

DRAFT
2011/12
4.



IMO
INTERNATIONAL MARITIME LAW INSTITUTE
Established under the auspices of the International Maritime Organization
A specialized agency of the United Nations



THE ARREST OF SHIPS ACT, 2012

A Legislation Drafting Project submitted in partial fulfillment of the requirements for the award of the Degree of Master of Laws (LL.M.) in International Maritime Law at the IMO International Maritime Law Institute

Submitted By: Duane A. R. Allen (Jamaica)

Supervisor: Ms. Elda Belja

Academic Year 2011/2012

THE ARREST OF SHIPS ACT, 2012

INTRODUCTION

The aim of this draft Bill is to incorporate the provisions of the International Convention on Arrest of Ships, 1999 into Jamaican legislation. Jamaica is a dualist country and, as such, is required to take this step upon accession to the Convention. It is submitted that Jamaica would stand to benefit from becoming a Party to this Convention and, therefore, a draft Instrument of Accession has been prepared and is appended to the draft Bill.

The draft Bill adheres to the style of preparation and presentation of Bills in Jamaica. Accordingly, the Explanatory Memorandum is located after the draft Bill. The purpose of the Explanatory Memorandum is to provide Parliament with a summary of the background to the drafting of the Bill, thereby providing a context within which the necessity for the draft Bill may be understood and appreciated. It also summarises the main purposes of the draft Bill.

HOW THE 1999 CONVENTION IS TO BE INCORPORATED INTO JAMAICAN LAW

This segment is included for the benefit of readers who may not be familiar with the Jamaican legislative process. The explanation it contains would be inappropriate for inclusion in the Explanatory Memorandum.

While Jamaica could, in principle, incorporate the provisions of the Convention into domestic law without becoming a Party to it, it is advisable that Jamaica becomes a Party in order to derive the full benefit of its provisions. Much of the reciprocity from which Jamaica would stand to benefit under the Convention is only available to States Parties. With the time for signature and ratification of the Convention already having passed, accession is the available course of action for Jamaica to pursue to become a Party. Accordingly, the instrument of accession has been prepared and submitted along with this draft Bill.

In preparing the draft Bill, the indirect method of incorporating the provisions of the Convention into domestic law – pursuant to which the essence of the Convention will be reflected in the wording of the draft Bill without necessarily adhering strictly to the wording of the Convention – has been preferred to direct method of simply giving the Convention the

'force of law'. In keeping with the indirect method, the full text of the Convention has been appended to the draft Bill as the First Schedule, for purposes of reference. The indirect method has enabled adjustments to be made to the Convention wording so as to ensure that the style of the drafting of the Bill is consistent with the general style of Jamaican legislation; this in an attempt to facilitate easier interpretation of the provisions of the draft Bill generally and vis-à-vis other legislation that will be thereby affected. The ease of reference permitted by the text of the Convention appearing in the First Schedule will enable any ambiguities that may be in the draft Bill to be interpreted in light of the spirit of the Convention.

In keeping with the aim of remaining faithful to the objects and purposes of the Convention, the draft is commenced with a preamble that aims to outline the context within which the legislation is being drafted. The interpretation section then designates the Supreme Court as the Court for the purposes of the Bill; an opportunity unique to the indirect method. The application provision has been placed close to the beginning of the Bill, in contrast to the Convention which places it towards the end. The same has been done with the provision on non-creation of maritime liens. This, it is submitted, enhances the overall coherence of the draft Bill and may make it more user-friendly. In essentially all other respects, the draft Bill follows the same format of the Convention, with only the final clauses excluded from the draft.

Finally, the draft makes consequential amendments to the UK Administration of Justice Act, 1956 insofar as the said Act is applicable to Jamaica. In the interest of the readers' ease of reference, the provisions of the 1956 Act which this draft Bill proposes to amend have been set out in an annex hereto, and is presented before the documents forming part of the draft Bill, which are listed hereunder.

The documents contained in this project will be in the following order:

1. Arrangement of sections
2. Draft Bill
3. Explanatory Memorandum
4. Draft Instrument of Accession.

ANNEX

Set out hereunder are the provisions of the UK Administration of Justice Act, 1956, which are amended by sections 11 and 12 of this Act –

1. Section 1(1) of the UK Administration of Justice Act provides as follows -

“PART I

ADMIRALTY JURISDICTION AND OTHER PROVISIONS AS TO SHIPS

1. – (1) The Admiralty jurisdiction of the High Court shall be as follows, that is to say, jurisdiction to hear and determine any of the following questions or claims –

Admiralty jurisdiction of the High Court.

- (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 done by a ship;
- (e) any claim for damage received 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 of the wrongful act, neglect or default of the owners charterers or persons in possession or control of a ship or of the master or crew thereof or of any other person for whose wrongful acts, neglects or defaults the owners, charterers or person 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 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 fifty-one of the Civil Aviation Act, 1949, of the law relating to salvage to aircraft and their apparel and cargo);
- (k) any claim in the nature of towage in respect of a ship or 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 dock charges or dues;
- (o) any claim by a master or member of the crew of a ship for wages and any claim by or in respect of a master or member of the crew of a ship for any money or property which under any of the provisions of the Merchant Shipping Acts, 1894 to 1954, is recoverable as wages or in the court and in the manner in which wages may be

recovered;

- (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 a 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,

together with any other jurisdiction which either was vested in the High Court of Admiralty immediately before the date of the date of the commencement of the Supreme Court of Judicature Act, 1873 (that is to say, the first day of November, eighteen hundred and seventy-five) or is conferred by or under an Act which came into operation on or after that date on the High Court as being a court with Admiralty jurisdiction and any other jurisdiction connected with ships or aircraft vested in the High Court apart from this section which is for the time being assigned by rules of court to the Probate, Divorce and Admiralty Division.”

2. Subsections (1), (2) and (4) of the UK Administration of Justice Act, 1956, respectively provide as follows –

“3. – (1) Subject to the provisions of the next following section, the Admiralty jurisdiction of the High Court, the Liverpool Court of Passage and any county court may in all Admiralty

cases be invoked by an action in personam.

jurisdiction.

(2) The Admiralty jurisdiction of the High Court may in the cases mentioned in paragraphs (a) to (c) and (s) of subsection (1) of section one of this Act be invoked by an action in rem against the ship or property in question.

