

LAWS OF THE GAMBIA

MERCHANT SHIPPING (ADMIRALTY JURISDICTION) ACT NO 9 OF 1997

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**The Gambia**

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## **DRAFTING INSTRUCTIONS**

As a new and comprehensive Merchant Shipping Act is being prepared for the Gambia to review and update all the maritime legislation in a single code, there is need to provide the framework and the machinery to be able to effectively enforce all the provisions therein.

At present there are scattered legislations addressing different matters based on the English Merchant Shipping Act 1894.

At the same time, a new Maritime Administration is being set up to specifically deal with matters arising and dealing with the new Merchant Shipping Act. Implementation per se is not the main stumbling block on the way but the effective enforcement of the laws.

There is need therefore to complement the efforts of the new Maritime Administration by legislating for the arrest of sea going ships and granting the national courts jurisdiction to hear and determine all cases on arrest of ships. This is vital in order to create a conducive atmosphere for shipowners and claimants who are very keen in ascertaining where their interest is secured before venturing into any investment.

As at 1994, the Gambia is not a party to the Arrest Convention of 1952 but being an English speaking and former colony of the United Kingdom, has the advantage of incorporating many of the English legislations.

It is therefore proposed to incorporate the Admiralty Jurisdiction of the High Court of England under the Supreme Court Act 1981 into the new Merchant Shipping Act of the Gambia, for the following reasons:-

1. The Arrest Convention of 1952 has been incorporated into English law by the enactment of the Administration of Justice Act 1956. The provisions of this Act have been tested and the problems and difficulties identified and the Admiralty jurisdiction of the High Court was therefore intended to remove the difficulties and bring the Act in line with international obligation of the UK being a party to the Arrest Convention.

The Gambia therefore has the benefit of incorporating an Act which may be said to be refined and easy to apply.

2. The incorporation of the Admiralty jurisdiction of the English High Court will enable the Gambia to implement the provisions of the Arrest Convention of 1952 without being a party to it. It must be mentioned that the nature of international shipping now is such that no country can go it alone without encountering difficulties or no country can isolate itself in the modern world of shipping since the bulk of all imports and exports to and from the Gambia

are done by sea. The Gambia therefore cannot be left alone but must act in conformity with the modern day international shipping regulations and standards.

It is therefore strongly recommended for the Gambia to accede to the International Convention relation to the Arrest of Seagoing Vessels, Brussels 1952 as soon as practicable. This has a considerable effect on the Gambia's position in international shipping and also under the Arrest Convention itself.

3. The decision of English courts is still cited in the Gambia as judicial authority and it will be advantageous for the Gambia to therefore follow the English practice rather than to enact the provisions of the 1952 Arrest Convention which may be difficult to harmonize with the Admiralty jurisdiction of the English High Court.

The courts in the Gambia can therefore follow the decisions of the English courts which have already been tested and well settled at the moment with all the inconsistencies and controversies removed.

4. The Admiralty jurisdiction will also be an added incentive to the enforcement powers of the new Maritime Administration who will in the end rely on the national courts to enforce any claim against any ship within the ports of the Gambia. The same powers of arrest will be extended to private claimants who may not be within the jurisdiction of the Gambia but can arrest and enforce any claim

against any vessel within the Gambian waters. In order to further secure creditors and mortgagees, ship financiers, etc. they should be convinced that they can arrest and enforce their security in any of the contracting state parties to the 1952 Brussels Convention.

5. Uniformity of laws is a major concern of the IMO and the Gambia will therefore close that gap once it accedes to the 1952 Arrest Convention and incorporate it into national law through the Admiralty jurisdiction of the English High Court.

The Supreme Court Act 1981, therefore provided an opportunity to bring together the framework of the Admiralty jurisdiction to meet international obligations and to make the whole a little less complex.

