

DRAFT LEGISLATION RESPECTING
MARITIME CLAIMS AND ARREST OF SHIPS
(PAKISTAN MERCHANT SHIPPING ACT)

A MARITIME LEGISLATION DRAFTING PROJECT SUBMITTED IN
PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE
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DRAFTING INSTRUCTIONS

1. Background

The existing Merchant Shipping Act of Pakistan dates back to 1923, which in essence is based on the British Merchant Shipping Act, 1894. The 1923 Act has, over the years, been amended and revised several times. In recent years with the development of international maritime law through numerous conventions, it has become necessary to consolidate and update the shipping legislation of Pakistan.

In 1990 Cabinet adopted a policy to introduce a comprehensive merchant shipping code and to that end created The Merchant Shipping Legislative Committee within the Ministry of Communications (Ports and Shipping Wing) to prepare a draft Merchant Shipping Bill. The draft was produced in 1990 and is now in the process of being considered by the Government.

Although the draft bill incorporates most of the major maritime conventions, some crucial aspects of shipping law, namely, maritime claims and arrest of ships have not yet being addressed in the bill. Cabinet has now adopted a definitive policy on these two matters. In light of recommendations made by experts and interest groups you are therefore instructed to prepare draft legislation on the topic of

Maritime Claims and Arrest of Ships as set forth in these instructions. You are to note that Government has decided to accede to the (i) International Convention For The Unification of Certain Rules of Law with Respect to Collision Between Vessels, 1910 (1910 Convention) and (ii) International Convention For The Unification of Certain Rules Relating To The Arrest of Sea-Going Ships, Brussels, 1952 (1952 Convention) and to adopt the provisions of The United Nations Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages, 1967 Convention as appropriate even though it is not yet in force.

As back ground you should be aware that maritime claims basically fall into two categories. One is known as the maritime lien; an inchoate right which travels with the res and is perfected or crystallized by proceedings against the res itself known in admiralty law as an action in rem. The other category is known as the statutory lien or the statutory right of action in rem. Although the concept of a maritime lien has its origin in the civil law of early European maritime codes, much of the jurisprudence in this area of the law has been developed by the English Courts. However, the case law is full of inconsistencies. Furthermore, there are sharp differences between the English, American and European Continental laws.

As early as in 1926, the world maritime community realised that uniformity was needed in this area of maritime law. Two attempts were made to achieve this through international convention. The 1967 Convention was created to update an earlier 1926 Convention, but did not come into force due to the lack of requisite ratification and is now under joint review by IMO and UNCTAD. It is the intention of the Pakistan Government to align its law in this area with that which is being developed internationally.

Historically the so-called maritime claims known as statutory liens, first appeared in the 1910 Convention. The Parliament of the United Kingdom first incorporated that Convention into The Administration of Justice Act. At present the provisions of the Convention are incorporated in the Supreme Court Act, 1981.

It should be noted that arrest of a res in admiralty law is a remedial process which affords a claimant a form of security pending a judicial resolution of the substantive merits of the claimant's case. Although arrest is not necessary for the commencement of a proceeding in rem, in practice, ships are frequently arrested to compel the owner to defend the action.

2. Instructions

Against this background you are to prepare legislation addressing three identifiable areas involving maritime claims, namely, maritime liens, statutory rights in rem and arrest of ships. In doing so, you will incorporate the provisions of the following conventions, namely; (i) 1910 Convention; (ii) 1952 Convention; and (iii) 1967 Convention.

As well you are to draft appropriate provisions conferring jurisdiction on the High Court or other judicial authority over all matters pertaining to maritime claims and arrest of ships.

In the first instance, those claims which are specified as maritime liens in the 1967 Convention are to be enumerated. These will include the liens recognised as traditional maritime liens under English law, namely master's and crew's wages, master's disbursements, bottomry and respondentia and claims ex delicto (damage) and ex contractu (salvage). In addition, in accordance with the 1967 Convention the paramount priority liens such as port, canal and other waterway dues are to be included. Finally claims for wreck removal, general average contribution and pilotage dues are to be designated as proper maritime liens.