(3)

(4) In the case of any such claim as is mentioned in paragraphs (d) to (r) of subsection (1) of section one of this Act, being a claim arising in connection with a ship, where the person who would be liable on the claim in an action in personam was, when the cause of action arose, the owner or charterer of, or in possession or control of, the ship, the Admiralty jurisdiction of the High Court and (where there is such jurisdiction) the Admiralty jurisdiction of the Liverpool Court of Passage or any county court may (whether the claim gives rise to a maritime lien on the ship or not) be invoked by an action in rem against –

- (a) that ship, if at the time when the action is brought it is beneficially owned as respects all the shares therein by that person; or
- (b) any other ship which, at the time when the action is brought, is beneficially owned as aforesaid.”

ARREST OF SHIPS

THE ARREST OF SHIPS ACT

ARRANGEMENT OF SECTIONS

PART I. *Preliminary*

1. Short title.
2. Interpretation.
3. Application.
4. Non-creation of maritime liens.

PART II. *Provisions on Arrest of Ships.*

5. Power of arrest.
6. Exercise of right of arrest.
7. Release from arrest.
8. Right of re-arrest and multiple arrest.
9. Protection of owners and demise charterers of arrested ships.
10. Jurisdiction on the merits of the case.

PART III. *Amendments to the Administration of Justice Act, 1956.*

11. Amendment to section 1(1).
12. Amendment to section 3.

PART IV. *Miscellaneous.*

13. Regulations.

A BILL

ENTITLED

AN ACT to Incorporate into Jamaican legislation the International Convention on Arrest of Ships, 1999, to make provisions having widespread application relating to the arrest of ships and for connected purposes.

WHEREAS the international community recognises the desirability of facilitating the harmonious and orderly development of world seaborne trade:

AND WHEREAS the arrest of ships is of vital importance as a precautionary measure in furtherance of the enforcement of maritime claims:

AND WHEREAS the International Convention Relating to the Arrest of Sea-going Ships was signed at Brussels, Belgium on the 10th day of May 10, 1952 and came into force on the 24th day of February, 1956:

AND WHEREAS the International Convention on Arrest of Ships, 1999, was signed at Geneva, Switzerland on the 12th day of March, 1999 and is intended to refine and update the principles of the International Convention Relating to the Arrest of Sea-going Ships, 1952:

AND WHEREAS the International Convention on Arrest of Ships, 1999 entered into force on the 14th day of September, 2011:

AND WHEREAS Jamaica proposes to accede to the International Convention on Arrest of Ships, 1999:

AND WHEREAS Jamaica is desirous of reflecting in its laws the recent developments in fields related to the arrest of ships through incorporating the provisions of the International Convention on Arrest of Ships, 1999 into its legislation:

NOW THEREFORE, BE IT ENACTED by The Queen's Most Excellent Majesty, by and with the advice and consent of the Senate and House of Representatives of Jamaica, and by the authority of the same, as follows:

Short title and commencement.

1. This Act may be cited as the Arrest of Ships Act, 2012, and shall come into operation on a day to be appointed by the Minister and published by notice in the *Gazette*.

PART I. *Preliminary*

Interpretation.

2. In this Act -

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

“claimant” means any person asserting a maritime claim;

“Convention” means the International Convention on Arrest of Ships, 1999, done at Geneva, Switzerland on the 12th day of March, 1999 and which entered into force on the 14th day of September, 2011;

“Court” means the Supreme Court of Judicature of Jamaica;

“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, minimise 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 paragraph (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 in relation 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 on board 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 “hypothèque” or a charge of the same nature on the ship; or

(v) any dispute arising out of a contract for the sale of the ship;

“non-Party State” means a State which is not a Party to the Convention;

“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;

“State Party” means a State which has become a Party to the International Convention on Arrest of Ships, 1999, whether by signature, ratification, acceptance, approval or accession.

Application and construction.

3. – (1) This Act shall apply to any ship within the jurisdiction of Jamaica, whether or not that ship is flying the flag of a State Party.

(2) This Act does not apply to any warship, naval auxiliary or other ships owned or operated by a State and used, for the time being, only on government non-commercial service.

(3) This Act does not affect any rights or powers vested in the Government of Jamaica or its departments, or in any

public authority, or in any dock or harbour authority, by any Act of Parliament or any subsidiary legislation made under the authority of such Act of Parliament, to detain or otherwise prevent from sailing any ship within their jurisdiction.

(4) This Act shall not affect the power conferred on any Court, by Act of Parliament or any subsidiary legislation made under the authority of such Act of Parliament, to make orders affecting the totality of a debtor's assets.

(5) Where an arrest is effected pursuant to this Act, nothing in this Act shall affect the application of any Act of Parliament which gives effect to any international convention providing for limitation of liability.

(6) Nothing in this Act shall modify or affect the rules of law in force in Jamaica relating to the arrest of any ship flying the Jamaican flag where said ship is physically within the jurisdiction of Jamaica, procured by a person whose habitual residence or principal place of business is in Jamaica, or by any other person who has acquired a claim from such person by subrogation, assignment or otherwise.

(7) This Act shall be construed in accordance with the provisions of the Convention, the full text of which is set out in the Schedule.

Schedule.

Non-creation of maritime liens.

4. Nothing in this Act shall be construed as creating a maritime lien.

PART II. *Provisions on Arrest of Ships.*

Power of arrest.

5. – (1) A ship may be arrested or released from arrest only

under the authority of the Court.

(2) A ship may only be arrested in respect of a maritime claim but in respect of no other claim.

(3) 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 a State other than Jamaica or arbitrated.

(4) Subsection (3) shall apply *muttatis mutandis* if the maritime claim in respect of which the arrest is effected is subject to the law of another State.

Exercise of right of arrest.

6. – (1) Arrest is permissible of any ship in respect of which a maritime claim is asserted if –

- (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;
- (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;
- (c) the claim is based upon a mortgage or a “hypothèque” or a charge of the same nature on the ship;
- (d) the claim is related 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 granted or arises under the laws of Jamaica.

(2) Arrest is also permissible of any other ship or ships 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 –

(i) owner of the ship, in respect of which the maritime claim arose; or

(ii) demise charterer, time charterer or voyage charterer of that ship.

(3) Subsection (2) shall not apply to claims in respect of ownership or possession of a ship.

(4) Notwithstanding the provisions of subsections (1) and (2), the arrest of a ship which is not owned by the person liable for the claim is permissible in view of the provisions authorising forced sale of ships found in sections 89 and 90 of the Shipping Act.

Release from arrest.

7. – (1) 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 paragraphs (s) and (t) of section 2.

(2) In cases in which a ship has been arrested in respect

of any of the maritime claims enumerated in paragraphs (s) and (t) of section 2, 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.

(3) 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.

