Enforcement of maritime claims in Jamaica

Hugh Clifton Hyman

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ENFORCEMENT OF MARITIME CLAIMS IN JAMAICA:

Preliminary Legal Issues and the International Dimension.

BY

HUGH CLIFTON HYMAN

PSA-89

Jamaica
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Preamble

The choice of this particular subject area for research had its genesis in the desire to produce work that could possibly be of some immediate as well as hopefully lasting practical utility and relevance.

This desire was itself fuelled by two main factors:

1. The absence to the writer's knowledge, of any substantial publication or other available work on Jamaican Maritime Law perse; and

2. the writer's own experiences in the private practice of law in Jamaica and his consequent perceptions regarding the research needs in the maritime law sphere.

The actual span of the thesis is to some extent a reflection of the writer's striving towards fulfillment of the above mentioned desire.

Thus, admittedly from the standpoint of theoretical analysis, the writer could have been kept busy and happy enough in looking only at one of the major sub-areas spanned by the thesis.
However, it was felt that from a practical standpoint, while paying cognizance to other relevant considerations, it would be more useful to take a broader perspective along the lines adopted in the dissertation.

This work is therefore a modest attempt to make an initial contribution to the virgin area of Jamaican Maritime Jurisprudence.

In so doing an attempt has been made to, inter alia, put Jamaica's Admiralty Jurisdiction and its Maritime Law generally in a proper historical, institutional, policy, and jurisprudential setting.

This, at least, it is hoped might be of some future value. If, in addition, the pith of the study should ring well and find itself translated into some practical use, then the writer would consider his efforts very much rewarded.

Finally, on a somewhat flippant note, throughout the thesis, the writer has used the masculine gender "he" rather than "he or she", in say, referring to any given maritime claimant.

In this time of environment conservation sensitivity, the writer contents himself with the knowledge that by avoiding the two extra words on each of the several occasions that they could have been used, some paper have been saved.

While the precise quantitative impact on the tree population is uncertain, some clear support for the approach adopted may be gleaned from the law itself.
Section 4 of the Interpretation Act, 1968, apparently unashamedly provides that:

"words importing the masculine gender include females..."

Of course, "she " could (or perhaps should) have been similarly used instead.

But then, may next time.

No doubt, by the foregoing discussion any fears of "semantic chauvinism" and the like that maybe have been prompted by this approach of convenience have now been dispelled.
Acknowledgements

Like many maritime endeavours this research effort has benefitted from the assistance of persons and organizations from various countries.

Thanks are due firstly to Professor Patrick Alderton, my course Professor, for his helpful comments, general guidance and forbearance in the completion of this work.

The dissertation has profited from discussions the writer had with a number of maritime law experts on different issues examined.

Among these were discussions with Professor William Tetley, at McGill University, Montreal, Canada; visiting Lecturers, Professors Frank Wiswall and Edgar Gold and Professor Jerry Mylnarzyck at the W.M.U.; Professor Sjur Braekhus at the Scandinavian Maritime Law Institute, University of Oslo, Norway and Dr. Thomas Mensah (IMO Visiting Professor) at the (1989) Law of the Sea Institute Conference, Noordwijk, Holland.
I wish to specially thank Richard Poisson and Cecelia Lundhall of the M.W.U. Library for their assistance in procuring materials and generally facilitating my research at the W.M.U. Library.

Also while at GARD P&I Club (Assuranceföreningen GARD), Arendal, Norway, and the Law Firms of Wikborg, Rein & Co. in Oslo, Norway and Brissett, Bishop, Davidson in Montreal, Canada, I was availed and gained much from the use of the various in-house libraries.

I wish to thank the Librarians at the following institutions for making easier my research work conducted there: The Jamaican Supreme Court Library, the Norman Manley Law School Library and the University of the West Indies Main Library, Mona, Jamaica; the Institute of Advanced Legal Studies, Univeristy of London: the Public Records Office, London, England; McGill University Law Faculty Library, The Library of the Palais de Justice, Montreal, Canada and the University of Lund Law Faculty Library, Lund, Sweden; and The Scandinavian Maritime Law Institute Library, University of Oslo, Norway.

Various persons kindly provided assistance by way of furnishing material or making arrangements to facilitate my research. Here, I would like to thank Mr. Geoffery Brice Q.C. and Mr. Donald Davies, Esq. of the English Bar, Messrs, David Colford,
Robert Cyphihot and Trevor Bishop of Brissett, Bishop Davidson, Montreal; Mr. Sven-Henrik Svensen of GARD and Mr. Haakon Stang Lund of Wikborg Rein & Co., Norway.

Also very special assistance was obtained from friends in Jamaica (Garcia, Jennifer, Albert, et al.) who sent materials to Sweden.

I wish to thank the European Community whose fellowship award made my attendance at the W.M.U. possible; Ruby Mcreath, the U.N.D.P. and others in Jamaica who dealt with the logistics or otherwise facilitated my coming to Sweden.

To my W.M.U. lecturers, from whom I learnt much, fellow students and others in Sweden who helped to provide a conducive atmosphere for the study, I wish to acknowledge their contribution with gratitude.

To my friend Stanley Cummings for arrangements for the typing, to Monique Fransen for kindly initiating the process and to Madubuko Diakité, and Scarlett Warfvinge-Massel for its completion.

Special thanks are due to Mr. Terje Groth, Mr. Gudmund Rognstad and SHIPDECO and Mr. Odd Nielsen of Norway, Mr. Joe Carton, Mr. Robert Scott and Alcan Shipping Services of Montreal, Canada.

Yet thanks are due to others still. However, some space must be left for the thesis itself.
Hence, I wish to conclude my acknowledgements by thanking most specially of all, my parents Metella and Douglas Hyman for their unfailing support and inspiration.

That the thesis might not at all reflect the imprint of any of the persons mentioned or otherwise do their assistance sufficient justice is but ample reminder that the responsibility for the final product fell and remains on my shoulders.
To my parents:

Metella and Douglas Hyman
ABSTRACT

Chapter 1 introduces the thesis including its aim, scope, raison d'etre, conceptual framework, premises, terminology, perspective of analysis, and research methodology.

Chapter 2 outlines the broad legal setting within which maritime law exists and functions in Jamaica and in which the maritime claimant seeks to enforce his claim.

Chapter 3 traces the development of Admiralty Jurisdiction in Jamaica towards establishing the legal foundations upon which the present Jamaican Admiralty jurisdiction rests. In so doing, the present scope of Jamaican Admiralty Jurisdiction is delineated.

Thus, it is shown what sort of claims the maritime claimant can have entertained in the Jamaican Admiralty Court.
Also, the international dimension to the present admiralty jurisdiction is highlighted and its relevance to the local judicial process noted.

Chapter 4 looks at the various aspects of the matter of Arrest of Ships. The Law governing ship arrest in Jamaica is examined. Relevant international stipulations are considered especially as these may have implications for Jamaica and its laws pertaining to ship arrest. The Mareva Injunction is considered particularly to the extent that it may, at times, be viewed as offering an alternative to ship arrest.

Chapter 5 attempts to look at the question of the exercise of jurisdiction from the perspectives of Private International Law and to a lesser extent that of Public International Law. In effect, it emphasizes the international dimension to Jurisdiction issues in Jamaica.

An attempt is made to identify and examine stipulations in International Convention Provisions
which may ultimately have implications for Jamaican maritime law and the maritime claimant as regards the exercise of Jurisdiction and Choice of Law.

This is done against the background of the relevant applicable Jamaican municipal law principles which are first examined.

Particular jurisprudential problems pertaining to Jurisdiction clauses and maritime torts committed beyond the territorial seas of but affecting Jamaica are discussed.

**Chapter 6** looks at the question of Time Bars as they relate to and operate in respect of maritime claims in Jamaica.

International Convention provisions with time bar stipulations are examined and their relevance to and possible consequences for or relevance to Jamaican Maritime Law and Maritime Claimants in Jamaica highlighted. Particular problems pertaining to 'Time and Bar' Arbitration Clauses and Time Bars in Jamaican Conflict of Laws are discussed.
Chapter 7 concludes. The main inferences to be drawn from the study are highlighted. Suggested changes and future challenges are summarily noted.
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Chapter 1

Introduction
Chapter 1

INTRODUCTION

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B: The Aim

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D: Terminology and Scope

E: The raison d'etre (Jamaica)

F: The international dimension

G: The Preliminary issues and law practice

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I: Some premises

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K: Type of study

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Chapter 1

Introduction

A: The raison d'être general

A right without a remedy is practically not much of a right. Graveson observes that: "It is not enough to be that a legal right exists: to be perfect it must be capable of enforcement in a Court of Law" ¹

It is hardly any consolation to a maritime claimant that he would have succeeded on his claim, if only he was given an opportunity of having it heard on its merits. The fact is such a claimant is normally interested in and satisfied only by actual settlement of his claim.

Likewise, a favourable court judgement in hand is of little comfort if there is nothing on which it can bite. In short, where ones claim is not provisionally secured before a court trial on the merits, "victory" obtained against, say, a foreign shipowner where none of his assets are within the courts jurisdiction (or are otherwise accessible) hardly warrents any celebration.

This points to the fact that there are preliminary legal issues of much practical importance that need to be focused on as regards enforcement of any maritime claim.

B: The Aim

The purpose of this study is to examine certain preliminary legal issues pertaining to the enforcement of maritime claims in Jamaica.

In so doing, an attempt is being made to take particular cognizance of relevant provisions of international maritime conventions as these relate to such issues.

These Conventions it is felt, help to provide an illuminating backdrop against which the relevant Jamaican Law may be viewed.

Thus, an underlying theme of the study is that there is often an international legal dimension worth bearing in mind when looking at these particular preliminary issues which appear in the Jamaican Municipal Law context, clothed only in local procedural garb.

C: The Preliminary Legal Issues

The study is concerned with preliminary issues such as pertain to: How much time the claimant is allowed before he must commence legal proceedings so as to preserve his fight and/or remedy?; Whether the claim in question is among the set of claims that the Admiralty Court can entertain?;

Whether the Court has jurisdiction to hear and determine the particular claim brought before it:

If the Court does have jurisdiction as regards the claim before it, whether it will exercise such jurisdiction:
What are the considerations as regards obtaining provisional security for one's maritime claim, in particular, by way of ship arrest?

Mainly the issues are procedural in character and or in some aspects embrace the field of Private International Law (Conflict of Laws).

The study does not concern itself except incidentally with certain civil procedural details such as pertains to pleadings which may arise in connection with some of these preliminary matters.

D: Terminology and Scope

"Preliminary Legal Issues" are limited to the extent indicated, and generally to those basic issues which arise prior to and independent of any hearing (or previous hearing) on the merits of the claim.

They in effect relate to the first set of legal hurdles the maritime claimant is faced with in his pursuit of legal redress.

Accordingly, matters such as the enforcement of foreign judgements and arbitration awards which arise after a previous hearing, fall outside the scope of the study. So too are all issues as regards the merits standing or status of a claim of which may arise in respect

2 Lush, L.J., notes in Poyser v. Minors (1881) 7 Q.B.D. 329 at 333 that "procedure" is "the mode of proceeding by which a legal right is enforced, as distinguished fro the law which gives or defines the right, and which by means of the proceeding the court is to administer; the machinery as distinguished from the product."

3 Cheshire and North Private International Law, 11th Edn., Butterworths, London, 1987, p. 4 states that: "Private International Law...is that part of law which comes into play when the issue before the court affects some fact, event, or transaction that is so closely connected with a foreign system of law so as to necessitate recourse to that system."
interrogatories, proof of foreign law, other evidentiary questions and the like.

The word "claim" is used simply in the sense of a demand for one's due or assertion of one's right. "Maritime" is used to mean: related to the sea.

The term "Maritime claim" is used with more forensic significance. It refers to a claim within the Admiralty Jurisdiction of the Supreme Court of Jamaica. 4

The expression "Maritime related claim" is used generically to encompass all claims that have some connection to the sea. From this it is clear that "Maritime claims" constitute a subset, (albeit a very large one), within "Maritime related claims".

The phrase: "Enforcement of maritime claims" is in this thesis used in the sense of prosecution of such claims.

This entails instituting legal proceedings towards obtaining legal redress. Unless the context indicates otherwise, "legal proceedings" refer to proceedings in the Admiralty Division of the Jamaican Supreme Court.

Jackson 5 in the major work: "Enforcement of Maritime claims", notes that:

"There are three aspects of Maritime Claims:

(i) The extent to which security may be obtained by a maritime claimant so as to ensure that there will be assets available to turn a judgement into a material gain (the provisional remedy aspect):

(ii) The rules governing the bringing of an action to enforce a maritime claim (the jurisdictional aspect):

4 See: Chapter 3.
(iii) The extent to which a maritime claimant becomes a preferred creditor (the security aspect)6

This study is more concerned with the first two aspects. The third is dealt with sparingly and only to the extent that it relates to the first two aspects.

It is the writer's view that despite the importance of "the security aspect", the subject of liens around which this third aspect is centered, while meriting some attention in the context of a discussion of maritime claims, is analytically, quite a distinct subject in its own right.

This, it is respectfully submitted to be even more the case, in the light of the conceptual framework so far delineated.

The writer takes some comfort as regards the approach adopted upon noting the title adopted by Tetley7, in another major work of relevance to the subject area of this thesis.

The title is: "Maritime Liens and Claims". Such a title and the distinction it emphasises are both apposite and instructive in the present context.

Moreover, under Jamaican Law (following the English Common Law position), only a small minority of maritime claims have attached to them maritime lien status.

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6 Ibid., p. lvii.
E: The raison d'etre

Specifically, as regards Jamaica, the study is prompted by a number of considerations.

There is a definite need for Jamaica to modernize its maritime laws in general.

Typically, when thought is being given in Jamaica to the updating of such laws, attention is focused only on substantive law matters. Thus, at present, efforts are directed at finalizing a draft comprehensive maritime code which deals with a variety of substantive law issues.

No attention is specifically paid to the preliminary legal issues such as those under focus in this thesis.

Indeed, there has been virtually no change in the relevant Rules of Court provisions relating to Admiralty procedure and practice in Jamaica since their promulgation almost a century ago.8

Yet the substantive law rules dealing with various rights and liabilities or duties and obligations can only be efficacious to the extent that they are facilitated and come to life through appropriate procedural and, or conflict of law rules.

For example, it is obvious that any large oil spill within or near Jamaican territorial waters is potentially catastrophic for the fragile local economy, whose foreign exchange mainstay is at present, Tourism.

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8 Vide: Chapter 4.
which would probably be a major victim in any such oil spill scenario.

Yet, although the substantive law rules would normally recognize such an oil spill, as giving rise to an action in tort, as the jurisdictional rules now stand, they could significantly fetter and frustrate effective civil action being taken against a delinquent shipowner. This is clearly against the national interest.

Also, typically, Jamaican parties to maritime contracts, for example, shippers, seafarers and the assured under marine insurance contracts are faced with adhesion type contracts which they enter with foreigners containing Foreign Jurisdiction and Choice of Law Clauses.

These stipulations normally have both a prorogatory effect in that they refer the parties, and disputes between them to the law and adjudication of a specified country, and partly a derogatory effect, in that by their wording, they preclude suits in all other jurisdictions.

One question might therefore be: Should a Jamaican Court in a particular case uphold such stipulations so as to effectively deny its citizens the right to bring their cases before the courts of their homeland?

In other words, should such "private ordering" by the parties be sufficient for a Jamaican Court to consider itself not suitable to hear and determine the dispute?

These, it is submitted, raise important jurisprudential and policy questions which are worth examining.

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9 Assuming, for instance, that there was negligence.
Similar questions arise regarding the so called "Time and Bar" Arbitration clauses\(^{10}\) which purport to terminate, absolutely, a party's right to take action for breach of a charterparty after elapse of a contractually stipulated time period, without arbitration proceedings being instituted.

These questions ultimately have implications for Jamaica's national interest.

Further, Jamaica aims to strengthen its position as a major maritime centre in the Caribbean. Generally it desires acceleration of its maritime development.

Undoubtedly, several factors enhance these prospects.

Jamaica has in the Port of Kingston, one of the finest container/transhipment terminals in the Western Hemisphere alongside modern breakbulk roll on/roll off facilities.

The Port of Kingston stands unrivaled among Caribbean ports and is built on Kingston Harbour which is the seventh largest natural harbour in the world and almost landlocked.

Geographically, it lies in a very strategic position. It is positioned mid-way between North and South America and lies on the direct route from Europe to the Orient via the Panama Canal.

This makes it a most convenient port for trading vessels and it remains today a major transhipment port.

In addition, Jamaica is one of the major cruise shipping destinations of the world.

In the sphere of legal services it has a Bar and Bench of a very high standard.

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\(^{10}\) Vide: Chapter 6.
large measure to their efforts, Jamaica has been selected as the site of the International
Seabed Authority under the new Montigo Bay Law of the Sea Convention.11

This should help to focus attention on Jamaica as a significant maritime centre.

Various Private Sector and Governmental organizations operating within the shipping
sector also enhance the maritime development prospects of Jamaica. Other factors also
augur well for such development.

However Jamaica can only fully realize its maritime development capabilities and
optimize benefits from any such development if there is in place up to date legal services
infrastructure including modern maritime procedural, and Conflict of Laws rules.

For instance: a common concern of maritime claimants and their lawyers in any given
case, is where is the best country to have an offending vessel arrested.

Thus Hill12 has commented:

"... the 64,000 dollar"question which your hypothetical bonafide maritime claimant
will likely pose is "where, how and when can I most advantageously arrest a ship in
pursuit of my particular claim?"13

Of much importance here are not only the national substantive law stipulations as these
pertain to the claim in issue, but also the requirements, efficiency and efficacy of the
Arrest procedure in a given country.

In this respect, Jamaica needs to be able to compete in the regional and international

11 Vide: Chapter 2.
13 Ibid., p.v.
market place to attract utilization of its legal services, by way of upholding high standards. The fact is "Forum Shopping" is very much a part of international shipping reality today. As Hill observes: "Forum Shopping" is an activity (cynics would call it a sport) which has been commonly practiced by maritime claimants the world over".14

This also helps to point to the matter of the international dimension.

**F: The international dimension**

Jamaica exists in an international maritime community in which international Convention provisions are more and more providing a setting for the operation of or are otherwise influencing the functioning and development of municipal law.

Tetley15 sees the main purpose of international conventions as embodying three principles:

"(1) Uniformity of law

(2) Certainty of law, and

(3) Justice, or a just solution to the problems requiring solution."16

This suggests that when Jamaica becomes a party to an international convention, such as say, The Hague Rules17, it ought to ensure that its Conflict of laws stipulations do not frustrate its international commitments.

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14 Ibid., p. vi.
16 Ibid., p. 390.
17 Vide: Infra.
conventions, bearing in mind these three principles.

Where a Convention is silent on a point or allows some latitude for particular national construction as in the case of the Hague Rules in respect of Jurisdiction Clauses, then it is being contended that in addition to bearing in mind these three principles, due regard should be had to Jamaica's national interest.

Also, even where Jamaica is not a party to a maritime Convention, it can help in the realization of the objectives implicit in these three "principles" when applying or seeking to develop its maritime municipal law.

This, it can do for instance by taking due cognizance of relevant international maritime convention provisions as these relate to particular preliminary legal issues.

This, it is submitted, is particularly relevant to the maritime law sphere which by nature operates in an international setting.

However, it is to be emphasized that in suggesting that note should be taken of the international legal dimension as regards the preliminary issue, no derogation from the normal role of local legal sources is being advocated.

All that is being contended is that the international legal dimension should also be borne in mind. The case for such an approach is further strengthened in Jamaica's particular situation by the dearth of local court decisions and legal writings as well as the existence of lacunae in maritime legislation on matters relating to maritime procedural and private international law.
mind:

"...Private international law differs from most other branches of law ...in the fact that there is comparatively little legislation or case law in this field"19

Related to this fact and compounding matters, is the fact that it appears, this field of the law is not one in which judges are in general at their happiest and competent best.

Here it may be borne in mind the words of the American Judge Cardozo, J, when he stated:

"The average judge, when confronted by a problem in the Conflict of Laws, feels almost completely lost, and like a drowning man, will grasp at a straw."20

In Jamaica, following the general trend in most countries, Conflict of Laws cases are few and far between. There appears to be no reported Maritime law case dealing with Conflict of Laws questions.

Overall, there is a pancy of Jamaican cases infringing on the specific area of focus of this thesis.

This makes it most likely that judicial clutching to the nearest and seemingly safest straw will take place.

In practice this often means a virtual mechanical resort to English Authorities.

These authorities, although generally of sound and high quality, do not always

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19 Ibid., p. 5.
always free from deficiencies.

They may at times reflect vested economic interests which are diametrically opposite to those of Jamaica.

Braekhus\textsuperscript{21} has for instance described how in effect vested national economic interests gave rise to opposite approaches being taken by English and American Courts in the period preceding The Harter Act, 1893 U.S. on the question of Choice of Law and Jurisdiction clauses in Bills of Lading. Involved then was the contending interests of British Shipowner and American Cargo interests.\textsuperscript{22}

Such overt expression of national interests are more readily discernible in Protectionist national legislation dealing with Substantive law questions. However, it appears these interests may also find covert expression in other areas of the law including that under focus in this thesis, perhaps at times by the device of "judicial interpretation"

While neither judicial insularity nor chauvanistic legislation is being promoted, it seems that in a world where perceived national interests may form a covert backdrop to not only legislative but also judicial activity, to would be less than prudent not to bear this in mind in striving to develop one's own jurisprudence.

Such an awareness should prompt a search for different perspectives so as to have a broader informed basis for making the relevant decisions.

These different perspectives may be those of other common law jurisdictions as well

\textsuperscript{21} Braekhus, Sjur: Choice of Law problems in International Shipping (Recent Developments), Printed for private circulation only. Extract from the Recueil des cours, volume 164, Sijthoff & Noordhoff, The Netherlands (undated).
\textsuperscript{22} Ibid. chapter 3.
as in appropriate cases civil law jurisdictions.

This study is not a comparative law study. Such an approach would extend the width and volume of this thesis beyond its proper dimensions. Nevertheless, as deemed necessary, references are made to the law of various countries.

At the minimum however, it is felt that international dimensions should be taken into account by the relevant decision makers.

In so doing, this should not lead only to a look at relevant international convention provisions. Importantly, regard should be had for the recorded deliberations of international maritime bodies such as UNCTADs Shipping Committee, I.M.O, I.L.O, and the C.M.I. as well as those of the U.N., where relevant.

In these fora a variety of legal opinions are canvassed by international maritime experts representing different interests and schools of thought.

It seems to the writer that this is one additional potentially fertile source that a country with an embryonic maritime jurisprudence can meaningfully tap.

Hence, the writer is in this thesis adopting an approach which expressly incorporates an international dimension in striving to look at what are in effect local maritime preliminary legal issues.

G: The preliminary issues and law practice.

These preliminary issues also take on a special significance in the actual practice of law in Jamaica.
In many instances, local practitioners have been limited to just addressing preliminary matters in maritime cases.

This may be as a result of a Jurisdiction Clause which results in the semi/processed case being shipped to say, London for final determination.\textsuperscript{23}

Even where the matter can be heard in Jamaica, the parties especially where they are all foreigners, may choose to have the matter dealt with in London (or some other international maritime and financial centre). In this case their legal representatives in London (or elsewhere) may only seek advice of local legal counsel on preliminary issues involving Jamaica.\textsuperscript{24}

Otherwise, it may simply be a case where after, say, a vessel is arrested and security put in place for its release, negotiations between the parties result in adequate arrangements being made to avoid litigation.

Also from the standpoint of practice, these preliminary issues are not only of interest in the context of legal proceedings. There is always the old adage that prevention is better than the cure.

Thus, local counsel may try to avoid future bottlenecks by careful contract formulation and drafting, advice to clients and in negotiations with foreign parties as pertain to such issues. However, in light of the thesis topic, this aspect is not developed, but is to be nevertheless borne in mind.

\textsuperscript{24} See: Appendix 20
H: The practical Objectives

The thesis thus aims to achieve the following practical objectives:

1: To analyse, discuss and make suggestions towards having particular areas of the relevant law updated and improved.

2: To make a contribution towards clarifying what the law is by stating what the law appears to be at present.

3: To make a contribution towards the development of an analytical framework for a Jamaican maritime jurisprudence.

4: To highlight the international dimension and to a lesser extent the policy considerations which the relevant preliminary issues might entail.

I: Some Premises

Discussion as regards Jamaica's public policy interests proceeds on the basis of a number of extra-legal considerations and assumptions.

These include the following:

1: Jamaica is a "cargo interests" rather than a "maritime carrier" country and its interests are best served at the present time by taking (so-called) pro cargo-interests positions.

2: Jamaica has a strong vested interest in promoting the economic welfare of its seafarers.
3: Jamaica's beaches (and other physical marine resources) constitute a vital economic resource, damage to which, by say, a large oil spill or other pollution to the marine environment would be extremely harmful to the island's economy which today has tourism as its main foreign exchange earner.

4: Jamaica needs to develop as an important part of its basic maritime infrastructure, its laws both substantive and procedural as well as its adjudicatory machinery.

5: Jamaica needs to set the stage where it can become a significant provider of legal services and an appealing forum for maritime litigation.

J: The perspective of analysis.

The subject matter of this study may be viewed with different lenses.

One standpoint may be that of a private legal practitioner in Jamaica having to contend with these preliminary questions.

Another might be that of an adjudicator dealing with the issues ex post facto after they have been "organized", researched and presented by appearing legal counsel.

Thirdly, the perspective may be that of the policy maker involved in basic questions as to what rules are in the national interests.

The study although inclined towards that of the first perspective, also attempts to take into account those of the second and third perspectives.
The study is essentially a legal one. It basically entails an analysis of specified aspects of the law by the utilization of legal reasoning.

Here, an attempt is made to heed the caution of Bos\textsuperscript{25}, who in his book, "A Methodology of International Law", stated:

"No reasoning can purport to be a 'legal' one unless it is borne out by one or more among the rules contained in one or more of these <recognized manifestations> of law".\textsuperscript{26}

For Bos, such "recognized manifestations of law" are "...the phenomena which in a given legal order one is allowed to invoke in order to legitimize a reasoning alleged to be a legal one".\textsuperscript{27}

In the context of Jamaican as well as International Law these manifestations may be referred to as "legal sources".\textsuperscript{28} An attempt is therefore made to buttress the contentions advanced or arguments employed in this study by utilization of these sources.

Despite the basic nature of the study, it is recognized that the law does not operate in a vacuum nor is it to be viewed as self-serving. Accordingly, extra-legal considerations, such as already indicated ultimately provide a practical context for the legal discussions.

Analysis of the law essentially takes place against the background of:

1. the need to develop the content and efficacy of the law;

\textsuperscript{25} Bos, Maarten: A Methodology of International Law, North-Holland, 1984.
\textsuperscript{26} Ibid., p. 49.
\textsuperscript{27} Ibid., p. 56.
\textsuperscript{28} Vide: Chapter 2.
2. perceived national interests; and

3. the provisions of international conventions.

I. The Research and its Methodology

The research was carried out mainly by way of consulting and analysing various legal publications and other written materials. The writer also had discussions with a number of maritime law experts and other persons in the shipping and legal fields as regards different issues examined.

A wide variety of legal materials was consulted.

These included the following: legislation; reported cases; unpublished court judgments; academic law treatises; law practitioner's texts; article; seminar papers; periodicals; pamphlets; publications of international conventions; conference and working committee reports; Governmental and private sector documents and other writings.

Also consulted were historical, shipping and other materials relating to the area of study.

Court files of Admiralty cases were perused at the Jamaican Supreme Court. Also perused in Jamaica for the purposes of the thesis were files that the writer had worked on.

While at two different International Law Firms (in Canada and Norway, respectively) which specialise in Maritime Law, and at a leading International P & I Club (in Norway), further exposure was had to how some of the issues discussed developed and were resolved in practice.

29 See also, supra: "Acknowledgements".
Here again, the writer was, inter alia, involved in the perusal of various files for the purposes of the thesis.

Discussion of some of the issues involved with maritime lawyers in these organizations as well as the preparation of opinions on some of the matters in the said files aided the gathering of relevant information for the thesis.

At the Jamaican Supreme Court, records were consulted as regards the frequency of Admiralty Cases and related matters.

Much of the legal-historical data in the thesis particularly that contained in Chapter 3 were obtained by the writer consulting old English and Canadian Maritime law publications, various published historical accounts of Jamaica (and other former British colonies), as well as importantly, Jamaican or other West Indian authored legal-historical materials.

Searches were also carried out in respect of Chapter 3 at the Public Records Office, London.

Overall, written materials for the thesis were collected in Jamaica, Canada, England, Sweden and Norway and to a lesser extent in Holland.

The research was conducted also by way of mainly informal interviews with a number of maritime jurists, on aspects of the thesis subject area.

Other persons consulted by way of informal interviews were in general from the shipping and law fields in the countries already named.
The purpose of these interviews varied from one interviewee to the next, but overall was to gain both theoretical and practical insight on matters pertaining to the thesis subject.

At times there were difficulties getting particular detailed information which were sent for from Jamaica, but on the whole, the necessary information was obtained.
Chapter 2

Jamaican Law, Legal System

and Maritime Law
Chapter 2

JAMAICAN LAW, LEGAL SYSTEM AND MARITIME LAW

A. General Background

B. Sources of Jamaican Law (Legal and Literary)

1 Legal Sources
   a. General
   b. Jamaican Maritime Law Legal Sources
      i Legislation
      ii Case Law
      iii Other Sources

2 Literary Sources
C. Jamaica's Court System

D. Stare Decisis Doctrine applied in Jamaica

E. Maritime Claims Adjudication

1. General

2. Adjudication by the Courts

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F. Jamaica and International Law

1. General

2. International Law and its applicability in Jamaican Municipal law
   a. Customary International Law
   b. Treaties

3. Succession to pre-independence treaties by Jamaica.

G. Concluding Comments
Chapter 2

Jamaican Law, Legal System and Maritime Law

A. General Background

Jamaica\(^1\) is an independent unitary\(^2\) state within the Commonwealth of Nations.\(^3\) The island was an English colony from 1655 until it gained independence on August 6, 1962. It is a parliamentary democracy with a separation of powers of the Executive, Legislative and Judicial arms of government. The form of government is that of a constitutional monarchy.\(^4\)

The island's law and legal system had their genesis in and today remain strongly influenced by those of the English.

There has been some controversy about the reception of English Law into Jamaica.\(^5\)

However, it is now well established that English Common law\(^6\) was received in 1661.\(^7\)

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1. See Appendices 1 & 2 for basic data on Jamaica.
2. As distinguished from Federal States such as the U.S.A. and Canada.
3. Association of the United Kingdom and self-governing nations whose territories originally formed part of the British Empire.
4. The British Queen is legally Head of State but plans are afoot to make Jamaica into a Republic: vide: eg. Daily Gleaner, August 20, 1989, p. 8A. Jamaica is still today, in English legal parlance referrable to as one of "her majesty's dominions": vide: Halsbury's Laws of England, 4th Edn., Vol 6.4
6. As distinguished from statute law.
In 1728 statutory confirmation\(^8\) was given of the continued operation in the island of English enactments which were up to then "... at any time esteemed, introduced, used, accepted or received as laws..." of Jamaica.\(^9\)

Thus, in order to determine whether an English Act passed prior to 1728 was or is part of Jamaican law it is necessary to ascertain whether such an Act was at any time "used" in the island before then.\(^10\) Satisfying such a criterion is fraught with enormous evidentiary difficulties.\(^11\)

This ultimately can have adverse implications for ascertaining the law on aspects of any given subject such as that under consideration. Overall, the question of the reception of English Statutes is of particular relevance to any consideration of Jamaican Maritime Law, a significant component of which is comprised of Imperial United Kingdom Statutory Provisions.\(^12\)

Patchett \(^13\) notes that:

"English statute law has been incorporated into the law of the various West Indian territories in four major ways:

1 Express extension by the United Kingdom Parliament of particular statutes, either

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8 1 Geo. 2, C. 2, section 22.
9 Ibid.
10 Morrison, op cit., 45 states that: "The effect of the 1728 Act however, was to make user the criterion for reception of English Law".
11 See generally: Morrison, op cit.; Grant, ibid.
12 eg. Merchant Shipping Act, 1894 (U.K.); Maritime Conventions Act, 1911 (U.K.).
13 See F.N. 5.
generally to all dependent territories or only to named colonies. Such extensions are usually made by the statutes themselves.

2 Adoption through incorporation by reference to colonial legislation. Again this may take two forms – by express incorporation of named statutes or by general incorporation clauses which do not specify individual Acts.

3 Adoption by repetition of the provisions of the English Acts.

4 Reception under the common law rules relating to statutes of general application in force in England before a specified date usually that of settlement or conquest.  

It is to be noted that soon after the English settlement, Jamaica was granted a legislature with power to repeal and alter the statute and common law of England and generally to make new law. Jamaican legislation actually dates back to at least 1681.  

By the Colonial Laws Validity Act, 1865, (U.K.), English statute Law was not to be deemed applicable to any colony unless it had been extended thereto either expressly or by necessary implication.

Accordingly, no English Statute relating to maritime (or any other matter) enacted since 1655 applies to Jamaica unless it has been incorporated in accordance with the foregoing.  

14 Ibid., p. 55.
16 See Grant, ibid, p. 5.
Most importantly, from the date of Jamaica's independence, the United Kingdom lost its legislative power over the island. Hence, *The Jamaican Independence Act, 1962, (U.K.), section 1(2)*, provides that as of that date (August 6, 1962), no Act of the United Kingdom "shall extend or be deemed to extend to Jamaica as part of the law thereof."

However, the pre-existing law continued in force upon Jamaica's independence. Thus section 4(1) of *The second schedule to The Jamaica Constitution Order in Council 1962* provides that:

"All laws in force in Jamaica immediately before the appointed day shall

(subject to amendment or repeal by the authority having power to amend or
repeal any such law) continue in force on and after that day..."

In turn, *section 4(1) of The Jamaican Constitution Order in Council*, provides that "subject to the provisions of this constitution, Parliament may make laws for the peace, order and good government of Jamaica".

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17 The Jamaican Constitution is the supreme law of the island, and provides (per section 2) that if any other law is inconsistent with it such "other law shall, to the extent of the consistency, be void." Thus, Carnegie notes in reference to the English doctrine of parliamentary sovereignty that: "In the Commonwealth Caribbean Constitutions, the doctrine of parliamentary sovereignty is ousted by the superior doctrine of the supremacy of the constitution: Carnegie, A. Ralph: The Law of the sea in the Commonwealth Caribbean: The Domestic Law context, Lecture notes on Coastal and Estuarine studies 27, A new Law of the sea for the Caribbean, Gold, Edgar (ed.), Springer-Verlag, N.Y. 1988, 83 at p. 87."
Where an English statute is in force in Jamaica under 1 Geo2, cap 1, section 2218, its repeal in England does not affect its operation in Jamaica. Similarly where an English Common Law rule has been recognised in Jamaica its abolition in England does not render it inoperative in Jamaica.

