the satisfaction of any judgment which may eventually be pronounced by a Court having jurisdiction so to decide; and the Court or other appropriate judicial authority of the country in which the arrest is made shall fix the time within which the claimant shall bring an action before a Court having such jurisdiction.

(3) If the parties have agreed to submit the dispute to the jurisdiction of a particular Court other than that within whose jurisdiction the arrest was made or to arbitration, the Court or other appropriate judicial authority within whose jurisdiction the arrest was made may fix the time within which the claimant shall bring proceedings.

⁽¹⁾ "Treaty Series No. 4 (1913)," Cd. 6677.

(4) If, in any of the cases mentioned in the two preceding paragraphs, the action or proceedings are not brought within the time so fixed, the defendant may apply for the release of the ship or of the bail or other security.

(5) This article shall not apply in cases covered by the provisions of the revised Rhine Navigation Convention of 17 October, 1868.⁽²⁾

ARTICLE 8

(1) The provisions of this Convention shall apply to any vessel flying the flag of a Contracting State in the jurisdiction of any Contracting State.

(2) A ship flying the flag of a non-Contracting State may be arrested in the jurisdiction of any Contracting State in respect of any of the maritime claims enumerated in Article 1 or of any other claim for which the law of the Contracting State permits arrest.

(3) Nevertheless any Contracting State shall be entitled wholly or partly to exclude from the benefits of this Convention any Government of a non-Contracting State or any person who has not, at the time of the arrest, his habitual residence or principal place of business in one of the Contracting States.

(4) Nothing in this Convention shall modify or affect the rules of law in force in the respective Contracting States relating to the arrest of any ship within the jurisdiction of the State of her flag by a person who has his habitual residence or principal place of business in that State.

(5) When a maritime claim is asserted by a third party other than the original claimant, whether by subrogation, assignment or otherwise, such third party shall, for the purpose of this Convention, be deemed to have the same habitual residence or principal place of business as the original claimant.

ARTICLE 9

Nothing in this Convention shall be construed as creating a right of action, which, apart from the provisions of this Convention, would not arise under the law applied by the Court which had seisin of the case, nor as creating any maritime liens which do not exist under such law or under the Convention on Maritime Mortgages and Liens, if the latter is applicable.

ARTICLE 10

The High Contracting Parties may at the time of signature, deposit or ratification or accession, reserve—

(a) the right not to apply this Convention to the arrest of a ship for any of the claims enumerated in paragraphs (o) and (p) of Article 1, but to apply their domestic laws to such claims;

(b) the right not to apply the first paragraph of Article 3 to the arrest of a ship, within their jurisdiction, for claims set out in Article 1, paragraph (q).

ARTICLE 11

The High Contracting Parties undertake to submit to arbitration any disputes between States arising out of the interpretation or application of this Convention, but this shall be without prejudice to the obligations of those High Contracting Parties who have agreed to submit their disputes to the International Court of Justice.

(2) "British and Foreign State Papers," Volume 59, page 470.

ARTICLE 12

This Convention shall be open for signature by the States represented at the Ninth Diplomatic Conference on Maritime Law. The protocol of signature shall be drawn up through the good offices of the Belgian Ministry of Foreign Affairs.

ARTICLE 13

This Convention shall be ratified and the instruments of ratification shall be deposited with the Belgian Ministry of Foreign Affairs which shall notify all signatory and acceding States of the deposit of any such instruments.

ARTICLE 14

(a) This Convention shall come into force between the two States which first ratify it, six months after the date of the deposit of the second instrument of ratification.⁽³⁾

(b) This Convention shall come into force in respect of each signatory State which ratifies it after the deposit of the second instrument of ratification six months after the date of the deposit of the instrument of ratification of that State.

ARTICLE 15

Any State not represented at the Ninth Diplomatic Conference on Maritime Law may accede to this Convention.

The accession of any State shall be notified to the Belgian Ministry of Foreign Affairs which shall inform through diplomatic channels all signatory and acceding States of such notification.

The Convention shall come into force in respect of the acceding State six months after the date of the receipt of such notification but not before the Convention has come into force in accordance with the provisions of Article 14 (a).

ARTICLE 16

Any High Contracting Party may three years after the coming into force of this Convention in respect of such High Contracting Party or at any time thereafter request that a conference be convened in order to consider amendments to the Convention.

Any High Contracting Party proposing to avail itself of this right shall notify the Belgian Government which shall convene the conference within six months thereafter.

ARTICLE 17

Any High Contracting Party shall have the right to denounce this Convention at any time after the coming into force thereof in respect of such High Contracting Party. This denunciation shall take effect one year after the date on which notification thereof has been received by the Belgian Government which shall inform through diplomatic channels all the other High Contracting Parties of such notification.

ARTICLE 18

(a) Any High Contracting Party may at the time of its ratification of or accession to this Convention or at any time thereafter declare by written notification to the Belgian Ministry of Foreign Affairs that the Convention

⁽³⁾ The Convention entered into force between Spain and Egypt on February 24, 1956.

shall extend to any of the territories for whose international relations it is responsible. The Convention shall six months after the date of the receipt of such notification by the Belgian Ministry of Foreign Affairs extend to the territories named therein, but not before the date of the coming into force of the Convention in respect of such High Contracting Party.

(b) A High Contracting Party which has made a declaration under paragraph (a) of this Article extending the Convention to any territory for whose international relations it is responsible may at any time thereafter declare by notification given to the Belgian Ministry of Foreign Affairs that the Convention shall cease to extend to such territory and the Convention shall one year after the receipt of the notification by the Belgian Ministry of Foreign Affairs cease to extend thereto.

(c) The Belgian Ministry of Foreign Affairs shall inform through diplomatic channels all signatory and acceding States of any notification received by it under this Article.

[For signatures see pages 36-38]

Note: the Convention was ratified by the United Kingdom on March 18, 1959.