(4) Any request for the ship to be released upon security being provided shall not be construed as an acknowledgement of liability nor as a waiver of any defence or any right to limit liability.

(5) If a ship has been arrested in a non-Party State and is not released although the security in respect of that ship has been provided in Jamaica in respect of the same claim, the Court shall order the release of such security upon application to that effect being made to it.

(6) If in a non-Party State the ship is released upon satisfactory security in respect of that ship being provided, the Court shall order the release of any security provided in Jamaica in respect of the same claim to the extent that the total amount of security provided in Jamaica and the non-Party State exceeds –

(a) the claim for which the ship has been arrested; or

(b) the value of the ship,

whichever is the lower.

(7) The release under subsection (6) shall not be ordered unless the security provided in the non-Party State will actually be available to the claimant and will be freely transferable.

(8) Where pursuant to subsection (1) security had been provided, the person providing such security may at any time apply to the Court to have that security reduced, modified or cancelled.

Right of re-arrest and multiple arrest.

8. – (1) Where in any State other than Jamaica a ship has already been arrested and released or security in respect of that ship has already been provided to secure a maritime claim, that ship shall not thereafter, in Jamaica, be re-arrested or arrested in respect of the same maritime claim unless –

- (a) the nature or amount of the security in respect of that ship already provided in respect of the same claim is inadequate, on condition that the aggregate amount of security may not exceed the value of the ship;
- (b) the person who has already provided the security is not, or is unlikely to be, able to fulfil some or all of that person's obligations;
- (c) the ship arrested or the security previously provided was released either –
 - (i) upon the application or with the consent of the claimant acting on reasonable grounds; or

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

(2) Any other ship which would otherwise be subject to arrest in respect of the same maritime claim shall not be arrested unless –

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

(b) the provisions of paragraphs (b) or (c) of subsection (1) are applicable.

“Release” for the purpose of this section shall not include any unlawful release or escape from arrest.

Protection of owners and demise charterers of arrested ships.

9. – (1) The Court may, as a condition of the arrest of a ship or of permitting an arrest already effected to be maintained, impose upon the claimant who seeks to arrest or who had 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 –

(a) the arrest having been wrongful or unjustified; or

(b) excessive security having been demanded or provided.

(2) Where an arrest is effected in Jamaica 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 –

(a) the arrest having been wrongful or unjustified, or

(b) excessive security having been demanded or provided.

(3) The liability, if any, of the claimant in accordance with subsection (2) shall be determined by application of the laws of Jamaica.

(4) If a court in another State or an arbitral tribunal is to determine the merits of the case in accordance with the provisions of section 10, then proceedings relating to the liability of the claimant in accordance with subsection (2) may be stayed pending that decision.

(5) When pursuant to subsection (1) 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.

Jurisdiction on the merits of the case.

10. – (1) The Court shall, 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, have jurisdiction to determine the case upon its merits where, within Jamaica –

(a) an arrest has been effected; or

(b) security has been provided to obtain the release of the ship.

(2) Notwithstanding the provisions of subsection (1), the Court may refuse to exercise that jurisdiction where –

(a) in the opinion of the Court another State has a closer connection with the claim in relation to which the ship was arrested; and

(b) the Court of that State accepts jurisdiction.

(3) The 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 where, in any case of an arrest having been effected or security having been provided to obtain the release of the ship, the Court –

(a) does not have jurisdiction to determine the case upon its merits; or

(b) has refused to exercise jurisdiction in accordance with the provisions of subsection (2).

(4) If proceedings are not brought within a period of time ordered in accordance with subsection (3), the Court shall upon request order the release of the ship arrested or the security provided.

(5) Any final decision resulting from proceedings being brought –

(a) within the period of time ordered in accordance with

subsection (3); or

- (b) before a competent court or arbitral tribunal in another State in the absence of an order under subsection (3),

shall be reorganised and given effect with respect to the arrested ship or to the security provided in order to obtain its release, on condition that –

- (a) the defendant has been given reasonable notice of such proceedings and a reasonable opportunity to present the case for the defence; and

- (b) such recognition is not against public policy.

- (6) Nothing contained in the provisions of subsection (5) shall restrict any further effect given to a foreign judgment or arbitral award under the laws of Jamaica where either the arrest of the ship was effected in Jamaica or security to obtain the release of the ship was provided in Jamaica.

PART III. *Amendments to the Administration of Justice Act, 1956.*

Amendment to section 1(1).

11. – (1) Insofar as it is applicable to Jamaica, subsection (1) of section 1 of the Administration of Justice Act, 1956 is amended by deleting paragraphs (a) to (s) and substituting therefor 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, minimise 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 paragraph (g);
- (e) any claim for damage received by a ship;
- (f) 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;
- (g) any agreement in relation to the use or hire of the ship, whether contained in a charter party or otherwise;

- (h) any agreement relating to the carriage of goods or passengers on board the ship, whether contained in a charter party or otherwise;
- (i) loss of or damage to or in connection with goods (including luggage) carried on board the ship;
- (j) general average;
- (k) towage;
- (l) pilotage;
- (m) goods, materials, provisions, bunkers, equipment (including containers) supplied or services rendered to the ship for its operation, management, preservation or maintenance;
- (n) construction, reconstruction, repair, converting or equipping of the ship;
- (o) port, canal, dock, harbour and other waterway dues and charges;
- (p) 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;
- (q) disbursements incurred on behalf of the ship or its owners;

- (r) insurance premiums (including mutual insurance calls) in respect of the ship, payable by or on behalf of the shipowner or demise charterer;
- (s) any commissions, brokerages or agency fees payable in respect of the ship by or on behalf of the shipowner or demise charterer;
- (t) any dispute as to ownership or possession of the ship;
- (u) any dispute between co-owners of the ship as to the employment or earnings of the ship;
- (v) a mortgage or a “hypothèque” or a charge of the same nature on the ship; or
- (w) any dispute arising out of a contract for the sale of the ship;
- (x) 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.”.

(2) Insofar as such provisions are applicable to Jamaica, all references in subsections (1) and (2) of section 1 of the Administration of Justice Act, 1956 to the “High Court” shall be construed as references to the Court.