B. Sources of Jamaican Law (Legal and Literary)

1 Legal Sources

a. General

The primary legal sources are (1) Legislation and (2) Case Law or Judicial Precedent. Other sources include custom and learned legal writings.

b. Jamaican Maritime Law Legal Sources

(i) Legislation

Old and often outdated statutory provisions inherited from England constitute the majority of existing maritime legislation in Jamaica. Mainly these are local pre-independence local enactments.

18 See, supra and F.N. 8.
19 Sutton v Thomas et al, Stephen’s R 810; Bernal v Feurtado 1927 Clark’s R, 238 cited by Grant, ibid., pp. 5-6.
20 Gray v Referee if Titles, 1 J.L.R. 97, cited by Grant, ibid., p. 6.
21 The means by which the law comes into existence.
which adapted and adapted as necessary U.K. statutory provisions.

Also, as intimated, a very significant part of Jamaican Maritime Law is comprised of Imperial U.K. Statutory provisions which were extended to Jamaica.

This process of extension at times creates particular difficulties in ascertaining the law on a given maritime matter, This is as regards both physically finding the relevant law in the first place as well as generally determining the law on the subject.

Section 9(1) of The Maritime Conventions Act, 1911 (U.K.) provides that: "This Act shall extend throughout His Majesty's dominions and to any territories under his protection..."

Similarly, section 91 of The Merchant Shipping Act, 1894 (U:K) in reference to Part 1 of that Act, provides that: "This Part of this Act shall apply to the whole of Her Majesty's dominions, and to all places where Her Majesty has jurisdiction."

Where there is such express extension in the "parent" U.K. Act itself as just quoted, then there is relatively little difficulty in ascertaining whether particular U.K. statutory provisions form part of Jamaican Maritime Law.

However, it appears that since the enactment of The Maritime Conventions Act, 1911, (U.K.), this practice was discontinued. Instead, the practice has been typically to reserve power in the British Crown to apply the relevant provisions to British possessions.
For instance, *Section 6(1)* of *The Merchant Shipping (International Labour Conventions) Act 1925, (U.K.)* provides that:

"His Majesty, may by Order in Council, direct that the provisions of this Act shall subject to such modifications and adaptations, to be specified in the Order, as appear to His Majesty necessary or expedient in the circumstances of the case apply to ships registered in any British possession..."

Similarly *section 36(1)* of the *Merchant Shipping (Safety and Load Line Conventions) Act, 1932, (U.K.)* provides in reference to Part 1 of that Act, that "His Majesty may by Order in Council direct that the provisions of this Part of this Act and ... the provisions of any other Act relating to Merchant Shipping, including any enactments for the time being in force amending or substituted for the provisions of this Part of this Act or any other such Act, shall extend, with such exceptions, adaptations or modifications (if any) as may be specified in the Order, to ... any colony."

An initial problem is of course that of locating the relevant Order in Council (if any). The problem in practice is exacerbated by the fact that extended U.K. statutory provisions are not contained in any official local publication as is the case with the readily accessible locally

*enacted legislation which are contained in printed official volumes of Laws of Jamaica.*
Other problems may arise as regards whether particular U.K. maritime statutory provisions are to be deemed as extended by necessary implication.

To further compound matters, it appears that various U.K. statutory provisions have been borrowed and used as if such provisions were in fact extended to Jamaica. This apparently has been the case even in respect of certain U.K. legislation passed after Jamaica’s independence.22

After a period of reliance on such legislation, persons using them may unwittingly regard them as part of the maritime statutory law to which Jamaica is subject. This ultimately abets uncertainty as regards maritime legislation in Jamaica.

Moreover, most of the maritime statutory provisions have never been adjudicated upon or otherwise subject to local judicial consideration. Accordingly, issues as to such provisions’ status and applicability seldom benefit from local judicial determination.

Since independence, the main areas of legislative activity in maritime matters have been those pertaining to (1) Port Maritime Administration and to a lesser extent (2) Economic Regulation of Shipping. Overall, the maritime area has received scant attention from local legislators.

22 This appears to be so as regards use by, for example Government Authorities concerned with ship registration and related matters of Merchant Shipping Acts, enacting in the U.K. after Jamaica’s independence. This has happened because of traditional reliance on U.K. shipping Forms and Rules in this area based on the continued application of Part 1 of the Merchant Shipping Act, 1894 (U.K.) to Jamaica. Thus where the Law and concomitantly subsidiary rules and forms have changed in the U.K. since independence it appears the new rules and forms and in the final analysis the new laws, have been resorted to.
However, there is at present a number of draft bills, including a comprehensive Modern Merchant Shipping Bill 23, due to replace The Merchant Shipping Act, 1894 (UK) still presently relied on. Unfortunately, such bills have tended in the past to remain so indefinitely.24

The area of Jamaican Maritime Adjectival Law remains essentially untouched by post-independence legislation. The same is true for Jamaican Private International Law. In effect, the area under study has not had any particular legislative indigenous input.

Appendix 3 provides a list of Jamaican Maritime Legislation.

(ii) Case Law

There is a dearth of Jamaican or other West Indian judicial decisions on Maritime matters. Reported cases are scarce.

In practice, reliance is normally placed on English decisions. Often, there is no Jamaican or West Indian case on point.25 This contrasts sharply with other areas of Jamaican Law such as Criminal, Labour, or Landlord and Tenant Law where a fledgling Jamaican or West Indian flavoured Jurisprudence may be said to be emerging and where there is a relative abundance of local case law.

23 The Jamaica Shipping Bill, 1989
25 However, Newton has observed that "...although in some areas of the law a number of important West Indian cases are summarised in the West Indian Reports, yet legal practitioners seem to prefer citing English cases in the courts." : Newton, Velma. Historical Perspective of Law-Reporting in the English-Speaking Caribbean, W.I.L.J., October 1978, 37 at p. 38; see also infra re literary sources.
(iii) Other Sources

There is at present hardly any Jamaican or West Indian legal writings in the maritime law field. Most writings that impinge on the field have to do with the broader public international law issues pertaining to the Law of the Sea. Thus in the unlikely event of a Jamaican Court feeling the need to seek the aid of indigenous "learned legal writings" in the field, it would be accordingly constrained. As regards custom, it appears that its roles as a legal source has so far been at most, negligible.

2. Literary Sources 26

The primary literary sources encompass legislation and law reports. Treatises are considered as secondary source material. "In Jamaica, legislation represents the greater part of published legal material followed by law reports and treaties." 27

As noted above, applicable Imperial U.K. Statutory provisions are not included in the official published volumes of statute law in Jamaica. This at times creates problems in locating the law especially in the maritime field. The problem in its most acute form might render it necessary to carry out searches in English archives.

Problems may also arise in respect of international law sources as these pertain to Jamaica.

26 Where the law is to be found.
Here, Carneigie laments that "...not even Jamaica has an official and comprehensive serial publication of the treaties entered into by the state..." 28

Although this is so, information regarding Jamaica's treaty undertakings can (albeit, at times belatedly) be obtained from the relevant Government Authorities and international bodies concerned. Undoubtedly however, such an official publication is needed.

As regards Law Reports, reliance is mainly placed on English Reports. However, there are Jamaican and West Indian Law Reports. Also unreported judgments of the Supreme Court and Court of Appeal are available. In keeping with the small number of locally decided maritime court cases, relatively few of them are to be found in these Reports.

Also as noted above, there is a paucity of research work 29 pertaining to the field of maritime law. These deficiencies as regards our literary sources raise more than simple problems of information documentation, accessibility and retrieval. They ultimately affect a maritime claimant in his quest to enforce his claim in Jamaica.

These deficiencies also ultimately make a mockery of the maxim: Ignorantia juris non excusat. It is also clear that not only is the claimant fettered but so too are those concerned with advocating or adjudicating his claim.

29 This also reflects a broader problem. As Fenty observes: "Publishing as an industry inthe Commonwealth Caribbean is not a vibrant enterprise. This can be attributed to several factors including the lack of organised publishing houses especially in the area of law. Other reasons are an apparent lack of interest in writing by both the academic and practitioners in their areas of expertise, and the absence of a large market for sales in the region."; Fenty, Leslie P.; The Literature of the Law: Law Reports and Treatises, The Caribbean Librarian, Vol, 2, No. 2, July 1985, 30 at p. 32.
C: Jamaica’s Court System

The hierarchy of the Jamaican Courts are in descending order: The Court of Appeal, the Supreme Court (so called, but which is not supreme), the Resident Magistrates Court and the Petty Sessions Court. There are also specialised courts: the Revenue Court, the Family Court, the Traffic Court and the Coroners Court, the Gun Court and the Juvenile Court.

The Jamaican Constitution provides for appeals to be made from the Court of Appeal to the Judicial Committee of the Privy Council in England. This conduit, in part serves to perpetuate the umbilical nexus between Jamaican and English Law and legal systems.

In reality therefore, at present the apex of the Jamaican Court System is in England. However, it appears plans are afoot to set up a Caribbean Court of Appeal and abolish local appeals to the English Privy Council.

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30 See infra, diagram of the Jamaica Court System: Fig. 2.1.
31 Per section 110
THE JAMAICAN COURT SYSTEM

APPEAL COURT OF JAMAICA

JUDICIAL COMMITTEE OF PRIVY COUNCIL

COURT OF APPEAL

SESSIONS COURT

PETTY SESSIONS COURT

FAMILY COURT

CORONERS COURT

TRAFFIC COURT

JUVENILE COURT

REVENUE COURT

RESIDENT COURTS

IMMIGRATION COURTS

THE JAMAICAN COURT SYSTEM
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D: Stare Decisis Doctrine applied in Jamaica

The fundamental doctrine of binding precedent or stare decisis states that courts are bound to follow the ratio decidendi of previous decisions of courts higher in the hierarchy in cases similar to those previously decided by those higher courts. 33

This doctrine is applied in Jamaica in keeping with the hierarchy of the Jamaican Court system outlined above. Thus, decisions of the Judicial Committee of the Privy Council in England on appeal cases emanating from Jamaica have the most force in local courts.

Decisions of Jamaica's past (pre-independence) Court of Appeal are treated as not binding but of high persuasive authority. 34 Decisions of other present West Indian Courts of Appeal are regarded as persuasive only. 35

In practice, English decisions are most resorted to and often treated as if they are binding.

Although these decisions ought not to be treated as more than highly persuasive. 36

On occasions when a point of law was not covered directly by the Privy Council, English or West Indian authority, Jamaican courts have looked at decisions from other jurisdictions, treating them as persuasive authority. 37

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35 Ibid.
36 Ibid, p. 33.
37 Ibid, p. 35.
It is submitted that more attention needs to be paid to such decisions and underlying jurisprudence, in the shaping of Jamaican jurisprudence.

As Burgess notes "...those decisions may on occasions provide more guidance for the development of law than the English equivalents." 39

E: Maritime Claims Adjudication

(1) General

Most maritime disputes are settled in Jamaica without resort to legal proceedings. Overall, the amount of maritime claims adjudicated are relatively few. 40

(2) Adjudication by the Courts

Generally, maritime claims are dealt with by the Admiralty Division of the Supreme Court. However, occasionally particular maritime related claims are filed and heard in the "Common Law" division of that court. Maritime related claims of limited amounts 41 may also be heard in the Resident Magistrates Court.

Of the small number of cases filed 42 in the Admiralty Division of the Supreme Court only a miniscule amount 43 ever reach the stage of final judgment. Understandably, there is no special

38Ibid.
39 Ibid., p. 35
40 Vide: F.N.42 & F.N.43
42 Normally not exceeding 20 cases annually on average (This estimate is based on inspection of the Supreme Court Records by the writer.).
43 No more than two cases on average.
court dealing exclusively with Admiralty matters as such a court would be in practice very much underemployed.

However, in principle such a specialized court would be desirable. As is noted in Guidelines for Maritime Legislation: 44 "There are a number of reasons which favour the establishment of specialized courts for the adjudication of maritime disputes such as the specialized character of maritime law, its international nature, the frequent involvement of technical problems and the need for quick disposal of maritime disputes. The negative aspect may be the greater cost of administration of justice, but this disadvantage is outweighed by the advantages previously mentioned." 45

In Jamaica's particular situation, it seems to the writer that a commercial court 46 should be set up, and included among its purview should be admiralty matters. Such a court dealing with a wide range of commercial matters would certainly have more than enough to deal with while benefiting from specialisation. Importantly, it would facilitate greater efficacy and efficiency in dealing with particular features and requirements of maritime related and commercial matters in general. Specialist judicial expertise could be better harnessed and honed. Jamaica’s Revenue Court dealing with taxation matters has already manifested the benefits of such specialisation. However, such a Commercial court would be most effective if certain other changes are

implemented.

At present, Appeal Court and Supreme Court Judges become such by progressing through the ranks of the Judicial Department of the Civil Service.

Typically, most of their initial experience and grooming is in the criminal law sphere. Whereas this has potentially unsatisfactory consequences for the administration of justice in the civil law area in general, such potential consequences appear to loom larger in Admiralty matters. This is so because of the lack of opportunity in practice to delve in such matters. Moreover, the judge(s) concerned might have had limited academic exposure as well to this area of the law which in many respects is quite different from other areas of the civil law.

It is submitted that this is so despite the acknowledged very high standards maintained by the Jamaican Judiciary in general. Hence, it is clear that for development of the process of maritime adjudication, far reaching changes may be needed not only in terms of restructuring the Supreme Court and setting up a new specialised court, but also as regards the preparation and staffing of such a court's complement.

3. Maritime Arbitration

This takes place rather infrequently, and usually involves the relatively smaller claims. There are no specially designated Rules for Maritime Arbitration. Like other private Arbitration in

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47 For instance, in the law faculty of the regional university, The University of the West Indies, Admiralty Law is not part of the curriculum.
Jamaica, it is governed by the Arbitration Act, 1900.

Typically, the relevant Arbitration clause stipulates London or some other International Commercial Arbitration centre as the venue for arbitration hearings. However, where the scale, cost-benefit analysis or other special circumstances of the claim concerned would render it inadvisable to deal with the matter outside Jamaica, then resort will normally be had to maritime arbitration locally.

Overall in Jamaica, it appears there is not sufficient sensitivity to the benefits of arbitration. This also contributes to the lack of use of this method of maritime adjudication.

\textit{F: Jamaica and International Law}

1. General

Jamaica is party to a number of international maritime and other conventions. Appendix 4 provides a list of the conventions to which Jamaica is a party. In the umbrella maritime sphere of the Law of the Sea, Jamaica it has had a particularly high profile contributing significantly to the new Montigo Bay\textsuperscript{48} Law of the Sea Convention.

Jamaica was chosen as the seat of the proposed International Seabed Authority. Thus article 156 (4) of the new (3rd) United Nations Convention of the Law of the Sea (U.N.C.L.O.S.) states that: "the seat of the Authority shall be Jamaica".

\textsuperscript{48}The Convention Was signed in Montigo Bay, Jamaica on December 10, 1982.
In general, it seems that Jamaica's level of successful activity in this broader area of the public international maritime law-making process, has generally not been matched by a commensurate level of effort as regards (1) timely updating or enactment of domestic maritime rules as required or contemplated by undertaken treaty obligations, or (2) becoming party to narrower focused related maritime conventions dealing with, for instance, civil liability and procedural issues. The particular area of focus of this thesis it appears, is very much a victim of this incongruity.

2. International Law and its applicability in Jamaican Municipal Law

(a) Customary International Law

The applicable principle is enunciated in R,v, Director of Public Prosecutions and another ex parte Dafney Schwartz (1976), 15 J.L.R. 33

There, Melville, J. stated that: "Customary rules of international law are deemed to be part of our municipal law, subject, of course to two important qualifications. Lord Atkoin stated it thus in Chung Chi Cheuy v. R (1939) A.C. at p. 168:

"The courts acknowledge the existence of a body of rules which nations accept among themselves. On any judicial issue they seek to ascertain what the relevant rule is, and having found it, they will treat it as incorporated into the domestic law, so far as it is not inconsistent with rules enacted by statutes, or finally declared by their tribunals'..."
Importantly, the Jamaican Court will have to be convinced that what is asserted to be customary international law is in fact so.

In paying cognizance to this requirement, Melville, J. adopted the statement of Lord McMillan when the latter stated:

"Now it is a recognised prerequisite of the adoption in our municipal law of a doctrine of public international law that it shall have attained the position of general acceptance by civilized nations as a rule of international conduct, evidenced by international treaties and conventions, authoritative text books, practice and judicial decisions. It is manifestly of the highest importance that the courts of this country before they give the force of law within this realm to any doctrine of international law should be satisfied that it has the hallmarks of general assent and reciprocity." 50

(b) Treaties

A treaty does not become a part of Jamaican law unless it is specifically incorporated as such by a legislative measure, an enabling Act of Parliament. 51

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49 Ibid., p. 35
50 Compania Naviera Vascongado v. SS Christina (1938) A.C., 497
Jamaica's approach is in keeping with the statement of the Judicial Committee of the Privy Council in England in the appeal case from Canada: *Attorney-General for Canada v. Attorney-General for Ontario, 1937, A.C. 326*:

"Within the British Empire there is a well established rule that the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action. Unlike some countries, the stipulations of a treaty duly ratified do not within the Empire, by virtue of the treaty alone, have the force of law."

3. Succession to pre-independence Treaties by Jamaica.

In *Jhirad v. Ferrandina (1937) 355 F. Supp. 1155*, it was stated that:

"As with much of International Law, the question of treaty succession is muddled. Yet it seems generally agreed that some rights and duties do devolve upon the new country, particularly those rights and duties locally connected to the area gaining independence....

Particularly in reference to emerging nations the weight of authority supports the view that new nations inherit the treaty obligation of the former colonies."

This American case thus applied the principle of continuity. However, shortly after, by 1974, in the discussions of the International Law Commission (I.L.C.) it became clear that in fact the majority view favoured the "clean slate" approach leaving the successor with a free Choice: Draft Articles, *Y.B.I.L.C., 1974, Vol. 2, pp 222, 214, 236, Articles. 15, 16, 23.*

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Thus in their commentary on Article 15, the I.L.C. stated that:

"The majority of writers take the view supported by State practice, that a newly independent State begins its life with a clean slate, except in regard to 'local' or 'real' obligations. The clean slate is generally recognized to be the 'traditional' view on the matter. It has been applied to earlier cases of newly independent States emerging either from former colonies...or from a process of secession or dismemberment."

However, in the case R. v. Director of Public Prosecutions and Another, ex parte Dafney Schwartz, the Full Court of the Jamaican Supreme Court, after considering the relevant ILC statements, held that: "It is ...a moot point as to whether the clean slate theory has hardened into a 'customary rule' of international law. If it has not, then it ought not to be adopted in our law." 53

The matter of Jamaica's succession to pre-independence treaties was dealt with in the Exchange of Letters between the newly independent state of Jamaica and the United Kingdom:

(The Jamaica Gazette, April 25, 1963).

Overall, the position appears to be that Jamaica succeeded at independence to the pre-independence treaties entered into on behalf of pre-independent Jamaica by the United Kingdom, subject to its right to denounce or otherwise take such actions in respect of such

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53 Ibid., per Melville, J. at p. 35.
treaties as it may deem appropriate.

Also, provisions of international conventions have found their way into Jamaican law without Jamaica becoming a party to these conventions. This happens where, as in the case of the International Convention For the Unification of Certain Rules Relating to the Arrest of Seagoing Ships, 1952, the United Kingdom becomes a party to a Convention without at the time of so doing or subsequently making the then colony of Jamaica a party as well.

Subsequently the U.K. would enact concomitant enabling legislation 54 provisions of which are later extended 55 to or adopted in Jamaica without Jamaica becoming a party to the Convention.

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54 In the case of the 1952 Arrest Convention, the enabling legislation was The Administration of Justice Act, 1956 (U.K.)
G: Concluding Remarks

It has been shown that there are some deficiencies in respect of Jamaican Law and Legal System, especially in the Maritime Law sphere, which have potentially adverse consequences for a maritime claimant.

Some of these deficiencies are legacies of a recent colonial past. Others reflect a lack of adequate material means to address certain problems.

Still others yet result from a basic lack of attention or sensitivity to the requirements of the maritime law area.

The fact that, for instance, Admiralty cases constitute a rather miniscule part of the work of the Jamaican legal profession (both bench and bar), means that in the profession itself there is less sensitivity to and advocacy for needed changes as would normally be the case. Development of Jamaican Maritime jurisprudence is accordingly hampered. There is also the related problem of lack of expertise, itself related to the perceived need or demand for such expertise.

Governmental and other authorities concerned with allocating scarce resources between competing ends may myopically look askance at the maritime law field when choosing priority areas of focus. However, it appears to the writer that from the standpoint of long term national
maritime development; and the potential contribution of legal and related services to the national economy, even a cursory cost-benefit analysis should readily vindicate the need for the suggested changes. There are strengths in the system to be built on such as the acknowledged generally high level of competence of the local judiciary and bar.

However, if a maritime claimant is to have his claim effectively and efficiently enforced, then it is respectfully submitted that the needed improvements identified ought to be considered and hopefully implemented sooner than later.
Chapter 3

Jamaican Admiralty Jurisdiction
Chapter 3

THE JAMAICAN ADMIRALTY JURISDICTION

A: Introduction

B: Origins and Development

C: Present Scope

D: The International Dimension

E: Concluding Comments
The Jamaican Admiralty Jurisdiction

A: Introduction

"Jurisdiction" is a multifaceted legal term. In the context of this chapter, the term essentially relates to the various types of subject-matters over which a court has competence.

The expression "Jamaican Admiralty Jurisdiction" is herein used to encompass the entire range of claims and issues that may be entertained by the Admiralty Division of the Supreme Court of Jamaica.

For, the Maritime claimant, it is crucial whether his claim is among those which may be dealt with in the "Admiralty Court" – that is those within The Jamaican Admiralty Jurisdiction.

This is so, since, he could in a particular case find himself turned away from that court on the basis of that "there was no jurisdiction on the court in Jamaica" to determine his specific claim as happened in the case: De Osca v The Lady D., 1961, 3 W.I.R. 515, 516. Most importantly,

1 The term "Admiral" appears to have been first used in England around the end of the thirteenth century. Originally the admirals only had jurisdiction over their fleets in relation to disciplinary matters. With the growth of piracy in the mid fourteenth century there developed a need for a court to administer justice. In time, jurisdiction to administer such a Court in relation to piracy or spoil was extended to the Admiral. Later such a jurisdiction grew to encompass other maritime related issues and became known as the "admiralty jurisdiction:" See generally: Holdsworth, W.S.: A History of English Law, Vol. 1, 544 - 559; Curzon, L. B.: English Legal History, 191 - 194; Robers, David N.: The Action in Rem: Is Provincial Adoption Viable and/or Desirable? (Unpublished), Canada; Marsden, R.G.: Select Pleas of the Court of Admiralty, Vol 1, pp. xiii - xiv.

only a claimant whose claim is within the Admiralty Jurisdiction can properly institute or have
instituted on his behalf civil proceedings directly against an offending ship. and have it
arrested.

The Jamaican Admiralty Jurisdiction is derived from imperial U.K. legislation. Its
present scope can best be appreciated by an examination of its origins and development to date.

3 That is, "in rem" proceedings, see, infra, chapter 4.
4 See, infra, chapter 4.
5 See: Colonial Courts of Admiralty Act, 1890 (U.K.), and infra.
B: Origins and Development

Admiralty Jurisdiction in Jamaica was originally exercised by a Vice-Admiralty Court whose existence in the island date to 16657. These courts were natural offshoots of the then High Court of Admiralty of England.

The jurisdiction of the Vice-Admiralty courts was much influenced and at times constrained by that exercised by the High Court of Admiralty, which for a long time heard appeals from these courts.

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6 To date, there appears to be no published or available account of the historical development in Jamaica of its Admiralty Jurisdiction. In certain studies dealing with the History of the Courts in Jamaica (eg. Chambers, Hugh V.T.: Essays on the Jamaican Legal System and... A concise History of the Courts in Jamaica From 1660 to the present time, 1974), no reference is made whatsoever to an Admiralty Court, yet alone its jurisdiction. This is paradoxical as in the early days of British Colonialism in Jamaica and for a long time after it appears that the Jamaican Vice-Admiralty Court (see F.N.7) was Jamaica's most active court or at least one of its most active and important courts. The dearth of published accounts and the accompanying paradox is reflected in Craton's observation that American scholars have in their writing ignored Caribbean Vice-Admiralty Courts, yet they were "more numerous and far busier than those of the mainland territories" and "when in fact in the Caribbean Courts Prize Cases seem to have outnumbered all others by ten to one, and the volume of business in Jamaica alone probably outnumber that of all the mainland Courts added together." "...Between 1763 and 1815, the Jamaican Vice-Admiralty Court handled 3,700 cases of which some 3,400 were Prize Cases...": Craton, Michael: The role of Caribbean Vice Admiralty Courts in British Imperialism, Caribbean Studies Vol. 11 July 1971, No. 2, 5.


8 See: Crump, Helen J: Colonial Admiralty Jurisdiction in the seventh century, Longman, London, 1973 at p. 101 where she observes that in Jamaica: "There was an admiralty Court working between 1657 and 1660, but it was not established by the Admiralty commissioners...The court rested simply on the authority of the governor..."; Also see: Doty, Joseph D: The British Admiralty Board as a factor in Colonial Administration 1689-1763, Philadelphia, 1930, p.20 where he notes that: "The earliest Vice-Admiralty Court in the colonies appears to have been in existence in Jamaica by 1658"


10 Ibid., p. 15., See also Wiswall, jr. Fran: The Development of Admiralty Jurisdiction and Practice since 1800, 1970, p. 98; Note: In 1833 by the Act of 3 & 4 Will 4, C. 41, 5.2 - The Judicial Committee Act (U.K.), appeals from Vice-Admiralty Courts to the High Court of Admiralty was discontinued and subsequently made to the Judicial Committee of the Privy Council in England. Also see generally: Hollander, Barnett: Colonial Justice, London, 1961.
Wiswall \(^{11}\) notes that the High Court of Admiralty heard "appeals from Colonial Vice-Admiralty courts" although "these courts actually exercised a wider instance jurisdiction than the High Court of Admiralty." \(^{12}\)

The English Admiralty Court itself had earlier received Maritime Law from other countries. \(^{13}\) Thus, as has been noted:

"Maritime law is not the product of a single legal system, instead, it is the result of an evolution of codes, customs, and usages of seafarers and seafaring nations since time immemorial." \(^{14}\)

Accordingly, it may likewise be emphasised that although Admiralty Jurisdiction reached Jamaica through England, this jurisdiction's ultimate roots are international and of great antiquity. Indeed, the present list of enumerated claims specified to be within the Jamaican Admiralty Jurisdiction has its more immediate genesis in the provisions of an International Maritime Convention. \(^{15}\)

For the present purposes, it is however only necessary to consider briefly the history of the English Admiralty Jurisdiction to comprehend the development of Jamaica's own Admiralty Jurisdiction and its present ambit.

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11 See: F.N. 10.
15 The International Convention for the Unification of Certain Rules Relating to the Arrest of Seagoing Ships, 1952, and see infra, part D of this Chapter.
The earliest distinct reference to a Court of Admiralty in England appears to be in 1357.16

The earliest statute relating to the English High Court of Admiralty Jurisdiction entitled "An Act concerning what things the Admiral and his deputy shall meddle" was enacted in 1389.17

From the early part of the fifteenth century there was one Lord Admiral and one High Court of Admiralty in lieu of the several courts which previously existed. Since then the English Court of Admiralty had been under two main divisions of Ordinary and Prize Jurisdiction.18

This Ordinary (or "Instance") Jurisdiction comprised three categories: (1) Civil Jurisdiction, (2) Criminal Jurisdiction and (3) Admiralty Droits.20

In the Civil Jurisdiction, the law administered was English Maritime Law, which is basically the law administered today except that it has lost much of its former international character and has generally otherwise undergone much development.

As regards the criminal jurisdiction, until 1536, the Court of Admiralty had an exclusive jurisdiction over crimes committed on the High Seas.21 By a number of enactments22 this jurisdiction was transferred from the ambit of the Ordinary Jurisdiction or otherwise whittled away.

17 See Roscoe, op. cit. p. 5.
18 See Fitzgerald, op.cit., p. 106.
19 Roscoe, op. cit. notes at p. 3, that "the word "Instance" seems to be used to describe a civil court one of suits and processes as distinguished from a Prize Court which is not in fact one in which ordinary litigation takes place."
21 Fitzgerald, op. cit., p. 108.
22 Eg. 28 Henry VIII, C. 15; 39 Geo III, C. 37; 4 & 5 William IV, C. 36.
Admiralty Droits were rights to property found at sea or stranded upon the shore. These have been put (in so far as they have not been abolished) under direct Governmental Administrative Control.24

"Prize" is property of a belligerent captured at sea by a vessel acting under governmental authority. Thus, in times of war a special commission is issued to the Admiralty Court giving it jurisdiction to adjudicate upon captures made at sea and to condemn the captured property as prize if lawfully subject to that sentence.

Accordingly, in more recent times, the Prize jurisdiction normally lies dormant until resurrected and invoked by the dictates of war. It appears the last such invocation was in respect of the second World War.25

The High Court of Admiralty itself underwent a prolonged period of dormancy from around the mid seventeenth century when it operated with a contracted jurisdiction to around the mid nineteenth century.26 Then it was resuscitated and its civil jurisdiction enlarged by a number of enactments.27

For the dormant period prior to the revival, that is going as far back as around the mid seventeenth century, the court's civil jurisdiction was limited to the following matters:28

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23 Winswall, op. cit., p. 8; Fitzgerald, op. cit., p. 111.
24 Vestiges of these are contained in the Merchant Shipping Act, 1894 (U.K.), Sections 510 - 529.
25 See Fitzgerald, op. cit., p. 111.
27 In particular: The Admiralty Court Act, 1840 (U.K.) 3 & 4 Vict. C. 65; The Admiralty Court Act, 1861, 24 Vict. c.10.
1. collision on the high seas;

2. towage on the high seas;

3. possession of but not title to ships;

4. bottomry and respondentia;

5. claims for seamen's wages where no special contract existed;

6. salvage services on the high seas; and

7. goods of pirates and goods practically taken.

Here, it may be borne in mind that it was during this period that Jamaica was colonized by England and English law was received in the Island.

The High Court of Admiralty continued as a separate court in its own right until November 1, 1875. Then, by the operation of two Acts of Parliament: The Supreme Court of Judicature Act, 1873 (U.K.) and The Supreme Court of Judicature Commencement Act, 1874 (U.K.) it along with other superior Courts in England were consolidated together and constituted as one Supreme Court of Judicature in England. This Court was divided into two divisions having respectively original and appellate jurisdiction.

The original jurisdiction included all the jurisdiction vested in or capable of being exercised either by the the High Court of Admiralty as well as that of the other courts with which it was consolidated.
Thus was constituted in England, the High Court of Justice with original jurisdiction as aforementioned and The Court of Appeal. The High Court of Justice was as a matter of administrative convenience further divided into five divisions one of which was called the Probate, Divorce and Admiralty Division.

The net result is that from then there has been no separate court system administering maritime law in England. The English "Admiralty Court" exists today solely as a matter of administrative convenience handling most of the maritime cases and applying the specialized procedural rules relating to Admiralty actions.

*The Judicature Act of 1873 (U.K.)* and subsequent enactments by which it has been amended were consolidated in *The Supreme Court of Judicature (Consolidation) Act, 1925 (U.K.).*

The Admiralty Jurisdiction of the High Court of Justice has since been extended significantly, by various enactments, in particular, *The Administration of Justice Act, 1956 (U.K.).* This Act was, inter alia passed to give legislative effect to the provisions of The International Convention for the Unification of Certain Rules relating to the Arrest of Seagoing Ships, 1952 and The International Convention for the Unification of Certain Rules Concerning Civil Jurisdiction in matters of Collision, 1952, to which the United Kingdom had become a party.

Admiralty Jurisdiction may be said to have been introduced in Jamaica consequent upon the appointment of the first English Governor in Jamaica.
It was the then English practice upon the appointment of a Governor to a new colony to sue to him a commission making him ex officio Vice-Admiral of the colony. Such a commission would vest the Admiralty jurisdiction in the Governor himself over an extensive list of causes.

Thus it has been stated by Dr. Croke, learned judge of the Vice-Admiralty Court of Nova Scotia, Canada in: The Hiram, 1813, Stewart's Nova Scotia Rep. 92, that:

"Upon the establishment of colonial governments, it was thought proper to invest the governors with the same civil and maritime powers..." [that is as were conferred upon former Vice-Admirals of England] "...and therefore it became usual for the Lord High Admiral, or the Lord Commissioners, to grant a commission of Vice-Admiralty to them."

The vital precursor to Jamaica's Admiralty Jurisdiction was thus the appointment of the first Governor to the then new colony of Jamaica in February 1661 by a Commission which, inter alia, directed him to "settle such Judicatories for Civil affaires and for the Admiraltes as may be proper to keep the peace of the Island and...determine all matters of right and controversy according to Justice and Equity." 29

Although this appointment and accompanying directives were apparently only temporary measures, 30 nevertheless by virtue of these directives to the Governor, "Courts were erected and various Orders made by the Governor and Council." 31

29 See Morrison, op. cit., p. 43.
30 Ibid.
31 See Morrison, op.cit., p. 50, and his F.N. 6, citing: Chalmers, G. (Ed.): "Opinions of eminent lawyers on various points of English jurisprudence, chiefly concerning the colonies, fisheries and commerce of Great
Among the early courts established was a Vice-Admiralty Courts whose records date to 1662. However it appears that prior to this first properly established Court, there was a Vice-Admiralty Court in existence with doubtful legal authority. In practice, the jurisdiction exercised by these courts in Jamaica as elsewhere was often ambiguous and rather flexible. As already intimated, this jurisdiction exceeded that exercised by the English High Court of Admiralty itself. This situation was reflected in the actual practices and procedures adopted by the court.

It appears that to some extent there was acquiescence on the part of the English Admiralty Court in all of this. Thus, in the case Le Louis Forest 2 Dodson, 239, it was held that: "The High Court of Admiralty will look with tenderness on the informalities in the practice of the Vice-Admiralty Courts."