In the second instance, all claims which give rise to a right of arrest under the Arrest Convention are to be enumerated as statutory rights of action in rem. These would include claims relating to possession, ownership, co-ownership and mortgage or other charges or earnings of the ship; claims relating to cargo and baggage, contract of carriage, towage, necessaries, damage received by a ship and claims in respect of construction, equipment or repair of the ship. Maritime liens are to have priority over statutory rights in rem and mortgages are to take priority over all other statutory liens. Both maritime and statutory liens are to take priority over claims arising out of bankruptcy and insolvency. Claims inter se are to rank in accordance with the priority ranking set out in the 1967 Convention. Some of these claims rank pari passu among themselves; others such as salvage, wreck removal and general average are to rank in inverse order. Possessory liens are to be postponed to all maritime liens but may outrank statutory liens or other preferential rights.

Maritime liens are to remain attached to the ship regardless of change in ownership or of the registration of the ship except where the claim is in connection with nuclear fuel or radioactive products or wastes.

Also, all maritime liens and other incumbrances must be extinguished in the event

of a judicial sale but this should not affect any contract of carriage or a lease of the ship.

Ships can be arrested in Pakistan in accordance with the provisions of the Arrest Convention but the rights of powers of government bodies to arrest or detain ships under statutory provisions will remain intact. Provision must be made for the posting of bail or other form of security by the defendant to have the ship released and no ship should be allowed to be arrested in Pakistan if it has already been arrested or security has been posted in another jurisdiction.

Provision must also be made to allow for the arrest of a sister ship in accordance with the Arrest Convention. Arrest and release procedure in Pakistan must be subject to the jurisdiction of The High Court or other appropriate judicial authority. Provisions should be drafted to deal with frivolous and vexatious arrests. If the tribunal in question finds that the arrest was invalid, it should order its release and the person responsible for the invalid arrest should be subjected to some form of financial sanctions.

An express provision should be inserted to ensure that the release of a ship is not construed as an admission of fault and the shipowner should be able to invoke

limitation of liability as afforded by law. Provisions should be made on time limits for the commencement of proceedings in rem or in personam following an arrest. As well, a limitation period of two years must be stipulated within which time the claimant of a maritime lien must perfect or crystallize his claim either by arresting the ship or directly bringing an action in rem.

Provisions must also be drafted to address the procedure pertaining to a judicial sale following an arrest and/or adjudication on the merits. Court costs should be first satisfied out of the proceeds of a judicial sale and provisions should be made for the purchaser of a ship under a judicial sale to receive an encumbrance-free title.

Appropriate definitions should be created in the legislation. In particular, definitions should be in conformity with the relevant convention and Pakistan Merchant Shipping Act.

PART**MARITIME CLAIMS AND ARREST OF SHIPS**

Interpretation 1. In this chapter,

"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 judgement.

"Baggage" means any article or vehicle carried by the carrier under a contract of carriage, excluding: (a) articles and vehicles carried under a charter party, bill of lading or other contract primarily concerned with the carriage of goods; and (b) live animals.

"Brussels Convention of 1910" means International Convention for The Unification of Certain Rules of Law with Respect To Collision Between Vessels, 1910.

"Claimant" means a person who alleges that a maritime claim

exists in his favour.

"Convention" means International Convention For The Unification of Certain Rules Relating To The Arrest Of Seagoing Ships, Brussels, 1952.

"Maritime Claim" means any claim referred to in section 2 or 3.

"Owner" includes in relation to a ship, the charterer, manager or operator of the ship.

"Person" means individuals, partnerships and bodies corporate, governments, their departments and public authorities.

"Registrar" means -

- (a) At the Port of Karachi and Port Muhammed Bin Qasim, the Principal officer of the Mercantile Marine Department Karachi District or a person duly authorised by the Government of Pakistan;

(b) At any other port, such authority as the

Federal Government may, by notification in the official Gazette, appoint, as the Registrar of Ships.

Maritime 2. The following claims may be secured by
 liens maritime liens:

- (a) wages and other sums due to the master, officer and other members of the ship's complement, in respect of their employment on the ship;
- (b) port, canal and other waterway dues;
- (c) claims against the owner in respect of loss of life or personal injury occurring, whether on land or water, in direct connection with the operation of the ship;
- (d) claims against the owner, based on a wrongful act and not on contract, in respect of loss of or damage to property occurring whether on land or on water, in direct connection with the operation of the ship;

- (e) claims for salvage, wreck removal and contribution in general average;
- (f) claims by masters, shippers, charterers or agents in respect of disbursements made on account of a ship;
- (g) claims arising out of bottomry or respondentia;
- (h) pilotage dues and claims in the nature of pilotage in respect of a ship or an aircraft.

