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INTERNATIONAL MARITIME LAW INSTITUTE

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THE ARREST OF SHIPS BILL NO. __ OF 2010

**A Legislation Drafting Project submitted in partial fulfillment of the
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1. INTRODUCTION

The maritime industry plays a central role in the economies of the maritime nations all over the world. In the past, great colonial powers such as United Kingdom (hereinafter referred to as UK), Spain and Portugal grounded their many conquests through the power of the sea. The Kenyan maritime industry has over the years played a significant role in the country's development and contributing immensely to the distinctive culture of the people of Kenya.

Kenya has a relatively long coastline measuring some 450 square kilometers and a long tradition in seafaring. Possessing this unique geographical position the country is making all efforts to reach its potential in international shipping.

In achieving this end Kenya is moving to fully exploit her maritime resources. Tourism is a key area in the country's economy, particularly in regards to cruise shipping and other related services, like convenient excursion package to tour the wild life sites for the cruise tourists.

Kenya currently has only one port, serving the entire East Africa region with an estimate population of 120 Million. The countries served by the Port of Mombasa are: The Republic of Uganda, Rwanda, Burundi, The Democratic Republic of Congo and Southern Sudan.

These States' reliance on the Port of Mombasa places the latter at a strategic position in the whole of the East Africa hence providing a great potential of growth of Kenya's maritime industry.

The Kenyan Government has initiated the preliminary processes of the construction of the second ultra modern port in the coastal town of Lamu.

Further, the port of Mombasa is getting a face lift with the dredging of the channel and the expansion of the Harbour. This will actively promote and

develop a cruise shipping sub-sector with Lamu as one the centres due to its historical and geographical advantages thus, leading to the increase in commercial shipping activities.

The main challenge has however been the lack of a coherent maritime policy and the failure to set up appropriate legal, institutional and administrative framework for the exploitation of these maritime activities. Because of this neglect, Kenya has failed to keep pace with technological developments at the international maritime arena. This state of affair has to be addressed if the Government is to realize the set agenda and spur a decent economic growth. Therefore, there is need for the Government to enact necessary legislations to further enhance the participation of Kenyans and foreign businessmen in the maritime industry in a safe and secure way.

Major international conventions in the maritime sector provide a rich source point when the Government is contemplating enactment of laws to govern the maritime industry. The Conventions cover areas of maritime trade; safety at sea; marine pollution; training and certification of seafarers; salvage at sea; preservation of the marine environment and maritime security.

Kenya and indeed the entire region of East and Central Africa rely on the commodity trade as the main economic development indicator. More than 90% of this commodity trade is transported via sea borne routes. The merchants involved in the trade have complained of insufficient protection against claims arising from the sea-leg transportation of their commodities. Therefore, if, Kenya is to bolster growth in the maritime sector then, there is need to provide security not only to the merchant's claims against shipowners but also to strike a balance in order to retain huge ship owning companies. The delicate balance would be achieved by providing a closed list of claims which forms the basis of the exercise of the right of arresting a ship.

The International Convention on the Arrest of Ships provides the mechanisms of dealing with claims arising from ships owned by companies and individuals based overseas.

What is Arrest of Ships?

In the middle Ages, the monarchs of both France and UK appointed Admirals who would administer justice under royal authority.¹ These courts were then bestowed with powers to compel the defendants to appear and contest the suits brought against them. The process permitted the jurisdiction to be exercised by the Admiralty Court in one or both of two modes: *in personam* and /or *in rem*.

Any proceedings brought to the Admiralty Court against a ship were actions *in rem*. On the other hand any proceedings brought to the Admiralty Court against the owner of a ship were actions *in personam*.

In the early twentieth century States were faced with the problem of shipowners evading to meet their obligation even when court decisions were pronounced against them. The arrest of ships provided the rationale whereby a claimant could proceed against the ship belonging to a person or entity liable for a maritime claim. The claimant would obtain a warrant of arrest against the *res* (the thing being the ship) and thus the claimant would obtain a security for the maritime claim in the form of restraining the ship (hereinafter referred to as the relevant ship) from sailing. This being an interim measure achieved two things:

- (a) Security for the release of the relevant ship from its owner;
- (b) The owner would avail himself in the participation in the suit proceedings.

The jurisdiction to proceed against the relevant ship is borne out of the fact that, that ship is in the territorial jurisdiction of State where the arrest is sought.

¹ Tetley, William; International Maritime and Admiralty Law, 3rd Edition, International Shipping Publication, Canada, 2002, pp.404.