Nevertheless, the jurisdiction of the Vice-Admiralty Court in Jamaica as it stood from its inception on to the mid nineteenth century may be roughly delineated. Its sketch appears to accord with Ubblehode observations:

"The colonial Vice-Admiralty Courts operated on three distinct levels. On the local level they heard and determined disagreements and problems of merchants and seamen. ... Late in the Seventeenth Century the British Crown had added a second jurisdiction: enforcement of

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32 See F.N. 8.
33 The writer has found in the records of The Public Records Office, London, England, reports of Vice-Admiralty Court cases from Jamaica dating to 1662; Also, see Craton, op. cit.
imperial control of trade. In 1696 the colonial Vice-Admiralty Courts were chosen as tribunals for prosecuting offenders against the trade and navigation statutes. And the court's jurisdiction became international in times of war, when the crown created them prize courts with authority to condemn captured enemy cargoes and vessels.36

With the passage of the Imperial Vice-Admiralty Court Acts of 1863 and 1867,37 the jurisdiction of the Vice-Admiralty Courts, then existing in the English colonies, including that of Jamaica was clarified and extended.

Prior to the passage of the 1863 Act., it was held by the Judicial Committee of the Privy Council in England in 1859, in a case on appeal from the then Vice-Admiralty Court at Hong Kong, The Australia (1859), 13 Moo. P.C. 132 at 160 that the Jurisdiction of Vice-Admiralty Courts was continued to that of the English high Court of Admiralty before the enactment of The Admiralty Court Act, Act 1840 (U.K.)

However, as is noted in another Privy Council case hearing an appeal from Canada: The Yuri Maru, The Woron, (1927) 17 Asp. M.L. 322 "The Vice-Admiralty Courts Acts of 1863 and 1867 extended the powers of Admiralty Courts overseas, not by reference to the powers of the High Court in England, but by scheduled statement of the causes of action in respect of which jurisdiction was newly conferred and specification of other amendments."38

36 Ibid., p. 12.
37 Vice - Admiralty Courts Act, 1863, 26 Vict., Cap. 24; Vice - Admiralty Courts Act Amendment Act, 1867, 30 & 31 Vict., Cap. 45.
38 Ibid., p. 325.
Section 10 of the Vice-Admiralty Courts Act, 1863 defined the civil jurisdiction of the Vice-Admiralty Courts. It provided as follows:

"The matters in respect of which the Vice-Admiralty Courts shall have jurisdiction are as follows:

(1) Claims for seamen's wages

(2) Claims for Master's wages, and for his disbursements on account of ship

(3) Claims in respect of pilotage

(4) Claims in respect of salvage of any ship or of life or goods therefrom

(5) Claims in respect of tonnage

(6) Claims for damage done by any ship

(7) Claims in respect of bottomry or respondentia bonds

(8) Claims in respect of any mortgage where the ship has been sold by a decree of the Vice-Admiralty Court, and the proceeds are under its control

(9) Claims between the owners of any ship registered in the possession in which the Court is established touching the ownership, possession, employment, or earnings of such ship

(10) Claims for necessaries supplied in which the Court is established, to any ship of which no owner or part owner is domiciled within the possession at the time of the necessaries being supplied"
(11) Claims in respect of the building, equipping, or repairing within any British possession of any ship of which no owner or part owner is domiciled within the possession at the time of the work being done."

In 1880, the Judicature (supreme Court) Act was passed in Jamaica. By this Act various superior Courts in Jamaica exercising jurisdiction over different subject-matters were consolidated together and constituted into "the Supreme Court of Judicature of Jamaica."

Section 4 of the Act provides:

"On the commencement of this Act, the several Courts of this Island hereinafter mentioned, that is to say –

The Supreme Court of Judicature,

The High court of Chancery,

The Encumbered Estates' Court

The Court for Divorce and Matrimonial Causes,

The Chief Court of Bankruptcy, and

The Circuit Courts,

Shall be consolidated together, and shall constitute one Supreme Court of Judicature…"

The Vice-Admiralty Court was thereby omitted from the list of courts constituting this new Supreme Court. The logic (if any) behind this omission is not readily apparent. In the analogous U.K. enactment, The Supreme Court of Judicature Act, 1873 (U.K.), the United Kingdom's
High Court of Admiralty was as shown above, included in the consolidation of the Superior Courts of England.

The effect of this omission was more than to render the then Vice-Admiralty Court an outcast as regards the new court schema. The omission, it seems, constitutes the most culpable precursor to the existing anomalous situation today, where as will be shortly shown, the Admiralty Jurisdiction of the present Supreme Court resides on a footing quite out of consonance with the rest of the Court's jurisdiction.

A decade later, the Colonial Courts of Admiralty Act, 1890, (U.K.) was enacted. By this Act the Jamaican Supreme Court was made a "Colonial Court of Admiralty." The Act abolished the then existing Jamaican Vice-Admiralty Court.

As regards the jurisdiction to be exercised by the Supreme Court qua a colonial Court of Admiralty, Section 2(2) of the Act provides that:

"The jurisdiction of a Colonial Court of Admiralty shall, subject to the provisions of this Act, be over the like place, persons, matters and things, as the Admiralty jurisdiction of the High Court in England, whether existing by virtue of any statute or otherwise, and the Colonial Court of Admiralty may exercise such jurisdiction in like manner and to as full an extent as the High Court in England, and shall have the same regard as that Court to international law and the comity of nations".
One question that was prompted by this provision was whether by virtue of this provision the local Admiralty Jurisdiction was coextensive with that of the United Kingdom. Thus, for instance, the question arose as to whether enlargement of the U.K. Admiralty Jurisdiction by The Supreme Court of Judicature (Consolidation) Act, 1925 (U.K.) to include certain claims also enlarged the local jurisdiction so as to include those claims.

The issue arose in De Osca v The Lady D, where the Jamaican Supreme Court in 1961, had to decide whether it had jurisdiction to determine a claim in respect of the mortgage of a ship.

The Court in arriving at its decision adopted the holding of the Privy Council in the Yuri Maru, The Woron, when in reference to The Colonial Courts of Admiralty Act, 1890, (U.K.), it was held: "On the whole, the true intent of the Act appears to their Lordships to have been to define as a maximum of jurisdictional authority for the courts to be set up thereunder, the admiralty jurisdiction of the High Court in England as it existed at the time when the Act passed."

The Jamaican Court found that the claim in respect of a mortgage of a ship was not within the jurisdiction of the English High Court at the time the 1890 Act was passed and that further in accordance with the holding in The Yuri Maru, The Woron, that "the Act of 1925 in England giving power to hear mortgage actions does not apply to the Admiralty Court in Jamaica......"

39 Ibid.
The Court therefore held that "the jurisdiction of a court of Admiralty in Jamaica was established by the Colonial Courts of Admiralty Act, 1890, that it conferred on the court in Jamaica jurisdiction similar to that possessed by the Supreme Court in England, and that there was not jurisdiction on the court in Jamaica to determine a claim in respect of the mortgage of a ship." 41

The position as regards the competence of a Court to hear ship mortgage and other maritime claims has since changed with the enlargement of the Jamaican Admiralty Jurisdiction by the passage of the Admiralty Jurisdiction (Jamaica) Order in Council, 1962, (U.K.) pursuant to Section 56 of the Administration of Justice Act, 1956 (U.K.)

C: Present Scope:

Section 2 of the Order in Council provides that "The Colonial Courts of Admiralty Act, 1890, shall in relation to the Supreme Court of Jamaica, have effect as if for the reference in subsection (2) of Section Two thereof there were substituted a reference to the Admiralty jurisdiction of that court as defined by Section One of the Administration of Justice Act, 1956..." subject to certain specified "adaptations and modifications of the said Section One."

Section 3 of the order provides that "The provisions of Sections Three, Four, Six, Seven and Eight of Part 1 of the Administration of Justice Act, 1956, shall extend to Jamaica with certain specified 'adaptations and modifications.'"

41 See Ibid., p. 516.
Accordingly, the Admiralty Jurisdiction of the Supreme Court encompasses at present the following questions or claims:

" (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 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 persons in possession or control of a ship are responsible, being an act, neglect or default in the navigation or management of the ship, in the loading, carriage or discharge of goods on, in or from the ship or in the embarkation, carriage or disembarkation of person on, in or from the ship;

(g) any claim for loss of or damage to goods carried in a ship;

(h) any claim arising out of any agreement relating to the carriage of goods in a ship or to the use or hire of a ship;
(j) any claim in the nature of salvage (including any claim arising by virtue of the
application, by or under section 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 an aircraft;

(l) any claim in the nature of pilotage in respect of a ship or an aircraft;

(m) any claim in respect of goods or materials supplied to a ship for her operation or
maintenance.

(n) any claim in respect of the construction, repair or equipment of a ship or dock charges
or dues;

(o) any claim by a master or member 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 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."

The latter part of the quoted provision, that is the portion after sub-paragraphs defines the Jamaican Admiralty jurisdiction in terms of what jurisdiction particular English Courts had at certain times. In addition, certain qualifications are given to the Jurisdiction to be exercised by reference to particular U.K. legislation.

Thus, although the list of claims is quite extensive and would normally cover most present day maritime related claims, where a claim is not enumerated, then in Jamaica, again resort will ultimately have to be made to "what the law was in England" at a given time.

This circuitous journey to ascertain the law is ipso facto undesirable. It is not in keeping with Jamaica's sovereign independent status for a claimant to be compelled by statutory anachronisms to resort to a foreign legal system to find out whether his particular maritime
related claim is within our Admiralty Jurisdiction.

Practically, it creates uncertainty for the maritime claimant as well as others involved in the administration of justice.

In addition, the observations made earlier about problems which arise in relation to extended legislation are here apposite.\(^4\) It seems to the writer that this state of affairs ought to be remedied by appropriate local legislation as it is manifestly undesirable that Jamaica's Admiralty Jurisdiction is now only to be found in foreign Imperial Legislation. In this respect it remains an anomalous eye sore within the present overall jurisdiction exercised by the Jamaican Supreme Court, all other of which are founded on local statutory provisions.

Moreover, the list of maritime claims although quite extensive cannot be said to be exhaustive. Thus, in another West Indian jurisdiction, with similar statutory provisions. The Barbadian High Court found in *Cooper Stevedoring Co Inc v MV Passat Bonaire* (owners, *Master and Crew*) 1977 *W.I.R.*, 36 that "As the matter stands the endorsement of claim on the writ for stevedoring services does not come within any specified head of jurisdiction laid down by statute"\(^4\) and that in Barbados "A claim for remuneration for stevedoring is not a claim known to the admiralty jurisdiction."\(^4\)

Likewise claims for stevedoring services rendered are not within the Jamaican Admiralty jurisdiction. Also excluded are others which will be considered in the following section.

\(^4\) See Chapter 2.
\(^4\) Ibid., p. 40.
\(^4\) Ibid., p. 41.
D: The International Dimension

The list of claims set out are essentially derived from Article 1 (1) of the International Convention for the Unification of Certain Rules Relating to the Arrest of Ships, 1952.

The Convention specifies claims in respect of which a vessel may be arrested. Such claims are defined by the Convention as "Maritime Claims".

Article 1 (1) provides as follows:

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

(a) damage caused by any ship either in collision or otherwise;

(b) loss of life or personal injury caused by any ship either in collision or occurring in connection with the operation of any ship;

(c) salvage;

(d) agreement relating to the use or hire of any ship whether by charterparty or otherwise;

(e) agreement relating to the carriage of goods in any ship whether by charterparty or otherwise;

(f) loss of or damage to goods including baggage carried in any ship;

(g) general average;
(h) bottomry;

(i) towage;

(j) pilotage;

(k) goods or materials wherever supplied to a ship for her operation or maintenance;

(l) construction, repair of equipment of any ship or docks charges and dues;

(m) wages of Master, officers, or crew;

(n) Master's disbursements, including disbursements made by shippers, charterers or agents on behalf of a ship or her owner;

(o) disputes as to the title to or ownership of any ship;

(p) disputes between co-owners of any ship as to the ownership, possession employment or earnings of that ship;

(q) the mortgage or hypothecation of any ship."

From this list it can be seen that in its much lengthier counterpart in Part 1 of The Administration of Justice Act, 1956 (U.K.) adaptations have been made to assimilate the Article 1 (1) provisions into English law.

Both lists are extensive and it is not necessary to compare in detail their respective stipulations. However, one important example will be considered.

For claim (a) in Article 1 (1), "damage caused by any ship either in collision or otherwise",
the words "or otherwise" were construed in England to cover all those situations where damage
is caused by one ship to another without physical contact, by wash or by a negligent
manoeuvre. Thus in the 1956 Act (U.K.), the wording used is "any claim for damage done by
a ship." 45

As regards this provision the House of Lords in England held in The Eschersheim (1976) 2
Lloyd's Report 1, that although the ship itself must be the actual instrument by which the
damage was done, "physical contact between the ship and whatever object sustains the damage
is not essential." 46

Significantly, in the same judgment it was held that where any provision of the Act which
appears to intend to give effect to The Arrest Convention, is ambiguous, the Court may look at
the Convention in order to gain assistance in deciding which meaning is to be preferred. 47

As already noted, Jamaica is not a party to the Arrest Convention. However, important parts
of this Convention have found their way into national law through the backdoor of extended
Imperial Legislation earlier described.

In the circumstances, it remains to be seen whether a Jamaican Court would resort to
scrutiny of a Convention to which Jamaica is not a party upon finding such an ambiguous
provision in the list of claims extended to Jamaica by The Admiralty Jurisdiction (Jamaica)


45 See claim (d), supra.
46 Per Lord Diplock at p. 8.
47 Ibid.
It seems to the writer, that in principle, it would be desirable purely as a matter of statutory construction, for a Jamaican Court in an appropriate case to seek the aid of the Convention as the original source of these provisions to interpret ambiguous statutory stipulations extended into Jamaican Law by the Order in Council.

Under the joint auspices of IMO and UNCTAD, active consideration is now being given to amending the Arrest Convention. One of the main areas targeted for change is the Article 1 (1) list of maritime claims.48

As regards this list the (IMO/UNCTAD) Joint Intergovernmental Group of Experts on Maritime Liens and Mortgages and Related Subjects has made the following finding:

"The ... list appears to be incomplete, outdated and the description of some claims unsatisfactory. It excludes certain claims which are clearly of a maritime nature, such as claims for agency fees and for unpaid insurance premiums, and stevedoring charges. It has been questioned whether this approach of providing as extensive, albeit non-exhaustive, list of maritime claims is satisfactory, or whether the list should be extended to cover other maritime claims, alternatively whether some general wording should be devised in order to allow arrest for all claims relating to the ship."

It may be noted here that the approach of setting out a hopefully comprehensive list of so-called "maritime claims" reflects attempts to reconcile differences which existed between English law under which a ship could only be arrested in respect of particular maritime claims raised

against it and the law of most civil law countries which permit the claimant to arrest any ship in respect of claims against the owner regardless of the nature of such claims.\textsuperscript{49}

Both the "extended list" or "general clause" options have their problems. If the present list is extended to include new claims, with time such a list will get outdated, whereas a general clause would be more susceptible to varying interpretations by different countries.

It therefore seems to the writer that the best solution might be to combine both. By doing so, certainty in international approach would be ensured in respect of an extensive list of claims while allowing to national law a limited degree of flexibility as regards maritime related claims not enumerated in the list. If the limited area of flexibility cannot be agreed then in the interest of certainty, the list method seems best.

A further issue relates to Maritime Liens.\textsuperscript{50} Practically, liens do not come into issue without claims, but not vice versa. Thus it seems essential that all claims that are granted maritime lien status under any International Convention should be designated as "Maritime Claims".

However, some of the claims giving rise to maritime liens under the International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages, 1926 are not fully covered under the "maritime claims" listed in the Arrest Convention.\textsuperscript{51}

Those claims not fully covered or not covered at all include the following:

(i) Law costs due to the State;

\textsuperscript{49} Ibid., p. 5.
\textsuperscript{50} International Convention For the Unification of Certain Rules Relating to Maritime Liens and Mortgages, 1967.
(ii) Expenses incurred in the common interest of the creditors in order to preserve the
vessel or to procure its sale and the distribution of the proceeds of the sale;

(iii) Costs of watching and preservation from the time of the entry of the vessel into the
last port; and

(iv) Claims resulting from contracts entered into or acts done by the Master, acting
within the scope of his authority, away from the home port, when such contracts
or acts are necessary for the preservation of the vessel or the continuation of the
voyage.

Jamaica is not a party to the 1926 Convention nor its 1967 counterpart, neither of which
attracted much international acceptance.

Work has now reached an advanced stage on the preparation of Draft Articles for a new
Convention on Maritime Liens and Mortgages.

These Draft Article have been incorporated in the Draft Jamaica Shipping Bill, 1989.

53 See: (IMO) LEG/MLM/21: Final Reading Of The Draft Articles For A Convention On Maritime Liens and Mortgages.
Section 68 of the Bill parallels Article 4 of the Draft Articles which lists the claims giving rise to Maritime Liens. Section 68 provides as follows:

"(1) Subject to the provisions of this Act the following claims may be secured by

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 and pilotage 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.

(2) In subsection (1) owner includes in relation to a ship, the charterer, manager or

operator of such ship"

However, there are significant differences between the section 68 provision in the

Jamaican Bill and those of Article 4 in their present state. It appears the Jamaican provisions

may have been based on an earlier version of the Draft Articles. In any event both provisions are

Draft provisions and subject to change.
Suffice it to say that efforts are being made by the Joint Committee to ensure that like terminology is used in reference to maritime claims in future Conventions dealing separately with Arrest and Maritime Liens respectively and generally to ensure that such Conventions operate in consort.

The aim of ensuring full compatibility between enumerated "Maritime Claims" and those claims which are designated as giving rise to Maritime Liens should in time find expression in provisions of local legislation.

It would seem to the writer desirable to have in one enactment provisions setting out those claims falling within the Admiralty Jurisdiction and the ones giving rise to Maritime Liens.

Local Admiralty practice in any given case is much influenced by whether a particular Maritime claim gives rise to a maritime lien or not.54

Thus such an enactment would be a convenient facility for legal practitioners.

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54 Vide: infra, chapter 4.
E: CONCLUDING REMARKS

By tracing and examining the origins and development of the Jamaican Admiralty
Jurisdiction, its legal foundations and present scope has been established. The Jurisdiction in
significant respects rest uneasily on its Imperial legislative foundations. There is urgent need for
legislative ratification of this situation.

As the law now stands, it is probable that a claimant will find that his maritime related claim
is among those covered by the extensive list of enumerated claims within the Jamaican
Admiralty Jurisdiction Court when faced with the relevant statutory provisions to bear in mind
this ultimate international aspect in construing or otherwise applying these provisions.

The need to ensure compatibility between separate lists of Maritime Claims and Maritime
Liens is being tackled in the international maritime law making sphere. Jamaica should not miss
out on this process and should in time ensure that its legislation and jurisprudence benefit from
this process.
E: Concluding Remarks

By tracing and examining the origins and development of the Jamaican Admiralty Jurisdiction, its legal foundation and present scope has been established. The Jurisdiction in significant respects rest uneasily in its Imperial statutory foundations. There is urgent need for legislative rectifications of this situation.

As the law now stands, it is probable that a claimant will find that his maritime related claim is among those covered by the extensive list of enumerated claims within the Jamaican Admiralty Jurisdiction. It seems advisable for a Jamaican Court when faced with the relevant statutory provisions to bear in mind this ultimate international aspect in construing or otherwise applying these provisions.

The need to ensure compatibility between separate lists of Maritime Claims and Maritime Liens is being tackled in the international maritime law making sphere. Jamaica should not miss out in this process and should in time ensure that its legislation and jurisprudence benefit from this process.
Chapter 4

Arrest of Ships
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Arrest of Ships

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Arrest of Ships

A: Introduction


For the Maritime Claimant, it is particularly important to obtain provisional security for his claim prior to its hearing on the merits. Also of vital importance is the basic need to put the court in a position where it may exercise and effectively so, its jurisdiction as regards his particular claim.

Overall, as ships are mobile and can easily move beyond the tentacles of the court's jurisdiction, the facility of ship arrest is an important device in the armoury of the maritime claimant at the preliminary stages of his quest for enforcement of his claim.

2. The Concept of Arrest.

Since ships may be detained in a variety of circumstances, it is important to clarify at the outset when should it be said that a ship has been arrested.

Guidance on this point may be obtained from the International Convention for the Unification of Certain Rules Relating to the Arrest of Seagoing Ships, 1952.
Article 1(2) of this Convention provides as follows:

"Arrest" means the detention of a ship by judicial process to secure a maritime claim, but does not include the seizure of a ship in execution or satisfaction of a judgement.

Further, Article 4 provides that a ship "may only be arrested under the Authority of a Court or of the appropriate judicial authority of the contracting state in which the arrest is made".

From this it is clear that "Arrest" is not simply equivalent to " detention" of a ship. As conceived and regulated by the Convention, "Arrest" is necessarily a judicial remedy.

"Arrest", is also to be distinguished from attachment, that is the "seizure of a ship in execution or satisfaction of a judgement".

As defined in the Convention, "Arrest" is also a security obtaining device. This accords with the emphasis on this aspect in civil law countries.

However, the power to secure claims by way of arrest is limited to the claims listed in Article 1(1) of the Convention. ¹ These claims, as already shown, are encompassed in the list of claims enumerated as falling within the Jamaican Admiralty

¹See: Chapter 3, part D.
3. The International Dimension

As previously noted, Jamaica is not a party to the Arrest Convention, although some of its provisions have found their way into Jamaican Law by way of extended U.K. legislation.

Hill in reference to the Convention has observed that:

"One distinct and basic feature of the Convention is the absence from it of an international law of arrest. The law and procedural rules applicable is/are those of the forum within which any particular arrest takes place" 3

Nevertheless, it is the writers contention that particular provisions of the Convention are worthwhile considering in an examination of the Jamaican law pertaining to ship arrest.

3 Ibid., p.v.
However, in accordance with Hill's intimation, such examination is rooted in, and necessitates focusing on the relevant municipal law stipulations applicable in Jamaica.

4. **Ship Arrest and the Jamaican Admiralty Jurisdiction.**

The facility of ship arrest is only available under Jamaican law pursuant to the institution of in rem proceedings.

In rem proceedings are proceedings instituted against a particular res, such as a ship, its cargo or freight.

These proceedings are to be distinguished from in personam proceedings which are directed against a particular person.

In Jamaica, in rem proceedings may only be instituted under the Supreme Court's Admiralty Jurisdiction, which also has jurisdiction to entertain in personam proceedings.

5. **Functions of Arrest.**
Here, Jackson has noted as follows:

"The arrest of ships has three possible functions. First and most obviously, it is a form of interim relief or provisional remedy - a "saisse conservatoire" (and in this context it should be noted that a creditor may obtain some protection through a caveat against release).

Secondly, it may operate as a ground of jurisdiction over the merits. Thirdly, it may provide 'security' for the claim on the merits. 4

6. Historical-jurisprudential theories and ship arrests.

Over the years, various conflicting views have been advanced in common law jurisdictions as to the legal implications of arresting a vessel.

The two main theories are the so-called personification and procedural theories. 5 To a large extent they entail a tracing and comprehension of the historical development of maritime liens and the use of the arrest device in England.


5 A third theory, "the conflict theory" is related to the historical conflict between the common law courts and the High Court of Admiralty in England; Also see generally: Price, Wiswall and Marsden, op. cit.
Under the personification theory, the ship is viewed as a distinct judicial entity, endowed with a personality and capacity to contract and commit torts. The ship is both the source and limit of liability.

American jurisprudence recognizes the personification theory. There, an action in rem is directed solely against the maritime property. Where the owners of the property appear, they do so as claimants of an interest not as defendants (unless joined as defendants in personam).

The jurisdiction of an American Court in an action in rem is limited to the value of the property: an appearance by the owner does not, without more, give the Court jurisdiction in personam.

In contradistinction, English jurisprudence accedes to the procedural theory whereby the seizure of the res by an action in rem, is held to be merely procedural to compel the owner to appear before the court.

The premise inherent in the procedural theory, is that historically the object of arrest, was to secure the appearance of the defendant and the provision of bail.

However, Thomas has noted:

6 See: Harley, S.T. and Batra, V: The security of a Maritime Lien, Tribox Ltd.
"The historical planks on which the theory is based are however of disputable validity and there is much in the modern law which it is impossible to relate to the tenets of the procedural theory."  

Nevertheless, the writer does not propose to here, delve here into a historical search to unearth the true object and roots of ship arrest and the maritime lien with which it has been associated.  

Various studies have yielded divergent results in this regard. Although, admittedly there has now emerged in English jurisprudence some consensus on the matter.  

Suffice it to say that despite any historical English antecedents or idiosyncrasies, Jamaica can fashion its own maritime jurisprudence as it deems best.  

This is not to suggest however that as a matter of law, the correctness or otherwise of the different on establishing what the law on arrest is in particular situations.  

However, as earlier intimated any such voyage into the inner recesses of English legal history as these pertain to maritime liens and ship arrest is decidedly beyond the scope of this study.

7 Ibid.
The writer contents himself with the observation that although discussion of the
different theories are no where to be found in any reported Jamaican case it appears that at
least implicitly Jamaica ascribes to the procedural theory.

Thus the analysis in this chapter proceeds on the basis that this is indeed the
case. Simultaneously, there is the implication of inheritance of the dubious features of
this theory from English law.

B. The law governing Arrest of Ships in

Jamaica.

The main procedural provisions are to be found in the Rules of the Supreme
Court of Judicature of Jamaica in the Admiralty Division. (hereinafter referred to as "the
Admiralty Rules").

These Rules were made pursuant to Section 7 of the Colonial Courts of
Admiralty Act, 1890 (U.K.) and in keeping with "...the manner prescribed by
Section 36 of the Judicature Law (Law 24 of 1979) as amended by Section 1 of
the Judicature Law, 1879, Amendment Law 1885. (Law 31 of 1885) for
facing Rules of Court to regulate the Procedure and Practice of the said Supreme Court in the exercise of its ordinary civil jurisdiction".

Section 7 of the colonial Courts of Admiralty Act 1890 (U.K.) provides that:

"(1) Rules of court for regulating the procedure and practice (including fees and costs) in a court in a British possession in the exercise of the jurisdiction conferred by this Act, whether original or appellate, may be made by the same authority and in the same manner as rules touching the practice, its ordinary civil jurisdiction respectively are made:

Provided that the rules under this section ...shall not (save as provided for by this section) come into operation until they have been approved by Her Majesty in Council, but on coming into operation shall have full effect as if enacted in this Act; and any enactment inconsistent therewith shall, so far as it is so insonsistant, be repealed..."

The approval of "Her Majesty in Council" is no longer required.

Section (5) of the First Schedule to the Jamaica Independence Act, 1962 provides that:

"...section four of the Colonial Courts of Admiralty Act, 1890 (which requires certain laws to be reserved for the signification of Her Majesty's pleasure..."
contain a suspending clause). and so much of section seven of that Act as
requires the approval of Her Majesty in Council to any rules of court for
regulation the practice and procedure of a Colonial Court of Admiralty,
shall cease to have effect in Jamaica".

Of special significance is the stipulation in Section 7 that on the coming into
operation of the Admiralty Rules "any enactment inconsistent therewith shall so for as it
is so inconsistent, be repealed".

This implies that any applicable Rules of Court then existing would continue to
apply in those areas (if any) not covered by the new Rules of Court but which are covered
by the existing Rules provided they are not inconsistent with the Admiralty Rules
provisions.

Here it may be noted that the Act, despite abolishing the previously existing
Vice-Admiralty Courts, nevertheless saved the Rules applicable to the Vice-Admiralty
Courts in then British "possessions", including Jamaica. This was provided for by
Sections 16(3) and 18 of the Act.

Section 16 provides that:

"If on the Commencement of this Act in any British possession, Rules of
Court have not been approved by Her Majesty in pursuance of this Act, the
Rules in force at such commencement under the Vice-Admiralty Act
1863... shall so far as applicable, have effect in the Colonial Courts of Admiralty of such possession... as Rules of Court under this Act, and may be revoked and varied accordingly...

Section 18 provides that:

"All enactments and rules at the passing of this Act in force touching the practice, procedure...in Vice-/Admiralty Courts shall have effect as rules made in pursuance of this Act... and shall apply to the Colonial Courts of Admiralty, and may be altered and revoked accordingly..."

Here it is to be noted that the Colonial Courts of Admiralty Act had come into force in Jamaica by July 1, 1891. The Admiralty Rules came into force later in 1893.

Accordingly when the Act came into force there were not yet any Rules of Court "approved by her Majesty" in pursuance of the Act for operation in Jamaica.

Hence the Rules of Court of the abolished Jamaican Vice-Admiralty Court continued in operation in Jamaica when the Act took effect in Jamaica.

These Rules are the "Rules for the Vice-Admiralty Courts in Her Majesty's Possessions Abroad". They had earlier come into operation in Jamaica on January 1, 1884.

The Admiralty Rules do not expressly repeal these rules. Thus in accordance with the Section 7 stipulation, it appears they were on the coming into operation of the
Admiralty Rules repealed only to the extent that they were inconsistent with these Rules.

So far the examination leads in the direction of thinking that where the Admiralty
Rules fail to cover a particular matter, then resort may be had to its predecessor Rules of
the abolished Jamaican Vice-Admiralty Court.

Here, it should be noted, that in turn, these Vice-Admiralty Court Rules provide
for resort to English High Court practice.

*Rule 207* under the caption "Cases not provided for" stipulates as follows:

"In all cases not provided for by these rules, the practice of the High
Court of Justice of England shall be followed".

However, *Rules 79* of the Admiralty Rules, provides as follows:

"Subject to the provisions contained in the foregoing rules, the
provisions of the "*Civil Procedure Code 1888*", and the Rules of
Court regulating the general
practice of the Supreme Court, shall so far as they
are applicable, apply to
procedure and practice in Admiralty actions".

Thus, by its terms, *Rule 79* requires resort to other local civil procedural Rules
and Rules of Court to supplement the provisions of the Admiralty Rules.
This means resort to the *Civil Procedure Code* and the *Supreme Court Rules of Court*.

However, *section 686* of the *Civil Procedure Code* provides that:

"Where no other provision is expressly made by Law or by Rules of Court, the procedure and practice for the Time being of the Supreme Court of Judicature in England shall, so far as applicable, be followed, and the forms prescribed shall require, be used".

This means that ultimately resort may be had to English Admiralty Practice and Procedural rules via this mechanism.

However there is some doubt as to whether *Section 676* provides for continued reception of U.K. Rules or they only relate to (again!) what the English Rules were at a particular time.

A similar question may also be raised as regards to *Rule 207* stipulation.

However, in practice as regards section 676, resort is permitted to the latest edition of the U.K. "White Book" (*"The Annual Practice of the U.K. Supreme Court*) in various civil matters.

However, the position is not without its doubts as local legal counsel are divided
on the true legal import of section 676.

Any application of the section as regards Admiralty Cases need to at least take into account the fact that whereas Jamaican Admiralty Jurisdiction is based on the 1956 U.K. Act, the U.K. have made a number of progressive changes to the 1956 stipulations, in particular by the Supreme Court. Act, 1981, (U.K.) 8

Moreover, strictly speaking, Admiralty Jurisdiction in Jamaica and the relevant Rules of Court have always had different statutory foundations.9

Overall, the law pertaining to ship arrest in Jamaica may be said to be governed by or based on the following:

1. The Admiralty Rules.
2. The Civil Procedure Code
3. The Supreme Court Rules of Court.
5. The Colonial Courts of Admiralty Act, 1890 (U.K.)
6. The Administration of Justice Act, 1956 (U.K.)

8Cannot find on man:
9See: Chapter 3


Also, Practice Directions pertaining to Ship Arrest (if any) issued by the Supreme Court would also be of assistance. However, it appears to date, none had been issued.

C. Types of claims which may give rise to right of arrest.

The types of claims for which ship arrests may take place are all those claims for which in rem proceedings may be instituted in the Admiralty division of the Supreme Court.

These encompass claims which give rise to maritime liens and others which may be termed "statutory rights in rem".
It is important to distinguish the two concepts.

Indeed, Goffey ¹⁰ notes that: "when arrest is contemplated the first thing to be considered is whether the cause of action confers a maritime lien or merely a right in rem".¹¹

1. Maritime Liens.

The expression "maritime lien" was probably first coined in English law by Sir John Jervis in the Bold Buccleugh, (1852) 7 Moo P.C, 267.¹²

There is to date no statutory definition of the term in Jamaican or English law.

Also there is no international law definition. The 1926 and 1967 Convention on Maritime Liens and Mortgages as well as the present Draft Articles for a new Convention on Maritime Liens and Mortgages have all avoided any attempt at a distinct and

¹⁰ See: Goffey, William: Arrest of Ships, 1975 L.M.C.L.Q., 34
¹¹ Ibid.
¹² See Thomas, ibid., para 1.
comprehensive definition of the term.

However, in the Bold Buccleugh itself, a definition was proffered by Sir John Jervis.

There, he stated that:

"...a maritime lien is ...a claim or privilege upon a thing to be carried into effect by legal process... that process to be a proceeding in rem...this claim or privilege travels with the thing into whosoever possession it may come. It is inchoate from the moment the claim or privilege attaches, and when carried into effect by legal process by a proceeding in rem, related back to the period when it first attached". 13

In The Tolten, Scott L.J. noted:

"The essence of the 'privilege' was and still is, whether in Continental or English law, that it comes into existence automatically without any antecedent formality, and simultaneously with the cause of action, and confers a true charge on the ship and Freight of a proprietary kind in favor of the privileged creditor. The charge goes with the ship everywhere, even in the hands of a purchaser for value without notice, and has a certain ranking with other maritime liens, all of which take precedence over mortgages". 14

13 (1851) 7 Moo. P.C. 267, 284
14 (1946) P. 135,150, cited by Thomas, ibid., para 10, who notes that the word 103
Tetly has put forward a definition which appears to have attracted some international approval.\textsuperscript{15}

He defines a maritime lien as "...a privilege against property (a ship) which attaches and gains priority without any court action or any deed or any registration". \textsuperscript{16}

Thomas \textsuperscript{17}, in what appears to be, at present, the major English work on the subject, describes a lien as:

"(1) a privileged claim or charge,

(2) upon maritime property,

(3) for service rendered to it or damage done by it,

(4) accruing from the moment of the events out of which the cause of action arises,

(5) Travelling with the property secretly and unconditionally, and

(6) enforced by an action in rem.\textsuperscript{18}

Under Jamaican law following the English position, the concept of a maritime lien is limited to a relatively small number of claims.

\textsuperscript{15}see Chapter 6, F.N. 93
\textsuperscript{16}Ibid.
\textsuperscript{17}Ibid., para 12
\textsuperscript{18}Ibid., para 12
The claims currently recognized as giving rise to maritime liens are:

1. damage done by a ship.
2. Salvage.
3. Seamen's and master's wages.
4. Master's disbursements, and
5. Bottomry and respondentia.\(^{19}\)

Here, Thomas notes that: "These represent the 'principal' or 'genuine' maritime liens although others may arise by implication from statutory enactments".\(^{20}\)

Section 3(3) of the Administration of Justice Act, 1956 (U.K.) as adapted and extended to Jamaica\(^{21}\) provides as follows:

"In any case in which there is a maritime lien or other charge on any ship, aircraft or other property for the amount claimed, the Admiralty Jurisdiction of the Supreme Court of Jamaica may be invoked by an action in rem against that ship, aircraft or property".