Claims giving 3. The following claims shall give rise to a rise to
 statutory right of action in rem:

statutory (a) any claim to the possession or right of
 ownership of a ship or to the ownership of action in rem of
 any share therein;

(b) any claim arising out of disputes
 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 loss of or damage to goods
 including baggage carried in any ship;

- (e) 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;
- (f) any claim in the nature of a towage in respect of a ship or an aircraft;
- (g) any claim for damage received by a ship;
- (h) any claim in respect of goods or materials supplied to a ship for her operation or maintenance;
- (i) any claim in respect of the construction, repair or equipment of a ship.

Priority of Maritime Claims

4. (1) The maritime liens set out in section 2 shall take priority over the claims in section 3 giving rise to statutory rights in rem;

(2) A claim in respect of a mortgage or other charge as provided for in paragraph 3 (c) shall take priority over all other claims referred to in section 3;

(3) The claims referred to in sub-section

(1) and (2) shall take priority over all claims or rights arising out of the law of bankruptcy and insolvency.

Order of 5. The maritime liens set out in section 2 priority of
shall:

maritime liens (a) rank in the order in which they are set out
in that section, so however, that maritime
liens securing claims for salvage, wreck removal
and contribution in general average shall take
priority over all other maritime liens which have
attached to the ship prior to the time when the
operations giving rise to such liens were
performed;

(b) in the case of claims arising under paragraphs
(a), (b), (c) and (d) of section 2 rank pari
passu among themselves;

(c) in the case of claims arising under
paragraph (e) of section 2, rank in
the inverse order of the time when the claims

secured thereby accrued; and for this purpose claims for salvage shall be deemed to have accrued on the date on which the salvage operation was terminated, and claims for general average shall be deemed to have accrued on the day on which the general average act was performed.

Rights of 6. Where a preferential right arises, pursuant shipbuilders to the provisions of the law relating to ship bankruptcy, or insolvency, in respect of a repairers ship in the possession of:

- (a) a ship builder, in order to secure claims for the building of the ship;
- or
- (b) a ship repairer, in order to secure claims for the repair of the ship, effected during such possession;

such rights shall be postponed to all the maritime liens set out in section 2 but may take precedence over any mortgage or other preferential right or a statutory right of action in rem registered under this part so long as the ship is in the possession of the ship builder or ship repairer, as the case may be.

Overriding 7. The maritime liens set out in section 2 shall nature of subject to section 18 remain attached to the maritime liens ship, notwithstanding any change of registered or beneficial ownership or of any change in the ship's registration.

Claims arising 8. A maritime lien shall not attach to a ship to from radio- secure a claim under paragraph (c) or (d) of active products, section 2 where such claim arises out of or etc.

results from the radioactive properties (or a combination of the radioactive properties with toxic, explosive or other hazardous properties) of nuclear fuel

or of radioactive products or waste.

- Arrest of ships 9. (1) Subject to sub-section (2), any ship may be arrested within the jurisdiction of Pakistan in respect of any maritime claim but in respect of no other claim;
- (2) The right of arrest provided in sub-section (1) shall not prejudice any rights or powers vested by statute or otherwise in any Government Ministry, Department or Agency, or any public authorities including Dock or Harbour Authorities to arrest, detain or otherwise prevent the sailing of a vessel from Pakistan.

- Arrest of Sisterships 10. (1) Subject to sub-section (3), 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 is 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 paragraphs 3 (a), (b) and (c).

(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) 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 this part but no other ship in the ownership of the registered owner shall be liable to arrest in respect of such maritime claims.

(b) This sub-section 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.

Prohibition 11. (1) Subject to sub-section (2): a ship against shall not be arrested nor shall bail or arrest if other security be given in Pakistan in ship arrested respect of the same maritime claim by or security the claimant, if the ship has been given in arrested within the jurisdiction of a another state party to the convention, or bail jurisdiction or other security has been given in such jurisdiction either to release the ship or to avoid a threatened arrest.

(2) If a ship referred to in sub-section

(1) or any ship in the same ownership is arrested by the same claimant for the same maritime claim, contrary to sub-section

(1) such arrest shall be set aside and the ship shall be released by the High Court or other appropriate judicial authority, 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.

Judicial 12. A ship may be arrested under the authority
jurisdiction of the High Court
or other for arrest of ships appropriate
judicial authority as provided in this Act.

Release of ship 13. (1) Subject to sub-section (2) the
upon furnishing High Court or other appropriate
of bail or other judicial authority within whose security
jurisdiction the ship has
been arrested shall permit the release of
the ship upon bail or other security being

furnished to the satisfaction of such court or authority.