In civil law countries claimants could only proceed against the shipowner by way of an action *in personam*. Civilian legal systems have never known the action *in rem*, largely because, historically, countries such as France never experienced the conflict between royal courts and other courts which left such deep a mark on English legal history.² Plaintiffs, including the maritime claimants, may, however, add to their *in personam* suits, a “saisie conservatoire”, in order to compel the defendant’s appearance and obtain the pre-judgment seizure of the defendant’s ship or other assets (including non-maritime property) within the court’s territorial jurisdiction,³ even where those assets are not the subject of the claim. This meant that the claimant could obtain a warrant of seizure of a ship for a non maritime claim leading to uncertainty in the shipping industry when ships called to ports in the civil law jurisdiction.

The International Community under the auspices of Comité Maritime International (hereinafter referred to as CMI) in 1930 initiated the process of formulating a convention of international application that would address these issues.

The committee members were unanimous that the arrest of the relevant ship, as the interim measure for obtaining security from the owner, could effectively address the litigant’s risk of having an award he could not execute notwithstanding where the cause of action arose.

The next issue was therefore to agree on the scope of the convention:

- (a) As to who would be entitled to arrest;
- (b) Which ships are subject to the arrest;
- (c) Where can the arrest be made;

² Tetley, William; *M.L.C.*, 2 Ed., 1998 at p.962-963.

³ *Ibid.* at p.963-964.

(d) What nature of claims would entitle the claimant to the right of arrest; and

(e) The condition for their release.

Negotiations for an Arrest of Ships Convention went on for more than 20 years. This was due to the fact that the States could not agree on what should be included in the maritime claims list, liability for wrongful arrest by the claimant and if another ship in the same ownership of the owner of the relevant ship, against which a maritime claim has arisen, could be arrested.

Finally during the Brussels Diplomatic Conference of 2nd to 10th May 1952 the International Convention Relating to the Arrest of Sea-Going Ships (hereinafter referred to as the 1952 Arrest Convention) was adopted.

The 1952 Arrest Convention

The 1952 Arrest Convention was a compilation or the Unification of Certain Rules Relating to the Arrest of Seagoing Ships that had existed in the individual States.

The claims which were subject to this Convention included maritime liens and a closed list of claims of maritime nature.

Under the Convention the power of government, public authorities and dock and harbour authorities, under national laws, to arrest, detain or prevent the sailing of ships in their jurisdiction is acknowledged and uninterfered.

The 1952 Arrest Convention also permits the arrest of a sister ship owned by a person liable for the maritime claim so long as at the time of initiating proceedings the person was the owner of that other ship; if the person liable is a demised owner then that other ship must have been owned by him at the commencement of the admiralty proceedings. One consequence of the sister

ship arrest provisions introduced by the 1952 Arrest Convention was the practice of shipowners registering ship companies to circumvent arrest *in rem*.

In the 1952 Arrest Convention the arresting court is seized of jurisdiction if the claimant has his habitual residence or principal place of business in that country of arrest, or if the claim arose from that country, or concerning a voyage when the arrest occurred, or if the claim arose out of a collision, or if the claim is for salvage, or if the claim is upon a mortgage or hypothec.

If the arresting court has no jurisdiction to hear the case on merit then the security must provide that it is given as security for the satisfaction of any judgment eventually pronounced by a competent court.

The 1952 Arrest Convention also requires the arresting courts to respect the choice of another court by the parties to the dispute but it should fix a time limit for the claimant to bring proceedings in that other court with competent jurisdiction.

The International Convention on Arrest of Ships, 1999

Pursuant to resolution A.405, the International Maritime Organization resolved to initiate the revision of the 1952 Arrest Convention.

The main areas considered for review were;

- (a) Article 1 which related to the definitions and particularly the maritime claims list,
- (b) Article 3 which dealt with the exercise of the right of arrest, and
- (c) Article 5 which concerned the right of rearrest and multiple arrests.

The new convention on the arrest of ships was deliberated in Geneva during the diplomatic conference in 1999 and on 12th March 1999 the International Convention on the Arrest of Ship (now referred as the 1999 Arrest Convention)

was adopted. The 1999 Arrest Convention is yet to come into force since it requires that it shall enter into force six months following the 10th State has expressed their consent to be bound by it.⁴

To date six States have signed while another six States have assented to the Convention.

In the 1999 Arrest Convention the word “arrest” as it appears in Article 1(2) denotes any detention or restriction from removal of the relevant ship by an order of the Court to secure a maritime claim. The arrest however, will not include the seizure of the relevant ship in execution or satisfaction of a judgment or other enforcement instrument.