Accordingly, a vessel may be arrested in Jamaica for any of the aforementioned

\(^{19}\)See eg. Thomas, ibid., para 6
\(^{20}\)Ibid
\(^{21}\)per The Admiralty Jurisdiction (Jamaica) Order in Council, 1962, Section 3.
claims giving rise to maritime lien.

In keeping with the basic nature of the maritime lien, a change of ownership of the vessel, does not affect the right to have it arrested in respect of such claims.

2. "Other charges"

One question raised by the wording of section 3(3) is as regards the import of the words "or other charge". Prima facie, the words suggest that there are situations where there are charges other than maritime liens for which the Admiralty jurisdiction may be invoked.

Thomas suggests that the expression "maritime lien or other charge" in section 3(3) points to instances where maritime liens arise by implication from statutory enactment.

Here, he states that:

"It may be that it is these implied statutory maritime liens which were, in part in the contemplation of the legislature when enacting the Administration of Justice Act, 1956 Section 3(3), and wherein reference is made to a "maritime lien or other charge"." 22

He cites certain occasions when under U.K. law maritime liens may possibly be

22Thomas, op. cit., para 20
implied by statute. These generally encompass certain unfulfilled obligations that may be
due to government authorities such as unpaid fees and expenses of the Receiver of wreck
and due remuneration for services rendered by coastguards.23

Tetley has referred to "special legislative rights" which he describes as "rights in
favor of governmental authorities (and sometimes individuals) against the ship and
sometimes against her cargo, usually ranking ahead of maritime liens. 24

These rights, Tetley indicates, relates to matters such as the recovery of dock and
harbour charges and the removal of wreck.25

Overall, it appears as Thomas intimates, that there is doubt as regards the exact
label to be placed on such claims which may possibly fall within this category of "other
charges".

The character or description of such "other charges" have apparently not been
subject to any judicial discussion. At least there appears to be no reported cases on the

23 ibid., para 20 et seq.
24 Op cit., p.42
25 ibid., p43
In the final analysis, it suffices for immediate purposes to emphasize that any such "other charge" falling within Section 3(3) will give rise to a right of arrest.

3. *Maritime Liens and the International Dimension*

The problem of construing Section 3(3), inter alia, highlights the need for there to be a clear definition of a maritime lien. More importantly, there is a need to have a statutorily enumerated exclusive list of maritime liens. Not only does it appear that there is no such definition to be found in Jamaican law, but there is no such list of liens.

Section 68 of the draft Jamaica Shipping Bill now has such a list. 26 This is to be welcomed as this will bring more certainty as to which claims definitely give rise to maritime liens.

Importantly, Jamaica can use this mechanism of statutory enactment to ensure

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26 See chapter 3
that those claims which it has under its law as giving rise to maritime liens are compatible
with its national interests.

As earlier noted the draft Bill provisions in this regard, is based on those of the
Draft Articles for a New Convention on Maritime Liens and Mortgages.

Hence the international dimension to the proposed statutory enactment on
maritime liens is here quite manifest.

This highlights not only the general need to pay attention to this international
dimension in dealing with preliminary issues in the domestic maritime law context.
Importantly, it signifies the need for Jamaicas participation in international fora involved.

For present purposes it is important to emphasize the link between the maritime
lien and arrest of ships. This link is also recognized in the international context.

Hence, there is an attempt to ensure full compatibility in the future between
different international Conventions dealing respectively with maritime liens and arrest of
ships.

Statutory rights in rem

27 See also chapters 3 and 6
28 See: chapter 3
Basically, these are the claims within the Jamaican Admiralty jurisdiction which do not have attached to them the status of maritime liens.

A statutory right in rem exists independently of a maritime lien. Although where a maritime lien exists there is concomitantly an available action in rem, it is not the case that where an action in rem is made available a maritime lien is thereby inferred. 29 This points to the existence of statutory rights in rem.

Unlike the maritime lien which is a substantive right, the statutory right in rem, is in essence, a procedural remedy. It accrues at the issue of the writ and is defeated by a sale to a

bona fide purchaser.

**Required Procedures**

1. **Effecting Arrest.**

Firstly, in rem proceedings have to be commenced by the filing of a Writ of Summons in the prescribed form.

A Praecipe for warrant to arrest the vessel along with a supporting Affidavit, are to be filed.

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The Affidavit to be filed on behalf of the party seeking to have the vessel arrested should contain certain particulars.

Rule 3 of The Admiralty Rules provide as follows:

"In actions in rem, a warrant for the arrest of property ...may be issued at the instance of the plaintiff at any time after the writ of summons has been filed or of shall be issued until an affidavit by the party or his agent has been filed complied with.

(a) The affidavit shall state the name and description of the party at whose instance the warrant is to be issued, the nature of the or counter claim, the name and nature of the property to be arrested and that the claim or counter claim has not been satisfied.

(b) In an action of wages, or of possession, the affidavit shall state the national character of the vessel proceeded
against a foreign vessel, that notice of the
action has been given to the Consul of the
vessel belongs if there be one resident in
notice shall be annexed to the affidavit.

(c) In an action of bottomry, the bottomry bond, and if in a
language also a translation thereof, shall be produced for
inspection and perusal of the Registrar and a copy of the
of the translation thereof, certified to be correct, shall be
to the affidavit."

However, the Court or Judge may as deemed fit, allow the warrant to issue,
although the affidavit may not contain all the aforementioned particulars. 30

In an action for wages the court or Judge may also waive the service of the notice
and in an action of bottomry, the production of the bond. 31

Once the warrant of Arrest is issued, the writ of summons, along with the
warrant to Arrest, are then served on the vessel in a particular manner.

This is the normal practice although, strictly speaking in terms of sequence of
activity, service of the writ of summons is what is first required since this is what gives

30 per Rule 4
31 Ibid.
the court jurisdiction over the vessel. The arresting of the vessel is then said to "perfect" the court's jurisdiction over the vessel.

Rule 6 provides that: "In actions in rem the warrant of arrest shall be served by the bailiff of the court..."

However, in actions in rem, service of the Warrant as well as that of the Writ of Summons must be carried out in a particular manner.

Service of the writ of summons or warrant against the ship, needs to be effected by nailing or affixing a copy of the writ or warrant on the mainmast or on the single mast of the vessel and leaving it there, nailed or affixed. 32

However, actual service of the writ or warrant as described may be dispensed with where, say the owner of the vessel or his lawyer agrees to accept service and put in bail or pay money into Court in lieu of bail. 33

However, once the documents have been duly served on the vessel as aforesaid, then it becomes effectively under arrest.

In practice, the Bailiff takes possession on the vessel and seeks to ensure that no one gains access to the vessel so as to move it out of the court's jurisdiction.

2. Release from Arrest

32 See: Rule 8.
33 See: Rule 5
Rule 25 provides that: "property arrested by warrant shall only be released under the authority of an instrument issued from the office of the Registrar, to be called a Release"

Normally, once a vessel has been arrested, its owner or other interested party, will take steps to procure its release.

Bail may be put up or money paid into Court in lieu of bail.

Such bail or payment is to provide alternative security for the Plaintiffs claim and to obtain release of the vessel.

The plaintiff is entitled to sufficient security to cover the amount of his claim, together with interests and costs. Security is usually provided in the form of a bank guarantee or letter of undertaking from a P&I Club.34

Bail or payment into court takes the place of the ship in the action and if after judgment it appears inadequate, nevertheless the ship cannot be arrested or rearrested for this reason.

A person desirous of preventing the release of the vessel under arrest, is required to file a praecipe for a caveat against release.

Once this is done, no order of the court affecting the vessel or money mentioned

34See eg appendix 17
in the caveat, may be issued unless the caveator is notified.35

3. **Forced Sale of Arrested Ship**

The court may order an arrested ship to be sold either on giving judgement at trial or by default, or prior to judgement pendent lite.

The circumstances under which the court may authorize the pendente lite sale, include high maintenance costs of the vessel, mounting daily expenses, the ship's deteriorating condition and unpaid crew wages.

Overall, the considerations would centre around whether the interests of the creditors would be best served by the immediate sale prior to judgment. Also of particular importance here is the residual interest of the defendants themselves.

Parnell,J, in the Jamaican Supreme Court case of **Morgan v. M.V. Vacuna and Others, 1968, 15 W.I.R.280, 296** emphasized that:

"Every sale must be preceded by a commission for the appraisement and

35See eg Georghadjis
sale and the commission must be addressed to the bailiff and executed by him unless the court directs to the contrary".

The object of the appraisement is to prevent the sale of a valuable property, as a ship, at an unreasonably low price.

The sale is usually carried out by public auction, after having been duly advertised in such local and foreign newspapers as the court directs.

As regards sale by private treaty Parnell J. points out:

"Before a sale by private treaty can properly take place, the name of the person purchasing; the sum to be paid and in what manner, and the terms of the agreement for sale must be submitted to the court for approval. And the sale must be effected by the bailiff unless the court otherwise directs".

Thus in the said case, a purported sale of a vessel in contravention of the relevant rules was treated as a nullity.

Where there is a sale of a ship the bailiff is required to deposit the gross proceeds in court for eventual payment out to the various claimants subject to the doctrine of priorities.
F: The International Dimension.

Here, the convention that is of primary relevance is The International Convention for the Unification of Certain Rules Relating to the Arrest of seagoing Ships, 1952. Also, of relevance are those International Conventions pertaining to Maritime Liens, that is, those of 1926 and 1967. Importantly, as already noted preparation of a new draft Convention on Maritime Liens and Mortgages is now at an advancec stage.

The main objective of the 1952 Arrest Convention was to protect the interests of both ship and cargo by securing free movement of vessels and by prohibiting arrest for claims not relates to the operation of the ships as under most national legal systems, arrest was permitted for any claim regardless of its nature. However here, it may be noted that this was not the case under the Common Law where a vessel could only be arrested with a view to enforcing claims against the ship.

The resulting compromise position adopted by the Convention is to specify a list of maritime claims in respect of which a ship may be arrested. 36

It provides the claimant having a "maritime claim" with the possibility of having the vessel arrested. At the same time, it restricts the power of arrest to the claims

36See also: chapter 3
specified in it.

As earlier noted, it is this list of claims which essentially comprises the Jamaican Admiralty Jurisdiction.

The Convention provides that a claimant may arrest either the particular ship in respect of which a claim is made, or any other ship in the same ownership, except in cases where the owner is not personally liable (for example in the case of a ship under bareboat charter). In the latter case, another ship owned by the person liable may be arrested.37

Under the Convention, ships are deemed to be in the same ownership when all the shares therein are owned by the same person or persons.

Article 3 (3) provides that:

"A ship shall not be arrested, nor shall bail or other security be given more than once in any one or more of the jurisdictions of any of the Contracting States in respect of the same maritime claim by the same claimant: and, if a ship has been arrested in any one of such jurisdictions, or bail or other security has been given in such jurisdiction either to release the ship or

37 See in particular, sub-paras 1&4 of Article 3
to avoid a threatened arrest, any subsequent arrest of the ship or of any ship in
the same ownership by the same claimant shall be set aside, and the ship
released by the Court or other appropriate judicial authority of that state unless
the claimant can satisfy the Court or other appropriate judicial authority that the
bail or other security had been finally released before the subsequent arrest or that
there is other good cause for maintaining that arrest”,

The convention thus restricts the ability to arrest to one ship in relation to each claim.

Hill has cited the case:

The Despina G.K. (1982) 2 Lloyd's Rep 555, as one in
which the issue of whether it is possible to arrest the same ship twice, came up for
decision in England.38 In that case, the English Admiralty Court decided that a
judgement creditor who has obtained a final judgment against a shipowner pursuant to
proceedings in rem in a foreign Admiralty Court, is permitted to bring a subsequent action
in England if necessary to complete the execution of the judgement provided that the
vessel is still in the same ownership of the judgment debtor at the time of the re-arrest.39

This holding apparently applies under English Law where a previous arrest can
correctly be defined as a maritime attachment either under the law of the country where the

38See Hill, op cit., pp 19-21
39Ibid., p. 21
arrest took place or under English Law. Once this is the case then according to Hill, the English Court will permit the second arrest as being merely to enforce the foreign judgment.

He emphasizes however, that:

"What cannot happen under any circumstances is for the same vessel to be arrested twice, both times being the putting into effect of an in rem right against the vessel whether or not the arrest is in the enforcement of a maritime lien on the vessel". 40

In Cyprus, another common law jurisdiction, the issue of whether a second or subsequent warrant of arrest may be taken out against the same vessel has come up for decision.41 There, it was held that the circumstances are such that the plaintiffs in the first case were not yet ready to proceed to judgement and execution and the plaintiffs in the second case were ready to proceed to judgment, it would be necessary and right for a second warrant of arrest to be granted.

In determining the matter, it appears the important consideration is as regards the prejudice the second plaintiff would suffer by the first plaintiffs inability to take immediate

41Georghadjis, opcit, p.21
The position in Cyprus is in keeping with the provisions of Article 3(3), since different claimants were involved. What the convention is basically against, is the same person arresting the same ship in respect of the same claim more than once. Such a possibility would prima facie, be inimical to the interests of the free flow of maritime commerce and the overall objectives of the Convention.

The exceptional situation referred to as regards England, although spoken of in terms of a second arrest of a ship appears to be more skin to attachment.

As earlier indicated, "arrest" does not include the seizure of a ship in execution or satisfaction of a judgement. Thus, it appears The Despina G.K. Case is not ipso facto concerned with arresting the same ship twice in the sense of the Convention.

Hill's observation in this context is, in the writers respectful opinion, based on a false notion, at least as far as the Convention is concerned.

Hill, after posing the question as to whether it is possible to arrest the same ship twice, states that: "The tempting answer is no. But it is not quite so simple as that". 43

He then cites The Despina G.K case as one in which the matter came up for decision since: "This ship was seized (arrested) twice". 44

He thus, it appears erroneously, equates "seizure" with "arrest" of a ship. It is

42 op cit., p. 19
43 ibid., p.19
44 ibid.
this false notion which is the basis for the subsequent fallacious reasoning which in turn underlines his reluctance to give a definitive negative answer to the question he poses.

There appears to be no reported Jamaican case on this issue of the same claimant arresting the same ship twice in respect of a particular claim.

This part of the Convention Provisions are not expressly enacted into the

*Administration of Justice Act, 1956 (U.K.)*

Hence, this part of the Convention provisions have not had clear express legislative force in Jamaican law.

However, it is the writer's submission that due regard should be had to these convention stipulations whenever the issue arises for determination in Jamaica.

Here the interests of uniformity, certainty and justice in international maritime matters as mentioned by Tetley\(^{45}\) would be served by the adoption of such a course of action in Jamaica despite the fact that Jamaica is not a party to the Convention.

As earlier intimated, the Convention allows under specified conditions for the arrest of a ship other than the one in relation to which the claim arose. This provision of the Convention reflects a compromise between the traditional English position which restricted arrest to the particular ship in respect of which the claim arose and the

\(^{45}\) See chapter 1, part F
Continental European approach which enabled the claimant to arrest any chattel belonging to the defendant shipowner concerned.

The relevant Convention stipulations may be said to be reflected in Jamaican law in the form of the extended Section 3 of Administration of Justice Act, 1956 (U.K.)

Section 3 as adapted and extended to Jamaica provides as follows:

"...(1) The Admiralty jurisdiction of the Supreme Court of Jamaica may in the case 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.

(2) In any case in which there is a maritime lien or other property for the amount be claimed, the Admiralty jurisdiction of the Supreme Court of Jamaica may be invoked by an action in rem against that ship, aircraft or property.

(3) 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 was, when the cause of action arose, the owner or charterers of, or in possession or in control of, the
ship, the Admiralty jurisdiction of the Supreme Court of Jamaica may 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.

(4) In the case of a claim in the nature of towage or pilotage in respect of an aircraft, the Admiralty jurisdiction of the Supreme Court of Jamaica may be invoked by an action in rem against that aircraft if at the time when the action is brought it is beneficially owned by the person who would be liable on the claim in an action in personam.

(5) Notwithstanding anything in the preceding provisions of this section, the Admiralty jurisdiction of the Supreme Court of Jamaica shall not be invoked by an action in rem in the case on any such claim as is mentioned in paragraph (D) of subsection (1) of section one of this Act unless the claim relates wholly or partly to wages (including any sum allotted out of wages or adjudged by a superintendent to be due by way of wages).
(6) Where, in the exercise of its Admiralty jurisdiction, the Supreme Court of Jamaica orders any ship, aircraft or other property to be sold, the court shall have jurisdiction to hear and determine any question arising as to the title to the proceeds of sale.

(7) In determining for the purposes of subsections (4) and (5) of this section whether a person would be liable in an action in personam it shall be assumed that he has his habitual residence or a place of business within Jamaica”.

From this it can be seen that section 3(4) permits the arrest of a ship other than the one in respect of which the claim arose.

However the provisions of section 3(4) lends itself to different interpretations.

Thus, Hazzlewood has observed that the interpretations of the sub-section has presented a dilemma in the form of the extent to which paragraph (b) is governed by paragraph (a).

He notes that:

46 Hazzelwood, Steven J: Gaps in the action in rem- plugged? L.M.C.L.Q 422
"the more liberal construction is that the two paragraphs operate independently with the effect that "any other ship" beneficially owned by the defendants may be arrested, notwithstanding that the defendant was not the owner of the offending vessel. The restrictive interpretation is that "any other ship" in paragraph (b) may be arrested only if it is in the same ownership as the offending ship; ie the two ships must be "sisterships"...47

The issue involved here is of much practical significance. Its resolution will determine whether a shipowner can with impunity, charter excess tonnage and commit wrongs in respect of the chartered vessels without having his own vessels arrested.

It often happens that a shipowner A time charters his ship S to B, another shipowner, who commits a breach of charterparty. A may now wish to arrest a ship beneficially owned by B. The question is therefore whether section 3 (4) sanctions such an arrest.

The facts of The Span Treza 181982) i Lloyd's Rep.225 were essentially those outlined in the preceding paragraph. The issue involved was basically whether section 3 (4) could be successfully used to arrest a vessel under the (beneficial) ownership of someone not the owner of the involved (or offending) ship.

The English Court of Appeal favored the more liberal construction of section 3

47 Ibid., p.423
(4). The decision thus sanctioned the arrest of a vessel which is not under the same
ownership of the involved or offending ship.

This did away with the restrictive view which had formerly held sway in English
Admiralty jurisprudence.

Prior to the *Span Terza* case, the English Courts had required a common
ownership link between the offending or involved vessel and the alternative ship selected
for arrest. The two vessels had to be in effect "sister-ships", that is, under the same
beneficial ownership as regards all their shares.

As a result the expression "sister-ship arrest" has been in vogue in English
Admiralty jurisprudence since the 1956 Act based on the section 3 (4) stipulation.

However, as shown in The Span Terza case, such an expression would now appear to be
misleading. A better expression, it appears, is alternative ship arrest", which is wider in
scope.

The doubts surrounding the construction of section 3(4) has its roots in the
United Kingdoms bungled attempt at giving effect to the relevant provisions of the Arrest
Convention.

Here it should be noted that paragraphs 1 and 4 of Article 3 of the Convention
provide, in so far as relevant, as follows:

"(1) Subject to the provisions of paragraph (4) of this Article... 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 maritime claim arose, the owner of the particular ship...

(4) When in the case of a charter by demise of a ship the charterer and registered owner is liable in respect of a maritime claim relating to that ship, the claimant may arrest such ship or any other ship in the ownership of the charterer by demise, subject to the provisions of this convention, but no other ship in the ownership of the registered owner shall be liable to arrest in respect of such maritime claims.

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

The opening words of paragraph 1 clearly indicate that it is to be read as being subject to paragraph 4. Clearly therefore in the present context it will be the provisions of paragraph 4 which will be one of overriding significance.

Paragraph 1 taken by itself requires both the involved or offending ship and the ship to be arrested to be in the same ownership.
It does not require either of them to be owned by the person liable for the claim.

Thus a literal reading of paragraph 1 alone would lead to the odd result where, if the person liable in respect of the claim is not the owner of the offending ship, none of his ships can be arrested while at the same time the offending ship owned by the innocent shipowner as well as all other ships owned by him could be arrested. However, thankfully as already emphasized, paragraph 1 is made subject to paragraph 4.

The final sentence in paragraph 4 makes it clear that the paragraph applies not only to demise charterers but also to any other person other than the involved or offending ship's registered owner. This surely is wide enough to encompass all ship charterers.

Accordingly, paragraph 4 is to be construed as affecting all such persons.

Paragraph (4) may be said to have three main effects in the present context.

Firstly, it exempts the other ships of the innocent owner from arrest. Secondly, it confirms that the involved or offending ship itself may be arrested. Thirdly, it allows the arrest of ships owned by a person other than the innocent registered owner of the involved or offending ship. Here the relevant person is the one who is liable in respect of the maritime claim. Accordingly his ships along with the involved or offending ship may also be arrested.

Hence, from the provisions of Article 4, it is clear that there need not be an ownership link between the involved and the alternative ship.
The English draughtsmen in draughting the 1956 legislative provisions purporting to give effect to Article 3, failed to include Article 3 (4) in the enabling legislation. As a consequence English law went off course with a restrictive judicial interpretation as to what alternative ship could be arrested.

Happily, The Span Treza case as well as subsequent amendments to the 1956 provisions have helped to provide a rudder for a path more in keeping with the Convention stipulations.

The matter of the interpretation of Section 3(4) has also come up for decision in other common law jurisdictions.

In a 1973 Cyprus case, Elias Rigas v The Ship "Baalbeck" now lying at Larnaca Harbor (1973) 11 J.S.C. 1519 the then restrictive English approach was followed. 48

However, in 1978, the Singapore Court of Appeal in The Permian, (1978) I Lloyd's Rep. 308. embraced the liberal approach and held that there was no requirement for the offending and arrestable ships to be sisterships and allowed the arrest of the defendant's vessel where the defendant was merely a charterer of the vessel in respect to which the claim had arisen.

The Singapore Court of appeal declined following the then restrictive approach adopted by the U.K. Rather this Singapore case in turn provided an important precedent

48See Georghadjis, op cit, p.11
for the English Court in the *Span Terza* case.

The liberal approach is more in keeping with international consensus in the matter as reflected in the Convention provisions.

Moreover, to the extent that the *Section 3(4)* provisions may be amenable to differing interpretations, it is submitted that as a matter of policy the liberal approach ought to be preferred. It is therefore hoped that this approach will commend itself to a Jamaican Court faced with the task of construing *Section 3(4)*.

As Tabbush 49 has observed:

"...The purpose of allowing the arrest of sister ships, in rem can only be to found jurisdiction against the person liable and to give the plaintiff security for his claim; there is no question of imputing liability to the ship itself because of its part in the incident, as there is when < the offending ship > is arrested because of a maritime lien. To serve this purpose, and to avoid doing injustice to third parties, the only important requirement is that < the ship to be arrested > be wholly owned by the person liable; no rational

49Tabbush, S.J.: Arrest of Ships owned by Charterers, L.M.C.L.Q., 585
purpose is served by any special relationship between <the offending ship> and <the ship to be arrested>..."50

Also as already shown the relevant Convention provisions clearly support the liberal interpretation. Thus, in the present context, the question as to whether a Jamaican court should in an appropriate case resort to this Convention to which Jamaica is not a party to clarify any perceived ambiguities such as may be obtained in respect of Section 3(4) takes on particular significance.

In The Banco, (1971) I Lloyd's Rep. 49 when the matter of the interpretation of Section 3(4) came before the English Court, it was held by Lane, J at first instance that:

"In the construction of a statute such as the Administration of Justice Act, 1956, passed to enact matters agreed at a prior Convention, the Court may, in the event of, ambiguity, look at the Convention even though the statute may have given effect to broader terms of agreement than those of a precise definition..."51 When the case went up to the English Court of Appeal,

50 Ibid., p. 587
51 Ibid
approach and holding of Lame, J was approved.

There, Lord Denning, M.R., stated as follows:

"It is now fully established that when an Act of Parliament is passed so as to give effect to an international Convention, we can look at the Convention so as to help us to construe the Act, see Salomon v. Commissioners of Customs and Excise, (1967) 2 Q.B. 116; (1966) 2 Lloyds Rep. 460; Post Office v Estuary Radio Ltd., (1968) 2 Q.B. 740; (1967) 2 Lloyd's Rep. 299, and this is to even though the Act of Parliament does not mention the Convention".52

Here, it must be emphasized that in the words of Lord Denning, it matters not whether or not the Convention is mentioned in the statute as is the case with the 1956 Act, (U.K.) in respect of both U.K. and Jamaica.

Ultimately the important question is the intent of the legislature. Where the intent of the enactment was decidedly to give legislative effect to a Convention, then it seems to the writer that this ought to be overriding consideration as regards whether to seek the aid

52 Ibid., p. 52
of the Convention Provisions in statutory interpretation.

Thus, whether the Country is or not a party to the Convention, is but one of the factors that should enter into the matrix of Considerations. Hence it seems to the writer that like the English Courts did in the case of *The Banco*, a Jamaican court may in an appropriate case pray in aid the Convention provisions for purposes of construing stipulations of the *1956 Act (U.K.)* such as those of *Section 3(4).*

Also as earlier shown, support for *The Banco* approach may be found in *The Eschersheim (1976) 2 Lloyd's Rep .I.*

The phrase "beneficially owned" is used in both *paragraphs (a) and (b) of Section 3(4).* In *The I Congress del Partido (1977) I Lloyd's Rep.* 536, at p. 561, Robert Goff, J., at first instance stated that the phrase was introduced to take account of trust law and that it refers to equitable ownership.

To determine who truly in the beneficial owner of a vessel it must be investigated not only who is the legal owner of its shares but also who has an equitable interest. It is only by taking into account both legal and equitable ownership that the beneficial ownership can be determined,

Thus, whereas the Convention simply refers to ownership without any

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53 see chapter 3, part D
54 see: Hill, op cit., p. 15
qualification, the 1956 Act by virtue of the English trust notion has added some complexity to the matter which has been extended to Jamaica as well via the applicable Section 3(4)) provisions.

Under the Convention all questions relating to liability for wrongful arrest and for the costs of providing security as well as all procedural matters are referred to the law of the state where the arrest takes place. 55

The basic procedural requirements in Jamaica for ship arrest have already been noted. As regards wrongful arrest it appears damages will only be available for gross negligence and where malafides are proven:56 The provision of security for costs by the arrester of the vessel in not mandatory and application for this has to be made to the Court.

The Convention contains provisions regarding jurisdiction 57 based on arrest for hearing claims on the merits which are elaborated upon in the next chapter dealing with Jurisdiction.

Here it may be briefly noted, that the Convention requires that where the court in whose jurisdiction the ship was arrested has no jurisdiction to decide upon the merits, the

55 see: Article 6, and Chapter 5
56 see eg, Jackson, op cit, p. 178
57 see Article 7, and
security given to procure the release of the ship is to be held as security for the satisfaction of and judgment by a Court having jurisdiction to decide, and the Court of the State in which the arrest is made must fix a time within which an action must be brought. The Convention further provides that the ship may be released if the proceedings are not brought within the time so specified. 58

Accordingly, the Convention, by necessary implication, provides for arrest (or bail or other security in lien) in one Contracting State as security for proceedings in another or for arbitration. 59 This also operates in tandem with the prohibition of arrest of more than one ship for one more claim in any one or more of the contracting states.

The law of the United Kingdom has traditionally linked, and subsequent to the United Kingdom's ratification of the Convention have continued to link arrest to proceedings on the merits.

Such linking of arrest to proceedings on the merits contravened the provision of the Convention. Thus there has been judicial criticism of the failure of the United Kingdom to implement this aspect of the Convention. 60

It appears that Jamaican law follows the English traditional approach. It is very doubtful, whether at present a Jamaican Court would hold on to property over which it

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58 Ibid.
59 see Jackson, op cit, p.
170; Articles 3(3), 5, 7(2) and (3)
60 see Jackson, ibid; The AndreaUrsula (1973) 1 Q.B.265; The Maritime Trader (1981) 2 Lloyd's Rep. 153 (Sheen. J.)
has no jurisdiction on the merits.

This appears to follow from the basic principles concerning Jurisdiction examined in the next Chapter as well as from what it is necessary for the would be ship arrest the show, (by way of affidavit) before a warrant for the arrest of the ship may be procured.

Significantly, as regards Jamaica, the Conventions permits the arrest of ships flying the flag of non-contracting states, in the jurisdiction of any Contracting State, in respect of maritime claims specified within the Convention and for any other claim permitted by the law of the Contracting State. 61

Thus the restriction of the right of arrest to the enumerated maritime claims applies only to ships having the nationality of a Contracting state, Thus, if as is the case in must civil law countries, the arrest of a vessel is generally permissible to secure any claim, whether maritime or not, vessels flying the flag of non-contracting states such as that of Jamaica may be so arrested, provided, however, the requirements of the lex fori are met.

Also, Article 8(3) provides that:

"...any Contracting state shall be entitled wholly or partly to exclude from the benefits of this Convention any Government of a non-

61 see: Article 8
person who has not, at the time of his arrest, his place of business in one of the contracting
states”.

The size of the fleet flying Jamaican flags is rather miniscule.

However, to the extent that such a fleet exists, the ships concerned stand to be affected as aforesaid.

While, in the Jamaican municipal law context, ship arrest is also linked to maritime liens, the Convention itself did not ipso facto affect the existing law pertaining to maritime liens.

Indeed, Article 9 provides:

"Nothing in this Convention shall be construed as creating a right of action, which apart from the provisions of this convention, would not arise under the law applied by the Court which had seisin of the case nor as creating any maritime liens which do not exist under such law or under the Convention on Maritime Mortgages and Liens, if the latter is applicable".
Thus, the 1956 Act in giving effect to provisions of the Convention did not create any new maritime liens, rather it allowed for arrest of a vessel in respect of the "maritime claims" set out in the Convention. Jamaican Admiralty Jurisdiction was accordingly expanded as a result while the previously existing list of maritime liens remained unaffected.

However, a point worth reiterating here is that at present attempts are being made to ensure the fullest compatibility between international conventions dealing respectively with Ship Arrest and Maritime Liens. Then, should Jamaica become party to both of such Conventions, this should bring not only greater harmony between the operative principles pertaining to ship arrest and maritime liens inter se, but also ensure greater harmony between Jamaican law and that of other countries implementing such conventions.

2. **Forced Sale of arrested Ship and International Stipulations.**

Enforcement of a security interest in a vessel is carried out by arrest and forced sale of the vessel. Earlier in this chapter the relevant local procedural rules pertaining to a forced sale of an arrested ship were generally considered. However, there are also some international stipulations pertaining to forced sale of ships.
These will be noted only briefly here since although they may be related to ship arrest, on the whole they are more concerned with the actual enforcement of security interests. As such they do not necessarily fall within the framework of the preliminary issues being examined in the thesis.

However, to the extent that they may affect procedures pertaining to ship arrest they deserve to be mentioned here.

Such stipulations are contained in the 1967 Convention on Maritime Liens and Mortgages. Importantly as regards Jamaica, the Draft Articles for a new Convention on Maritime Liens and Mortgages contain such provisions.

The relevant provisions of these Draft Articles have been incorporated into the new Draft *Jamaica Merchant Shipping Bill, 1989: Sections 75-78.*

*Section 75* requires 30 days notice to be given by the executing officer to various holders of security interests in the vessel as regards the time and place of its sale. This is based on Article 10 of the Draft of Articles.

The objective here is to provide protection to creditors, enabling them to participate in the distribution of the proceeds of sale in accordance with their respective priorities.

There is no such 30 day notice requirement at present. Hence, *Section 75*, if it becomes law would bring about a significant change to this aspect of the procedural rules.
pertaining to ship arrest and sale.

The other Sections 76-78 are basically concerned with ensuring a transfer of a clean title in the vessel to the purchase and the issuing of a certificate to that effect. There is provision as to the actual disposition of the proceeds of sale. However, until a new Maritime Liens and Mortgage Convention finally comes into being these draft statutory provisions are likely to remain such and subject to change with changes in the Draft Articles' provisions.

F. "Postscript": The Mareva Injunction - an alternative to ship arrest?

In The Span Terza case, considered earlier, Donaldson L.J. in the course of argument suggested to counsel that his cause, which he sought to protect by means of ship arrest, would be equally well served by employing instead the device which now bears the sobriquet of "The Mareva Injunction".

The Law Lord suggested that in the particular case such a device would be just as effective in preventing the respondents from removing the vessel from the jurisdiction and giving rise to the provision of security "...in exactly the same way as security will, no doubt, be provided in respect of this arrest..."62

This firstly raises the question as to what exactly is the Mareva Injunction? A

second question is whether such a device is available under Jamaican law? Thirdly, there is the question as to how in fact does it compare to the facility of ship arrest? In the latter case, the suggestions of Donaldson, L.J. makes such an inquiry particularly pertinent.

The Mareva Injunction is essentially a Court Order restraining a defendant from removing assets from the jurisdiction. It is a species of interlocutory injunction. As such, it continues until final disposition of the action or until a further order is made.

The Mareva Injunction took its name from an English case. It was actually developed in 1975 in England largely through the judicial initiative of Lord Denning.

Prior to the development of the Mareva doctrine in 1975, it was a fundamental principle of the law of interlocutory injunctions, that no injunctions would be granted prior to trial to restrain the defendant from disposing of or dealing with his assets. This appears throughout the literature of the Common Law as the rule that there shall be no execution before judgment. In Robinson v Pickering (1881) 16 Ch. D. 660, it was bluntly stated that: "you cannot get an injunction to restrain a man from parting with his property".

The Mareva Doctrine developed out of the increasing need for swift judicial

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63 See Appendix 18
64 See eg: Mc Allister, Debra M.: Mareva Injunctions, Carswell, Canada, p.9
65 Mareva Companie Naviera SA v. International Bulcarriers S.A. The Mareva, (1975) 2 Lloyd's Rep. 509; However, the Injunction was earlier granted in Nippon Yusen Kaisha v. Karageoris (1975) 2 Lloyd's Rep. 137
66 See eg: Mc Allister, op. cit. p. 18; Lister & Co. v. Stubbs 1890, 45 Ch. D.I.
action to prevent a person moving his assets out of the jurisdiction so as to render ineffectual any judgment given against him.67

Such assets may be anything that has a pecuniary value such as a ship. Indeed, the Mareva injunction has for some time now been applied to ships.68

The conditions for the grant of the Mareva Injunction are basically the following:

1. The Plaintiff must have a substantive cause of action within the jurisdiction;

2. The Plaintiff must show he has a good arguable case.

3. The defendant must have assets in the jurisdiction;

4. There must be a real danger that the defendant will remove the assets from, or dissipate them within the jurisdiction; and

5. it must be just and convenient to grant the injunction.