(2) In respect of maritime claims

enumerated in paragraph 2 (a), (b) and (c), the High Court or other appropriate judicial authority may permit the person in possession of the ship to continue trading the ship upon such person furnishing bail or other security to the satisfaction of such court or authority; or may at its discretion deal with the operation of the ship during the period of arrest in a manner as it sees fit.

(3) The release of a ship under this

section shall

not be construed as

an acknowledgement of liability by the owner or as a waiver by

such owner of the benefit of limitation of liability under this Act.

- Rules of
14. (1) The Federal Government shall make rules of Procedure procedure governing all matters of for arrest of procedure relating to arrests of ships, ships and in particular shall provide for a preliminary hearing by the High Court or other appropriate judicial authority to determine the legal validity of an arrest.
- (2) Where, at a preliminary hearing, The Court or other judicial authority, as the case may be, is satisfied upon the evidence before it that the arrest is not valid at law, it shall set aside the arrest and shall hold the claimant liable for damages in respect of the arrest and for the costs of the bail or other security furnished to release or prevent the arrest of the ship.

- Jurisdiction 15. (1) The High Court or such other judicial to hear case authority as may be provided for by this on the merits Act within whose jurisdiction a ship has been arrested shall have jurisdiction to determine the case upon its merits, and in particular, in any of the following cases, namely -
- (a) if the claimant has his habitual residence or principal place of business in Pakistan;
 - (b) if the claim arose in Pakistan;
 - (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 Brussels Convention of 1910;
 - (e) if the claim is for salvage;

(f) if the claim is upon a mortgage or other charge or the ship arrested.

(2) The High Court or other appropriate judicial authority under whose jurisdiction a ship has been arrested shall fix the time within which the claimant shall bring an action in rem against the arrested ship or an action in personam against her owner, regardless of the tribunal in which such action may eventually be brought.

(3) If an action is not commenced within the time fixed in accordance with subsection (2), the Court or Tribunal, as the case may be, may at its discretion, and upon application made by the defendant, release the ship or the bail or other security.

Limitation 16. (1) The maritime liens relating to a ship set Period
out in section 2 shall be extinguished after a
period of two years from the time when the claims

secured thereby arose unless, prior to the expiry of such period, the ship has been arrested and the arrest has led to a forced sale pursuant to the law for the time being in force relating to the sale of property in admiralty proceedings.

(2) The two year period referred to in

subsection (1) shall not be subject to interruption or suspension except that time shall not run during the period the claimant is legally prevented from arresting the vessel.

Notice of sale 17. Prior to the forced sale of a ship as to be given described in section 16, the executing officer shall give or cause to be given thirty days written notice of the time and place of such sale to -

(a) all holders of mortgages and other preferential rights

registered under this part which have not been issued to bearer;

(b) the holders of such mortgages and rights as have been issued to bearer, whose claims have been notified to the officer;

(c) all holders of maritime liens as set out in section 2, whose claims have been notified to the officer; and

(d) the Registrar of ships.

Effect of 18. (1) In the event of the forced sale of a ship sale on as described in section 16 and in accordance mortgages with this part -

(a) all mortgages and other preferential rights registered under this Part, except

those assumed by the purchaser
with the consent of the holders thereof; and

(b) all maritime liens and other
encumbrances of whatsoever nature but not
including a charter party or contract for the use of the
ship

shall cease to attach to the ship.

(2) No charter party or contract for the use of

the ship shall be deemed to be a maritime
lien or encumbrance for the purposes of this section.

Disposition 19. The costs awarded by the Court and arising out of proceeds
of the arrest and subsequent sale of a ship

of sale shall be paid first out of the proceeds of such sale,
and the balance of such proceeds shall be distributed
among -

(a) the holders of maritime liens under section

2;

(b) the holders of preferential rights under section 6;

(c) the holders of mortgages and other preferential rights registered under this Part; and

(d) the holders of statutory rights of actions in rem,

in accordance with the provisions of this Part and to the extent necessary to satisfy their claims.

Issue of 20. When a ship, registered in any country or a certificate territory thereof, has been the subject of a that a ship forced sale in Pakistan the executing officer is free of shall, at the request of the purchaser, and on mortgages, being satisfied that the provisions of this Part maritime have been complied with, issue a certificate to liens, etc. the effect that the ship is sold free of all mortgages, liens and other encumbrances (except those

assumed by the purchaser), provided that the proceeds of such forced sale have been deposited with the authority competent to distribute such proceeds to the persons entitled thereto.