1. The Simplicity of the 1981 Admiralty Jurisdiction of The Supreme Court

The Supreme Court Act 1981 (hereinafter referred to as "the Act") is simplified in that it is more clearly drafted than the 1956 Administration of Justice Act (hereinafter referred to as the "1956 Act"). Nowhere in either statute are the rules for instituting an action in rem or an action in personam set out. The legal framework relating to jurisdiction of English courts is to be found partly in judicial development and partly in the Rules of the Supreme Court, particularly Orders 10, 11 and 75.

The Arrest Convention is brought into English law through providing jurisdiction on the merits for the claims which under the Convention are susceptible to arrest. In English law, because of the provisions relating to jurisdiction, consequences of security necessarily follow but are left to be gleaned from judicial decisions. In these respects a more comprehensive statute is needed dealing with maritime claims and their enforcement.

## 2. Bringing the Act up to Date

Various judicial pronouncements have been made since 1956 which have been reflected in the 1981 Act invoking the Admiralty jurisdiction such as issue and service of writ in rem. The 1956 Act used the phrase:

"The Admiralty jurisdiction .... may be ..... invoked"

in setting but the rules governing the claims in respect of which and the circumstances in which an action in personam would lie (Section 3). This caused a little judicial inconsistency in that in 1967 in the "**Monica S. (1968) P. 741**" Brandon J, linked the invoking of the Admiralty jurisdiction to the bringing of an action in rem which in turn he believed meant the issue of a writ in rem. As a result he held that a sale of a ship after issue of a writ did not defeat the claim.

In 1977 in "**The Berny (1970) QB 80**", Brandon J, faced with the argument that if the Admiralty jurisdiction was not invoked by the issue of the writ a plaintiff could issue only one writ, held that the jurisdiction

was not invoked until the service of the writ.

The Act of 1981 therefore omitted the "invocation" which created the inconsistency and employs the more simple phrase in section 21 of the 1981 Act that in respect of specified claims "an action in rem or an action in personam may be brought".

As a result it is clear that the reference to the bringing of actions in rem and in personam there are only two critical points of time - "when the action is brought" and "when the cause of action arose".

### 3. Damage Received by a Ship

The Act removes this ground of claim from those which may be enforced by an action in rem reflecting the views of the House of Lords in 1976 in "**The Jade (1976) 2 LLR.1**". In that case Lord Diplock pointed out first that this ground does not appear in the Arrest Convention 1952, as a maritime claim for which a ship may be arrested and secondly the 1956 Act as drafted permitted an action in rem only in connection with the ship in respect of which the claim arose, i.e. the ship receiving the damage. This would mean that where the claim was based on damage received by a ship a claimant could only arrest his own ship under "**Section 20(2)(d)**".

Such a ground can only be the basis on a claim in personam.

Whether or not there are policy grounds in favour of an action in rem for damage received by a ship, particularly in respect of a sister ship



action, it is clear that the English law is at par with the Convention.

4. Enacting the Arrest Convention

Under the 1956 Act, claims listed as within the Admiralty jurisdiction could all be enforced by an action in rem or an action in personam. As to the action in rem, they were divided into three categories under Section 3(2), (3) and (4).

1. Maritime claims.

2. Claims such as ownership, involving co-ownership, mortgage and forfeiture; and

3. All claims save those in (2) above not qualifying for or not enforced through a maritime lien. The Supreme Court Act 1981 adopts identical categories with the exception of damage received by a ship. But as to the third category there are some important amendments.

a) In relation to the ship in respect of which the claim arises,  
and

b) "Sister" ships.

5. The Ship in Respect of Which the Claim Arises

The requirement in the 1956 Act that to bring an action in rem against a ship, the beneficial owner of the ship at the time of bringing the action must, if sued, be liable in personam, is hardly consistent with the pattern of the Arrest Convention. The Convention makes no mention of liability in personam at the time the action is brought nor, in relation to the ship in respect of which the claim arose, when the cause of action arose. In effect, it provides that the ship may be arrested whoever is liable on the claim. In so providing, the Convention is not thereby creating any foundation for jurisdiction on the merits nor is it creating any rule dictating the effect of the arrest as security for the claim as against other creditors.