As regards the jurisdiction for its grant, it may be noted that it developed in the

67 See: Harvey, Brian: Judicial Interpretation in Commercial Law- The Proper Limits of Judicial Inventiveness, Paper 11A2(b), 8th Commonwealth Law Conference, Ocho Rios, Jamaica, September 7-13, 1986, at p.3


69 See: generally, Powles, op.cit, chapter 2
U.K. based on the wide discretionary power granted by Section 45 of the Supreme Court of Judicature (Consolidation) Act, 1925 (U.K.) which provides as follows:

"... A mandamus or injunction may be granted or a receiver appointed by an interlocutory order of the court in all cases in which it shall appear to be just of convenient..."

Morrison, 70 writing in an Article published in 1985, after reviewing the various English decisions on the Mareva Injunction observed in reference to the section 45 provision that:

"It is because that provision is in pari materia with section 49 (h) of the Judicature Supreme Court Act, that it is thought that these decisions and the subsequent learning on Mareva injunctions in the United Kingdom may, in a proper case, be given effect in Jamaica".71

However, since that Article was written, applications for Mareva Injunctions have been often made and granted in Jamaica. Thus the device is definitely available.

71 Ibid., p.16
under the law of Jamaica and now is an important facility in the practice of law in
Jamaica. 72

The basis for the grant is as Morrison contemplated, Section 49 (h) of the
Judicature Supreme Court Act 1880. The Section 49(h) provisions are originally based
on Section 25(8) of the Judicature Act, 1873 (U.K.) which was Section 45 of the
Supreme Court of Judicature
(Consolidation) Act 1925 (U.K.) the basis of the first grants of the Mareva Junction.73

The essential similarity between ship arrest and the Mareva Injunction is that they
both operate to restrain the movement out of the jurisdiction of the ship concerned and
thereby to prompt the provision of security for the claim.

However, there are clear distinctions between them, which, inter alia, will affect
the advantages one may have over the other in any given situation.74

Firstly, an injunction can only operate in personam. It does not operate to give
the plaintiff any proprietary interest in the assets of the defendant.

Hence, such assets are accordingly available to satisfy the claims of other
creditors. The plaintiff cannot treat such assets as security for his yet undetermined claim.

72 Although todate, there are no reported cases
73 But now see : Section 37 (1) of The Supreme Court Act, 1981 (U.K.)
74 See Powles, op. cit., pp 7-10

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On the other hand, Arrest of the vessel by the plaintiff necessarily operates in rem and gives a priority and a security which the Mareva does not. Lord Justice Donaldson said in *The Span Terza* that a Mareva Injunction must inevitably have led to the provision of security, presumably by some guarantee.

However, it would not have assisted the arrester in that case if before security was provided, which of course the vessel owners are not obliged to give, another creditor had come along and arrested the vessel.

This, no doubt operated strongly on the mind of counsel when he would not allow himself to be persuaded by Lord Justice Donaldson's attempts to entice him with the Mareva option.

A second important distinction in that whereas Arrest operates as an actual seizure of assets this is clearly not the effect of the injunction which merely orders the Defendant not to do certain things with his assets, breach of such an order, being Contempt of Court with its attendant consequences.

Thirdly, an arrest must fasten *is* to a particular asset whereas a Mareva Injunction may only relate to particularised but unspecified assets of the defendant, that is those assets within the jurisdiction. However, this is not the case where the injunction applies to the defendant's arrest in the toto and a fortiori, to a particular asset such as a ship. In these instances, the practical effect is more akin to ship arrest.

An application for an interlocutory order such as a Mareva injunction may be
made at any time before or after trial. "Arrest" as defined in the 1952 Arrest Convention is not a post trial device although it may be said cynically that "arrest" in the non-forensic sense of "detention", merely goes by a different name when it takes place after trial, that is, "attachment".

Generally, applications for the Mareva may not be made before a writ is issued but in cases of urgency, this may be done. For an arrest to take place, as earlier shown, a writ in rem is required. Thus in this respect a Mareva may lend itself to greater dispatch.

Usually, application is like arrest, made ex parte in case of urgency, although as a general rule, application for interim relief should be made by motion or summons.

A supporting affidavit is required and should contain certain particulars in keeping with the conditions for the grant of the injunction, mentioned earlier. But, it appears even this requirement may be dispensed with temporarily in order to ensure speedy action.

Here it may be emphasized that:

75 "The whole point of the Mareva jurisdiction is that the plaintiff proceeds by stealth so as to pre.empt any action by the defendant to remove his assets from the jurisdiction".76

75 See Powles, op. cit., pp 7.10
Overall, the advantages of the Mareva injunction as applied to ships when compared to ship arrest include the following: 77

1. It prevents whatever assets are covered in the injunction and not only
the ship

prohibit the movement of

and no more. (To the extent

movement of more than one ship, it is

contrary to the provisions of the 1952 Arrest

Convention

2. In a Mareva Injunction, the property remains in the possession of the
defendant and, consequently, the attendant costs and expenses incurred
in its

exercise are not high. Where the ship is arrested, the custody of the ship

is with

the Bailiff of the Supreme Court and the overall costs inclusive of

maintenance

and security while the ship is in such custody may be very high.

3. The plaintiff applying for a Mareva Injunction need only make an
undertaking
to issue proceedings and to file an affidavit. Arresting a

ship requires the plaintiff
to actually take out a writ in rem and file an

77 The list of "advantages" are based on a list set out by Tetly: See Tetly, William: Attraction, the Mareva Injunction and saisie conservatoire, L.M.C.L.Q., February 1985, 59 at pp 79-80
The advantages of ship arrest vis-a-vis the Mareva Injunction include the following:

1. By ship arrest, the ship is physically put into the custody of the court and placed with the Bailiff. With a Mareva injunction, the owner or master is in effect ordered not to move his ship, the only remedy for breach of this order is contempt of court.

2. Where a ship is arrested, the claimant arrestor becomes a secured creditor from the date of the issue of the writ in rem and his claim will receive priority as of that date. The Mareva injunction does not give the plaintiff any security interest in the ship or any priority over other claimants.

3. As earlier shown, when the offending ship is under charter and the person who is liable on the claim is the charterer, the claimant in an action in rem may arrest either the offending ship or a ship owned by the charterer. The Mareva Injunction can only be taken out against the property of the defendant, that is, in this case, the charterer.
4. It is seldom that the arrestor of a ship is subject to damages, whereas a Mareva Injunction will entail a damages suit if it is shown to have been unjustified or abusive.

It is clear from the foregoing list of respective "advantages" that care has to be taken to ensure that the more appropriate device is employed for the particular situation. On the whole the Arrest device in practice seems to be a more potent weapon.

As early as 1980, Bland expressed the view that:

"...the time may come when the Mareva may prove a powerful procedural device in the Caribbean Courts..."

That time has already in Jamaica. It remains to see how and to what extent the Mareva device will be used where ship arrest is also available.

F: CONCLUDING COMMENTS

Examination of the arrest device has shown that it is a useful device for the
maritime claimant. However, certain procedural requirements need to be adhered to in
seeking to make use of the facility.

The relevant procedural and other rules pertaining to ship arrest are largely
extended or sanctioned by the U.K. Rules of Court promulgated a century ago remain
basically unchanged.

There is doubt surrounding the applicability of present U.K. Rules where there
is lacunae in the local stipulations. Also, with extended legislation has come certain
deficiencies inherent in U.K. law such as relate to that country's attempt to give legislative
effect to the 1952 Arrest Convention.

Jamaica, it seems, may have to resort to this Convention to deal with some of
these deficiencies especially as regards the relevant statutory interpretation.

Also, it has been shown that there are possibly adverse consequences for
Jamaica not becoming a party to this Convention.

In the case of Maritime Liens, the incorporation of a list of maritime liens as well
as certain rules pertaining to forced sale of an arrested ship is a positive development
which had its roots in the provisions of Draft Articles for a new International Convention
on Maritime Liens and Mortgages.

This again highlights the international dimension to some of these preliminary
and related issues such as ship arrest. The need to take note of the relevant Convention
provisions therefore can hardly be overemphasized. Also it seems that in the case of the
extended provisions of the 1956 U.K. Act, legislative amendments seem advisable.

Such amendments should take note of the provisions of the initial source, that is, the Arrest Convention.

This should not only give rise to greater clarity in the presently ambiguous provisions but aid in the quest for uniformity, certainty and justice internationally in maritime matters.

Serious thought should also be given to Jamaica becoming a party to the Arrest Convention. As elsewhere mentioned, but here bears reiterating, Jamaica should also seek to involve itself fully in the making of any new international rules pertaining to ship arrest and Maritime Liens as clearly these rules have important consequences in the domestic context of Jamaica.

Consideration of the Mareva Injunction has shown that there are basic similarities in the practical purposes served by this device and that of ship arrest.

Although, like the Arrest device, it is quite useful in restraining the movement of a ship and in prompting the furnishing of security, overall, it appears, arrest is likely to be preferred in the majority of cases.

Finally and importantly, it was noted that Arrest is also a jurisdiction obtaining device. The matter of Jurisdiction is the subject of the next chapter.
CHAPTER 5

Jurisdiction and it's exercise in Maritime Matters-

The International Dimension
CHAPTER 5

Jurisdiction and it's exercise in Maritime Matters-

The International Dimension

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CHAPTER 5

Jurisdiction and its exercise in Maritime Matters –
the international dimension

A: General Legal Framework

1. Introduction

It is axiomatic that maritime claims by nature tend to have an international dimension. They may for instance relate to any one of the vast number of maritime contracts entered into daily by parties from different countries.

In Jamaica, such contractual claims may be those of shippers or seafarers against foreign shipowners or a local assured against a foreign marine underwriter. Also the maritime claimant may be a foreign shipowner claiming against a Jamaican charterer.
Otherwise, a claim may arise because a tort was committed a certain distance from shore thus falling within a particular nationally proclaimed maritime zone. Thus Jamaican fishermen may for instance, wish to claim damages from a foreign carrier which has spilled oil a certain distance from Jamaica's shoreline.

In general, as ships are always moving to and from different countries and maritime zones, while occupying their central position in various international maritime transactions and relationships, inevitably problems with an international legal dimension will arise.

In today's shipping world, the ownership, master, crew, management and registry of a ship might probably involve in each case a different country.

In the final analysis, different legal systems of different states may have an interest in a particular claim. A related issue might ultimately be as regards what one state or the other may or may not do.

As such, there is a necessary interplay between the umbrella public international law governing relationships between states and the narrower circumscribed municipal law, especially the conflict of laws of the particular state(s) concerned as regards maritime claims.

For the maritime claimant in Jamaica these preliminary issues, in this context, ultimately translate into questions as to the "Jurisdiction" (if any) exercisable by the Jamaican Court in respect of the claim concerned.
2. The Public International Law Context

From the perspective of public international law "Jurisdiction" refers to the competence of the state to affect legal interests.\(^1\) In effect, it refers to the authority of a state to govern persons and property by its municipal law (civil and criminal).\(^2\)

This competence embraces jurisdiction to prescribe and proscribe, to adjudicate and enforce the law.\(^3\)

At the most basic level, the raison d'être for a state's exercise of jurisdiction is that the state has some relationship to, or interest in the person or property concerned.\(^4\)

Jurisdiction is an attribute of state sovereignty.\(^5\) Thus, traditionally, the basis for jurisdiction of a state is predicated either on the fact that as every state has sovereignty within its own territory, that state can control and regulate matters concerning all persons, property and acts done within its territory,\(^6\) or alternatively, that a state has a right to exercise jurisdiction over its nationals wherever they may be.\(^7\)

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3. Ibid.
4. See. Ott, op cit
7. See the nationality principle, see Ott, op. cit, p138; Bates, ibid.
3. Municipal Law Considerations

(a) General

Jurisdiction from the municipal law perspective basically refers to the competence of a state court to hear and determine a matter brought before it.

Here the initial concern of the maritime claimant will be whether the selected court will hear and determine his case.

Accordingly, an initial question for any party to potential litigation in Jamaican Court has jurisdiction over the dispute.

If yes, the next question is whether the court will agree to exercise its jurisdiction.

Thirdly, there is the related question of whether the Jamaican Court will apply Jamaican Law or the law of some other country.

(b) Whether the Court has jurisdiction

(in) General

The relevant common law rules are purely proclaimed in character. The court's jurisdiction in respect of any maritime claim is based on service of a writ of summons (or other originating process) on the defendant. For purposes of founding jurisdiction in a maritime matter the Court is not concerned with the connection the parties have with Jamaica. Such

9 Ibid, also see generally Dicey and Morris on the Conflict of Laws, 10th Edn, London, Steven & Sons Ltd, Chapter 9&10.
10 Vide: ibid.
considerations may only be relevant to whether the court will exercise jurisdiction.

Thus, the mere service of the writ on the defendant will give the Jamaican Court power to try an action which may have no factual connection with Jamaica or is otherwise inappropriate for trial in Jamaica.

In Jamaica, Maritime claims may be brought against the person liable on the claim, through an "action in personam" or against property (ship, cargo or freight) with which the claim is concerned through an "action in rem".11

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11 See also: Chapter 4
(ii) Actions in Personam

The Jamaican Supreme Court has jurisdiction\textsuperscript{12} to entertain an admiralty action:

(1) if the defendant (or his agent) is served with a writ in Jamaica;

(2) where the defendant (or his agent) submits\textsuperscript{13} to the jurisdiction of the court; or

(3) where the court assures jurisdiction under its discretionary power to permit the service of the writ outside the jurisdiction of the defendant (or his agent).

The circumstances under which the Jamaican Supreme Court may assume "extra-territorial" jurisdiction, that is, grant permission for service of a writ outside the jurisdiction is governed by Section 45 of the Jamaican Civil Procedure Code.

The section provides (in so far as is relevant to maritime claims) as follows:

"Service out of the jurisdiction of a writ of summons, or notice of a writ of summons may be allowed by the court or a Judge whenever

...(c) any relief is sought against any person domiciled of ordinarily resident within the jurisdiction; or

...(e) the action is founded on any breach or alleged breach, within the jurisdiction, of and contract wherever made, which according to the terms thereof ought to be executed according to the law of this island; or

\textsuperscript{12} See also infra, for special stipulations re exercise of this jurisdiction in Collision cases, and generally Dicey and Morris, and Cheshire and North, ibid.

\textsuperscript{13} Such submission may take place in various ways eg; by instituting court proceedings in a particular matter, a Plaintiff in effect submits to the court's jurisdiction to entertain a counterclaim against him in some related matter; see Dicey and Morris, op cit. p.191 et seg.
...(ee) the action is founded on a tort committed within the jurisdiction

...(f) any injunction is sought as to anything to be done within the jurisdiction...

...(g) any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction.

(iii) Actions in Rem

The Supreme Court has jurisdiction to entertain an Admiralty action in rem if the writ is served on the res in Jamaica or is deemed to have been duly served on the defendant.¹⁴

(c) Whether the court will exercise Jurisdiction

(in) General

Jamaican courts have a discretionary jurisdiction, whenever it is necessary to prevent injustice, to stay or strike out an action or other proceeding in Jamaica.

A mere balance of convenience is not sufficient ground for depriving a plaintiff of the advantages of prosecuting his action in a Jamaican Court, if it is otherwise properly brought. However, a stay will be granted if:

(a) continuance of the proceedings will cause injustice to the defendant and,

(b) a stay will not cause injustice to the plaintiff.

¹⁴ See: chapter 4 and The Rules of the Supreme Court of Judicature of Jamaica in the Admiralty Jurisdiction, Rules 1 and 5.
Lord Diplock stated the applicable considerations thus:

"In order to justify a stay, two conditions must be satisfied...

(a) the defendant must satisfy the court that there is another forum to whose jurisdiction he is amenable in which justice can be done between the parties at substantially less inconvenience or expense, and

(b) the stay must not deprive the plaintiff of a legitimate personal or juridical advantage which would be available to him if he invoked the jurisdiction of the ... court."  

(ii) Lis alibi pendens

One ground on which the court may be asked to interfere by staying Jamaican proceedings is that simultaneous actions are pending in Jamaica and in a foreign country between the same parties and involving the same or similar issues.

The court may be asked to stay an action in Jamaica in two distinct situations:

(a) where the same plaintiff sues the same defendant in Jamaica and abroad: or

(b) where the plaintiff in Jamaica is defendant abroad, or vice versa.  

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17 See also, infra, re collision cases.
(iii) **Foreign Jurisdiction Clauses**

The common law position is that where a contract provides that all disputes between the parties are to be referred to the exclusive jurisdiction of a foreign tribunal, the local court should stay proceedings instituted in breach of such agreement, unless the plaintiff proves that it is just and proper to allow them to continue.18

(d) **If the Court exercises Jurisdiction, which law is to be applied**

(i) **General**

The presence of a foreign element of any kind in any dispute raises the possibility that foreign law may be used by the Jamaican Court to resolve that dispute.

In order to determine which rules of foreign law (if any) are to be applied, a court will classify a maritime claim or issue and attach to it its concomitant choice of law rule.

If the issue is a procedural one, then the law to be applied is the lex fori.19 If it is a substantive law issue the choice of law rule is selected and applied as is appropriate to the claim.

What rule is appropriate will depend on whether for instance, the claim is one arising from breach of contract or commission of a tort.

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18 See: Oland, A. Barry: Forum non conveniens in Canada: The Common Law position, The Federal Court of Canada,
suggested Reform, Meredith Memorial Lectures, Richard de Boo Publishers, 1987; Dicey and Morris, op. cit., p255
19 the law of the forum or court in which the cases is tried.
(ii) Maritime Contracts

The basic principle applicable in Jamaica is that, subject to statutory provisions (if any), and public policy considerations, issues will be referred to their proper law. Each maritime contract is thus to be linked to its proper law.

Thus, in *National Chemesearch Corporation Caribbean V. Davidson 1966, 9 J.L.R.468, 471*, Graham-Perkins, J. (Ag) in a judgement of the Jamaican Supreme Court states that:

"... the legal system by which the essential validity of a contract must be determined is what has been called the proper law of the contract."

The proper law of the contract is the system of law by which the party intended their contract to be governed, or, where the intention is neither expressed nor to be inferred from the circumstances, the system of law with which the transaction had its closest and most real connection.\(^{20}\)

(iii) Maritime Torts

Cheshire and North\(^{21}\) state the position at common law thus:

"The law that governs maritime torts depends upon whether they have been committed within the territorial waters of some state or upon the high seas."\(^{22}\)

\(^{20}\) see eg. Scott, A:W:: Private International Law, (Conflict of Laws), 1979 at p. 208 quoting Dicey.

\(^{21}\) op cit.
If the tort is committed in the territorial waters of some foreign state, then the ordinary rules relating to torts committed in foreign countries would apply.

As a general rule, an act done in a foreign country is a tort and actionable as such in Jamaica, only if it is both:

(a) actionable as a tort according to Jamaican law (lex fori) or to put it differently, is an act which, if done in Jamaica would be a tort; and

(b) actionable according to the law of the foreign country where it was done (lex loci delicti commissi)

Thus, according to the common law position, where torts are committed within Jamaican Territorial Waters, the applicable law is Jamaican.

Where the tort is committed in the territorial sea of a foreign state, the locus delicti is deemed to be the littoral state rather than the country of the ship's flag and the applicable law is accordingly that of the littoral state.

For acts committed on the High Seas a distinction is made between torts having consequences external to the ship and those having purely internal consequences.

In the latter case, the maritime claimant who sues in Jamaica, in respect of acts, all of which have occurred on board a single foreign vessel, must prove that the conduct of the defendant was actionable by the law of the flag and that it would have been actionable had it

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22 Ibid., p
23 The exceptional circumstances relate to where resort may also be had to the law of another country if this has the most significant relationship with the occurrence and the parties; see Dicey and Morris, p 927.
24 the law of the place where a tort has been committed, see Scott, op. cit; p.7
occurred in Jamaica.

All other acts occurring on the high seas and later put in suit in Jamaica must be tested solely by Jamaican maritime law.25

B: International Convention Provision and Jurisdiction and Choice of Law

issues-implications for the maritime claimant.

(in) General

In the United Nations publication, "Guidelines for Maritime Legislation", it is stated:

"There is no International Convention regulating Conflicts of Law problems on a worldwide basis."26

Although this statement remains apposite today, there are a number of maritime conventions with provisions dealing directly with the question of Jurisdictions and/or rather more indirectly with that of choice of law.

Even where such issues are not at all adverted to by any provision in a maritime convention, Jurisdiction and Choice of Law jurisprudential ramifications may yet be inferred for the maritime claimant from such convention provisions.

Of the various Conventions dealing more directly with issues of Jurisdiction and (to a lesser extent) Choice of Law, Jamaica is only party to those pertaining to the Law of the Sea.

In the case of the International Convention for the Unification of Certain Rules

25 See generally Cheshire and North, op cit, p. 545 et seq.
26 at p. 246.
Concerning Civil Jurisdiction in Matters of collision, 1952, provisions of this Convention have slipped into Jamaican Law by way of extended Imperial Statutory provisions. This is by virtue of Section 3 of The Admiralty Jurisdiction (Jamaica) Order in Council, 1962 (U.K.) extending provisions of The Administration of Justice Act, 1956, (U.K) which gave legislative effect to that Convention.


Generally, these Conventions raise somewhat different issues as regards Jurisdiction and Choice of law than the rest of the Conventions, provisions pertaining to such issues. Accordingly, it is convenient for this reason as well as the fact that Jamaica is only a party to the Law of the Sea Conventions to first consider for purposes of analysis these Conventions and the others after.

However, as the relevant provisions of the two Geneva Conventions have been essentially reproduced in the more recent and comprehensive Montego Bay Convention, discussion will primarily be focused on the provisions of the Montego Bay Convention. Moreover, the provisions to be considered are generally acknowledged to be, in any event, now part of international customary law.

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27 Jamaica ratified March 21, 1983
28 Jamaica accede October 8, 1965
29 Jamaica accede October 8, 1965
(2) Law of the Sea Conventions

Only one of the very extensive Montego Bay Convention deals exclusively with the question of civil jurisdiction, that is Article 28.

This Article is captioned "Civil Jurisdiction in relation to foreign ships. It provides as follows:

"1. The coastal state should not stop or divert a foreign ship passing through the territorial sea for the purpose of exercising civil jurisdiction in relation to a person on board the ship.

2. The coastal state may not levy execution against or arrest the ship for the purpose of any civil proceedings, save only in respect of obligations or liabilities assumed or incurred by the ship itself in the course or for the purpose of its voyage through the waters of the coastal state.

3. Paragraph 2 is without prejudice to the right of the coastal state to levy execution against or to arrest for the purpose of civil proceedings, a foreign ship lying in the territorial sea, or passing through the territorial sea after leaving international waters."

Accordingly, where a writ has been issued against a particular person, of that person is known to be on board a ship passing through the Jamaican Territorial Waters, the stopping or
diverting of the ship for the purpose of serving a writ (or other originating process) on such a person so as to make him subject to the court's jurisdiction.

Thus, one may sardonically picture a frustrated maritime claimant sitting on a Jamaican beach with his high powered binoculars, watching and lamenting: "there he goes cruising through again!!"

Where a ship is not lying in or passing through the territorial sea on its way from local internal waters (or otherwise within local jurisdiction) it may only be arrested in respect of obligations or liabilities assumed or incurred by the ship itself in the course or for the purpose of its voyage through Jamaican waters.

Otherwise, arrest is permitted in accordance with Jamaican law as discussed in the preceding chapter.

One basic objective of the Article, it appears, is to ensure that innocent passage through the territorial Sea is not fettered by the application of the littoral state's civil jurisdiction. (There is less restraint imposed on the coastal state as regards exercise of its criminal jurisdiction in appropriate cases: (see:Article 27).)

Article 28 (3) uses the expression "lying in the territorial sea". Presumably this is not simply equivalent to "stationary in the territorial sea"

If "lying" is to be taken to mean "stationary simpliciter" then it seems to the writer that this would run counter to the objective referred to, in light of Article 18 (2) of the Convention.

Article 18 is captioned: "Meaning of passage". Article 18 (2) provides as follows:

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"Passage shall be continuous and expeditious. However, passage includes stopping and anchoring, but only in so far as the same are incidental to ordinary by force majeure or distress or for the purpose of rendering assistance to persons, ships or aircraft in danger of distress"

Hence, if a vessel has stopped and is thus stationary, in the territorial sea solely for the purposes of rendering assistance to another vessel in distress, presumably it should not be deemed as "lying" in the territorial sea so as to render it amenable to arrest, if it was not so amenable before stopping. This appears to be so, since the good Samaritan vessel would be still in "passage" through the territorial sea.

Although, clearly, it would be literally lying in the sense of being stationary in the territorial sea.

It should be noted that except for a minor cosmetic change the third paragraph, Article 28 is identical in wording to that of its predecessor, Article 20 of the 1958 Convention on The Territorial Sea and Contiguous Zone.

Further, Article 20 is already enacted into Jamaican Statute Law: Schedule to The Territorial Sea Act, 1971. This Act was passed to give effect to the provisions of the said Geneva Convention, to which Jamaica became a party on October 8, 1965.

As regards Article 20, Section 5 of The Territorial Sea Act under the caption, "Restriction of execution of civil process", provides as follows:

"Nothing shall be lawful to any extent to which it is inconsistent with any provisions of the convention in so far as they are restrictive of the taking, pursuant to Jamaica's sovereignty
over The territorial sea of measures for the purposes of the execution of civil process of the exercise of civil jurisdiction”.

The territorial sea itself qua maritime zone within national jurisdiction, ipso facto, ultimately entails consequences for the maritime claimant as regards Jurisdiction and Choice of Law issues.

Starke 30 notes that "For the purpose of territorial jurisdiction, besides actual territory, it has been customary to assimilate...(the territorial sea)... to state territory.31

Here, it should be borne in mind the provisions of Article 2 of the Montego Bay Convention which (like its predecessor Article 1 of the 1958 Convention on the Territorial Sea and Contiguous Zone) provides that:

"The sovereignty of a coastal state extends beyond its land territory and internal waters...to an adjacent belt of sea, described as the territorial sea".

Article 3 of the Montego Bay Convention provides that:

"Every state has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles..."

The extent to which this is done by a particular state is left up to its municipal law. In the case of Jamaica, its territorial sea breadth has already been established by The Territorial Sea Act.

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Section 3 (2) of this Act provides that:

"The territorial sea shall be twelve miles in breadth or have such other breadth as may be
prescribes".

The Jamaican Parliament was empowered to pass such legislation in accordance with the
provisions of Section 3 of the First Schedule to The Jamaica Independence Act, 1962,
(U.K.)

Section 3 provides that :"The legislature of Jamaica shall have full power to make laws
having extra-territorial operation".

Despite this provision, it appears that up to the time of the passage of The territorial Sea
Act, the prerogative of the Crown, (that is, the English Monarch), to prescribe the limits of
Jamaica's Territorial Sea was still intact or at least the position as regards this was not
unequivocal was in light of Jamaica's constitutional status as a monarchy and the position at
common law as regards the Crown's prerogative to delimit maritime territorial bounderies.


Such a situation was patently undesirable in light of Jamaica's independent status.

Moreover as intimidated in the present context, significant consequences appertain to the
bounderies of the territorial sea as regards the possible enforcement of a maritime claim.

Accordingly: it is only appropriate that such powers should vest indubitably and solely
with the Jamaican Parliament.

Thus, Section 6 (1) of The Territorial Sea Act vests the relevant Minister with power,
inter alia, to define the limits of the Territorial sea (per sub-paragraph (b) and to prescribe "anything authorised or required by this Act to be prescribed" (per sub-paragraph (f)). Most importantly, Section 7 of the Act stipulates: "This Act binds the Crown".

Accordingly, Henriques 32 observes that: "In Jamaica the prerogative right of the Crown to determine the maritime boundary of the state and the limits of the territorial sea has been abrogated by statute. The Crown has lost the right to extend the sovereignty of the state beyond its land territory by virtue of the Act. The prerogative power of the Crown has been replaced by the statute. The extent of the Sovereignty of the State of Jamaica has been fixed by the Territorial Sea Act, which can only be altered by an amending Act of Parliament".33

The net result is that Jamaica's sovereignty is extended to the 12 miles breadth of the Territorial Sea and the power to affect such breadth resides solely with the Jamaican Parliament.

Further, where there are Adjectival law or conflict of Laws stipulations which refer to "in Jamaica" or "the jurisdiction", or whose ramifications relate to the territorial extent of Jamaica and its waters, then such stipulations, prima facis, bring into issue the territorial sea of Jamaica and its ambit.

Such considerations as will be shown shortly are particularly relevant to questions such as those of the exercise of the court's assumed or extra-territorial jurisdiction and Choice of Law as regards maritime torts.

Henriques notes that:

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33 Ibid., p 51

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"Since the sovereignty of Jamaica is extended to the breadth of the territorial sea, concomitantly, its laws, both common law and statute are similarly extended. It follows by parity of reasoning that the Laws of Jamaica will be applicable to all persons found in the Territorial sea."

From this it is clear that the restraints placed in respect of the exercise of civil jurisdiction in the territorial sea operates as a fetter on the sovereign rights of Jamaica.

In this context Starke indicates that provisions such as those of Article 28 "... impose limitations on the jurisdictional rights of the coastal state in the interests of minimizing interference with shipping in transit".

A significant feature of the Law of the Sea traditionally is its division of international maritime space into zone which fit neatly into a dichotomy of being within or beyond national jurisdiction.

O'Connel notes that "The division of the sea into various zones which in modern parlance are zones of "national jurisdiction" or "beyond national jurisdiction" has meant that there are varying scales of competence of coastal states and shipping states over things, persons, and events at sea."

The territorial sea and internal waters are well established zones of national jurisdiction.

Thus, expect where there are particular derogations from the littoral state's jurisdictional rights,

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34 Ibid., p 50
35 Op cit, at p. 265
37 Ibis., p. 733 (Vol.2).
in accordance with international law, ships and persons entering such zones are normally subject to the littoral states civil jurisdiction.

Exceptions in respect of the Territorial Sea have already been noted.

Internal Waters encompass ports, harbours, lakes and canals and generally the baselines used in measuring the breadth of the territorial sea One possible exception regarding the exercise of civil jurisdiction in these waters has been noted in respect of Ports.

Starke states:

"The general rule is that a merchant vessel enters a port of a foreign state subject to the local jurisdiction. The derogations from this rule depend on the practice followed by each state. There is, however, an important exception which belongs to the field of customary international law, namely that a vessel in distress has a right to seek shelter in a foreign port, and on account of the circumstances of its entry is considered immune from local jurisdiction, subject perhaps to the limitation that no deliberate breaches of local municipal law are committed while in port. On the other hand, some authorities concede only a qualified immunity to such vessels".

It cannot be said with any certainty what approach would be taken in Jamaica in such emergency cases as regards the exercise of local civil jurisdiction.

However, largely on an apriori basis, it seems to the writer that it would be unlikely that such a claimed immunity would easily move a court to say, order the release of a vessel that has

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39 op cit, at p267
been arrested in such alleged circumstances.

This is, so because of the evidentiary questions involved and if such a claimed immunity was to easily succeed then this would conceivably open the floodgates for such immunity claims in the future. In time perhaps what would have started as an immunity based on noble considerations would conceivably degenerate into a mere "defence" in the armoury of legal counsel.

Although, admittedly there is a strong parallel between this situation and the hypothetical situation discussed as regards a ship stationary but presumably not "lying" in the Territorial Sea because of special considerations.

Other traditional maritime zoned include the High Seas which is outside national jurisdiction.

Importantly, the Montego Bay Convention has introduced the concept of the Exclusive Economic Zone (EEZ).

Although the Convention is not yet in force, this concept is generally regarded as now part of international customary law.40

It is being contended by the writer that this new concept may ultimately have significant

jurisprudential ramifications as regards Jurisdiction and Choice of Law issues under Jamaican Law.

This is so as, inter alia, it appears to disturb the traditional and more jurisprudentially convenient dichotomy of maritime zones being clearly within or beyond national jurisdiction. Yet, some of the rules which arise in the context of the Conflict of Laws seem to be, inter alia, predicated on just such a dichotomy.

Two examples to be considered later in this chapter are in respect of:

(1) the assumption of extra-territorial jurisdiction by a Jamaican Court in relation to maritime torts; and

(2) the choice of Law rules applicable to such maritime torts.

However, it is first necessary to consider the legal character of the E.E.Z.

Articles 55, 56, 58, 59 and 86 point to the essence of the concept.

Article 55 provides the captain "specific legal regime of the exclusive economic zone" as follows:

"The exclusive economic zone is an area beyond and adjacent to the territorial sea, subject to the specific legal regime established in this Part, under which the rights and jurisdiction of the coastal state and the rights and freedoms of other states are governed by the relevant provision of this convention"

Article 56, captioned "Rights, jurisdiction, and duties of the coastal state in the exclusive..."
economic zone" provides:

1. In the exclusive economic zone, the coastal state has:

(a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the sea-bed and of the sea-bed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds;

(b) jurisdiction as provided for in the relevant provisions of this Convention with regard to:

(i) the establishment and use of artificial islands, installations and structures;

(ii) marine scientific research;

(iii) The protection and preservation of the marine environment;

(c) other rights and duties provided for in this Convention.

2. In exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention.

3. ... "

Article 58 deals with Rights and duties of other states in the E.E.Z.

Here, all states are granted certain freedoms of communication as pertains to the High Seas, such as freedom of navigation and overflight.
However, states are required to ..."comply with the laws and regulations adopted by the coastal state in accordance with the provisions of this Convention and other rules of international law in so far as they are not incompatible with this part"

Article 86 in reference to Part 7 of the Convention which deals with the High Seas states that:

The provisions of this Part apply to all parts of the sea that are not included in the exclusive zone, in the territorial sea, or in the internal waters of a state, or in the archipelagic state. This article does not entail any abridgement of the freedoms enjoyed by all states on the exclusive economic zone in accordance with article 58".

Accordingly, the E.E.Z. is an area beyond and adjacent to the territorial sea, constituted by a part of the sea not included in the high seas and subject to a specific legal regime embracing:

(1) sovereign rights of the coastal state for economic purposes;

(2) other rights and duties contemplated in the convention as appertaining to the coastal state;

(3) jurisdiction of the coastal state as regards specified matters such as protection and preservation of the marine environment; and

(4) other state's freedoms of communication such as those of navigation, overflight and laying of submarine cables.
From the foregoing, one is prompted to ask to whom really does the zone belong?

Related to this is the issue of to whom may be attributed the so-called residual rights, that is, those rights which are not expressly conferred either on the coastal state nor on other states.

These issues are of relevance in the present context because the convention does not specifically address the question of the exercise of civil jurisdiction in or regarding the E.E.Z.\(^41\)

This seeming omission from the convention could simply be because the issue does not at all arise as regards this maritime zone.