In the Convention the word “Court” under Article 1(4) means any competent judicial authority of a State.

Explanation of the Salient Issues Contained in the 1999 Arrest Convention

(A) Article 1- DEFINITIONS

The 1999 Arrest Convention provides a more detailed list of the maritime claims. The claims incorporated include claims in respect of the cost of rehabilitating the environment polluted by the relevant ship, claims regarding removal of the wrecks, as well as claims in respect of insurance premiums.

Some of the maritime claims captured in the 1999 Arrest Convention include;

1(a) loss or damage caused by the operation of the ship;

In the 1952 Arrest Convention this claim appeared as “damage caused by any ship either in collision or otherwise”. The change was necessitated to bring this Convention in line with the 1993 Maritime Liens and Mortgages Convention (hereinafter referred to as 1993 MLM Convention), article 4(1) (e). The reason

⁴ The Geneva Arrest of Ships Convention, 1999, article 14(1).

for this change was to widen the scope of this maritime claim to any damage connected with the operation of the ship or, more precisely, shift the scope from the ship itself to the activities performed with the ship.

1(b) loss or damage caused by the operation of the ship including loss of life or personal injury;

This claim was reworded and retained notwithstanding the wide scope of paragraph 1 (a) of the 1999 Arrest Convention.

1(c) salvage operations or any salvage agreement, including, if applicable, special compensation relating to salvage operations in respect of a ship which by itself or its cargo threatened damage to the environment;

The description in the 1999 Arrest Convention provides clarity to the scope of a salvage claim. Previously the 1952 Arrest Convention did not provide for claims arising out of the salvage operation or salvage agreement.

1(d) damage or threat of damage by the ship to the environment, coastline or related interest; measures taken to prevent, minimize, or remove such damage; compensation for such damage; cost of reasonable measures of reinstatement of the environment actually undertaken or to be undertaken; loss incurred or likely to be incurred by third parties in connection with such damage; and damage, costs, or loss of a similar nature to those identified in this sub-paragraph (d).

This sub-paragraph was not captured in the 1952 Arrest Convention. This category of claim expands the description of environmental damage. The provision contained in sub-paragraph 1(d) is derived from Conventions such as United Nations Convention on the Law of Sea and International Liability Convention on Civil Liability for Oil Damage 1992 Pollution (hereinafter referred to as CLC 1992). Under this sub-paragraph environmental damage or threat of damage thereof must be caused by relevant ship. A threat of damage

can cause a loss if the threat hinders sea resort tourists and therefore covered under this Convention.

1(e) costs or expenses relating to the raising, removal, recovery, destruction or the rendering harmless of a ship which is sunk, wrecked, stranded or abandoned, including anything that is or has been on board such ship, and costs or expenses relating to the preservation of an abandoned ship and maintenance of its crew;

This maritime claim is an addition to the list as it did not appear in the 1952 Arrest Convention. This sub-paragraph will supplement the provisions available in the Nairobi Wreck Removal Convention and the Limitation of Liability for Maritime Claims Convention 1976 (hereinafter referred to as LLMC Convention 1976). It covers the costs of a Claimant for the removal of wrecks which possesses a navigational risk or environmental degradation.

1(f) any agreement relating to the use or hire of the ship, whether contained in a charter party or otherwise;

The only change from the 1952 Arrest Convention is that the charter party was not referred to as the type of contract, but as the document of the contract. The scope of this sub-paragraph is the same and its purpose is to cover any agreement relating to the use of the relevant ship, the purpose of which is not the carriage of goods, as any agreement relating to the carriage of goods is covered by the subsequent sub-paragraph (g).

1(g) any agreement relating to the carriage of goods or passengers on board the ship, whether contained in a charter party or otherwise;

This sub-paragraph now includes any agreement of carriage of goods (or passengers) on board the relevant ship. The provision refers to “the ship” meaning that the claim must be in relation to an identified ship. The words “or otherwise” refer to contracts of carriage of goods evidenced by bill of lading

and sea waybills and, for the carriage passengers by tickets or similar documents issued to the individual passenger.

1(h) loss of or damage to or in connection with goods (including luggage) carried on board the ship;

The wording of this sub-paragraph differs slightly from that of the corresponding provision in the 1952 Arrest Convention. The words “loss or damage to goods” have been replaced by “loss of or damage to or in connection with goods”. The loss in connection of goods may consist of economic loss and damage for delay. The word “baggage” has been replaced with the word “luggage”. The word “the” has been used in place of “any” to connote a particular ship.