In imposing requirements relating to liability in personam the 1956 Act was maintaining the general English law rule that an action in rem requires liability of the owner in personam. As distinct from maritime liens, the action in rem created a security only from the beginning of the action, it followed that the owner must be liable in personam both at the date of the claim arising and at the date of issue of the writ. It was the requirement of "beneficial ownership" at the date of bringing the action that in practice maintained the rule requiring the owner to be liable in personam.

It is however, not a Convention rule in regard to the ship in respect of which the claim arose.

### Removal of the Need for the Owners Liability

The proposed changes was to remove any specific requirement of liability in personam from the ability to bring an action in rem against the ship in respect of which the claim arose.

### Extension to Demise Chartered Ships

The 1956 Act linked the action to liability of the user and the owner in personam. For an action to lien it was necessary if the action were brought against the ship in respect of which the claim arose that:

- a) the "owner, charterer or person in possession or control of the ship" when the cause of action arose would, if sued, be liable in personam.
- b) at the time the action was brought, that the ship was "beneficially owned as respects all the shares therein" by the person who fitted the above description.

In 1970 in "**The Andrea Ursula (1973) QB 265**", Brandon J, held that demise charterers were beneficial owners within the meaning of the statutory requirements but in 1977 in "**The I Congreso Del Partido (1978) QB 500**" Robert Goff J, held that "beneficially owned" meant what it said, i.e. equitable ownership whether or not accompanied by legal ownership and in 1979 in "**the Father Thames (1979) 2 LLR 364**" Sheen J, agreed that demise

charterers did not qualify as beneficial owners.

The pre-requisite that the person liable in personam should be the beneficial owner at the time that the action was brought was clearly contrary to the Arrest Convention so far as the ability to arrest is 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 at the time the action is brought.

The 1981 Act has therefore brought us one step closer to the uniformity professed.

**B. "SISTER" SHIPS**

The Arrest Convention provides in Article 3(i) that "subject to the provisions of paragraph (4) of this Article and Article 10, a claimant may arrest the ship in respect of which the claim arose" ("the particular ship") "or any other ship which is owned by the person who was, at the time the maritime claim arose the owner of the particular ship .....".

Article 3(4) 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".

It was clear that, as with the Convention, an action could be brought against ships owned by the owner of the ship in respect of which the claim arose. But it was not clear whether an action could be against ships owned by charterers liable in respect of a claim, or whether such remedy was available against ships owned by demise charterers it extended to ships owned by time and voyage charterers.

In "**The Span Terza (1982) 1 LLR 225**" the question whether in an action by shipowners against time charterers of their ship the plaintiffs could arrest a ship owned by the time charterers. It seems clear that under section 21(4) of the Supreme Court Act, an action in rem will lie against ships owned by "charterers" of or those in possession or control of the ship in respect of which the claim arose. Had the defendants been demise charterers, the arrest could stand. Re-drafting has therefore cured the ambiguity.

Does "Charterer" include Voyage and Time Charter?"

Although in "**the Maritime Trader (1981) 2 LLR 153**", the defendant was a time charterer the issue was decided on the basis that the 1956 Act did not permit ships owned by defendant charterers to be arrested. In the *Span Terza*, the majority of the Court of Appeal thought that "charterer" in the relevant provision of the 1956 Act included all types of charterers. But section 21(4) of the Supreme Court Act confined the word "charter" by specifically referring to "charter by demise". The majority view in this case seems to give substance to the Convention as well as accord with a policy of making ships owned by those liable for maritime claims available to claimants. It may be arguable that a ship under time or voyage charter should not be available to a claimant who has a claim against the charterers, but if this is so, it seems sensible to make ships owned by such charterers available to arrest in the enforcing the claim.

Having pointed out all the difficulties in both the Arrest Convention of 1952 and the Administration of Justice Act 1956, it would be better and convenient for the Gambia to adopt and incorporate the Admiralty jurisdiction of the Supreme Court Act 1981 to ensure conformity and uniformity with the judicial pronouncements of the English courts.