Alternatively, despite any express reference to the exercise of civil jurisdiction pertaining to the E.E.Z., inferences as regards such exercise may nevertheless be drawn upon perusal of the Convention Provisions.

It is being contended that the latter is indeed the case.

At this point, the provisions of Article 59 should be noted. Importantly, they attempt to address the residual rights issue.

Article 59 provides:

"In cases where this convention does not attribute rights of jurisdiction to the coastal state or to other states within the exclusive economic zone, and a conflict arises between the interests of the coastal state and any other state or states, the conflict should be resolved on the

\(^{41}\) Church hill and Lowe, op cit, at p. 129 for instance indicates that if the E.E.Z. is deemed To have a residual territorial sea character, then a presumption would arise: "that nay activity not falling within the clearly defined rights of non-coastal states would come under the jurisdiction of the coastal state". 
basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole'.

This was the closest the convention comes (and apparently could have come\textsuperscript{42}) in addressing the residual rights issue.

It is clear from its wording that Article 59 does not resolve the residual rights question. Essentially, the Article merely proffers resort to equitable principles in resolving disputes between states when in fact the matter of residual rights do come into issue.

Thus Article 59, in effect, leaves open for instance, the question as to whether the littoral state has rights under international law to prescribe and enforce rules in the E.E.Z. as regards say, ship arrest in a manner analogous to and in extrapolation of such right in The Territorial Sea.

So, in spite of Article 59, there is still the basic question of whether the E.E.Z. is a zone of national jurisdiction so as to render it generally up to the coastal state to, as it wishes, exercise its civil jurisdiction territorially over the zone, as it does over the Territorial Sea.

It is widely accepted that the E.E.Z. is a zone sui generis.\textsuperscript{43} It is clearly distinguishable from the territorial sea and the high seas although containing elements of both.

Thus Lupinacci states in reference to the Law of the Sea Conference and the zone:

"In the view of the great majority of the delegates, participating in the conference, the

\textsuperscript{42} In order to arrive at a compromise position, see Lupinacci and Schreiber, ibid

\textsuperscript{43} See eg. Churchill and Lowe, op cit., p 130
Exclusive Economic Zone is not a part either of the territorial sea or of the high seas; it is a zone sui generis, with a statute of its own that does not fit into the classic moulds.44

Schreiber argues 45 that the E.E.Z. is not only a zone sui generis but also a zone of national jurisdiction.

His arguments may be summarized as being based on the following:

1. the nature of the concepts used to characterise the zone, that is, "sovereign rights", and "rights of sovereignty" and importantly that of "jurisdiction as used in Article 56(1)(b);

2. the scope of the rights ascribed to the coastal state in the E.E.Z., which leaves to other states only the freedom of international communications the exercise of which is itself limited;

3. related to (2), a balancing of the rights and jurisdiction of the coastal state against the freedoms and rights of other states in the E.E.Z., from both a qualitative and quantitative viewpoint tilts the scale a great deal in favour of the coastal state;

4. the powers accorded to the coastal state to ensure compliance with its laws and regulations in cases expressly provided for, including the visit, inspection and seizure of vessels and the institution of proceedings against vessels;

5. the great majority of coastal countries consider the E.E.Z. a zone of national jurisdiction in relation to which they feel empowered to legislate;

6. the prevailing opinion today is that due to geographical, economic, social and security considerations, the coastal state has a right superior to that of any other over resources of its

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44 Ibid., p105
45 Ibid.
adjacent seas and to protect other interests of its population within a zone not exceeding 200 miles;

7. the uses of third states are marginal with respect to this zone, in which they do not exercise any special competence but only jurisdiction over their own vessels; and

8. the continental shelf is a zone of national jurisdiction and as the seabed and subsoil sector of the E.E.Z. is indistinguishable from the continental shelf up to a distance of 200 miles from the relevant baselines and also since that sector of the E.E.Z. along with its superjacent waters form an indivisible zone, the E.E.Z. is a zone of national jurisdiction.

If indeed the zone is one of national jurisdiction, then this would imply that the coastal state would have the blessing of international law to pass laws relating to the exercise of its civil jurisdiction so as to fully affect foreigners or vessels in the zone, subject to any derogations from the exercise of such rights as provided for by international law.

However, Attard, while acknowledging the sui generis character of the zone, warns of the danger as well as questions the validity in modern times of dividing up world maritime space on the basis of sovereignty.

He asserts:

"The division of the oceans today on the basis of sovereignty, however, is a solution as dangerous and as obsolete as the maintenance of an unrestricted concept of the freedom of the seas. Clearly, therefore, neither sovereignty nor freedom today provides an acceptable basis for a viable regime to regulate uses of the sea beyond the territorial sea"
Lupinacci observes that:

"the classic clean-out division between maritime spaces, subject either to the statute of sovereignty or to the statute of freedom, has been left behind by the evolution of the Law of the Sea".47

In the E.E.Z., Lupinacci sees that:

"...there is a distribution of residual rights in favor of the coastal state with respect, essentially to economic and associated interests and in favor of all states with respect to the interest of international communication. There remains the no-man's-land, which would seem to be constituted of other interests with no well defined legal protection and governed by the provision of Article 59, whose application to each specific case may give rise at the time to serious difficulties of interpretation".48

The precise legal states of the E.E.Z. is clearly enmeshed in doubt. State practice or further international rules might in time help to clarify the matter. Hence, in the context of this chapter sweeping generalization as regards the effect of the new concept would seem inadvisable.

Nevertheless, in so far as Article 56 (1)(b) specifically invests the coastal state with jurisdiction in respect of a number of matters, it seems to the writer that littoral states are at least competent to extend their civil jurisdiction to encompass such matters as they pertain to the E.E.Z.

48 Ibid p.110
Perusal by the writer of various post-convention national enactments on the E.E.Z. did not reveal any specific reference to the exercise of state civil jurisdiction in the zone.

Typically, in the various enactments such as those of the U.S.S.R., Indonesia, Equatorial Guinea and the U.S.A., there are only stipulations as to the particular state's jurisdiction in the E.E.Z. over the matters mentioned under Article 56 (1)(b).

Jamaica is yet to declare an E.E.Z. However, the preparation of an E.E.Z. bill is underway.

While, specific reference need not be made to the exercise of civil jurisdiction in such a bill, it is the writer's submission that the declaration of an E.E.Z. should be followed up by alterations being made to particular Jamaican Conflict of Laws rules pertaining to maritime claims.

Thus, the statutory requirement for the exercise of the court's extra-territorial jurisdiction as regards maritime torts should concomitantly be changed.

It should stipulate that torts committed within the E.E.Z. and falling within the ambit of those matters embraced by Article 56 (1) (b) should be deemed as committed within the jurisdiction for purposes of the relevant statutory provision.

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50 Decree of the Union of Soviet Socialist Republics on the Economic Zone of 28 February 1984
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52 Act No 15/1984 of 12 November 1984 on the Territorial Sea and Exclusive Economic Zone.
53 Proclamation 5030, 10 March 1983 by the President of the United States of America.
54 See eg. daily Gleaner Report, January 13, 1989 at p.2 The Bill appears to be at its very formative and "confidential" stage and thus attempts by the writer to procure a copy of what has been done so far was unsuccessful.
Similar considerations should also apply in respect of the application of Choice of Law Rules pertaining to Maritime torts.

Both conflict of Laws issues are in fact presently reside on the traditional dichotomy of maritime zones being within or beyond national jurisdiction.

An oil spill in a state's E.E.Z. clearly runs afoul that state's interests in protecting and preserving the marine environment as provided for by Article 56 (1)(b).

Hence, Jamaica, when it enacts E.E.Z. legislation ought to ensure that there are no jurisdictional impediments as now presently exists as regards prosecuting a claim for compensation arising from such a spill, say twenty miles from shore.

Firstly, it seems the E.E.Z. law ought to be enacted as a matter of urgency.

It is obvious that Jamaica has nothing to lose by declaring such a zone. Although, Jamaica as a "Carib-locked" geographically disadvantaged country with an E.E.Z., with resources of relatively limited economic value, has never been particularly enthusiastic about the E.E.Z. in the first place.55

However, it ought to see the matter of the Commission of maritime torts such as the spilling of oil in its E.E.Z. as cogent reason to enact E.E.Z. legislation and concomitant jurisdictional provisions to protect its interest in having its nationals obtain compensation from, say, delinquent shipowners' for damage and losses sustained of a result of such a spill.

As the law stands at present, if such an oil spill was to take place one hundred miles from shore causing extensive damage to fisheries stocks up to a distance of fifteen miles from shore then the tort is deemed to have taken place outside of Jamaica's jurisdiction.

It appears to the writer, that such an issue may also be seen in terms of whether or not the facts give rise to a cause of action.

However, in the present context, it is appropriate to emphasize the maritime conflict of laws dimension. In any event, it would have to be made to the Jamaican private international law rules.

This is so because assuming that there is a cause of action, then it is probable that such a ship, its master, owner and crew would not be within the reaches of the courts normal territorial jurisdiction.

Thus Abecassis 56 notes:

"unfortunately for the potential plaintiff in an oil pollution case, the chances of the ship which caused the damage, or a sister ship or its owner or master being within the jurisdiction at some time after the writ has been issued are not very great".57

This therefore rules out the ship's arrest as well as that of service within the jurisdiction.

The only alternative would thus be to attempt to effect service out of the jurisdiction.

57 Ibid., p. 152.
Here, the most relevant basis for seeking to obtain the court's necessary blessing for service outside the jurisdiction, is likely to be That "the action is founded on a tort committed within the jurisdiction..."58

But, with the law in its present state, such a spill would be deemed to have been committed (on the High Seas) beyond national jurisdiction.

Thus, the court could not assume jurisdiction.

Thus it is being submitted that changes in the relevant procedural and private international law rules should ultimately be effected so as to ensure the efficacy of the court's exercise of its civil jurisdiction in respect of the E.E.Z. and specifically the Article 56 (1)(b) matters:

(1) the establishment and use of artificial islands, installations and structures;
(2) marine scientific research; and
(3) the protection and preservation of the marine environment.

Of these matters (3) appears to be of most immediate relevance to Jamaica.

This is because of the grave danger that would be posed to the island's tourist industry, economy and general well being if there was a large oil spill affecting in particular the island's beautiful beaches. 59

58 Vide: supra
Thus, Rattray, in reference to the Caribbean, has alluded to the potential for oil spill and pollution...thereby threatening the lifeline of the economies of many of the states, particularly those heavily dependant on Tourism".61

In such circumstances, it would be absolutely vital that the island's own laws do not fetter maximum compensation recovery as in fact they could possibly do now.

Since the adoption of the Montego Bay Convention, two international treaties have incorporated provisions pertaining to the E.E.Z., which lend support to the writer's foregoing submissions.

These Conventions are,


Article 2 of the 1969 Liability Convention (as amended by Article 3 of its 1984 Protocol) provides that:

"This Convention shall apply exclusively:

(a) to pollution damage caused:

(i) in the territory, including the territorial sea, of a Contracting State, and

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61 Ibid.
(ii) in the exclusive economic zone of a Contracting State, established in accordance with international law, or if a Contracting State has not established such a zone, in an area beyond and adjacent to the territorial sea of that state in accordance with international law and not extending more than 200 nautical miles from the baselines from which the breadth of its territorial sea is measured;

(b) to preventative measures, wherever taken, to prevent or minimize such damage".

Abecassis and Jarashow 62 indicate that the protagonists behind the development of this provision "... felt that recent developments in international law gave states the jurisdiction to protect the environment within the exclusive economic zone. They clearly had in mind not only the provisions of the Law of the Sea Convention 1982, but the existing assumption by many states of jurisdiction over areas beyond the territorial sea". 63

This Convention, it must be borne in mind, basically provides for civil liability compensation for oil pollution damage. 64

The Fund Convention jurisdictional and related provisions parallel those of the Liability Convention and, in this and other respects the two Conventions operate in tandem.

Enactment of enabling legislation pursuant to becoming a party to these Conventions could take the form of creating a new cause of action, that is, to say that oil pollution committed

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63 Ibid., p. 235
64 See: chapter 6
in the E.E.Z. or its equivalent, is actionable locally and/or the form of extending the court's civil jurisdiction to include specified torts, committed within the E.E.Z. affecting the preservation of the marine environment.

Whichever option is utilized, the effect would be to ensure that not only the court would have jurisdiction over the matter, but that Jamaican law would be applied.

Another aspect of the Montigo Bay Convention that is of particular relevance to the issues under discussion in this chapter, is its provisions in respect of the nationality of ships.

Article 91 (1) provides as follows:

"Every state shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the state whose flag they are entitled to fly. There must exist a genuine link between the state and the ship".

Article 92 (1) provides that: "Ships sail under the flag of one state only and, save in exceptional Cases...shall be subject to its exclusive jurisdiction on the high seas".

Article 94 deals with the duties of the flag state and provides.

"1. Every state shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.

2. In particular every state shall:
(a) maintain a register of ships...

(b) assume jurisdiction under its internal law over each ship flying its flag and its master, officers and crew in respect of administrative, technical and social matters concerning the ship...

The quoted provisions are similar to those contained in Articles 5 and 6 of the Geneva Convention on the High Seas, 1958 which never came into force. However as Singh 65 notes "since the preamble of the convention declares that its provisions are based on 'established principles of international law', it may be regarded as stating the existing law on the subject".66

The effect of the Montego Bay Convention provisions and their Geneva predecessor, and as reflected in state practice, have been to leave it up to the particular state to determine the conditions under which it will allow a ship to fly its flag.

The phenomena of flags of convenience67 have made a mockery of the "genuine link" requirement, showing it up as an ineffectual stipulation.

Braekhus, for instance notes that the genuine link demand ..."is somewhat vague...and the requirement seems as yet, to have had little real effect..." 68

65 Singh, Nagendrs: International Maritime Law Conventions, (Vol 1-4), 1983
66 Ibid., Vol.4., p. 2638
68 op. cit., p. 280
The fact that in practice, shipowners' often choose national flags for their ships with impunity that, in accordance with the quoted provisions, they likewise make choices as regards the national jurisdiction and law to which they wish to may be subject, as regards, for instance a particular maritime claim.

Thus Braekhus observes:

"The choice of a flag is a choice of legal affiliation to a certain state, and, as for as that goes, a choice of law far-reaching in nature." 69

This can lead to unsavory consequences in the application of Jamaica's maritime conflict of laws rules.

Basically, a Jamaican Court may be obliged by its Choice of Law rules to apply the law of a Flag of Convenience Country in circumstances where there is virtually no link with that country and a particular matter giving rise to a claim.

The only link might well be the fact of paper registration of the vessel in the Registry of the Flag of Convenience Country. 70

This might typically operate against a Jamaican seafarer working on such a vessel.

It is not proposed to delve any further into the problems posed by the loophole provided for Flags of Convenience Countries by the Montego Bay Convention.

Suffice to say, however, that whenever Jamaica's choice of Law rules require resort to

69 Ibid., p. 282
70 Thus Nye notes that although the Law of the Sea requires a "genuine link", "...in practice simply entry into a register may be enough ": Nye, Daniel A: Jurisdiction and Choice of Law, Lecture: The Norwegian Shipping Academy, 28 March 1984 (unpublished).
the law of the flag then this may discreetly brings into play the relevant provisions of the
Convention dealing with ship registration and nationality.

Subsequent attempts to give more substance to the "genuine link" requirement have on
the whole had the effect of giving legal blessing to open registries and flags of convenience.

The United Nations Convention on Conditions for Registration of Ships, 1986 seem to
generally have had just such an effect.

Jamaica, unlike a number of its Caribbean counterparts,71 is not a flag of Convenience
country. Its ship registration requirements are governed by Part 1 of the Merchant Shipping
Act,1894, (U.K.)

(3) OTHER INTERNATIONAL CONVENTION PROVISIONS

(a) An Overview

A number of international conventions contain provisions dealing directly or indirectly with issues of jurisdiction and choice of law. Unlike the just discussed Law of the Sea provisions, the provisions to be now considered generally tend to address these issues more specifically from a private international law perspective.

The Seamen's Articles of Agreement Convention, 1926 (Article 4)

This Convention provides that "national law" shall govern a number of specified matters pertaining to the seaman's employment contract with the shipowner.

This national law means in effect that of the country of the ship's flag in keeping with the Article 94 (2) provisions of the Montego Bay Convention, discussed earlier. Indeed, the ILO Committee of Experts on the Application of Conventions and Recommendations in interpreting the provisions of the seamen's Articles Convention has stated that the terms of maritime employment contracts should be subject to the law of the state of registration. This generally translates in practice to mean the law of the flag.

Article 4 of the Seaman's Articles Convention provides as follows:

1. Adequate measures shall be taken in accordance with national law for
ensuring that the agreement shall not contain any stipulation by which the parties purport to contract in advance to depart from the ordinary rules as to jurisdiction over the agreement.

2. This Article shall not be interpreted as excluding a reference to arbitration".

This Article appears to be directed against the use of the Jurisdiction Clause device to circumvent the intent of the Convention to inter alia, ensure a minimum amount of protection is afforded the seaman under his contract of employment.

However, it appears that the flag shopping shipowner is able to avoid any inconvenient effect of this stipulation by choosing an appropriate flag of convenience, such as one that is not a party to this Convention.

*International Convention for the Unification of Certain Rules Concerning Immunity of State-owned Ships, 1926* (Article 3)

Article 3 provides for the immunity of specified State-owned vessels from inter alia, arrests or in rem proceedings, thus, in effect, precluding the exercise of another state court's jurisdiction over such vessels.

72 See also infra for further discussion
Article 3, however goes on to provide as follows:

"Nevertheless, claimants shall have the right to proceed before the appropriate Courts of the State which owns or operates the ships in the following cases:

(i) Claims in respect of collision or other accidents of navigation;

(ii) Claims in respect of salvage or in the nature of salvage and in respect of general average:

(iii) Claims in respect of repairs, supplies or other contracts relating to the ship:

and the State shall not be entitled to rely upon any immunity as a defense..."

The same rules apply to State-owned cargoes carried on board the State-owned ships granted immunity as aforesaid.

The other non-immune State-owned ships, generally those operated for commercial purposes, are as regards its liabilities and obligations, subject to the same rules relating to the jurisdiction of the courts and procedure as their privately owned counterparts.

The Montego Bay Convention to which Jamaica is a party similarly recognises a distinction between commercially and non-commercially operated government owned vessels for purposes of granting immunity. 73

Overall, the approach of national courts internationally seem to be inclined towards immunity along the lines reflected in the provisions referred to. It is not clear what precise approach the Jamaican Courts will take, although one may surmise that they will probably

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73 See eg. Articles 29-32
embrace some sort of a restrictive approach to sovereign immunity. There appears to be no locally reported cases on the subject.

However, the Solicitor General of Jamaica and former Rapporteur at the last law of the Sea Conference, Dr Kenneth Rattray, has opined that:

"The doctrine of restrictive immunity is an attempt to achieve some measure of justice but, as articulated, it prejudges the legitimacy of certain areas of State activities. It may well be that the state should be placed in the same position of ordinary individuals in respect of all activities. It is then that both the ends of justice and non-differentiation between political systems might be harmonized". 74

**The International Convention for the Unification of Certain Rules Concerning Civil Jurisdiction in matters of Collision, 1952.**

Article 1 of this Convention permits a claimant in a collision case, to commence his action at his choice;

"(a) either before the Court where the defendant has his habitual residence or a place of business;

(b) or before the Court of the place where arrest has been effected of the defendant ship or of any other ship belonging to the defendant which can be lawfully arrested, or where arrest could have been effected and bail or other security has been furnished;"

74 In: Sovereign Immunity: W.I.L.J., May 1978, 4 at pp.7-8
(c) or before the court of the place of collision when the collision has occurred within the limits of a port or in inland waters.

Collision cases by nature tend to be the most amenable to forum shopping. This is so because of the potentially large number of legal contacts such incidents can have with different legal systems, thus rendering courts of different states competent to exercise jurisdiction in the matter.

For the forum shopping maritime claimant it appears Article 1(b) allows him the most scope for "shopping" as he can hold strain after a collision incident and simply wait until the offending ship enters a jurisdiction he likes and have it arrested there.

The state court of such a place will have jurisdiction in accordance with the provisions of Article 1(b). However, it may elect not to exercise such jurisdiction on the basis of forum non conveniens or for some other reason.

Importantly, provisions of this Convention have been given effect in Jamaican law, although, as noted, Jamaica is not a party to this Convention. This is by virtue of the extension of the provisions of Section 4 of the Administration of Justice Act, 1955 (U:K:) to Jamaica, pursuant to Section 3 of the Admiralty Jurisdiction (Jamaica) Order in Council, 1962.

The Section 4 provisions gave legislative effect in the U:K: to provisions of the Convention. The U:K: had earlier become a party to this Convention but never at the time, or subsequently, made Jamaica also a party to this Convention.
Despite the existence of the section 4 provisions in its law which are ultimately based on those of the Convention, Jamaica is yet to become a party to the Convention.

Section 4 of the Administration of Justice Act, 1956 U:K: as adapted and extended to Jamaica provides as follows:

(1) No court in Jamaica shall entertain an action in personam to enforce a claim to which this section applies until any proceedings previously brought by the plaintiff in any court outside Jamaica against the same defendant in respect of the same incident or series of incidents have been discontinued or otherwise come to an end.

(3) The preceding provisions of this section shall apply to counter-claims (not being counter-claims in proceedings arising out of the same incident or series of incidents) as they apply to actions in personam, but as if the references to the plaintiff and the defendant were respectively references to the plaintiff on the counter-claim and the defendant to the counter-claim.

(4) The preceding provisions of this section shall not apply to any action or counter-claim of the defendant thereto submits or has agreed to submit to the jurisdiction of the court.

(5) Subject to the provision of sub-section (2) of this section, the Supreme Court of Jamaica shall have jurisdiction to entertain an action in personam to enforce a claim to which the section applies whenever any of the conditions specified in paragraphs (a) to (c) of subsection (1) of this section are satisfied, and the rules of court relating to the service of process outside

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the jurisdiction shall make such provisions as may appear.

(6) ..< omitted > 75

(7) The claims to which this section applies are claims for damage, loss of life or personal injury arising out of a collision between ships or out of the carrying out of or omission to carry out a manoeuvre in the case of one or more of two or more ships or out of non-compliance, on the part of one or more of two or more ships, with the collision regulations.

(8) For the avoidance of doubt, it is hereby declared that this section applies in relation to the jurisdiction of any court not being Admiralty jurisdiction, as well as in relation to its Admiralty Jurisdiction, if any".

From this it is clear that the provisions of Article 1 of the Convention, with the exception of its paragraph (1) is reflected in Section 4 (1)

Overall Section 4 deals with "Jurisdiction in personam of courts in collision and other cases" 76

Accordingly, Article 1 (b) dealing as it does with in rem jurisdiction is beyond its scope.

Moreover, English law as well as that of Jamaica in any event already allowed for the exercise of such jurisdiction as provided for by Article 1(b)

Basically, section 4 (1) lays down the essential conditions for the exercise of the courts in personam jurisdiction. "Territorial waters of Jamaica" as used in sub-section 1 presumably

76 per marginal note, see also section 4(7); "other cases" presumably includes Allision cases.
encompasses the Territorial Sea of Jamaica. The sub-section also applies the principle of res judicata.\footnote{per section 4(1)(c)}

Sub-sections 2-4 of Section 4 deals with the matter of lis alibi pendens.

They clearly require the Jamaican Supreme Court to stay proceedings where proceedings between the two parties instituted in some foreign country in respect of the same matter are in esse.

The court is required to so act except where a defendant submits to the jurisdiction of the court.

Sub-sections 2-4 of section 4 largely relate to Article 1(2) and 3 of the Convention.

"A claimant shall not be allowed to bring a further action against the same defendant on the same facts in another jurisdiction, without discontinuing an action already instituted".

Article 3 provides:

(1) Counterclaims arising out of the same collision can be brought before the Court having jurisdiction over the principal action in accordance with the provisions of Article 1.

(2) In the event of there being several claimants, any claimant may bring his action before the Court previously seized of an action against the same party arising out of the same collision.

(3) In the case of a collision or collisions in which two or more vessels are involved
nothing in this Convention shall prevent any Court seized of an action by reason of the provisions of this Convention, from exercising jurisdiction under its national laws in further actions arising out of the same incident".

It therefore appears that the provisions of sub-sections 2-4 are in keeping with or at least do not run counter to those of Articles 1(2) and 3.

Section 4 (5) contemplated the making of Rules of Court relating to the assumption of the courts extra-territorial jurisdiction in Collision cases.

However, no such Rules have so far been promulgated in Jamaica.

In keeping with the overall provisions of Section 4, such Rules ought to stipulate that the court may assume jurisdiction over a claim for damage, loss of life or personal injury arising out of a collision or like navigational incident involving two or more ships where:

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

(b) the cause of action arose within the territorial waters, including any port, dock or harbour in Jamaica;

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

As regards (b), when Jamaica enacts its E.E.Z. legislation, then this stipulation should be extended to take account of the Articles 56 (1) (b) stipulations of the Montego Bay Convention, discussed earlier.

Then, where for instance a collision takes place in the E.E.Z. resulting in pollution of the marine environment, the court would be able to assume jurisdiction in respect of the relevant claim.

With the present lacuna in the Jamaican law as regards the contemplated Rules of Court in respect of Collision cases, it is probable that Section 686 of the Jamaica Civil Procedure Code\(^{79}\), would be brought into play in a given collision case requiring service out of the jurisdiction.

This the relevant English Rules, namely those contained in Order 75, Rule 4 of the Rules of the Supreme Court (U.K.) would be relied on.

This Rule is similar in terms to the writer's suggested stipulations for Jamaica's Rules. There appears to be no reported Jamaican case dealing with the Section 4 stipulations. Despite, the apparent disuse it seems Jamaica ought to update its law in this area by enacting the relevant Rules of Court contemplated by section 4 (5).

Also, it might wish to consider its position as regards the Convention itself. Afterall, Jamaica actually has the essential stipulations of the Convention reflected in its laws.

At present, as a non-contracting party, its position is dealt with by the provisions of Article 8 of the Convention.

\(^{79}\) See Chapter 4
Article 8 provides:

"The provisions of this Convention shall be applied as regards all persons interested when all the vessels concerned in any action belong to States of the High Contracting Parties.

Providing always that:

(1) As regards persons interested who belong to a Non-contracting State, the application of the above provisions may be made by each of the contracting States conditional upon reciprocity;

(2) Where all the persons interested belong to the same State as the court trying the case, the provisions of the national law and not of the Convention are applicable":

Here, it appears that Jamaica should easily satisfy the reciprocity criterion since its own municipal laws essentially require it to act in accordance with the Convention provisions.

Nevertheless, it is submitted that Jamaica ought to consider the Convention provisions as a whole with a view as deemed appropriate from such consideration of "regularizing" its position vis-a-vis the Convention by acceding to it.
International Convention Relating to the Limitation of the liability of
owners of seagoing ships, 1957 (Article 4)

Artical 4 of this Convention provides that the rules relating to the constitution and
distribution of the limitation fund and all rules of procedure shall be governed by the national
law of the state in which the fund is constituted.

International Convention for the Unification of Certain Rules Relating to
the Arrest of Seagoing Ships, 1952

(Article 7, 10)

Ship arrest was examined in the previous Chapter. Here it may be briefly noted in the
present context that the Convention sanctions the use of ship arrest as a basis for jurisdiction on
the merits in particular circumstances.

Also, it provides that the law of the country where the ship is arrested is to be the one to
govern procedural and related matters.

It has already been shown that in the case of Jamaica, ship arrest is predicated upon the
court having in rem jurisdiction. The Converse is not true. Also, under Jamaican private
international law, procedural matters are in any event governed by the lex fori.
Article 10 gives a claimant against an operator of a ship equipped with a nuclear power plant, the option of instituting proceedings before the courts of the ship's licensing state "or before the courts of the Contracting State or States in whose territory nuclear damage has been sustained".

This Convention which is not yet in force has attracted very limited international support and its relevance has waned very much since its adoption in 1962.

*International Convention on Civil Liability for oil Pollution Damage, 1969* (Articles 9&10) as amended by its *1984 Protocol*; and


Both Articles 9 (of the Liability Convention) and 7 (of the Fund Convention) require that where an incident has caused oil pollution damage in the territory (including the territorial sea), the E.E.Z. (or its equivalent) of a contracting state (or states) or where preventive measures have been taken to avert or minimize such pollution damage, actions for compensation may only be brought in the Courts of any such Contracting State (or States).
This requirement also obtains in respect of indemnification claims as provided for under the Fund Convention (per Article 7).

Each Contracting State is required to ensure that its courts possess the necessary jurisdiction.

Although Jamaica is not a party to either Convention it is a party to the regional: Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region, 1983 and the Protocol Concerning Co-operation in Combatting Oil Spills in the Wider Caribbean Region, 1983.

Article 14 of the Convention stipulates that:

"The Contracting Parties shall co-operate with a view to adopting appropriate rules and procedures, which are in conformity with international law, in the field of liability and compensation for damage resulting from pollution of the Convention area".

It seems to the writer that among the "appropriate rules" should be Jurisdictional and Choice of Law rules dealing with the occurrence of oil spills in the various maritime zones spanned by the Convention area.

Here, due cognizance should be paid to the precedence set by these two international Conventions as regards the E.E.Z.

The opportunity should be taken to harmonize in the region the relevant Rules at least as

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80 per Article 5, Fund Convention, 1971
these pertain to the critical matter of oil pollution of the marine environment.

In the past, attempts have been made to harmonize shipping legislation in the Caribbean. This has been through the instrumentality of the Caribbean Community Secretariat.

However, those attempts have focused on the preparation of comprehensive Merchant Shipping Codes dealing in the main with substantive law issues.

It appears the basic issues under focus in this thesis are yet to entice any regional co-operative legislative or other activity.

However, it is submitted that Article 14 could provide a launching pad for an effort inclusive of such activity in respect of the critical matter of oil pollution of the marine environment along lines so far put forward in this chapter.

*Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea, Athens, 1974* (Article 17) as amended by its *1974 Protocol*

Article 17 gives a claimant in an action against a carrier for damage suffered as a result of the death of or personal injury to a passenger of the loss or damage to luggage, the option of bringing his action in one of a number of different courts provided that the court chosen is located in a state party to the Convention.
The options are:

"(a) the court of the place of permanent residence of principal place of business of the defendant, or

(b) the court of the place of departure or that of the destination according to the contract of carriage, or

(c) a court of the state of the domicile or permanent residence of the claimant, if the defendant has a place of business and is subject to jurisdiction in that state, or

(d) a court of the state where the contract of carriage was made, if the defendant has a place of business and is subject to jurisdiction in that state".

However, sub-section 2 of Article 17 provides that:

"After the occurrence of the incident which has caused the damage, the parties may agree that the claim for damages shall be submitted to judicial proceedings or to arbitration".

*Convention on Limitation of Liability for maritime claims, 1976* (Article 14)

Like its 1957 predecessor's Article 4, Article 14 provides that the rules relating to the constitution and distribution of the limitation fund and all rules of procedure are to be governed by the national law of the state in which the fund is constituted.

(Hamburg Rules) (Articles 21 and 22)

Article 21 provides:

1. In judicial proceedings relating to carriage of goods under this Convention, the plaintiff, at his option, may institute an action in a court which, according to the law of the state where the court is situated, is competent and within the jurisdiction of which is situated one of the following places:

   (a) the principal place of business or, in the absence thereof
   (b) the place where the contract was made provided that the defendant has there a place of business, branch or agency through which the contract was made; or
   (c) the port of loading or the port of discharge; or
   (d) any additional place designated for that purpose in the contract of carriage by sea.

2. (a) Notwithstanding the preceding provisions of this article, action may be instituted in the courts of any port or place in
a Contraction State at which the carrying vessel or any other vessel of the same ownership may have been arrested in accordance with applicable rules of the law of that state and international law. However, in such a case, at the petition of the defendant, the claimant must remove the action, at his choice, to one of the jurisdictions referred to in paragraph 1 of this article for the determination of the claim, but before such removal the defendant must furnish security sufficient to ensure payment of any judgment that may subsequently be awarded to the claimant in the action.

(b) All questions relating to the sufficiency or otherwise of the security shall be determined by the court at the port or place of the arrest.

3. No judicial proceedings relating to carriage of goods under this Convention may be instituted in a place not specified in paragraph 1 or 2 of this Article. The provisions of this paragraph so not constitute an obstacle to the jurisdiction of the Contracting States for provisional or protective measures.
4. (a) Where an action has been instituted in a court competent under paragraph 1 or 2 of this article or where judgement has been delivered by such a court, no new action may be started between the same parties on the same grounds unless the judgement of the court before which the first action was instituted is nor enforceable in the country in which the new proceedings are instituted;

(b) for the purpose of this article the institution of measures with a view to obtaining enforcement of a judgement is not to be considered as the starting of a new action;

(c) for the purpose of this article, the removal of an action to a different court within the same country, or to a court in another country, in accordance with paragraph 2(a) of this article, is not to be considered as the starting of a new action.

5. Notwithstanding the provisions of the preceding paragraphs, an agreement made by the parties, after a claim under the contract of carriage by sea has arisen, which designates the place where the claimant may institute an action, is effective".

Article 22 provides for the settlement of disputes by Arbitration proceedings. It provides that:

"...3. The arbitration proceedings shall at the option of the claimant, be instituted at one
of the following places:

(a) a place in State whose territory is situated

(i) the principal place of business of the defendant

or, in the absence thereof, the habitual residence of the defendant; or

(ii) the place where the contract was made,

provided that the defendant has there a place of business,

branch or agency through which the contract was made;

or

(iii) the port of loading or the port of discharge; or

(b) any place designated for that purpose in the arbitration clause or agreement.

4. The arbitrator or arbitration tribunal shall apply the rules of this convention.

5. The provisions of paragraphs 3 and 4 of this article are deemed to to be part of every arbitration clause or agreement , and any term of such clause or agreement which is inconsistent therewith is null and void.

6. Nothing in this Article affects the validity of an agreement relating to arbitration made be the parties after the claim under the contract of carriage by sea has arisen".
The provisions of the Hamburg Rules relating to Jurisdiction are of particular importance. They have a special significance for Jamaica and its shippers who often today find themselves with Bills of Lading with exclusive foreign jurisdiction clauses.

The Hamburg Rules were developed to replace the Hague and Hague-Visby Rules. Jamaica is a party to and applies the Hague Rules. These Rules are enacted into Jamaican Law by way of incorporation into the Carriage of Goods Act, 1900. They are actually contained with limited modifications in the Schedule to that Act.

The Hague Rules did not at all assess the question of jurisdiction. This matter was therefore left to be dealt with by the national law of the various contracting states:

In time, various countries including Jamaica have been faced with the use of exclusive jurisdiction clauses in Bills of Lading.