1(i) general average;

It is certain that claims of general average come under this sub-paragraph but, it is however, doubtful that other claims arising out of acts of a general average are also covered. Probably the problem has no great practical importance, because these claims could fall under sub-paragraph (h).

1(j) towage;

Any type of towage, whether deep-sea or port towage is covered as well as claims such as damage done by the tug to the tow or vice versa, or breach of contract. This sub-paragraph refers to services rendered under towage contract and it is doubtful if other towage contract claims were covered.

1(k) pilotage;

It was proposed in the 1952 Arrest Convention that claims of pilotage services would entitle the pilots to arrest the ship. In this sub-paragraph as in sub-paragraph (j) above reference is made to the type of service giving rise to the claims, rather than the claims themselves.

During the negotiation of the 1999 Arrest Convention members were divided on whether to retain a closed list of the maritime claims or allow an open kind or striking a balance by adopting a mixed approach. This issue was settled at the diplomatic conference leading to the adoption of the Convention were the members settle for a closed list with only the claim under environmental damage getting a wider scope by adding the words “and damage, cost, or loss of a similar nature to those identified in this sub-paragraph (d)”⁵

It is worth noting that the provisions of the 1999 Arrest Convention do not apply to warships, naval or any State owned and or operated ships.

The 1999 Arrest Convention also contains an enhanced scope of jurisdiction for ships arrest but does not interfere with the powers of the public authority under domestic laws to detain or otherwise issuing any command to a ship within its jurisdiction.

(B) Article 2- POWERS OF ARREST

Under this article the relevant ship may be arrested for purposes of obtaining a security notwithstanding the technical jurisdictional issues. The arrest may be in respect of maritime claim(s) but not in respect of any other claim. Arrest of a ship may be effected against a ship registered under a State which is not a member of the Convention. This wider scope is provided under Article 8(2) of the 1999 Arrest Convention and which did not appear in the 1952 Arrest Convention.

(C) Article 3- EXERCISE OF RIGHT OF ARREST

From the definition of arrest in both the 1952 and the 1999 Arrest Conventions the detention of the relevant ship to secure a maritime claim would only be enforceable against the relevant ship if, the claim is related to that particular ship and the claim is against the owner of that ship.

⁵ 1999 Convention article 1(d)

Therefore the arrest is permissible if the person who owns the relevant ship at the time of occurrence of the maritime claim is liable for the claim and he is still the owner at the time the arrest is effected; likewise if the owner is a demised charterer.

The arrest is also permissible if the maritime claim is a claim based on a mortgage, hypothec or a charge on the same ship; arrest is also allowed if the maritime claim is a claim relating to the ownership or possession of the relevant ship.

The arrest is permissible of the relevant ship if the claim is one secured as a maritime lien against the owner, demised charterer, manager or operator but which is granted or arises under the law of the State where the arrest is sought.

The 1999 Arrest Convention provides in a more clear way that the national courts may order the arrest of a sister ship belonging to the shipowner or demise charterer of the ship to which the maritime claim relates and who were liable for the claim when it arose, if the said sister ship is within the territorial jurisdiction of the State where the claimant has instituted the suit.

The 1999 Arrest Convention also made permissible the arrest of a ship which is not owned by the person liable for the claim provided the national law grants the right to arrest in the execution of a judgment by way of judicial or forced sale of that ship. This right extends to the right to arrest in respects of claims against any charterer, and thus also to claims against the time and voyage charterer.⁶

⁶ See the comments on Art.3 (4) of the 1952 Convention in the Report of the Chairman of the CMI International Sub-Committee to the Lisbon Conference, Appendix VII, p. 561.

(D) Article 7- JURISDICTION ON THE MERIT OF THE CASE

The common law approach that arrest is a means of obtaining jurisdiction⁷ was adopted in the 1952 retained in the 1999 Arrest Convention. During the 1999 Diplomatic Conference leading to the adoption of the 1999 Arrest Convention jurisdiction on the merits was provided in two situations: when arrest is effected, and when security is given to obtain the release of the relevant ship from arrest.

The 1999 Arrest Convention provided for two exceptions to the general rule that the courts of the State where the arrest is made or security given have jurisdiction on the merits. They are:

(a) Where the parties have agreed to submit the dispute to a court of another State or to arbitration provided, however, that the agreement is valid and that the court chosen by the parties accepts jurisdiction

(b) The second exception, which does not exist in the 1952 Arrest Convention, is where the courts of the State in which the arrest is made or security given refuse to exercise jurisdiction. The exception will operate if the law of the State permits that refusal for reasons like *forum non conveniens*, or a court of another State accepts jurisdiction.