It is also recommended for the Gambia to accede to the Arrest Convention of 1952 in order to share the advantages and benefits as a contracting

party with the rest of the international community.

REFERENCE: Jackson D.C. - "Admiralty Jurisdiction - The Supreme Court Act 1981"  
Lloyds Maritime and Commercial Law Quarterly 1982, P. 236

**MERCHANT SHIPPING (ADMIRALTY JURISDICTION) ACT**

**NO 9 OF 1997**

**AN ACT TO IMPLEMENT THE PROVISIONS OF THE SUPREME COURT  
(ADMIRALTY JURISDICTION) ACT 1981**

BE IT ENACTED BY THE HOUSE OF ASSEMBLY OF THE GAMBIA AS FOLLOWS:-

**PART I - PRELIMINARY**

Section 1 **Short Title and Commencement**

This Act may be cited as the Merchant Shipping (Admiralty Jurisdiction) Act and shall come into force as soon as enacted into law by the House of Assembly.

Section 2 **Interpretation**

1. "Action in Personam" means an action seeking judgment against a person involving his personal rights and based on jurisdiction over the person.
2. "Action in Rem" means an action instituted against the thing or property within the jurisdiction of the court. "Gambian Waters" refers to the territorial and inland waters of the Gambia, including the River Gambia and tributaries thereof, or creeks directly or indirectly opening into or adjacent thereto, within the limits of the Gambia.
3. "Charges" means any charges with the exception of light dues, local light dues and any other charges in respect of light houses, buoys or beacons and of charges in respect of pilotage.



4. "Collision Regulations" means the International Regulations for preventing collisions at sea 1972 as may be amended from time to time.
5. "The Court" means the court having jurisdiction to hear matters under the Merchant Shipping Act in force in the Gambia.
6. "Goods" includes baggages, animals (whether alive or dead) and all other moveable property of any kind whatsoever.
7. "Government" means the Government of the Republic of the Gambia.
8. "Master" includes every person (except a pilot) having command or charge of a ship.
9. "Merchant Shipping Act" means the Merchant Shipping Act in force in the Gambia.
10. "Maritime Lien" means a privileged claim on a vessel for some service rendered to it to facilitate its use in navigation or a special property right in a ship given to a creditor by law as security for a debt or claim

subsisting from the moment the debt arises with right to have the ship sold and debt paid out of the proceeds.

11. "Pilotage" includes any description of a vessel used in navigation.

12. "Port" means a port declared under Section 4 of the Ports Act No 21 of 1977.

13. "Towage" means the act of service of towing ships and vessels usually by means of a small vessel called a "tug" and includes the charge for such service.

"Towage" and "Pilotage" in relation to an aircraft means towage and pilotage while the aircraft is water-borne.

14. "Ship" includes any description of a vessel used in navigation.

## **PART II - ADMIRALTY JURISDICTION**

### Section 3 Admiralty Jurisdiction of the Court

(1) The Admiralty jurisdiction of the court shall be as follows:

a) Jurisdiction to hear and determine any of the questions and claims mentioned in sub-section (2);

- b) Jurisdiction in relation to any of the proceedings mentioned in sub-section (3);
- c) Any other admiralty jurisdiction which it had immediately before the commencement of this Act;  
and
- d) Any jurisdiction connected with ships or aircraft which is vested in the court apart from this section and is for the time being by rules of the court made or coming into force after the commencement of this Act directed by the rules to be exercised by the court.