Amendment to section 3. **12.** – (1) Insofar as they are applicable to Jamaica, the following subsections of section 3 of the Administration of

Justice Act, 1956 are amended in the manner hereunder set out

- (a) subsection (1) is deleted and the following substituted therefor –

“(1) Subject to the provisions of the following section, the Admiralty jurisdiction of the High Court may in all cases be invoked by an action *in personam*.”;

- (b) subsection (2) is deleted and the following substituted therefor –

“(2) The Admiralty jurisdiction of the High Court may in the cases mentioned in paragraphs (t), (u) and (x) of subsection (1) of section 1 be invoked by an action *in rem* against the ship or property in question.”; and

- (c) subsection (4) is deleted and the following substituted therefor –

“(4) In the case of any such claim as is mentioned in paragraphs (a) to (s), (v) and (w) of section 1 of this Act, being a claim arising in connection with a ship, the Admiralty jurisdiction of the High Court may be invoked by an action *in rem* against –

- (a) that ship where –

- (i) 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;

- (ii) 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;
 - (iii) the claim is based upon a mortgage or a “hypothèque” or a charge of the same nature on the ship; or
 - (iv) the claim is against the owner, demise charterer, manager or operator of the ship and is secured by a maritime lien which is granted or arises under the laws of Jamaica; or
- (b) any other ship or ships 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 –
- (i) owner of the ship, in respect of which the maritime claim arose; or
 - (ii) demise charterer, time charterer or voyage charterer of that ship.”

(2) Insofar as such provisions are applicable to Jamaica, all references in section 3 of the Administration of Justice Act, 1956 to the “High Court” shall be construed as references to the Court.

PART IV. *Miscellaneous.*

13. The Minister may make Regulations generally for giving

Regulations.

effect to the provisions of this Act.

International Convention on the Arrest of Ships

(Geneva, March 12, 1999)

The States Parties to this Convention, Recognising the desirability of facilitating the harmonious and orderly development of world seaborne trade, Convinced of the necessity for a legal instrument establishing international uniformity in the field of arrest of ships which takes account of recent developments in related fields,

Have agreed as follows:

Article 1

Definitions

For the purposes of this Convention:

1. "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, minimise 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 in relation 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 on board 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 "hypothèque" or a charge of the same nature on the ship;
 - (v) any dispute arising out of a contract for the sale of the ship.
2. "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 the execution or satisfaction of a judgment or other enforceable instrument
 3. "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.
 4. "Claimant" means any person asserting a maritime claim.

5. "Court" means any competent judicial authority of a State.

Article 2

Powers of arrest

1. A ship may be arrested or released from arrest only under the authority of a Court of the state party in which the arrest is effected.
2. A ship may only be arrested in respect of a maritime claim but in respect of no other claim.
3. 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 a State other than the state where the arrest is effected, or is to be arbitrated, or is to be adjudicated subject to the law of another State.
4. Subject to the provisions of this Convention, the procedure relating to the arrest of a ship or its release shall be governed by the law of the State in which the arrest was effected or applied for.

Article 3

Exercise of right of arrest

1. Arrest is permissible of any ship in respect of which a maritime claim is asserted if:
 - (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 "hypothèque" or a charge of the same nature on the ship; or
 - (d) the claim is related 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 granted or arises under the law of the State where the arrest is applied for.
2. Arrest is also permissible of any other ship or ships 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:
 - (a) owner of the ship, in respect of which the maritime claim arose; or

(b) demise charterer, time charterer or voyage charterer of that ship.

This provision does not apply to claims in respect of ownership or possession of a ship.

3. Notwithstanding the provisions of paragraphs 1 and 2 of this article, the arrest of a ship which is not owned by the person liable for the claim shall be permissible only if, under the law of the State where the arrest is applied for, a judgment in respect of that claim can be enforced against the ship by judicial or forced sale of that ship.

Article 4

Release from arrest

1. 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 article 1, paragraph 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.
2. 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.
3. Any request for the ship to be released upon security being provided shall be construed as an acknowledgement of liability nor as a waiver of any defence or any right to limit liability.
4. If a ship has been arrested in a non-party State and is not release although the security in respect of that ship has been provided in a State Party in respect of the same claim, that security shall be ordered to be released on application to the court in that State Party.
5. If in a non-party the ship is released upon satisfactory security in respect of that ship being provided, any security provided in a State Party 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:
 - (a) the claim for which the ship has been arrested, or
 - (b) the value of the ship, whichever is the lower. Such release shall, however, not be ordered unless the security provided in the non-party State will actually be available to the claimant and will be freely transferable.
6. Where, pursuant to paragraph 1 of this article, security had been provided, the person providing such security may at any time apply to the Court to have that security reduced, modified or cancelled.

Article 5

Right of rearrest and multiple arrest

1. Where in any State a ship has already been arrested and released or security in respect of that ship has already been provided to secure a maritime claim, that ship shall not thereafter be rearrested or arrested in respect of the same maritime claim unless:
 4. the nature or amount of the security in respect of that ship already provided in respect of the same claim is inadequate, on condition that the aggregate amount of security may not exceed the value of the ship; or
 5. the person who has already provided the security is not, or is unlikely to be, able to fulfil some or all of that person's obligations; or
 6. the ship arrested of the security previously provided was released either
 - (i) upon the application or with the consent of the claimant acting on reasonable grounds; or
 - (ii) because the claimant could not by taking reasonable steps prevent the release.
2. Any other ship which would otherwise be subject to arrest in respect of the same maritime claim shall not be arrested unless:
 - (a) the nature or amount of the security already provided in respect of the same claim is inadequate; or
 - (b) the provisions of paragraph 1 (b) or (c) of this article are applicable.
3. "Release" for the purpose of this article shall not include any unlawful release or escape from arrest.

Article 6

Protection of owners and demise charterers of arrested ships

1. The court may as a condition of the arrest of a ship, or of permitting an arrest already effected to be maintained, impose upon the claimant who seeks to arrest or who had 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:
 - (a) the arrest having been wrongful or unjustified; or
 - (b) excessive security having been demanded or provided.

2. The Courts of the State in which an arrest has been effected 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:
 - (a) the arrest having been wrongful or unjustified, or
 - (b) excessive security having been demanded or provided.
3. The liability, if any, of the claimant in accordance with paragraph 2 of this article shall be determined by application of the law of the State where the arrest was effected.
4. If a court in another State or an arbitral tribunal is to determine the merits of the case in accordance with the provisions of article 7, then proceedings relating to the liability of the claimant in accordance with paragraph 2 of this article may be stayed pending that decision.
5. Where pursuant to paragraph 1 of this article 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.