2. OBJECTIVE OF THE DRAFT

Kenya has twelve (12) Acts of Parliament which regulate the maritime industry and their related activities.

⁷ In England the admiralty jurisdiction of the High Court is established with reference to the nature of the claims and may be invoked by an action *in personam* or by an action *in rem* against the ship or property.....in the United States, pursuant to supplementary rule C of the Federal Rules of Civil Procedure, jurisdiction *in rem* is dependent either on seizure of the vessel by the process of Admiralty Court or upon the ability to seize her (see *Benedict on Admiralty* Vol. 2A, S51, p. 6-2).

However, there is no domestic legislation enacted in the field of arrest of ships and also many of the other fifty or so conventions related to maritime activities have not been domesticated into the Kenyan Statutes.

More specifically, from the conventions adopted under the auspices of the International Maritime Organization Kenya has ratified 12 conventions but most of these conventions have not been domesticated into the national laws although some provisions in the various conventions have found their way into the laws through legislations of general application and the recently enacted Merchant Shipping Act 2009.

Due to Kenya's strategic position as the gate way to East and Central Africa, with great potential of becoming a transit hub extending from north of Djibouti to south of Durban, export point for copper from Zambia, tea and coffee from Kenya and Uganda, there is need to review its legislations in areas of maritime trade.

It would therefore be appropriate if the Government of Kenya would through the prescribed process initiate the enactment of maritime laws within the framework of the various international conventions starting with the Arrest of Ships Legislation.

The advantages of this Arrest of Ships Bill to Kenya are:

- (a) Claimants may pursue the relevant ship by way of arrest on the basis of a listed maritime claim provided that the owner of the relevant ship is liable and that he is the owner of the relevant ship at the time of arrest or is the demised charterer;
- (b) The effect of arrest would be to procure the appearance of the offender and the claimant would also obtain adequate pre- judgment security;

(c) Notwithstanding that there is a jurisdiction clause in the contract between the parties, the claimant may still take out proceedings for the arrest of the relevant ship;

(d) The arrest warrant from another jurisdiction can be enforced in any State the relevant ship is physically located and also the provisions of the Bill shall apply to all ships within the admiralty jurisdiction except warship, naval auxiliary or other ships owned the State if only used for non-commercial activities by the Government;

(e) A claimant may bring proceedings for arrest in Kenya if the relevant ship is expected to enter its jurisdiction even if the claim arose in another State.

(f) A maritime claim having either been adjudicated in Kenya or its decision having been admitted to being from a competent judicial authority will accord the Claimant under the Bill the necessary process to secure the claim if the relevant ship is within admiralty jurisdiction.

The enactment of this Bill would place Kenya among nations with a predictable legal regime in area of arrest of ships. With the signing of the East African Community Common Market Protocol in July 2009, the country would stand to attract the capital from the expanded market with a domestic product of sixty billion dollars translating to increased trade and the realization of the country's vision 2030⁸. Further maritime ventures would be undertaken in a safer and efficient manner. The merchants and shipowners would also adhere to the protection of the marine environment while undertaking their activities.

3. LEGISLATIVE FRAMEWORK AND ENFORCEMENT

The draft Arrest of Ships Act may be presented as a private or government sponsored Bill. For the purpose of this part (government sponsored Bill) the

⁸ www.nation.co.ke, of January 12, 2010.

Minister in charge of Transport would prepare a Cabinet paper on the advantages of having this law. The report would also contain any changes necessary in the existing laws. The draft of the Arrest of Ships will also be attached. The Cabinet will then approve the proposal and the Minister will then forward the recommendations to the Attorney General.

The Attorney General will be expected to publish a Bill known as The Arrest of Ships Bill. He will then bring it to parliament with explanatory notes of the need for enactment of the Bill.

By virtue of the powers conferred to Parliament by Part 2 section 46(1) and (2) of the Constitution the legislatures are expected to deliberate the Bill and pass it.

The President of the Republic of Kenya is then required under section 46(3) assent to the Bill within 21 days of receipt of the Bill and notifies the Speaker of such assent.

If the Bill contains a self executing mechanism then, once the President of the Republic has assent to the Bill it shall become law upon being published in the Official Gazette. The other option would require the Minister in charge of Transport to place a notification in the Official Gazette of the commencement date (this is the option the writer proposes to be the executing mechanism for this Bill). The advantage of this is that the Minister would have time to put in place all the administrative machinery required for the operationalisation of the Act which would include the necessary coordination required with the Chief Justice on the implementation.