2. The questions and claims referred to in sub-section (1) (a) are:-

- a) any claim to the possession or ownership of a ship or to the ownership of any share therein;
- b) any question arising between the co-owners of a ship as to possession, employment or earnings of that ship;

- c) any claim in respect of a mortgage of or charge on a ship or any share therein;
- d) any claim for damage received by a ship;
- e) any claim for damage done by a ship;
- f) any claim for loss of life or personal injury sustained in consequence of any defect in a ship or in her apparel or equipment or in consequence of the wrongful act, neglect or default of:
  - i) the owners, charterers or persons in possession or control of a ship; or
  - ii) the master or crew of a ship, or any other person for whose wrongful acts, neglects or defaults the owners, charterers or persons in possession or control of a ship are responsible;  
being an act, neglect or default in the navigation or management of the ship, in the loading, carriage or discharge of goods on, in or from the ship, or in the embarkation, carriage or disembarkation of persons on, in or from the ship;

- g) any claim for loss of or damage to goods carried in a ship;
- h) any claim arising out of any agreement relating to the carriage of goods in a ship or to the use or hire of a ship;
- j) any claim in the nature of salvage (including any claim arising by virtue of the application, by or under section 55 of the Shipping Casualty Act No 20 of 1950 of the law relating to salvage to a vessel, and her apparel and cargo)
- k) any claim in the nature of towage in respect of a ship or an aircraft;
- l) any claim in the nature of pilotage in respect of a ship or an aircraft;
- m) any claim in respect of goods or materials supplied to a ship for her operation or maintenance;
- n) any claim in respect of the construction, repair or equipment of a ship or in respect of dock

charges or dues;

- o) any claim by a master or member of a crew of a ship for wages (including any sum allotted out of wages or adjudged by a superintendent to be due by way of wages);
- p) any claim by a master, shipper, charterer or agent in respect of disbursements made on account of a ship;
- q) any claim arising out of an act which is or is claimed to be general average act
- r) any claim arising out of bottomry;
- s) any claim for the forfeiture or condemnation of a ship or of goods which are being or have been carried, or have been attempted to be carried, in a ship, or for the restoration of a ship or any such goods after seizure, or for droits of Admiralty.

3. The proceedings referred to in sub-section (1) (b) are:-

- a) any application to the court under the Merchant

Shipping Act in force in the Gambia other than an application for the appointment of a person to act as a substitute for a person incapable of acting;

b) any action to enforce a claim for damages, loss of life or personal injury arising out of:

i) a collision between ships; or

ii) the carrying out of or omission to carry out a manoeuvre in the case of one or more of two or more ships; or

iii) non-compliance, on the part of one or more or two or more ships with the collision regulations

c) any action by shipowners or other persons under the Merchant Shipping Act in force in the Gambia for the limitation of the amount of their liability in connection with a ship or other property

4. The jurisdiction of the court under sub-section (2) (d) includes power to settle any account outstanding and outstanding and unsettled between the parties in

relation to the ship, and to direct that the ship, or any share thereof shall be sold and to make such other order as the court thinks fit.

5. Sub-section (2)(e) extends to:-

a) any claim in respect of a liability incurred under the Merchant Shipping (Oil Pollution) Act in force in the Gambia;

b) any claim in respect of a liability falling on the International Oil Pollution Compensation Fund under the Merchant Shipping Act in force in the Gambia;

c) the reference in sub-section (2)(j) to claims in the nature of salvage includes a reference to such claims for services rendered in saving life from a ship or an aircraft or in preserving cargo, apparel or wreck under the Merchant Shipping Act in force in the Gambia.

7. The preceding provisions of this section shall apply:-

a) in relation to all ships or aircraft, whether Gambian or not and whether registered or not and



wherever the residence or domicile of their owners may be;

b) in relation to all claims, where ever arising (including in the case of cargo or wreck salvage claims in respect of cargo or wreck found on land) and;

c) so far as they relate to mortgages and charges to all mortgages and charges, whether registered or not and whether legal or equitable, including mortgages and charges created under foreign law;

Provided that nothing in this sub-section shall be construed as extending the cases in which money or property is recoverable under any of the provisions of the Merchant Shipping Act in force in the Gambia.

#### Section 4 Mode of Exercise of Admiralty Jurisdiction

1. Subject to section 5, an action in personam may be brought in the court in all cases within the Admiralty jurisdiction of the court.

2. In the case of any such claim as is mentioned in Section 3(2) (a), (c) or (s) or any such question as is mentioned in section 3(2)(b), an action in rem may be

brought in the court against the ship or property in connection with which the claim or question arises.