Carriers usually attempt to avoid dealing with courts and jurisprudence that may operate against their interests by inserting jurisdiction clauses in their Bills of Lading specifying that a particular Country's Courts should exclusively determine any dispute that may arise under the Bill of Lading.

Typically also, such clauses would contain a choice of applicable law stating that the law of a particular country, is to govern.

In practice, such jurisdiction clauses in Bills of Lading usually take one of two

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81 International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, 1924; See also chapter 6.
82 The Hague Rules as amended by its 1968 Brussels Protocol; see also chapter 6.
forms.

It may take the form of the following:

"The contract evidenced by this bill of lading shall be governed by X law and dispute determined in X (or at the option of the carrier, at the point of destination) according to X law to the exclusion of the jurisdiction of the courts of any other country"

Alternatively, the clause may provide as follows:

"Any dispute arising under this Bill of Lading shall be decided in the country where the carrier has his principal place of business, and the law of such country shall apply"

In both instances there is a choice of both jurisdiction and applicable law.

As is noted by Judge Hand in *The Tricolor (193 ) AMC 919*: "The choice of a court may be more important than many of the (other) express terms of the contract "and" may indeed be determinative of the outcome".

Jurisdiction clauses have partly a prorogatory effect, in that they refer the parties concerned to the courts of or to arbitration in a specified state and partly a derogatory effect, in that by their wording or intention preclude suits in all other jurisdictions."
For the Jamaican shipper, faced with a Jurisdiction Clause, it is the purported derogatory effect which appears to loom largest.

Here, the clause may require that disputes are only to be adjudicated in, say, London. The inconvenience and costs involved will often make recourse to such proceedings in London impractical for the shipper. Yet, essentially, the objective behind the insertion of the clause in the Bill of Lading, by its draughtsman in such a case is likely to be that of ensuring that disputes between the parties are adjudicated in London only.

Braekhus has indicated that generally courts have an easier time accepting the prorogatory effect of these clauses than they have as regards their derogatory effect.

He points out that:

"The unwillingness of Courts in certain states to accept derogation is sometimes based on principles of public policy: the effect of a jurisdiction clause is to oust the jurisdiction of the national courts; private individuals ought not to be able by contract to limit the authority of the courts of a state in that way. Courts have been especially unwilling to accept the clauses where the result is that one of the citizens of the state is being denied the right to bring his case before the courts of his homeland".84

However, internationally there has been different approaches to this important

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83See: Braekhus, op. cit., p 300.
84Ibid., pp 300-301
matter of jurisdiction clauses.

The provisions of Article 21 must, inter alia, must seen against this background.

Article 21 allows a choice of jurisdiction to be still made by way of jurisdiction clause. However, most importantly, it denies such a clause, any exclusive character.

Thus the Article is in this respect, essentially directed at the derogatory effect purported any such clauses.

Thus it does by enumerating a number of places with direct connection with the carriage (as well as the contractually designated jurisdiction) at which an action may be brought by the plaintiff's at his option.

Thus, where the jurisdiction clause purports to give jurisdiction exclusively to the courts of a particular country, this will not prevent the Plaintiff from having his claim heard elsewhere.

Here, other courts whose state had some connection with the contract of affreightment, such as say the port State of loading or discharge are deemed to be competent by the convention and may accordingly hear and determine the claim.

However, while Article 21(1) enumerates a number of places connected with the contract of affreightment, Article 21(2) provides for the possible exercise of jurisdiction by a state court whose State has no connection with the contract of carriage.

Here, the basis for the exercise of jurisdiction is the arrest of the offending vessel or another in the same ownership.

However, the defendant may have the action to one of the places specified in
paragraph 1 upon furnishing security sufficient to ensure payment of any judgement that may subsequently be awarded to the claimant in the action.

At present, it appears a Jamaican court has security of it does not possess jurisdiction of declined jurisdiction on the merits.85

Hence, adoption and enactment of Article 21(2) into Jamaican law would apparently result in the filling of this gap in Jamaican law.

Also, as regards selection of jurisdiction, Article 21 must be read with Article 22 which deals with arbitration.

The Convention recognizes that parties may agree to refer their disputes to arbitration.86

In so doing they are in fact selecting their jurisdiction in the sense that they are nominating the tribunal which is to have the power of adjudication

However, selection of where to have such arbitration proceedings is limited in a manner similar to that as regards court proceedings.

Arbitration proceedings may only be brought in one of a number of specified places. Apart from the place of arrest, provided for in Article 21(2), those places are identical with those where legal proceedings may be brought.

However, after the claim has arisen the parties may by agreement designate the place where court or arbitration proceedings may be heard.

85 See eg. The Golden Trader (1975) Q.B. 348
86 See also: chapter 6
It is to be noted that the places of jurisdiction are, except as just noted, exclusive and apart from the places of arrest, are not contained to contracting states.

This has the effect of giving the claimant a wide variety of options.

It is clear that the aim of the jurisdictional provisions was to achieve a balance between the carrier and cargo interests.

As the law now stands internationally this balance tilts very much in favor of the carrier.\textsuperscript{87}

However, the Convention does not at all deal with the second limb of the jurisdiction issue that arises in practice.

This as noted above, embraces the question as to whether the court will exercise the jurisdictions permitted under the Convention to refuse to hear a case on the grounds of say forum non conveniens.

Article 21 (4) essentially prohibits the bringing of more than one action between the same parties on the same ground where the normal principles pertaining to lis alibi pendens and res judicata apply.

As regards the Jurisdiction and Choice of Law clauses it may be noted that although they are being focused on in the present context in relation to the carriage of goods by sea they also operate elsewhere in the Jamaican Maritime context.

Thus there may arise in relation to contracts of marine insurance where a

\textsuperscript{87}See also: chapter 6.
Jamaican assured, often has his contract of insurance \(^8\) with a foreign insurer. Also, they may be in issue in a contract of employment \(^9\) between a Jamaican seafarer and a foreign shipowner.

However, in the present context, the thrust of the discussion is as regards the effect to be given to these clauses in Bills of Lading.

Simultaneously, it is to be borne in mind that some of the considerations equally apply in other contexts in Jamaica.

As alluded to, the Hague Rules make no reference to "Jurisdiction Clauses" and neither so their enabling Act in Jamaica: *The Carriage of Goods Act, 1900*.

There are no Jamaican Admiralty cases dealing with the issue of Jurisdiction Clauses. However, there is some slight indication in Jamaican Jurisprudence of the possible attitude a Jamaican Court might take to such clauses.

In *National Chemsearch Corporation Caribbean v. Davidson*, \(^{90}\) Graham-Perkins, J, stated that:

"The law of this country is committed to the principle of the unfettered freedom of contract and where the parties to a contract have therein expressed an intention that a particular legal system shall govern their rights and obligations that intention almost invariably must prevail....But the law of this country is also committed to another

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\(^8\)See: Legal and documentary aspects of Marine insurance, INCTAD, TD/B/C.4/ILS/27/Rev.1, at p.25
\(^9\)See generally, Morgenstern, op. cit
\(^{90}\)(1969). 9 J.L.R.468
principle which I may state thus: where a contract, the proper law of which is that of a foreign jurisdiction is, by the law of this country, prima facie void as being contrary to the public policy of this country, it must be shown to be essentially valid not only by its proper law, but also by the law of this country if it is sought to be enforced here".91

In the case, Graham-Perkins, J (Ag.) applied these principles in holding that a certain restrictive covenant in a sales representative agreement was void ab initio.

The contract had provided that it was to "...be construed under and governed by the laws of the state of Texas..."92 Nevertheless Graham-Perkins J (ag) found that as the restrictive covenant stipulation was contrary to public policy, it was treated as void ab initio.

It therefore appears that in an appropriate case a Jamaican Court is prepared to find a Choice of Law or Jurisdiction stipulation as void ab initio based on public policy considerations.

However as was emphasized in the instant case, there is a very strong commitment to the notion of the sanctity of contractee to the extent that "where the parties to a contract have expressed an intention that a particular legal system shall govern their rights and obligations that intention almost invariably must prevail".

One is therefore prompted to contemplate what are the possible considerations that might of ought to move a Jamaican Court to treat as void ab initio or otherwise,

91Ibid., p 471
92Ibid.

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circumvent a Jurisdiction or Choice of Law clause in the present context whether on the basis of such clause being deemed to be contrary to public policy or otherwise.

Jurisdiction and Choice of Law clauses, appear to find their strongest buttress in the argument that persons should be held to their agreement: the principle of the sanctity of contract.

However, this principle was itself founded on certain premises which have been eroded by the present adhesion\(^{93}\) character of Bills of Lading.

In the Bills of Lading, the Jamaican shipper is faced with a standard form fine print document whose terms he has had no opportunity of negotiating and practically is hardly in a position to negotiate.

He is very much the weaker party in the relationship and has practically not much of a bargaining power.

At times, he may find himself being subject to terms which he can have no real opportunity of knowing their details.

This usually takes place by use of the device of clause incorporating charterparty

\(^{93}\) An adhesion contract is based on standard form, used to supply mass demands for goods and/or services, crafted for an indefinite number of persons, rather than a single individual and whose use entails the superior bargaining power of the stipulator vis-a-vis the individual customer/consumer who had no bargaining power, must either adhere to the contract or refuse to contract altogether. See eg. Burgess, Andrew: Adhesion Contracts and Unfair Terms..., Faculty If Law, U.W.I., at p 7 citing Lenhoff, Contracts of Adhesion and Freedom of Contract (1962) 36 Tul. L.R.48
terms. Such terms may include Jurisdiction and Choice of Law Stipulations.

In addition, it may well be that a jurisdiction and Choice of Law clause may, if given effect in Jamaica, may lead to an avoidance of the Hague Rules stipulations to which Jamaica is subject.

This will happen where the designated jurisdiction and applicable law is that of a country which does not apply the Rules.

In the case, *The Morviken, 1983, Lloyd's Rep.1.*, the House of Lords in England, decided that a jurisdiction clause is null and void pursuant to Article 3(8) of the Hague Rules when the court to which the dispute would be submitted would apply provisions less favorable to the cargo owner than those of the Rules.

Article 3(8) provides, inter alia, that any clause in a contract of carriage which lessens the liability, otherwise than as provided for the Rules are null and void and of no effect.

Clearly therefore, Jurisdiction Clauses when they have this effect ought to be treated as null and void.

However, this may be said to be a particular situation. There is the question as to whether these clauses are amenable to some sort of general approach particular presumptions as to their enforceability. Here the varying approaches of different countries may be noted.

American Courts, in the past, held consistently that jurisdiction clauses were not
valid perse as purporting to "oust the courts of their jurisdiction"\textsuperscript{94} 

Braekhus has cited the practice of American Courts in the period preceding The Harter Act, 1893 (U.S.) as an example of the vindication of national mandatory law through the rejection of both Jurisdiction and Choice of Law clauses.\textsuperscript{95}

He observes that then:

"...the English shipping companies, who dominated the traffic between Europe and the United States of America, employed broad exemption of liability clauses in their bills of lading. These exemptions were respected by the English Courts, but to a large degree declared to be against public policy and invalid by the American courts, thereby protecting American cargo interests engaged in import and export, to and from the United States of America. The English shipowners attempted to avoid the stringent liability imposed by the United States law first by including a clause in bills of lading that they be subject to English law, and then via a clause providing that the suits arising due to a loss of or damage to cargo only could be brought before English Courts. The American cargo interests were forced to accept such bills of lading. Nevertheless, both the choice of law and jurisdiction clauses were rejected by the American Courts".\textsuperscript{96}

\textsuperscript{94}See: Wiid & Salik Inc. v. Companie Generale Transatlantique, 43 F. 2d. 941, 942. (2d Cir. 1930)
\textsuperscript{95}Op cit., p. 304
\textsuperscript{96}Ibid.
The protectionist attitude in the U.S.A. was subsequently more overtly maintained by way of legislation through the *Harter Act* of 1893 and later the *Carriage of Goods by Sea Act, 1936 (U.S.)* 97

Since 1949, American courts have respected clauses granting exclusive jurisdiction to foreign courts if they were "reasonable"98. It is for the Plaintiff to prove that the clause was unreasonable.

Here, it is noted that "mere inconvenience or additional expense is not the test of unreasonableness'.

In Belgium, foreign jurisdiction clauses are in principle, deemed not valid as they may relieve the carrier from liability he would normally have incurred under Belgian Law.

However, it appears, Belgian Courts tend to recognize foreign jurisdiction clauses if they are satisfied that the foreign courts will apply the Hague Rules in the Same way as Belgian Courts.

Australia has by way of legislation, made such clauses invalid. 99

97Ibid.
Thus its *Carriage of Goods by Sea Act* provides:

"Any stipulation or agreement, whether made in the Commonwealth or elsewhere, purporting to oust or lessen the jurisdiction of the courts of the Commonwealth or of a state in respect of any bill of lading or document relating to the carriage of goods from any place outside Australia to any place in Australia shall be illegal, null and void and of no effect. The basic English Common law position has already been summarily indicated above.

In the Eleftheria (1969= 1 Lloyd's Rep. 237, Justice Brandon elaborated on the position thus:

"(1) Where plaintiffs sue in England in breach of an agreement to refer disputes to a foreign court, and the defendants apply for a stay, the English Court, assuming the claim to be otherwise within the jurisdiction, is not bound to grant a stay but has discretion whether to do so or not.

(2) The discretion should be exercised by granting a stay unless strong cause for not doing so is shown.

(3) The burden of proving such strong cause is on the plaintiffs.

(4) In exercising its discretion the Court should take into account all the circumstances of the particular case."
(5) In particular, but without prejudice to (4), the following matters, where they arise may be properly regarded:

(a) In what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and foreign courts;

(b) Whether the law of the foreign court applies and, if so, whether it differs from English law in any material respects;

(d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages, whether there would be very great delay relative to English proceedings and whether remedies available in England would not be available in the foreign forum.

(e) Whether the plaintiff would be prejudiced by having to sue in the foreign court because they would: (i) be deprived of security for that claim; (ii) be unable to enforce any judgment obtained; (iii) be faced with a time bar not applicable in England; or (iv) for political, racial, religious or other reasons be unlikely to get a fair trial." 100

It is to be noted that Justice Brandon's first three principles place very strong emphasis on the sanctity of contract notion.

100Ibid., p. 242
They refer to the plaintiff bringing an action in breach of an agreement to refer disputes to a foreign court and the strong onus on the plaintiff to defeat a jurisdiction clause.

Oland,\textsuperscript{101} writing about the situation in Canada where the Eleftheria's principles are applied, has noted in this context that:

"...the sanctity of contract issue...is paraded before the courts in biblical terms by P&I Council. This issue fails to recognize the realities of commercial life, that Bills of Lading in unreadable form are prepared by contractual craftsmen employed by vessel owners and P&I Clubs. Except for the Hague Rules, the terms of a bill of lading are those of a contract of adhesion. There is no free discussion or negotiation about a jurisdiction clause..."\textsuperscript{102}

Oland goes on to lament in this context the adoption of a contractual interpretation in Canada "...that effectively sends litigants away from the courts to other jurisdictions"\textsuperscript{103}

He argues for an approach which "...if not actually welcoming a claimant, at least does not discourage him from using the court's services"\textsuperscript{104}

It seems to the writer, that just such an approach is highly advisable in the case of Jamaica.

\textsuperscript{102} Ibid., p. 318
\textsuperscript{103} Ibid., p. 319
\textsuperscript{104} Ibid.
If the Jamaican Admiralty Court and Jamaican maritime jurisprudence is to develop fully, then an approach ought to be adopted which is strongly inclined towards hearing a case whenever the aid of the court is sought, provided the court's jurisdiction had been properly invoked.

In short, the court should be strongly inclined to exercise whatever jurisdiction it has in matters where, say, a Jamaican shipper or consignee holds a Bill of Lading with a foreign jurisdiction clause and wishes to make a claim against a foreign shipowner in Jamaica.

Such an approach would not only in the normal case protect Jamaica's cargo interests, but also generally serve to expand the judicial and legal services provided in Jamaica in the maritime sphere locally as well as in due course to persons from overseas who may be attracted to the jurisdiction.

Here it is acknowledged that, inter alia, various charges are needed to improve the efficacy of Jamaican Admiralty Law and practice before the suggested approach can have any significant result in the direction contemplated.105

However, one thing is clear, a judicial approach that discourage use of the court is one which can only result in such a prospect receding further and further away from ever coming to fruition.

The Eleftheriil approach in England to Jurisdiction clauses is quite compatible

105See g. Chapter 2.
with that country’s position as the leading centre in the world for adjudication of maritime cases.

In Jamaica, an approach ought to be taken which takes into account Jamaica’s national interests based on considerations of public policy.

The particular position of the Jamaican cargo-owner vis-a-vis the adhesion type contract he is confronted with, should be taken into account.

inconvenience and extra expenses to the cargo-owner in having his matter heard overseas, should weigh very heavily in favor of Jamaica assuming jurisdiction.

The Hamburg Rules, Article 21 is clearly against the carrier dictating to the shipper and national courts where the shipper must go to have his claim adjudicated.

The Hamburg Rules provisions are thus instructive in this regard.

Overall, it appears that these provisions merit special attention.

They attempt to establish a better balance between the competing interests of shipper and carrier.

They were developed after much discussion and compromise between the competing interests of shipowner, shipper and their respective insurers.

In contrast their predecessor Hague Rules reflect basically the interests of shipowners. These Rules had their genesis in the era when almost all of the present developing countries were colonies and had no opportunity to present their points of view.
as they had a regards the Hamburg Rules.

As is to be expected, the result of this was that the Hague Rules largely reflected the interests of the club of shipowning countries who enacted them in accordance with their vested maritime interests.

No provision as regards Jurisdiction or Jurisdiction clauses effectively meant that carriers who in reality unilaterally draw up the terms of the Bill of Lading, have sought to take advantage of the opening in the Hague Rules by way of self serving Jurisdiction and Choice of Law Stipulations.

The Hamburg Rules Article 21 and 22 provisions after a solution to the problems which flow from this situation.

Jamaica, as a "shippers" country, ought to bear this in mind and have the reality of this fact reflected in its laws.

Indeed, Oland has strongly argued for the immediate enactment into Canadian legislation of the provision of Articles 21 and 22 of the Hamburg Rules.106

Canada is hardly to be compared with Jamaica as a "shippers country".

Hence, it seems that a fortiori, the enactment of the Hamburg Jurisdiction provisions is also highly advisable in Jamaica's case where it is saddled with the aging Hague Rules and a common law approach to Jurisdiction and Choice of Law clauses which, if not creatively applied, stand to exacerbate an inequitable situation and generally

106 Ibid., p. 321
operate contrary to Jamaica's best interest in the present context.

Articles 21 and 22 may be given local legislative effect, with or without Jamaica becoming a party to the Hamburg Rules.

Indeed, there are already instances in Jamaican law where International Maritime Convention provisions are given legislative effect without Jamaica being a party to the particular convention.

Thus such enactment as suggested need not await appraisal of the Rules in toto and their ratification.

Until such enactment (if any) due cognizance may also be paid to the considerations embodied in The Eleftheria's fifth principle. However these should be done from the perspective indicated. The Australian approach in statutorily outlawing such clauses recommends itself as a secondary option.

Finally, it should be emphasized that no blanket judicial insularity or chauvinistic legislation promulgation is being promoted.

However, it appears to the writer that in a world where perceived "national interests" often provide the ratio d'être whether overtly or covertly for legislative or judicial activity, it would be less than prudent not to have regard for one's own national interests in attempting to shape an indigenous and relevant maritime jurisprudence.

United Nations Convention

234
on International Multimodal Transport of Goods, 1980

(Articles 26 and 27)

The Jurisdiction stipulations of this Convention broadly parallel those of its UNCTAD counterpart, the Hamburg Rules.

Article 26 provides that in judicial proceedings relating to international multimodal transport under the Convention, the Plaintiff at his option may institute an action in a court which, according to the law of the state where the court is situated, it is competent and within the jurisdiction of which is situated one of the following places:

(a) the principle place of business, or in the absence thereof, the habitual residence of the defendant; or

(b) the place where the multimodal contract was made,

provided that the defendant has there a place of business, branch of agency through which the contract was made; or

(c) the place os taking the goods in charge for international multimodal transport or the place of delivery; or

(d) any other place designated for that purpose in the multimodal transport document.

Likewise, where provided for, arbitration proceedings may be instituted in any of the said places. Agreements between the Parties after the claim has arisen as regards
the place of jurisdiction are valid.

C: CONCLUDING REMARKS

The various Convention provisions examined may be considered as falling into 3 broad categories.

Firstly, there is a category of provisions which embraces the issue of the geographical ambit of a state court's jurisdiction.

Here, the precise location of the place where say, a maritime tort was committed, or a particular person or vessel vis-a-vis the various maritime zones is crucial in determining whether a court had or may exercise its jurisdiction in a particular case.

Also such provisions in the case of maritime torts provide the public international law framework for the application of choice of law rules.

The provisions in this first category are to be found in the provisions of the law of the sea conventions and influence the local law as described.
Secondly, there is the category in which the majority of provisions examined fall.

This category deals with the question as to which country's tribunals are competent to adjudicate a particular maritime claim.

This question falls more directly in the realm of private international law. The relevant provisions have more potential for direct and immediate impact on national law once the relevant convention is ratified or acceded to and subsequently given the force of law in the state concerned.

As already intimated, Jamaica is not a party to any of these Conventions.

However, should Jamaica become a party to such Conventions, then it will be obliged to make special provisions for the jurisdictional rules in its procedural and private international law.

The net result would be that Jamaican courts would then have no jurisdiction to entertain an action falling under such enabling enactments unless the particular Convention jurisdictional requirements are met.

Examples of such Conventions are The Hamburg Rules, the Civil Liability for Oil Pollution Convention and the Athens Passengers and Luggage Convention.

A feature of this second category is therefore that becoming a party to the particular Convention, of necessity, ultimately has direct consequences for the local
maritime procedural and private international law rules, where these are different from those stipulated in the connection. In effect, the Convention Jurisdiction stipulations and ramifications are of a mandatory character.

In contrast, ratification of say the Montigo Bay Convention, places no obligation on a state to declare an EEZ and to concomitantly enact appropriate jurisdiction and choice of law rules.

The relevant Law of the Sea provisions in the final analysis merely sets outer limits as regards the possible exercise of civil jurisdiction by ascribing varying degrees of competence to the littoral state depending on which maritime zone is involved.

The rest of the Convention provisions looked at may broadly be considered as falling into a third category embracing a variety of public and private international law issues.

For the most part, they relate to the matter of Choice of Law, whether directly or indirectly.

The effect of these provisions on national law are not as direct as those of the second category.

thus, for instance, the ship nationality provisions of the Law of the Sea, are amenable to interpretations permitting the use of flags of Convenience.

These in turn have consequences for choice of law.

Hence, the provisions affect the local law rather indirectly whenever the
question of the law of the flag state is brought into issue.

Similar considerations obtain in respect of the Choice of Law provisions in the seamen's Articles of Agreement Convention.

Overall, it had been shown that as regards the Conventions to which Jamaica is a party, the provisions relating to the considered preliminary issues may ultimately have consequences for Jamaican maritime procedural and private international law.

This will be even more so the case when Jamaica fully exercises its rights under such Conventions. An important case in point, is the establishment of an EEZ as provided for by the Montigo Bay Convention.

In the case of the 1952 Collision Convention, where Jamaica has given legislative effect to its provisions without becoming a party to the convention, the relevant legislation contemplates the enactment of certain Rules of Court.

These are yet to be promulgated. There is thus a gap in the local law which has its roots in the provisions of an international convention to which Jamaica is not even a party.

This situation ought to be rectified along the lines already suggested.

As Jamaica is not a party to the Conventions whose considered provisions fall within the second category their stipulations have not up to now had any direct consequences for Jamaican law.

However, indirectly they may affect Jamaican Jurisprudence to the extent that
they offer guidelines as to international thinking on jurisdictional questions which may well inform legislative and judicial activity.

This, it is suggested, is particularly the case as regards the Hamburg Rules jurisdictional stipulations and its ramifications for Jurisdiction clauses in Bills of Lading.

Here, much guidance can be obtained from these provisions for judicial and legislative activity.

Indeed, immediate enactment of their stipulations is being strongly urged.

Another matter which the analysis reveals is particularly deserving of immediate attention is the maritime procedural and private international law relating to marine pollution.

Here, urgent changes are necessary in the law as an integral part of any national or regional marine pollution disaster preparedness effort.

In the final analysis, it is essential that the local jurisdictional and related rules as they exist now, and develop in the future, within international legal parameters advance, or at least do not frustrate vested national interests.
Chapter 6

Time Limitation of Maritime Actions
Chapter 6

TIME LIMITATION OF MARITIME ACTIONS

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Chapter 7

The Limitation of Maritime Actions

Part A — General Background

1. Introduction

In practice it is of the most importance that a maritime claimant does not go to sleep on his claim. He is required to commence and pursue his claim with reasonable dispatch. As Jackson notes, "Delay is relevant to every stage of enforcement proceedings and can have the consequence of penalty in costs, destruction of the remedy or destruction of the claim."

Various devices and sanctions are available and used at different stages of the litigation process to discourage and penalize a tardy claimant.

At the pre-litigation stage a claimant is in the first place required to commence court proceedings within a stipulated time period. After he has started his action, he is required to

promptly proceed with his claim or be liable to have his action dismissed by the court for "want of prosecution".

In this regard Lord Justice Diplock noted:

"Courts do not like to deprive a plaintiff of the right to his day in Court or of having his action tried but, at the same time, delays cannot be permitted to the prejudice of defendants who are entitled to have the issues disposed of promptly and in accordance with the rules."

In keeping with the focus of this thesis, this chapter is essentially concerned with time stipulations in respect of commencing legal proceedings by the maritime claimant as distinct from those relating to continuation of such proceedings. Here, time is of the essence not only for the claimant but also for the claimant's lawyer who may, if properly and timely briefed, be exposed to liability for negligence where he fails to start proceedings within the time allowed.

Thus, Pineus observes:

"An Attorney will not always win his case. How could he? He is not

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Diplock, L.J. (as he then was) in Allen v Sir Alfred McAlpine and Sons Ltd. et al (1968), 2QB 229 at p. 254.
expected to. It will not be held against him unless it happens because he had missed a time bar."

Danielson and Smith notes (in respect of cargo claims):

"Upon receipt of the file from underwriters, the first thing to be determined by the Attorney is how much time remains before suit must be filed."

In Jamaica, following the English practice, the expression "Limitation of Action" is used in reference to the situation where a Claimant is liable to lose or forfeit his right of action or remedy as a result of lapse of a stipulated period of time before he commences court proceedings. For the claimant, the limitation period is accordingly "... the period during which the law permits him to delay, without losing his right ..."

Various statutory provisions prescribe limitation periods affecting maritime claims in Jamaica. The principal Jamaican Statute of Limitation is The Limitations of Actions Act, 1881,

Danielson, David and Smith, Craig: The presentation of the claimant's cargo case, 1981.
Archbold v Scully (1861) 9 H.L. Case 360 per Lord Wensleydale at p. 383 cited also in Weld v Petre (1929) 1 Ch. 33 (C.A.).
Roughly analogous terms used in Continental European civil law jurisdictions are "prescription" and "Verjährung".
Mozley and Whitely's Law Dictionary 10th edition, E.R. Butterworths (E.R. Hardy Ivany (editor)) stated that "A statute of limitation is one which provides that no court shall entertain proceedings for the enforcement of
(itself dated) which is general in its scope.

There is as such one other Statute of Limitation in Jamaica: The Public Authorities Protection Act, 1942. This Act deals exclusively with actions instituted against Public Authorities.

Neither statute makes any specific reference to maritime claims although these claims generally fall within their purview. The exceptions are the few instances where there are in other statutes particular provisions specifying limitation periods for certain maritime claims. In these cases it is the particular stipulations which apply and take precedence over any general stipulations which would otherwise apply. Thus as Jackson states "Any inquiry about time limits must, therefore, start with a search for a particular statute relevant to the claim." If such a search is not fruitful, then one looks to the more general and all embracing limitation statutory provisions.

2. Policy Considerations

Various policy reasons supporting the need for statutes of limitation have been put forward
by the courts. These include:

1. that long dormant claims have more cruelty than justice in them

   (RB Policies at Lloyds v Butter 2 ALL E.R. 226 at 229, 230 per Streatfield J.);

2. that a defendant might have lost the evidence to disprove a stale claim

   (Jones v Bellgrove Properties Ltd. (1949) 2 K.B. 700 at 704, C.A. per Lord Goddars C.J.); and

3. that persons with good causes of actions should pursue them with reasonable diligence (Board of Trade v Cayzer, Irvine and Co (1927) AC 610 at 628, HL, per Lord Atkinson).

The Ontario Law Reform Commission of Canada in its Report on Limitation of Actions succinctly sets out the raison d'être of limitation periods as follows:

"Lawsuits should be brought within a reasonable time. This is the policy behind limitation statutes. These laws are designed to prevent persons from beginning actions once that reasonable time has passed. Underlying

the policy is a recognition that it is not fair that an individual should be a subject indefinitely to the threat of being sued over a particular matter. Nor is it in the interest of the community that disputes should be capable of dragging on interminably. Furthermore, evidentiary problems are likely to arise as time passes. Witnesses become forgetful or die; documents may be lost or destroyed. Certainly, it is desirable that, at some point, there should be an end to the possibility of litigation in any dispute.

From the commercial perspective, as Gertner notes, "Limitation periods also inject a much needed element of certainty or finality into commercial dealings and the commercial world, where certainty is the handmaid of efficiency and progress."

From the standpoint of the Legislator setting the cut off point is a balancing exercise involving the differing interests of the Plaintiff and the Defendant. Thus Stone notes that a "sensible legislator" should in drawing the line, inter alia, "... give Plaintiffs a reasonable opportunity of enforcing their rights", taking into account "... disabilities to which the plaintiff may be subject and to difficulties which he may have in discovering the facts from which the claim arises". Conversely, the legislator should endeavor not to "disappoint reasonable

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Ibid., at p. 9.
Gertner, Eric: Dismissal for want of prosecution: A Decade after Sir Alfred McAlpine and Sons Ltd., at p. 48.
expectations of the defendant that a matter is closed".

3. Limitation Periods – the General Principles

a. When time starts to run

In general, the period of limitation begins to run when the cause of action accrues. Apart from any special provision, a cause of action normally accrues when there is in existence a person who can sue and another who can be sued, and when there are present all the facts which are material to be proved to entitle the plaintiff to succeed. The general rule in contract is that the cause of action accrues when the breach takes place and in tort when the damage is suffered.

b. Preventing time from running out

i. By commencing court proceedings

Ibid..
"The fact or combination of facts which give rise to a cause of action" (per Osborn's Concise Law Dictionary, 7th Edition, at p. 66.
Cooke v Gill (1873) LR 8CP 107 at 116 per Brett J; Read v Brown (1888) 22 Q.B.D. 128, C.A.
Pineus, Kaj (ed.), op. cit., at p. 71; Halisbury's Laws. op. cit., para 622 et seq.
This is done in Jamaica by filing or having issued a written of originating
summons in the Supreme Court or a Plaint in the Resident Magistrate's Court.

ii. Where there is an Agreement not to sue

"If creditors enter into a binding agreement not to sue a debtor for a certain time,
the agreement can be pleaded as a defence to an action by the creditors and no
statute of limitation will run while the agreement is in force."

iii. Where there is a promise not to plead the statutory provisions

Such a promise accompanied by acknowledgement of debt may set time running
afresh. Even, without such an express promise, it appears, a defendant may be
stopped from pleading the statutory limitation provisions where he represents to
the Plaintiff that he wishes him to delay proceedings without prejudice to the
Plaintiff who in good faith does so based on this representation. In general, an
express or implied agreement not to plead a time-bar is valid if supported by
consideration and will be given effect to by the court.

c. Extension or Postponement of Limitation Period

In general, limitation periods may be extended in case of disability (e.g. where an infant

Halisbury's Laws, op. cit., para 643-
Ibid., para 644; Pineus, Kaj (ed), op. cit., at p. 72; The doctrine of promissory estoppel is started in Central
Pineus, Kaj (ed), op. cit., at p. 72.
or person of unsound mind is involved). They may be postponed where there has been certain written acknowledgement of obligation or part payment appropriate to the right of action, or in cases of fraudulent concealment or mistake.

Halsbury's Laws, op. cit., para 864 et seq.
d. The effect of time having run

The general rule, in Jamaica (following the traditional English view) is that the effect of a time-bar is to take away the claimant’s remedies (by action or by set-off) It leaves the right to the claim otherwise intact. Thus, claimant, may by means other than action or set-off on the time-barred claim still recover his due.

Part B – Limitation of Maritime Actions in Jamaica

1. General Stipulations

In Jamaica, the general period of limitation is six years from the accrual of the cause of action where it is founded on simple contract or on tort. For actions against Public Authorities, the limitation period is one year. In cases of fatal accident, the relevant time period is three years. Thus, where there are no special provisions relating to a particular maritime claim, these

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Ibid., paras 645, 646.  
See generally: The Limitation of Actions Act, 1881.  
The Public Authorities Protection Act, 1942, section 2.  
The Fatal Accidents Act, section 3.
time periods would, in general, apply to the claim.

2. Particular stipulations

a. Carriage of Goods by Sea Claims

Article III, paragraph 6 of the SCHEDULE to the Jamaican Carriage of Goods Act, 1889, (enacting the Hague Rules) provides that:

"Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into custody of the person entitled to delivery therest under the contract of carriage, or if the loss or damage be not apparent within three days, such removal shall be prima facie evidence of the delivery by the carrier of the goods as described in the bill of loading.

The notice in writing need not be given if the state of the goods has at the time of their receipt been the subject of joint surrey or inspection.

The International Convention for the unification of certain rules of law relating to bills of lading, 1924. Note: This section of the thesis focuses on carriage of goods claims covered by the Hague Rules. For other carriage of goods claims, other considerations will apply, vide:infra.
In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered."

Notice by certain time

From this it follows that the consignee or person taking delivery on his behalf is normally required to upon taking custody of the goods to indicate then, at the latest, that they are not in the same order and condition described in the Bill of Loading, if that is the case. Except that where the loss or damage is not apparent such written notice has to be given within three days.

The penalty for failing to give notice within the time stipulated is to provide the carrier with prima facie evidence of delivery of the goods in the same order and condition as described in the bill of loading.

Thus, it appears that essentially the legal implication is that a tardy consignee in such a case would (by failing to give timely written notice) have the onus of proving loss of or damage to the goods definitely thrust upon him.

However, in Scrutton on charterparties it is asserted in reference to the relevant sub-

Except where the goods were subject to a joint survey or inspection.
paragraph of paragraph 6 dealing with notice, that it "... appears to have no legal effect. Whether notice is given or not, the onus of proving loss or damage will lie upon the person asserting it".