Once the Bill has been assented to it becomes an Act of Parliament and it is assigned a number, which shall be preceded by the word "Chapter" signifying its reference in the Laws of Kenya.

4. CONCLUSION

The enactment of this Bill will promote the industry as a predictable maritime sector with uniform legislative provisions on Arrest of Ships and hence attract maritime business.

The Government will be required to assent to the International Convention on Arrest of Ships, 1999 to signify that the State will be bound by the provisions of the treaty.

In order to facilitate operationalisation of this Bill the Government may wish to provide Admiralty Jurisdiction rules. These rules will provide for the administrative and procedural aspects for the arrest of ships and other auxiliary activities.

5. THE ARREST OF SHIPS BILL NO. __Of 2010

THE ARREST OF SHIPS BILL NO. __Of 2010

Date of assent:

Date of commencement: By Notice

ARRANGEMENT OF SECTIONS

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CHAPTER
THE ARREST OF SHIP

ACT of Parliament to make provisions for recent developments, achievement of uniformity and orderly seaborne trade, especially in the area of arrest of ships, to secure maritime claims and the matters connected therewith and incidental thereto

ENACTED by the Parliament of Kenya, as follows:

Part 1-PRELIMINARY

1. This Act may be cited as the Arrest of Ships Act, 2010 and shall come into force on such date as the Minister may, by notice in the Gazette, appoint. **Short title and commencement.**

2. (1) This Act shall apply to any ship within the jurisdiction of Kenya, whether or not that ship is flying the Kenyan flag. **Application.**

2. (2) Nothing in this Act shall apply to any warship, naval auxiliary or other ships owned, operated or used, for the time being, by any Government.

2. (3) Nothing in this Act shall affect:

a) the rights or powers vested in the Government or its departments, or in any public authority, or in any dock or harbour authority, or under any domestic law or regulation, to detain or otherwise prevent from sailing any ship within the Kenyan jurisdiction.

- b) the power of Government or Court to make orders affecting the totality of a debtor's assets.
- c) the limits of liability provided under any law applicable in Kenya when the arrest is effected.
- d) or modify the law applicable to the arrest of the ship if, the ship is within the jurisdiction of the Court provided the arrest is applied by a person whose habitual residence or principal place of business is within the jurisdiction of the Court, or by any other person who has acquired a claim from such person by subrogation, assignment or otherwise.

3. (1) In this Act:

Definition.

"Maritime Claim" means a claim arising out of one or more of the following-

- a) loss or damage caused by the operation of the ship;
- b) loss of life or personal injury occurring, whether on land or on water, in direct connection with the operation of the ship;
- c) salvage operations or any salvage agreement, including, if applicable, special compensation relating to salvage operations in respect of a ship which by itself or its cargo threatened damage to the environment;
- d) damage or threat of damage caused by the ship to

the environment, coastline or related interests; measures taken to prevent, minimize, or remove such damage; compensation for such damage; costs of reasonable measures of reinstatement of the environment actually undertaken or to be undertaken; loss incurred or likely to be incurred by third parties in connection with such damage; and damage, costs, or loss of a similar nature to those identified in this subparagraph (d);

- e) costs or expenses relating to the raising, removal, recovery, destruction or the rendering harmless of a ship which is sunk, wrecked, stranded or abandoned, including anything that is or has been on board such ship, and costs or expenses relating to the preservation of an abandoned ship and maintenance of its crew;
- f) any agreement relating to the use or hire of the ship, whether contained in a charter party or otherwise;
- g) any agreement relating to the carriage of goods or passengers on board the ship, whether contained in a charter party or otherwise;
- h) loss of or damage to or in connection with goods (including luggage) carried onboard the ship;
- i) general average;
- j) towage;

- k) pilotage;
- l) goods, materials, provisions, bunkers, equipment (including containers) supplied or services rendered to the ship for its operation, management, preservation or maintenance;
- m) construction, reconstruction, repair, converting or equipping of the ship;
- n) port, canal, dock, harbour and other waterway dues and charges;
- o) wages and other sums due to the master, officers and other members of the ship's complement in respect of their employment on the ship, including costs of repatriation and social insurance contributions payable on their behalf;
- p) disbursements incurred on behalf of the ship or its owners;
- q) insurance premiums (including mutual insurance calls) in respect of the ship, payable by or on behalf of the shipowner or demise charterer;
- r) any commissions, brokerages or agency fees payable in respect of the ship by or on behalf of the shipowner or demise charterer;
- s) any dispute as to ownership or possession of the ship;

- t) any dispute between co-owners of the ship as to the employment or earnings of the ship;
- u) a mortgage or a charge of the same nature on the ship;
- v) any dispute arising out of a contract for the sale of the ship.