Article 7

Jurisdiction on the merits of the case

1. The Courts of the State in which an arrest has been effected or security provided to obtain the release of the ship 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.
2. Notwithstanding the provisions of paragraph 1 of this article, the Courts of the State in which an arrest had been effected, or security provided to obtain the release of the ship, may refuse to exercise that jurisdiction where that refusal is permitted by the law of that State and a Court of another State accepts jurisdiction.
3. In cases where a Court of the State where an arrest had been effected or security provided to obtain the release of the ship:
 - (a) does not have jurisdiction to determine the case upon its merits; or
 - (b) has refused to exercise jurisdiction in accordance with the provisions of paragraph 2 of this article, 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.
4. If proceedings are not brought within a period of time ordered in accordance with paragraph 3 of this article then the ship arrested or the security provided shall, upon request, be ordered to be released.

5. If proceedings are brought within the period of time ordered in accordance with paragraph 3 of this article, or if proceeding before a competent Court or arbitral tribunal in another state are brought in the absence of such order, any final decision resulting therefrom shall be reorganised and given effect with respect to the arrested ship or to the security provided in order to obtain its release, on condition that:
 - (a) the defendant has been given reasonable notice of such proceedings and a reasonable opportunity to present the case for the defence; and
 - (b) such recognition is not against public policy (ordre public).
6. Nothing contained in the provisions of paragraph 5 of this article shall restrict any further effect given to a foreign judgment or arbitral award under the law of the State where the arrest of the ship was effected or security provided to obtain its release.

Article 8

Application

1. This convention shall apply to any ship within the jurisdiction of any State Party, whether or not that ship is flying the flag of a State Party.
2. This convention shall not apply to any warship, naval auxiliary or other ships owned or operated by a State and used, for the time being, only on government non-commercial service.
3. This convention does not affect any rights or powers vested in any Government or its departments, or in any public authority, or in any dock or harbour authority, under any international convention or under any domestic law or regulation, to detain or otherwise prevent from sailing any ship within their jurisdiction.
4. This Convention shall not affect the power of any State or Court to make orders affecting the totality of a debtor's assets.
5. Nothing in this Convention shall affect the application of international conventions providing for limitation of liability, or domestic law giving effect thereto, in the State where an arrest is effected.
6. Nothing in this Convention shall modify or affect the rules of law in force on the States Parties relating to the arrest of any ship physically within the jurisdiction of the State of its flag procured by a person whose habitual residence or principal place of business is in that State, or by any other person who has acquired a claim from such person by subrogation, assignment or otherwise.

Article 9

Non-creation of maritime liens

Nothing in this Convention shall be construed as creating a maritime lien.

Article 10

Reservations

1. Any State may, at the time of signature, ratification, acceptance, approval, or accession, or at any time thereafter, reserve the right to exclude the application of this Convention to any or all of the following:
 - (a) ships which are not seagoing;
 - (b) ships not flying the flag of a State Party;
 - (c) claims under article 1, paragraph 1 (s);
2. A State may, when it is also a State Party to a specified treaty on navigation on inland waterways, declare when signing, ratifying, accepting, approving or acceding to this Convention, that rules on jurisdiction, recognition and execution of court decisions provided for in such treaties shall prevail over the rules contained in article 7 of this Convention.

Article 11

Depositary

This Convention shall be deposited with the Secretary-General of the United Nations.

Article 12

Signature, ratification, acceptance, approval and accession

1. This Convention shall be open for signature by any State at the headquarters of the United Nations, New York, from 1 September 1999 to 31 August 2000 and shall thereafter remain open for accession.
2. States may express their consent to be bound by this Convention by:
 - (a) signature without reservation as to ratification, acceptance or approval; or
 - (b) signature subject to ratification, acceptance or approval, followed by ratification, acceptance or approval; or

(c) accession.

3. Ratification, acceptance, approval or accession shall be effected by the deposit of an instrument to that effect with the depositary.

Article 13

States with more than one system of law

1. If a State has two or more territorial units in which different systems of law are applicable in relation to matters dealt with in this Convention, it may at the time of signature, ratification, acceptance, approval or accession declare that this Convention shall extend to all its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time.
2. Any such declaration shall be notified to the depositary and shall state expressly the territorial units to which the Convention applies.
3. In relation to a State Party which has two or more systems of law with regard to arrest of ships applicable in different territorial units, references in this Convention to the Court of a State and the law of a State shall be respectively construed as referring to the Court of the relevant territorial units within that State and the law of the relevant territorial unit of that State.

Article 14

Entry into force

1. This Convention shall enter into force six months following the date on which 10 States have expressed their consent to be bound by it.
2. For a State which expresses its consent to be bound by this Convention after the conditions for entry into force thereof have been met, such consent shall take effect three months after the date of expression of such consent.

Article 15

Revision and amendment

1. A conference of States Parties for the purpose of revising or amending this Convention shall be convened by the Secretary-General of the United Nations at the request of one-third of the States Parties.
2. Any consent to be bound by this Convention, expressed after the date of entry into force of an amendment to this Convention, shall be deemed to apply to the Convention, as amended.

Article 16

Denunciation

1. This Convention may be denounced by any State Party at any time after the date on which this Convention enters into force for that State.
2. Denunciation shall be effected by deposit of an instrument of denunciation with the depositary.
3. A denunciation shall take effect one year, or such longer period as may be specified in the instrument of denunciation, after receipt of the instrument of denunciation by the depositary.

Article 17

Languages

This Convention is established in a single original in the Arabic, Chinese, English, French, Russian and Spanish languages, each text being equally authentic.

DONE AT Geneva this twelfth day of March, one thousand nine hundred and ninety-nine.

IN WITNESS WHEREOF the undersigned being duly authorised by their respective Governments for that purpose have signed this Convention.

EXPLANATORY MEMORANDUM

INTRODUCTION

This draft Bill seeks to incorporate the provisions of the International Convention on the Arrest of Ships, 1999 into Jamaican domestic law. This will be the first step in the intended modernisation of the legislative framework in which is embodied Jamaica's Admiralty jurisdiction. Despite having gained independence from British colonial rule since 6 August 1962, Jamaica's Admiralty jurisdiction is still based on a colonial statute, the UK Administration of Justice Act, 1956. This outdated legislative framework is in large measure responsible for Jamaica's failure to exploit its favourable geographical location and other advantageous attributes in order to become a foremost maritime State within the Western hemisphere.

Modernising the Admiralty jurisdiction promises to be a massive undertaking, and one that is too daunting to realistically undertake in a single legislative effort. As such an incremental approach has been favoured. Arrest of ships has been selected as the first increment because Admiralty jurisdiction is exercised most often by the arrest or the seizure of ships.