3. In any case in which there is a maritime lien or other charge on any ship, aircraft or other property for the amount claimed, an action in rem may be brought in the court against that ship, aircraft or property.

4. 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, an action in rem may (whether or not the claim gives rise to a maritime lien on that ship) be brought in the 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.

5. In the case of a claim in the nature of towage or pilotage in respect of an aircraft, an action in rem may be brought in the court against that aircraft if, at the time when the action is brought, it is beneficially owned by the person who would be liable on the claim in an action in personam.
6. Where, in the exercise of its Admiralty jurisdiction, the court orders any ship, aircraft or other property to be sold, the court shall have jurisdiction to hear and determine any question arising as to the title to the proceeds of sale
7. In determining for the purposes of sub-sections (4) and (5) whether a person would be liable on a claim in an action in personam it shall be assumed that he has his habitual residence or a place or business within the Gambia

8. Where, as regards any such claim as is mentioned in section (3)(2) (e) to (r), a ship has been served with a writ or arrested in an action in rem brought to enforce that claim, no other ship may be served with a writ or arrested in that or any other action in rem brought to enforce that claim, but this sub-section does not prevent the issue, in respect of any one such claim, a writ naming more than one ship or of two or more writs each naming a different ship.

Section 5 Restrictions on Actions in Personam in Collision and Other Similar Matters.

1. This section applies to any claim for damage, loss of life or personal injury arising out of:-
  - a) a collision between ships; or
  - b) the carrying out of, or omission to carry out, a manoeuvre in the case of one or more or two or more ships; or
  - c) non-compliance on the part of one or more or two or more ships, with the collision regulations.
2. The court shall not entertain any action in personam to enforce a claim to which this section applies unless:-

a) the defendant has his habitual residence or place of business in the Gambia; or

b) the cause of action arose within inland waters of the Gambia; or

c) an action arising out of the same incident or series of incidents is proceeding in the court or has been heard and determined in the court.

3. The court shall not entertain any action in personam to enforce a claim to which this section applies in any proceedings previously brought by the plaintiff in any court outside the Gambia against the same defendant in respect of the same incident or series of incidents have been discontinued or otherwise come to an end.

4. Sub-sections (2) and (3) shall apply to counterclaims (except counterclaims in proceedings arising out of the same incident or series of incidents) as they apply to actions, the references to the plaintiff and the defendant being for this purpose read as references to the plaintiff on the counterclaim and the defendant to

the counterclaim respectively.

5. Sub-sections (2) and (3) shall not apply to any action or counterclaim if the defendant thereto submits or has agreed to submit to the jurisdiction of the court.
  
6. Subject to the provisions of sub-section (3) the court shall have jurisdiction to entertain an action in personam to enforce a claim to which this section applies whenever any of the conditions specified in sub-section (2) (a) to (c) is satisfied, and the rules of the court relating to the service of process outside the jurisdiction as may appear to the Rules Committee to be appropriate having regard to the provisions of this sub-section.
  
7. Nothing in this section shall prevent an action which is brought in accordance with the provisions of this section in the court being transferred in accordance with the enactments in that behalf, in some other court.
  
8. For the avoidance of doubt it is hereby declared that this section applies in relation to the jurisdiction of the court not being Admiralty jurisdiction, as well as in relation to its Admiralty jurisdiction.

**PART III - SUPPLEMENTARY**

Section 6 Supplementary Provisions as to Admiralty Jurisdiction

1. Nothing in this Act shall:-
  - a) be construed as limiting the jurisdiction of the court to refuse to entertain an action for wages by the master or a member of the crew of a ship, not being a Gambian ship;
  - b) affect the power of a receiver of wreck to detain a ship in respect of a salvage claim under the provisions of section 62 of the Shipping Casualty Act No 12 of 1950, or any amendment thereto; or
  - c) authorise proceedings in rem in respect of any claim against the state, or the arrest, detention or sale of any Government ships or any cargo or other property belonging to the state.