"Arrest" means any detention or restriction on removal of a ship by order of a Court to secure a maritime claim, but does not include the seizure of a ship in execution or satisfaction of a judgment or other enforceable instrument.

"Person" means any individual or partnership or any public or private body, whether corporate or not, including a State or any of its constituent subdivisions.

"Claimant" means any person asserting a maritime claim.

"Court" means any competent judicial authority in Kenya.

3. (2) "Release" shall not mean or include any unlawful release or escape from arrest.

PART 2 - POWERS OF ARREST

4. A ship may be arrested or released from arrest only under the authority of the Court. **Who may order arrest.**
5. A ship may only be arrested in respect of a maritime claim but in respect of no other claim. **Reason for arrest.**
6. A ship may be arrested for the purpose of obtaining security notwithstanding that, by virtue of a jurisdiction clause or arbitration clause in any relevant contract, or otherwise, the maritime claim in respect of which the arrest is effected is to be adjudicated in another State, or is to be adjudicated subject to the law of another State. **Aim of arrest.**
7. Subject to the provisions of this Act, the procedure relating to the arrest of a ship or its release shall be governed by the Kenyan admiralty procedures. **Procedure of arrest.**

Part 3-EXERCISE OF RIGHT OF ARREST

8. Arrest is permissible of any ship in respect of which a maritime claim is asserted if: **Ships which arrest is permitted.**
- a) the person who owned the ship at the time when the maritime claim arose is liable for the claim and is owner of the ship when the arrest is effected; or
- b) the demise charterer of the ship at the time when the maritime claim arose is liable for the claim and is demise charterer or owner of the ship when the

arrest is effected; or

- c) the claim is based upon a mortgage or a charge of the same nature on the ship; or
- d) the claim relates to the ownership or possession of the ship; or
- e) the claim is against the owner, demise charterer, manager or operator of the ship and is secured by a maritime lien which is provided under any law applicable in Kenya.

9. Arrest is also permissible of any other ship or ships other than the relevant ship which, when the arrest is effected, is or are owned by the person who is liable for the maritime claim and who was, when the claim arose: **Sistership arrest.**

- (1) owner of the ship in respect of which the maritime claim arose; or
- (2) demise charterer, time charterer or voyage charterer of that ship;

Provided, that this section does not apply to claims in respect of ownership or possession of a ship.

10. Notwithstanding the provisions of sections 8 and 9 of this Act, the arrest of a ship which is not owned by the person liable for the claim shall be permissible in execution of a judgment in respect of claims **Arrest in judicial or forced sale.**

enforceable against that ship by judicial or forced sale of that ship.

PART 4-RELEASE FROM ARREST

11. A ship which has been arrested shall be released when sufficient security has been provided in a satisfactory form, save in cases in which a ship has been arrested in respect of any of the maritime claims enumerated in section 3 (1) (s) and (t). In such cases, the Court may permit the person in possession of the ship to continue trading the ship, upon such person providing sufficient security, or may otherwise deal with the operation of the ship during the period of the arrest. **Receipt of sufficient security.**
12. In the absence of agreement between the parties as to the sufficiency and form of the security, the Court shall determine its nature and the amount thereof, not exceeding the value of the arrested ship. **Absence of agreement.**
13. Any request for the ship to be released upon security being provided shall not be construed as an acknowledgement of liability or as a waiver of any defence or any right to limit liability. **Non acknowledgement of liability.**
14. If a ship has been arrested in another State and is not released although security in respect of that ship has been provided in Kenya in respect of the same claim, that security shall be ordered to be released on application to the Court. **Arrest in another State.**

15. If in another State the ship is released upon satisfactory security in respect of that ship being provided, any security provided in the Court in respect of the same claim shall be ordered to be released to the extent that the total amount of security provided in the two States exceeds:
- (1) the claim for which the ship has been arrested, or
- (2) the value of the ship, whichever is the lower. Such release shall, however, not be ordered unless the security provided in the other State will actually be available to the claimant and will be freely transferable.
16. Where, pursuant to sections 11 and 19 of this Act, security has been provided, the person providing such security may at any time apply to the Court to have that security reduced, modified, or cancelled.