The circumstances in which the Admiralty jurisdiction of the High Court may be invoked by an action *in rem* are governed by section 3 of the Administration of Justice Act 1956. The Act reflects the International Convention Relating to the Arrest of Seagoing Ships, which was signed at Brussels on May 10, 1952 (hereafter referred to as "the 1952 Convention"). The 1952 Convention is neither directly referred to nor embodied in the 1956 Act. Despite this, the precise provisions of the Arrest Convention may be relied on in judicial consideration of the relevant provisions of section 3 of the 1956 Act.¹

The effect of this Convention has been to make the action *in rem* more widely available. However, since Jamaica now has its own Supreme Court (the equivalent of the High Court in most other common law jurisdictions), it is in the invidious position of having on its statute book an Act that confers Admiralty jurisdiction on a court which no longer has jurisdiction over Jamaica. The availability of actions *in rem* in Jamaica is therefore questionable, particularly in light of the fact that the Civil Procedure Rules 2002 make procedural

¹ Thomas, D.R.; Maritime Liens, Volume 14, Steven & Sons, UK, 1980, p. 46.

provisions for arrest of ships which are, the Rules profess, based on the Shipping Act.² The Shipping Act, however, only makes specific provisions for maritime liens. Further, it makes no specific provisions for arrest of ships, whether as a provisional measure or with regard to arrest for the purpose of establishing jurisdiction on the merits of the court. Arrest of a ship as a provisional measure serves to obtain security in relation to one or more of a list of maritime claims, not all of which are secured by a maritime lien. The Shipping Act's provisions are therefore inadequate to regulate this area of the law. Further, the Maritime Areas Act, to which the relevant Part of the Civil Procedure Rules makes reference, contains provisions that are more relevant to innocent passage of warships than they are to this area of the law, and as such are even less instructive.

As stated above, Jamaica's maritime legislative framework has been left behind by recent developments in the field. The main maritime nations have identified the weaknesses in the overall framework of the 1952 Convention and have been spurred into action, resulting in the promulgation of the 1999 Convention. The 1999 Convention proposes significant changes to the 1952 Convention regime.

NATURE AND PURPOSE OF ARREST

The powerful weapon of arrest is available in common law systems only as a result of property being arrestable, the claim being enforceable by an action *in rem* and the issue of a claim form *in rem*. Arrest is not dependent on an arguable claim being shown or on the demonstration of inability to meet any judgment. Further, arrest requires no undertaking in damages and its impact on third parties is of no practical significance.³

There are three possible functions that may be served by the arrest of maritime property:⁴

- It may be a form of interim or 'provisional' remedy – a "*saisie conservatoire*". In this regard it should be noted that a creditor may obtain some protection through a caution against release.
- It may operate as a ground of jurisdiction over the merits.

² This Act may be viewed on the Ministry of Justice website at www.moj.gov.jm. Jamaican Acts of Parliament are not listed or cited by chapter number.

³ Jackson, D.C.; *Enforcement of Maritime Claims*, 4th Edition, LLP, London, Hong Kong, 2005, p. 393.

⁴ *Ibid.*

- It may be used as a primary method of ensuring the availability of judicial sale, which itself may be the means of implementing the interest conferred or enforced through the action *in rem*.

In civil law countries, the process of distinguishing these three functions is aided by maritime and civil procedure codes.⁵ The Code of Procedure usually deals with the questions of jurisdiction and arrest; in many cases these questions will be dealt with independently of each other. Frequently, the relevance of “arrest” is confined to it being an interim remedy. As such, provision will generally be made for security (such as bail or guarantee), the effect of which may be to prevent arrest or to cause the release of the arrested property. A more substantial link between the country and the issue than that provided by the seizure of a ship temporarily in that country may be required to establish jurisdiction on the merits.⁶

The classification of claims as “preferred” provides the basis for security for the merits claim. Such classification gives priority over unsecured creditors. Additionally, the “preferred” classification may enable the person against whom the claim is made to enforce the claim against purchasers. The Maritime or Commercial Code sets out these preferred claims, which are sometimes labelled “liens”.⁷

Common law classifies arrest as a component part of the action *in rem*. It is dependent, at least initially, on jurisdiction in the substantive action due to it being available on the issue of the claim form *in rem*. The result of this is that jurisdiction issues are commonly discussed in terms of the right to arrest. Within this context arrest functions as “security”, i.e. to ensure that the asset will be available for enforcement of a judgment. The possibility does, however, exist that through the indirect operation of Conventions (or arguably without) arrest could itself be a jurisdiction base.⁸

One may prevent or end an arrest by providing alternative security in the form of bail or payment into court, or by the provision of an undertaking or guarantee. Bail or payment into court permits liability to be limited through the setting up of a limitation fund, thus providing a notional or actual fund which represents the ship for the claimant. Proceedings may continue on that basis. However, any guarantee or undertaking is contractual. As such, it does

⁵ Ibid., p. 393.

⁶ Ibid.

⁷ Ibid.

⁸ Ibid, pp. 393-394.

not provide any fund for claims. It is merely an agreement that is enforceable on the conditions specified therein. The terms of this agreement will determine whether or not it is in addition to or in substitution for any lien. The existence of any lien will be unaffected merely by the replacement of arrest. This is because the lien is not dependent on arrest. It follows that the “security” is contractual in nature, and this applies whether the “security” is provisional as replacing arrest or is on a merits claim as arguably replacing any lien.⁹

A form of protection which is an alternative to arrest is the lodging of a caution against release from arrest. This option will only be available where another person has arrested the ship. This action will guarantee the person entering the caution an opportunity to re-arrest the ship upon any action being taken to release the ship. This alternative is less costly than arrest, but is commensurately less effective.¹⁰

As stated above, arrest, as a provisional security, is provided for by two international Conventions, the first of which was in 1952 and the second of which was in 1999. The main elements of each will be considered in turn.

THE 1952 CONVENTION

A Convention of great significance with regard to its impact on the arrest procedures of many nations, the 1952 Convention harmonized the varying *in rem* procedures existing in the laws of the major maritime nations, both from the civil law and common law traditions. Under common law, which is the legal tradition in which Jamaica’s legal system is rooted, Admiralty jurisprudence had been unduly restrictive, confining the exercise of the right *in rem* to the ship in respect of which the maritime claim arose. These restrictions were eased by the 1952 Convention as it moved the common law in this regard closer to the approach taken in civil law jurisdictions. Its effect was to confine the judicial arrest of a ship to the relevant ship while stipulating special circumstances within which judicial arrest may, alternatively, be effected on any other ship within the same ownership as the ship that gave rise to the claim. The 1952 Convention provides for arrest as a provisional remedy.

⁹ Ibid., p. 394.

¹⁰ Ibid.

The 1952 Convention's definition of "arrest" is limited to securing a maritime claim and specifically excludes "the seizure of a ship in execution or satisfaction of a judgment".¹¹ It severely limits the possibility of the same claimant arresting any ship more than once for the same claim in any one or more of the jurisdictions of any of the contracting States.¹² Similar restrictions are imposed relating to the giving of bail or other security in relation to the same ship.¹³ Both these restrictions may be eased upon proof of good cause.¹⁴ Further, it restricts the claims in regard to which a ship may be arrested to maritime claims.¹⁵

Any vessel flying the flag of a contracting State in the jurisdiction of a contracting State will fall within the ambit of the Convention's provisions.¹⁶ Further, it allows for ships of non-contracting States to be arrested in the jurisdiction of a contracting State for any of the Convention maritime claims and any other claim for which the domestic law of the contracting State permits arrest.¹⁷ A further important observation is that where the bareboat charterer of the ship and not the owner is liable in respect of the claim, either the chartered ship or any other ship owned by the charterer may be arrested.¹⁸

The 1952 Convention recognizes any circumstances in which domestic law permits jurisdiction on the merits.¹⁹ The effect of this is that countries which permit jurisdiction based on the availability of arrest (such as Jamaica) may become Parties and apply their respective domestic laws. The 1952 Convention also specifies the circumstances in which a court of the country in which the arrest was made has jurisdiction to adjudge the merits.²⁰

Where the court of the State in which the ship was arrested lacks jurisdiction to try the case on the merits, the merits may be tried in another State whose courts have such jurisdiction, but the ship shall not be released from the first mentioned State without security for such release being given which specifically provides that such security is given for the satisfaction

¹¹ Article 1(2).

¹² Article 3(3).

¹³ Article 5.

¹⁴ Ibid.

¹⁵ Article 2.

¹⁶ Article 8(1).

¹⁷ Article 8(2).

¹⁸ Article 3(4).

¹⁹ Article 7(1).

²⁰ Article 7.

of any judgment which may eventually be pronounced by the court which tries the merits of the case.²¹

Nothing in the Convention is to be construed as creating a right of action which, apart from the Convention would not arise under the domestic law of the court having jurisdiction, nor as creating any maritime lien not existing under such law or the Convention on Maritime Mortgages and Liens, if applicable.²²

Over the years the shortcomings of the regime based on the 1952 Convention have increasingly come to the fore. According to Jackson, the 1952 regime left uncertainty regarding substantive rights in an arrested ship, and it permitted the arrest of a ship on the basis of a somewhat tenuous link between the ship arrested and the person liable being established.²³ The feature of the 1952 regime that perpetuated a narrow scope of jurisdiction on the merits frequently impeded rather than facilitated the expeditious determination of claims. Further, the scope of the definition of arrest was insufficiently wide, and Article 8(2) created uncertainties whether only Article 2 was excluded or the Convention in its entirety.

These and other considerations led to the promulgation of the International Convention on Arrest of Ships, 1999 (hereafter “the 1999 Convention”), which was adopted by consensus on 12 March 1999, at a Joint United Nations/International Maritime Organization Diplomatic Conference, held in Geneva under the auspices of UNCTAD. The 1999 Convention came into force in September 2011 as a result of Albania becoming the tenth State to accede to it, thereby fulfilling the stipulated entry into force requirement.

THE 1999 CONVENTION

The 1999 Convention refines and updates the principles of the 1952 Convention. Greater drafting precision has, in part, enabled it to follow the format of its predecessor while filling many of its predecessor’s perceived gaps and thereby giving itself more widespread application.²⁴ Uncertainty of substantive rights in an arrested ship has been removed;²⁵ the requirements regarding the strength of the link between the person liable on the claim and the

²¹ Article 7.

²² Article 9.

²³ Article 3(1) and the last sentence of Article 3(4).

²⁴ Jackson, pp. 396-397.

²⁵ Article 3.

ship at the time of arrest have been increased.²⁶ The definition of arrest has been widened to include “restriction on removal” and detention of a ship.²⁷ However, seizure of a ship in execution or satisfaction of a judgment remains excluded.

The 1999 Convention is not limited to sea-going ships, but the Parties are permitted to exclude non-sea going ships and ships not flying the flag of a State Party or any dispute as to ownership or possession of a ship.²⁸ Further, if one of the Parties is a Party to a specified treaty on inland waterways, it may declare that this treaty shall take precedence as to jurisdiction, recognition and execution of court decision.²⁹ The Convention also incorporates the concept of jurisdiction on the merits, but includes qualifications for national laws.³⁰

Unlike the 1952 Convention, the 1999 Convention extends its application to any ship within the jurisdiction of a State Party,³¹ but does not apply to ships on government non-commercial service,³² rights of detention of public authorities,³³ national law affecting the totality of a debtor’s assets,³⁴ or Conventions relating to limitation of liability.³⁵ Additionally, its application does not extend to national laws in relation to arrest in a State of a ship with the flag State by a person whose habitual residence or place of business is in that State.³⁶ The 1999 Convention specifically stipulates that none of its provisions is to be interpreted as creating a maritime lien.³⁷

Whereas the 1952 Convention applied to 17 stipulated maritime claims, i.e. those for which a ship may be arrested, the 1999 Convention has removed the now obsolete bottomry claim and added 6 new maritime claims, bringing the total number of recognized maritime claims to 22.³⁸ Notably, the additional maritime claims include environmental damage or threat, insurance premiums and brokerage fees paid on behalf of the ship owner.³⁹ The claim relating to environmental damage is somewhat open-ended in view of the difficulties inherent in defining all possible forms such damage and related costs. As such, Article 1(1)(d) lists

²⁶ Ibid. See also Jackson, p. 396.

²⁷ Article 1(2).

²⁸ Article 10.

²⁹ Ibid.

³⁰ Article 7.

³¹ Article 8(1).

³² Article 8(2).

³³ Article 8(3).

³⁴ Article 8(4).

³⁵ Article 8(5).

³⁶ Article 8(6).

³⁷ Article 9.

³⁸ Article 1(1).