**Secure
satisfactory
security.**

**Application to
vary/cancel
security.**

PART 5-RIGHT OF RE-ARREST AND MULTIPLE ARREST

17. If a ship has already been arrested and released subject to security in respect of that ship having been provided to secure a maritime claim, that ship shall not be re-arrested or arrested in respect of the same maritime claim unless:
- (1) the nature or amount of the security in respect of that ship already provided in respect of the same

**Re-arrest and
multiple
arrests.**

claim is inadequate, on condition that the aggregate amount of security may not exceed the value of the ship; or

(2) the person who has already provided the security is not, or is unlikely to be, able to fulfill some or all of that person's obligations; or

(3) the ship arrested or the security previously provided was released either:

a) upon the application or with the consent of the claimant acting on reasonable grounds, or

b) because the claimant could not by taking reasonable steps prevent the release.

18. Any other ship which would otherwise be subject to arrest in respect of the same maritime claim shall not be arrested unless: **Circumstances warranting re-arrest.**

(1) the nature or amount of the security already provided in respect of the same claim is inadequate; or

(2) the provisions of section 17 subsection (2) and (3) of this Act are applicable.

PART 6-PROTECTION OF OWNERS AND DEMISE CHARTERERS OF ARRESTED SHIPS

19. The Court may as a condition of the arrest of a ship, or **Security for**

of permitting an arrest already effected to be maintained, impose upon the claimant who seeks to arrest or who has procured the arrest of the ship the obligation to provide security of a kind and for an amount, and upon such terms, as may be determined by that Court for any loss which may be incurred by the defendant as a result of the arrest, and for which the claimant may be found liable, including but not restricted to such loss or damage as may be incurred by that defendant in consequence of:

- (1) the arrest having been wrongful or unjustified; or
- (2) excessive security having been demanded and provided.

20. The Court shall have jurisdiction to determine the extent of the liability, if any, of the claimant for loss or damage caused by the arrest of a ship, including but not restricted to such loss or damage as may be caused in consequence of:

- (1) the arrest having been wrongful or unjustified, or
- (2) excessive security having been demanded and provided.

21. The liability, if any, of the claimant in accordance with section 20 of this Act shall be determined in accordance with the laws applicable in Kenya.

Court to determine extend of liability.

Applicable provisions.

22. If a Court in another State or an arbitral tribunal is to determine the merits of the case in accordance with the provisions of Part 7 of this Act, then proceedings relating to the liability of the claimant in accordance with section 20 of this Act may be stayed pending that decision. **Staying of decision.**

PART 7-JURISDICTION ON THE MERITS OF THE CASE

23. The Court shall have jurisdiction to determine the case upon its merits, unless the parties validly agree or have validly agreed to submit the dispute to a Court of another State which accepts jurisdiction, or to arbitration. **Courts' jurisdiction.**
24. Notwithstanding the provisions of section 23 of this Act, the Court may refuse to exercise that jurisdiction where that refusal is permitted by any law applicable in Kenya and a Court of another State accepts jurisdiction. **Inappropriate forum.**
25. If an arrest has been effected or security provided to obtain the release of the ship in the Court which: **Refusal of jurisdiction.**
- (1) does not have jurisdiction to determine the case upon its merits; or
- (2) has refused to exercise jurisdiction in

accordance with the provisions of section 24 of this Act, such Court may, and upon request shall, order a period of time within which the claimant shall bring proceedings before a competent Court or arbitral tribunal.

26. If proceedings are not brought within the period of **Limitation** time ordered in accordance with section 25 of this Act **period.** then the ship arrested or the security provided shall, upon request, be ordered to be released.
27. If proceedings are brought within the period of time **Enforcement of** ordered in accordance with section 25 of this Act, or if **decisions of** proceedings before a competent Court or arbitral **court.** tribunal in another State are brought in the absence of such order, any final decision resulting therefrom shall be recognized and given effect with respect to the arrested ship or to the security provided in order to obtain its release, on condition that:
- (1) the defendant has been given reasonable notice of such proceedings and a reasonable opportunity to present the case for the defence; and
 - (2) such recognition is not against public policy.
28. Nothing contained in the provisions of section 27 of **Effect of** this Act shall restrict any further effect given to a **foreign** foreign judgment or arbitral award if, the arrest of the **decisions.**

ship was effected or security provided to obtain its release was under the order of the Court.

PART 8-NON-CREATION OF MARITIME LIENS

- 29.** Nothing in this Act shall be construed as creating a **Maritime liens.** maritime lien.

6. Bibliography

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