³⁹ Article 1(1)(d).

examples of the type of damage which it envisages and concludes by leaving the door ajar with the words "... and damage, costs of loss of a similar nature ...". Further, only a court authorised Admiralty Marshall may arrest a ship, which may be subject to the provision of security by the claimant for wrongful arrest or excessive security.⁴⁰ An arrest may be effected in order to obtain security although, by virtue of a jurisdiction or arbitration clause, the merits are required to be adjudicated elsewhere or arbitrated.⁴¹ Further, another ship may be arrested for the same claim only if the security provided by the first arrest is inadequate or defective.⁴²

Article 3(3) of the 1999 Convention closes a gap in the 1952 regime by allowing for the arrest of a ship not owned by the person liable. However, this may be done only if the relevant national law permits the claim to be enforced against the ship by a judicial or forced sale. Like the 1952 Convention, the 1999 Convention requires that, except in claims of ownership or possession, a ship is to be released upon adequate security in relation thereto being provided.⁴³ Discretion to deal with the operation of a ship exists in respect of ownership and possession claims. The provisions regarding re-arrest have been made clearer in the 1999 Convention, allowing re-arrest in case of the security provided being inadequate or defective.⁴⁴

Under the 1999 Convention, jurisdiction on the merits is conferred by arrest of the ship "or security provided to obtain the release of the ship".⁴⁵ This is, however, made subject to a jurisdiction or arbitration agreement. Notably, no provision is made for jurisdiction on the merits of the case regarding such security being provided to avoid arrest; however, the courts may "... determine the extent of the liability, if any, of the claimant for loss or damage caused by the arrest of a ship ...", including where such loss or damage was the result of "... the arrest having been wrongful or unjustified ...".⁴⁶ Both owners and demise charterers of the subject ship are given protection by Article 6, which empowers the Court "... as a condition of the arrest of the ship, or of permitting an arrest already effected to be maintained ..." to "... impose upon the claimant [...] the obligation to provide security ..." for loss or damage which may be occasioned to the owner or demise charterer on account of either "...

⁴⁰ Article 4.

⁴¹ Article 2(3).

⁴² Article 5.

⁴³ Article 4.

⁴⁴ Article 5.

⁴⁵ Article 7(1).

⁴⁶ Article 6.

the arrest having been wrongful or unjustified ...” or “... excessive security having been demanded or provided.”⁴⁷

A State is permitted, in compliance with the provisions of its national law, to refuse to exercise jurisdiction provided another State accepts jurisdiction.⁴⁸ The refusing State may, but shall where a request to that effect is made, specify a period of time within which the action should be brought in the State accepting jurisdiction.⁴⁹ The judgment given in such proceedings is to be enforced in relation to the arrested ship or security only if the defendant was afforded a reasonable opportunity to present his case and the application of any general rule of recognition of judgments is not contrary to public policy.⁵⁰ It is specifically provided that this provision does not limit any such general rules of recognition of judgments.⁵¹

WHY SHOULD JAMAICA ACCEDE TO THE 1999 ARREST CONVENTION?

The present legislative regime has proven to be an inadequate basis for the arrest of ships within Jamaica. This area has been largely neglected since Jamaica gained its independence. Meanwhile, the developments outlined above have left Jamaica very far behind with regard to putting in place a legislative framework that will enable Jamaica to modernise its transport sector. Further, an updated legislative framework would position Jamaica to take advantage of the undeniable development potential offered by the maritime transport sector, which development forms a crucial part of the overall national development strategy as outlined in the ‘Vision 2030 Jamaica National Development Plan’.⁵²

With the decision at long last having been taken to address the issue of modernising Jamaica’s legislative framework, it is advisable that legislative action be taken that will bring Jamaica in line with the most modern developments, which in this field are exemplified by the 1999 Convention. One practical advantage that is immediately identifiable about the 1999 Convention is an expanded and exhaustive list of maritime claims. This expanded list will offer certainty, stability and predictability to the regime for dealing with arrest of ships; all vitally important characteristics if Jamaica is to take full advantage of its favourable

⁴⁷ Article 6(1).

⁴⁸ Article 7(2).

⁴⁹ Article 7(3) of the 1999 Convention.

⁵⁰ Article 7(5).

⁵¹ Article 7(6).

⁵² Viewed on 3 March, 2012 at: <http://www.vision2030.gov.jm/Portals/0/Reports/History.pdf>

geographical position in order to become a major transshipment point within the Western hemisphere. With these characteristics, the various overseas shipping interests that are expected to use Jamaica as a transshipment point will, when docking at Jamaican ports, be able to rest assured that the legal framework in Jamaica is predictable and consistent with the modern international standards. It follows from this that acceding to the Convention will be consistent with the aim of globally harmonising laws relating to various aspects of maritime transport, which is one of the main motivations behind the promulgation of international Conventions such as the 1999 Convention.

Further, the maritime claim that deals with environmental damage due to shipping or shipping related activity is a significant advantage of the 1999 Convention over the 1952 Convention, not being found in the latter. Such environmental damage has been a perennial problem in Jamaica for many years and this provision would be a powerful tool in the arsenal of those charged with combatting this scourge.

In the event that this Bill is passed, the Rules Committee of the Supreme Court will be required to make consequential amendments to the Civil Procedure Rules, 2002, specifically in Rule 70.2. The required amendments will ensure that the list of maritime claims in Article 1 of the Convention, and reproduced in clause 2 of the draft Bill, are reflected in the amended Rule 70.2.

Finally, it is to be noted that the draft Bill makes consequential amendments to the Administration of Justice Act, 1956 UK that make provisions for arrest of ships. This is recommended as an interim measure until the daunting task of repealing that Act and enacting suitable domestic legislation can be undertaken.

**INSTRUMENT OF ACCESSION
TO THE INTERNATIONAL CONVENTION ON THE ARREST OF
SHIPS, 1999**

WHEREAS the International Convention on Arrest of Ships, 1999 (hereinafter referred to as “the Convention”) was open for signature by any State at the headquarters of the United Nations, New York, from 1 September 1999 to 31 August 2000 and has thereafter remained open for accession:

AND WHEREAS Jamaica did not sign the Convention:

AND WHEREAS the arrest of ships is of vital importance as a precautionary measure in furtherance of the enforcement of maritime claims:

AND WHEREAS the Convention entered into force on the 14th day of September, 2011:

AND WHEREAS JAMAICA is desirous of reflecting in its laws the recent developments in fields related to the arrest of ships through incorporating the provisions of the Convention into its legislation:

NOW, THEREFORE, I, ARNOLD NICHOLSON, Minister of Foreign Affairs and Foreign Trade, on behalf of the Government of Jamaica, having considered the abovementioned, hereby accede to the International Convention on the Arrest of Ships, 1999.

IN WITNESS WHEREOF, I have signed this Instrument of Accession at Kingston, Jamaica, on the [INSERT DATE], two thousand and twelve.

**Arnold Nicholson
Ministry of Foreign Affairs
and Foreign Trade
Jamaica**