However, with respect, it appears to the writer, that this assertion fails to distinguish "legal" from 'practical" consequences. Mankabady, for instance states that the sanction for not giving timely notice in accordance with the provisions under discussion, "... is that the burden if proof shifts from the carrier to the shipper." This surely is a legal consequence and follows logically from the evidential presumption against the consignee where he fails to give notice.

It is true that in practice it is likely that in the final analysis a claimant, despite any initial presumption in his favour will ultimately have to discharge the burden of proving his claim. Hence, it may be said that the first sub-paragraph of paragraph 6 is of limited practical significance. Nevertheless, the view that it is of no legal effect seems unsupportable in strict legal terms, since the mere shifting of the burden of proof however short lived that might be is of definite legal consequence. Moreover, such shift need not be temporary nor does it appear that the first sub-paragraph is devoid of practical significance.

For instance, where a consignee can furnish a qualified receipt, this will automatically

18th edition.
Ibid., at p. 428.

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provide prima facie evidence against the carrier of the existence of loss or damage at the time of
delivery. This then places the onus of furnishing rebuttal evidence on the carrier. In a situation
where a prima facie case has been made out and there is difficulty on procuring rebuttal evidence
then this may well be decisive in favour of the consignee.

Conversely, the giving of a clean receipt to the carrier upon taking delivery of the goods or
otherwise failing to give timely written notice of loss or damage to the goods will, as Astle
notes, place upon the consignee "the onus of retuting the prima facie evidence of the clean
receipt...".

Two final observations may be made regarding the Notice stipulations. Firstly, as is noted in
Scrutton on Chapter parties:

"If by the time the goods have been removed into the custody of the person
entitled to delivery the ship has sailed and has no agent at the port of
discharge, it is a little difficult to see how this provision will be complied
with."

Scrutton suggests that possibly the agent employed for the ship will be held to continue to be
agent for the purpose of receiving notice. Thankfully, the problem does not seem to present

Ibid.
Ibid.

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itself in practice as conceivably, difficult problems would arise concerning any ungratified assumed authority of such a former agent of the carrier.

Moreover, in the first place, the person who was employed as agent for the ship may be held to be within his rights not to accept any such notice after the ship has left and his agency contract with the carrier has ended on the basis that he has no actual or implied authority to do so.

The second observation concerns the words: "... before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof..." Normally, the consignee does not receive the goods directly from the ship. Typically, cargo after discharge in Jamaica, will at least pass through the hands of the reminal Operator and Customs Authorities before it reaches the consignee. These "intermediaries" ought therefore to take care of timely quality in writing their receipt of the goods as appropriate.

"Suit" to be brought within one year

An initial question to be determined is the meaning and scope of the term "suit" in this context. Importantly, does it include arbitration proceedings?

Ibid.
Astle, Ibid.
Normally the term "suit" means civil court proceedings. The English Osborn's concise Law Dictionary states that suit is "any legal proceeding of a civil kind brought by one person against another." The American Black's Law Dictionary in its definition unequivocally indicates that suit necessarily means court proceedings.

It states that "suit" is "A generic term, of comprehensive signification, referring to any proceeding by one person or persons against another or others in a court of justice in which the plaintiff pursues, in such court, the remedy which the law affords him for the redress of an injury or the enforcement of a right... " Kohl v U.S., 91 U.S. 367,375, 23 L. Ed. 449; Weston v Charleston, 27 U.S. (2Pet.) 449, 464, 7 L. ED 481; Syracruse Plaster Co v Agostini Bros, Bldg Corporation, 169 Misc. 564, 7 N.Y.S. 2d 897.

Black's Dictionary goes on to point out that the term "is, however, seldom applied to a criminal prosecution" and has, "generally been replaced by the term 'action'...."

Section 2 of the Jamaican Civil Procedure Code which deals with the interpretation to be given to various terms used in the code, tersely states that "suit" "shall include action". This "definition" by itself hardly takes us any further. However the code then states that "action" "shall mean a civil proceeding commenced by writ, and shall not include a criminal proceeding

at p. 315.
Ibid.
The Consolidated Judicature (Civil Procedure Code) Law, Chapter 177, 1889.
It therefore appear that at the very least, as a matter of legal semantics, the term "suit" implies civil court proceedings. The question therefore arises as to whether "suit to be brought within one year under Article 3(6) should be confined to civil court proceedings.

The issue of whether commencement of arbitration proceedings was "suit brought" within the meaning of Article 3(6), came up for decision in the English case of The Merak.

In that case, cargo owned by the plaintiffs was discharged on 21st November 1961, in a damaged condition. The bill of lading contained a clause requiring any dispute to be referred to arbitration within 12 months of final discharge. The plaintiffs issued a writ on 15th November 1962, and the case came on trail on 28th July 1964, when the trail Judge stayed the action on the ground that the parties had agreed to refer the dispute to arbitration. By then, the time limit under the arbitration clause had long since passed. The plaintiffs appealed and claimed that the arbitration clause was void in that it conflicted with Article 3, paragraph 6 and 8, of the Hague Rules, and that they were still entitled to bring an action within one year of final discharge as they had done in fact.

The English Court of Appeal held that the action must be stayed. The arbitration clause was

effective, and since the matter had not been referred to arbitration within 12 month, the plaintiffs were without a remedy. The word "suit" in Article 3(6) was held to include Arbitration proceedings.

The ultimate consequences for the consignee were clearly severe. Prima facie, it seems to be a case where the right thing was not done at the right time by the plaintiff. However, further exploration of the facts reveals that the Arbitration Clause and its time stipulation was not apparent on the face of the Bill of Lading. Rather, these stipulations were incorporated into the Bill of Lading by reference.

It is respectfully submitted that whenever the bill of lading is issued under a charterparty containing an arbitration clause a different approach ought to be taken by the courts. Here, the consignee will typically be ignorant of the details of the charterparty provisions, and often cannot without much inconvenience and costs to himself procure such information.

Otherwise, it seems in principle desirable to construe "suit" as including arbitration. Thus where for instance, a Bill of Lading clearly on the face of it requires disputes to be settled by arbitration, them arbitration proceedings timely commenced should be sufficient to satisfy the provisions of Article 3(6). However, if an arbitration clause stipulates a time limit shorter than that in Article 3(6) it should be held to be at least void to this extent.

Vide infra.
This is do since this would clearly violate Article 3(8) of the schedule of the Jamaican Carriage of Goods Act (which enacts the same provision of the Hague Rules) and provides as follows:

"Any clause, covenant or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with goods arising from negligence, fault or failure in the duties and obligations provided in this Article or lessening such liability otherwise than as provided in these Rules, shall be null and void and of no effect…"

When time starts to run

Firstly, time starts to run from the date of delivery of the goods. Secondly, it starts to run from when the goods should have been delivered. Thus it is important to consider what constitutes "delivery" and whether, for instance, it has the same meaning as "discharge".

Different courts in different countries have attributed differing interpretations to "delivery" vis-à-vis "discharge" in their interpretation of Article 3(6) of the Hague Rules.

The Supreme Court of Australia has held that "delivery" was made for the purpose of

In Automatic Tube Co Pty Ltd. and Email Ltd. - Balfour Buzacott Division v Adelaide SS (Operations) Ltd., Adelaide SS Co Ltd. and Adelaide SS Co Pty Ltd., The Beltrane (1967) i Lloyd's Rep 531.
Article 3(6), either when the goods were landed on the wharf and freed from the ship's tackle, or at the latest, when they were placed in a warehouse and immediately became available to the consignee.

In an American Case, it was held that the time-bar period started running after discharge plus notice to the consignee plus a reasonable opportunity to receive the goods. In another American case it was held that "delivery" was not synonymous with discharge and denoted a two-party transaction in which the consignee would have an opportunity to observe defects.

There appears to be no Jamaican or other West Indian or English cases directly on point. However, it appears, to the writer that mere discharge of the goods should not be sufficient to start time running against the consignee. At least he needs to have been notified and given a reasonable opportunity of receiving and inspecting the goods to at least ascertain apparent defects before time should start running against him.

Enactment of the Hague Rules

Article 3(6) of the Schedule to the Jamaican Carriage of Goods Act in its enactment of the corresponding provision of the Hague Rules omitted the second sub-paragraph of the latter's

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National Packaging Corp. v Nippon Yusen Kaiska (NYK Line) 1973 I Lloyd's Rep 46.
provisions.

This sub-paragraph provides that:

"If the loss or damage is not apparent, the notice must be given within three
days of the delivery of the goods".

This extra wording which was perhaps put in the Hague Rules to aid its translation into
other languages was apparently omitted from the Jamaican Act by the draughtsmen to avoid
tautology.

This appears to be so as the requirements of the deleted sub-paragraph are contained in the
first sub-paragraph of paragraph 6.

Nevertheless, it appears to the writer that its inclusion, although seemingly repetitions would
have enhanced the clarity of paragraph's 6 stipulations,

This submission is based on the fact that the first sub-paragraph is cumbrously drafted. It
requires rather careful reading to extract the meaning readily conveyed by the deleted sub-
paragraph.

The Jamaican Carriage of Goods Act is actually divided into two parts. Part 1 deals with the
carriage of goods by land. Part 2 deals with the carriage of goods by sea and incorporates the
Hague Rules.

It seems to the writer that it would have been better to have had a separate Act dealing
exclusively with the carriage of goods by sea rather than have those provisions in effect, attached to a largely unrelated and dated 1889 Act dealing with carriage of goods by land.

Part 2 of the Act is essentially a duplication of the 1924 United Kingdom Carriage of Goods by Sea Act, which enacted the Hague Rules into English Law. Part 2 was enacted by Act 10 of 1927.

The Hague Rules Amendments

The provisions of Article 3(6) of the Hague Rules have been amended by Article 1, paragraph 2 of the Brussels Protocol, 1968.

The amendment is firstly by way of deleting sub-paragraph 4 of paragraph 6, which provides that:

"In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered."

This deleted sub-paragraph is replaced by the following in the Hague–Visby Rules:

Like its Jamaican counterpart does now, it applied only to "outward" Bills of Lading.
"Subject to paragraph 6bis the carrier and the ship shall in any event be discharged from all liability whatsoever in respect of the goods unless suit is brought within one year of their delivery or of the date when they should have been delivered. This period may however be extended if the parties so agree after the cause of action has arisen."

The effect of this amendment, it appears, is to now apply the one year time limit to all claims in respect of loss or damage, inclusive of claims such as those for wrongful delivery.

In addition the amendment makes it clear that the parties may by agreement extend the limitation period after the cause of action has accrued. This, in any event, can normally be done under the general law pertaining to limitation of actions.

By virtue of Article, paragraph 3 of the Brussels Protocol, an additional paragraph b bis has been added. It immediately follows the now amended paragraph 6 of Article 3 of the Hague Rules and provides as follows:

"An action for indemnity against a third person may be brought even after the expiration of the year provided for in the preceding paragraph if brought within the time allowed by the law of the Court seized of the case. However, the time allowed shall not be less than three months commencing from the

Astle, op. cit., p. 52.
Vide supra.
day when the person bringing such action for indemnity has settled the claim
or has been served with process in the action himself”.

By virtue of this amendment, the carrier is not discharged from liability within the one year
time limit provided by Article 3(6), in the case of claims for indemnity by, for instance, another
carrier who had to pay a claim for loss or damage to cargo which occurred while the cargo was
in the custody of the carrier against whom the right of indemnity exists.

The carrier who has paid the claim has at least three months from the time of (1) the
settlement of the claim or (2) when proceedings were instituted against him, to Commence
proceedings against the other carrier for an indemnity.

The Hamburg Rules Amendments

These have effected very significant changes in both substance and form to the Hague Rules
Article 3(6) provisions. Under the Hamburg Rules, only its Article 20 is captioned "Limitation
of Actions". However, the matter of limitation of actions and intimately related issues are dealt
with by 4 articles: 19–22, comprising part 5 of those rules under the caption: "Claims and

Astle, Ibid..
The subject matter of Article 19 is "Notice of loss, damage or delay". Accordingly, Article 19 deals with those matters within the purview of the first three and fifth sub-paragraphs of Article 3, paragraph 6 of the Hague Rules. Here, significant amendments have been made. However, it appears that, by far the most significant amendments have been made in respect of sub-paragraph 4 of Article 3, paragraph 6 which requires "suit" to be "... brought within one year...". These amendments have largely been instituted by the cumulative effect of Articles 20–22.

Articles 21 and 22, which deal with "Jurisdiction" and "Arbitration", respectively, have no counterparts in neither the Hague nor Hague-Visby Rules. They were introduced in the Hamburg Rules to deal with particular deficiencies arising from certain lacunae in both the Hague and Hague-Visby Rules.

Article 19 provides as follows:

"1 Unless notice of loss or damage, specifying the general nature of such loss or damage, is given in writing by the consignee to the carrier not later than the working day after when the goods were handed over to the consignee, such handing over is prima facie evidence of the delivery by
the carrier of the goods as described in the document of transport or, if no such document has been issued, in good condition.

2 Where the loss or damage is not apparent, the provisions of paragraph 1 of this article apply correspondingly if notice in writing is not given within 15 consecutive days after the day when the goods were handed over to the consignee.

3 If the state of the goods at the time they were handed over to the consignee has been the subject of a point surrey or inspection by the parties, notice in writing need not be given of loss or damage ascertained during such survey or inspection.

4 In the case of any actual or apprehended loss or damage the carrier and the consignee must give all reasonable facilities to each other for inspecting and tallying the goods.

5 No compensation shall be payable for loss resulting from delay in delivery unless a notice has been given in writing to the carrier within 60 consecutive days after the day when the goods were handed over to the consignee.
6 If the goods have been delivered by an actual carrier, any notice given under this article to him shall have the same effect as if it had been given to the carrier, and any notice given to the carrier shall have effect as if given to such actual carrier.

7 Unless notice of loss or damage, specifying the general nature of the loss or damage is given in writing by the carrier or actual carrier to the shipper not later than 90 consecutive days after the occurrence of such loss or damage or after the delivery of the goods in accordance with paragraph 2 of Article 4, whichever is later, the failure to give such notice is prima facie evidence that the carrier or actual carrier has sustained no loss or damage due to the fault or neglect of the shipper, his servants or agents.

8 For the purpose of this Article, notice given to a person acting on the carrier's or the actual carrier's behalf, including the master or the officer in charge of the ship, or to a person acting on the shipper's behalf is deemed to have been given to the carrier, to the actual carrier or the

"any person by whom or in whose name a contract of carriage of goods by sea has been concluded with a shipper" (per Article 1)
"any person to whom the performance of the carriage of the goods, or of part of the carriage has been entrusted by the carrier; and includes any other person to whom such performance has been entrusted." (per Article 1)

Article 4(2) provides that the carrier is deemed to be in charge (and accordingly responsible, per Article 4(1)) for the goods from the time he has taken them over until when he has delivered them.
The main amendments effected by Article 19 therefore appears to be the following:

1 Time starts to run against the consignee for giving notice from when the goods are handed over to the consignee.

2 In the case of apparent loss or damage to the goods, the consignee now has until the working day after the goods were handed to him to give notice. Under the Hague Rules he is required to give notice immediately.

3 Where the loss or damage is not apparent, the time allowed is now 25 days as compared to only 3 days under the Hague Rules.

4 Whereas under the Hague Rules, a joint inspection or survey of the goods eliminates the need to give written notice by the consignee, under the Hamburg Rules such notice requirement is only precluded in respect of "... loss or damage ascertained during such survey of inspection."

Thus if the consignee discovers damage after say, a joint inspection, he will be required to give timely written notice.

5 Losses arising from delay in delivery are treated separately. Claims in
respect of such losses must now be given within 60 days of the goods
dehanding over to the consignee. Otherwise no compensation is payable.

This severe consequence contrasts markedly with the "evidentiary"
sanctions for untimely notice in respect of loss or damage to goods under
the Hague, Hague-Visby and Hamburg Rules themselves.

6 The consignee may give the relevant notice to either the actual carrier or
the carrier in whose name the contract of affreightment was entered.

7 A limitation period of 90 days is introduced for the "carrier" or "actual
carrier" to give written notice to the shipper of any loss of damage due to
the fault of the shipper. Failure to give timely notice is prima facie
evidence that no such loss or damage was sustained.

8 Notice for the actual carrier, carrier or shipper may respectively be given
to anyone acting on each behalf.

Article 20 of the Hamburg Rules provide that:

"1 Any action relating to carriage of goods under this Convention is time-

barred if judicial or arbitral proceedings have not been instituted within a

period of two years."
2 The limitation period commences on the day on which the carrier has delivered the goods or part thereof or, in cases where no goods have been delivered, on the last day on which the goods should have been delivered.

3 The day on which the limitation period commences is not included in the period.

4 The person against whom a claim is made may at any time during the running of the limitation period extend that period by a declaration in writing to the claimant. This period may be further extended by another declaration or declarations.

5 An action for indemnity by a person held liable may be instituted even after the expiration of the limitation period provided for in the preceding paragraphs if instituted within the time allowed by the law of the State where proceedings are instituted. However, the time allowed shall not be less than 90 days commencing from the day when the person instituting such action for the indemnity has settled the claim or has been served with process in the action against himself."
This Article along with Articles 21 and 22 have virtually effected a transmutation of the provisions of sub-paragraph 4 of Article 3, Paragraph 6 of the Hague Rules. These latter provisions with their requirements for "suit" to be brought within one year with time revealed a number of deficiencies and have been subject to a variety of judicial interpretations.

Often, it seemed that this provision in conjunction with others was weighted against cargo interests.

This served to exacerbate the unease with which a number of developing countries viewed the Hague Rules and its amendments. Most of these countries were colonies when the Hague Rules were promulgated under the yoke of the dominant ship owning perspectives of a number of developed countries.

The unease and agitation of the developing countries culminated in UNCTAD, in 1970 mandating UNCITRAL to review in detail the Hague Rules and their amendments. Among the areas singled out for special attention were those pertaining to limitation periods and related issues of jurisdiction.

The UNCTAD committee in its review of Article 3, paragraph 6 was particularly concerned with sub-paragraph 4.

The Committee sought to have clarified the following five questions:


(a) what constitutes "delivery" in order to start the one year period running? Here, the view was taken that "delivery" would normally mean the moment when the consignee receives the goods from the person competent to deliver them. Accordingly, it was proposed by the Committee that the Article 3, paragraph 6 provisions be changed to indicate that the moment from which time begins to run is from when the consignee received the goods or on the 1st day when he should have received them. This proposal is reflected in Article 20 (2) (as well as Article 19 (2) and (3).

(b) Does "brought within one year" mean brought anywhere within one year, or brought before a particular court within that time?

In the English case, Compania Colombia de Seguros v Pacific Steam Navigation Co (1932) 2 Lloyds Rep 479, it was held that a suit was time-barred because it was not brought in England within one year, although they were previously brought within one year in another country — the United States.

The decision in this case was very much criticized. The UNCTAD Committee opined that "if the object of the time limit is to make cargo owners give prompt notice of claims to carriers, this could be accomplished suitable by permitting commencement of an action in any jurisdiction having a reasonable close connection with the contract of carriage"

Ibid., p. 50.
The Committee felt that there should be amendments stating that it would be sufficient for suit to be brought in any jurisdiction having reasonable close connection with the contract of carriage, and as the country of shipment or destination, and that the cargo claimant would not be restricted to bringing suit in a particular jurisdiction.

Accordingly, Article 21 gives a claimant a wide choice of jurisdiction. Further, even where the contract of carriage stipulates jurisdiction in a particular country or courts, the claimant is not, by the Hamburg Rules precluded from seeking alternative jurisdiction.

(c) Does the word "suit" include arbitration?

As already noted, the English case, The Mearak, held that "suit" includes arbitration. The UNCTAD Committee was concerned that where "suit" is held to include arbitration, the consequences could be very prejudicial to consignees when the Bill of Lading has been issued under a charterparty containing an arbitration clause.

Here, the charterparty is usually incorporated into the Bill of Lading by reference and the consignee does not know of its contents. The result is that the consignee might start court proceedings within one year. Belatedly, he discovers that his legal suit will not be entertained because he did not in the first place arbitrate. His application for arbitration then fails because he

(1965) p. 223, (1965) 1 All E.R. 230, C.A.
did not appoint an arbitrator within the one year period. The end result is that he is without a remedy.

However, if "suit" is taken to exclude arbitration and the parties in fact submit to arbitration, there is the question of whether this means that they have thereby waived the requirement that suit must be brought within one year.

In the final analysis the word "suit" was abandoned and Article 20 (1) expressly indicates that either judicial and arbitral proceedings may be commenced to satisfy the time limitation requirement.

Nevertheless, it appears, a claimant is still required to ensure that he starts the right proceedings at the right time. This is so as the Rules expressly provides for the settlement of disputes by arbitration per Article 22 (1).

Further, Article 22 (2) provides that :

"When a charter-party contains a provision that disputes arising thereunder shall be referred to arbitration and a bill of lading issued pursuant to the charter-party does not contain a special annotation providing that such provision shall be binding upon the holder of the bill of lading, the carrier may not invoke such provision as against a holder having acquired the will of lading in good faith".

Hence the problem of due notice to the bill of lading holder as to what proceedings to
commence should not normally arise.

(d) What is the significance of the phrase "in any event"?

Here, Astle notes that "There was also a conflict among the Common Law Countries as to the effect of the words 'in any event'." Under English Law an unjustifiable deviation could conceivably (via the fundamental breach doctrine) result in the six year common law limitation period being applied instead of that of the Hague Rules.

In the United States the one year time limit continues to apply even in cases of unjustifiable deviation, because of the words "in any event".

UNCTAD sought to have this potential conflict in interpretation clarified by appropriate amendment. However, it appears that in the final analysis the Rules have not by express provision resolved this problem.

Although, inductive reasoning would seem to suggest that under the Hamburg Rules, the latter American view regarding the Hague Rules "in any event" stipulation is the one adopted.

To begin with, Mankabady notes in reference to the time limit under section 20 of the Hamburg

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See e.g. Hain Steamship Co Ltd v Late & Lyle, (1936) 2 All ER 597, in which Lord Atkin stated that: "... the departure from the voyage contracted to be made is a breach by the ship owner of his contract, a breach of such a serious character that, however slight the deviation, the other party to the contract is entitled to treat it as going to the root of the contract, and to declare himself as no longer bound by any of the contract terms..."

Astle, Ibid..
Rules that "the time limit will still be applicable in case the loss damage of delay resulted from an intentional or a reckless act. It is clear from Article 8 that the only sanction is that the carrier loses benefit of the limitation of liability."

This inference appears to be based on reasoning which may be analogised with that underlying the law maxim: "what is not prohibited is permitted".

Thus, it is noted that sanctions are stipulated for when the carrier or actual carrier does or fails to do certain things. This is the case, for example, under Article 8, where the right to limit liability is lost upon certain happenings.

No such stipulations are made with respect to the carrier losing the benefit of the limitation period stipulations. Hence, one can infer that none was intended.

It therefore appears that, prima facie, the limitation period stipulations under the Hamburg Rules will always apply regardless of what the carrier or actual carrier does or fails to do.

(e) May the parties extend the time limit by agreement?

While extension by the parties is permitted in Jamaica and in most countries, it was not allowed in certain Eastern European countries. Such extension accords with the provisions of Article 5 of the Hague Rules which permits the carrier to surrender wholly or partly his rights

Op. cit., p. 96
Mankabady, op. cit., p. 97
and immunities or to increase any of his responsibilities and liabilities under the Rules.

Whatever existing doubts that persisted should be put to rest by paragraph 4 of Article 20 which expressly permits such extension by a declaration in writing to the claimant. As alluded to, this does not affect the position in Jamaica where, in any event, such extension is permitted under the general principles relating to limitation of actions.

Finally, as regards Article 20, it has quite importantly, increased the one year period of limitation to two years. Also, this Hamburg Rules provision unlike its Hague Rules counterpart is formulated as a time-bar rather than as a discharge from liability. It therefore seems open to be construed as only barring the claimants remedy and not his right to claim. For recourse actions for indemnity claims, the relevant limitation period is not less than 90 days instead of (not less than) 30 days (under paragraph 6bis of Article 3, Hague-Visby Rules).

(b) Claims for Collision Damage and Salvage Remuneration

The Maritime Conventions Act, 1911 (U.K.) applies to Jamaica by virtue of its section 9(1) which provides that:

"This Act shall extend throughout His Majesty's Dominions and to any territories under

This accords with certain established practice. For instance, under the existing "Gold Clause Agreement", British ship owners agree to, in effect, allow up to two years for cargo interests to start action against them provided specified timely notice is given of the claim.

Vide: supra
his protection..."

Section 8 of the said Act is captioned "Limitation of Actions" and provides as follows:

"No action shall be maintainable to enforce any claim or lien against a vessel or her owners in respect of any damage or loss to another vessel, her cargo or freight, or any property on board her, or damages for loss of life or personal injuries suffered by any person on board her, caused by the fault of the former vessel, whether such vessel be wholly or partly in fault, or in respect of any salvage services unless proceedings therein are commenced within two years from the date when the damage or loss or injury was caused or the salvage services were rendered, and an action shall not be maintainable under this Act to enforce any contribution on respect of an overpaid proportion of any damage for loss of life or personal injuries unless proceedings therein are commenced within one year from the date of payment:

Provided that any Court having jurisdiction to deal with an action to which this section relates may, in accordance with the rules of court, extend any such period, to such extent and on such conditions as it thinks fit, and shall if satisfied that there has not during such period been any reasonable opportunity of arresting the defendant vessel in the territorial waters of the country to which the plaintiff's ship belongs or in which the plaintiff resides
or have his principal place of business extend any such period to an extent sufficient to give such reasonable opportunity."

The Maritime Conventions Act, 1911 (U.K.) was enacted to give legislative effect to two Brussels Conventions on Collision and Salvage to which the United Kingdom and with her Jamaica acceded on February 1, 1913.

The two conventions are The International Convention for The Unification of Certain Rules of Law with respect to Collision between vessels, 1910 and The Convention for the Unification of Certain Rules of Law relating to assistance and salvage at sea, 1910.

Section 8 of The Maritime Conventions Act, 1911 (U.K.), was enacted to cumulatively give legislative effect to Article 7 of the Collision Convention and Article 10 of the Salvage Convention. These Articles respectively prescribe a limitation period of two years for collision and salvage claims.

Both Articles permit State Parties to the Conventions to provide in their legislation for the extension of the limitation periods where it has not been possible to arrest the defendant vessel in the territorial waters of the state in which the plaintiff has his domicile or principal place of business.
Article 7 also stipulates a one year period of limitation for enforcement of rights to obtain contribution for excess damages paid to third parties in respect of death or personal injuries.

As under English law claims for salvage and for damage done by a ship in collision with another ship or vessel are among the claims recognised as giving rise to maritime liens, section 8 of the Act specifies that the enforcement in each case of both the claim and the lien to which it gives rise to will be barred after two years. This provision thus provides one of the exceptions to the general rule that liens are only extinguished in accordance with the doctrine of laches.

"Temperley's Merchant Shipping Acts, emphasises that section 8 by its wording, only applies "... to claims in respect of damage or loss to cargo or property or loss of life or personal injury which lie against the other vessel."

It states further that "claims of this nature which lie against the vessel carrying the persons, cargo or property in question are not affected by this period of limitation: cf. The Nice to de Larrinaga (1966) P. 80; The Alnwick (1965) 1 Lloyd's Rep. 69 (reversed ibid. 320 on another point). Jackson notes that they "are subject only to the general pattern of time-bar rules."

As an action in rem commences when the writ is issued, the lack of reasonable opportunity to arrest does not prevent a prospective plaintiff from ensuring that the time limit is complied with

Ibid., para 844
Ibid., para 844
Ibid.
in the first place.

However, having had the writ issued, he might not have an opportunity to serve it before the writ expires.

Here, section 30 of the Jamaica Civil Procedure Code provides that:

"No original writ of summons shall be in force for more than twelve months from the day of the date thereof, including the day of such date; but if any defendant therein named shall not have been served therewith, the plaintiff may, before the expiration of the twelve months, apply to the court or Judge for leave to renew the writ; and the Court or Judge if satisfied that reasonable efforts have been made to serve such defendant, or for other good reason, may order that the original or concurrent writ of summons be renewed for six months from the date of such removal inclusive, and so from time to time during the currency of the renewed writ."

Even if application is not made within the prescribed time, the court can extend the time for renewing the writ, despite the general rule of practice that the court will not by the renewal of the writ revive a statute-barred debt: Doyle v Kaufman (1878) 3Q.B.Q. 1, 340; Hewett v Barr (1891) 1 Q.B. 98.

In the case of The Espanoleto, 36 T.L.R. 554; (1920) p. 223. the facts were that a collision

Vide: F.N. 40
having taken place in February 1917, a writ in rem was issued in December 1918. By that time
the defendant vessel had left the jurisdiction. Application for renewal of the writ was made in
March 1920. Then, the vessel was arrested upon her first return to a port within jurisdiction.

Upon a motion to set aside the writ and the renewal and the warrant of arrest, and to
discharge the undertaking to put in bail, Hill J. held that in as much as the period of limitation
provided by section 8 was not absolute, the court should consider the applicant on its merits and
inquire whether the circumstances were such that the court would have given leave to issue the
writ notwithstanding that the time had expired, on the ground that the plaintiff exercised due
diligence in prosecuting his claim. If leave to issue the writ would have been granted, a fortiori,
a renewal of a writ taken out within the prescribed time should be granted.

Section 8, refers to the court extending the time period "in accordance with rules of court".
Although no rules of court have yet been made under the section, the court may exercise its
discretion as to extending time: H.M.S. Archer (1919) p. 1.

The principles upon which the court will grant such extension under section 8 are the same
applicable for renewing the writ.

The 1965 Annual Practice states that:

"In considering whether to grant a renewal or further renewal of a writ, the court will
have regard to all the circumstances of the case."

In the Owenbaum, (1973) 1 Lloyd's Rep. 56, Brandon J. envisaged three situations in which it was just to renew the writ:

(1) where there is an express agreement deferring service

(2) where there is an implied agreement to the same effect; and

(3) where there has been conduct leading the plaintiff to suppose that it would be all right to defer service.

This list is not exhaustive. It appears that once the court is convinced that there is "good reason" to renew the writ or likewise extend the two years limitation, it will normally do so.

However, mere negotiation between the parties do not constitute "good reason" to renew. Thus, Lord Denning M.R. in Easy v Universal Anchorage Co Ltd (1974) 1 W.L.R. 899 at p. 902 states that: "Negotiations for a settlement do not afford any excuse for failing to serve a writ in time or to renew it."

Finally, as regards section 8, it should be noted that despite the reference to arrest in its proviso, the discretion to extend time applies to actions in personal as well as to action in rem:

The Arraiz (1924) L.L Rep 235.

"The only principle is that a writ is not to be renewed except for good reason..." per Lord Denning. M.R. in Easy v. Universal Anchorage Co. Ltd. (1974) 1 W.L.R. 899 at p. 902; Vide: Odgers' Principles of Pleading and Practice in Civil Actions in the High Court of Justice (22nd Edn.), London, Stevens & Sons, 1981.
New Salvage Convention

There is now a new Salvage Convention: The International Convention on Salvage, 1989.

Its Article 23 under the caption "Limitation of Actions" provides as follows:

"1 Any action relating to payment under this Convention shall be time-barred if judicial or arbitral proceedings have not been instituted within a period of two years. The limitation period commences on the day on which the salvage operations are terminated.

2 The person against whom a claim is made may at any time during the running of the limitation period extend that period by a declaration to the claimant. This period may in the like manner be further extended.

3 An action for indemnity by a person liable may be instituted even after the expiration of the limitation period provided for in the preceding paragraphs, if brought within the time allowed by the law of the State where proceedings are instituted."

Thus, the limitation period remains at two years, before it runs from the day on which the
salvage services terminate.

It is now expressly provided that the person against whom a claim is made can during the limitation period allow more time to the claimant for commencing his action against him. This, as already noted, would in any event be normally allowed under Jamaican Law.

Article 23 expressly indicates that commencing arbitration proceedings will be sufficient to stop time from running against the claimant. No reference was made to arbitration under the 1910 convention.

The new stipulation parallels the Hamburg Rules Article 20 (1) provisions and appears to be indicative of a new trend in International Maritime Convention provisions.

Under the new provisions, a court would no longer, at least, by virtue of the Convention, have any power to extend the time for bringing action except in respect of recourse actions for indemnity.

For indemnity actions, no maximum period is stipulated. This is left to the law of the state where proceedings are instituted.

(c) Maritime Claims in Jamaica – without claim specific limitation periods (and International Convention provisions)

Supra.
Discussed, supra
i General

In Jamaica, these are, in general, governed by the broadly applicable 6 year period of limitation. On exception is in respect of maritime fatal accident claims, involving for example ship passengers or crew. Here, as noted, the relevant period under The Fatal Accidents Act is three years. Also, where the Government or other Public Authority is being sued the applicable limitation period for commencing suit is one year (Public Authorities Protection Act, section 2).

ii Claims against carrier by sea in respect of Passengers Death, Personal Injury, Loss of or Damage to Luggage.

Article 16 of the 1974 Athens Convention Relating to The Carriage of Passengers and Their Luggage by Sea, which is captioned "Time-bar for actions" provides that:

"1 Any action for damages arising out of the death or personal injury to a passenger or for the loss of or damage to luggage shall be time-barred after a period of two years.

2 The limitation period shall be calculated as follows:

(a) in the case of personal injury, from the date of disembarkation of the passenger;

(b) in the case of death occurring during carriage, from the date when the passenger after disembarkation, from the date of death, provided that this period

Supra
shall not exceed three years from the date of disembarkation;

(c) in the case of loss or damage to luggage, from the date of disembarkation or from the date when disembarkation should have taken place which ever is later.

3 The law of the court seized of the case shall govern the grounds of suspension and interruption of limitation periods, but in no case shall an action be brought after the expiration of three years from the date of disembarkation of the passenger or from the date when disembarkation should have taken place, whichever is later.

4 Notwithstanding paragraph 1, 2 and 3 of this Article, the period of limitation may be extended by a declaration of the carrier or by agreement of the parties after the cause of action has arisen. The declaration or agreement shall be in writing."

In determining when time begins to run paragraph (b) makes a distinction between when death occurs during carriage and when it occurs after carriage of the passenger. Under the Jamaican Fatal Accident Act, the primary concern is the date of death.

Jamaica is not a party to the Athens Convention. However, in an appropriate case, a Jamaican court could pay cognizance to the distinction.

The distinction seems well advised as whoever is bringing suit might not be made aware of the death of the deceased until after the time he should have disembarked.

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Clearly, if the distinction is followed the result will be to increase the period of limitation that would be available to the claimant for death occurring during the voyage.

The absolute ceiling of three years for fatal accident claims, except for the distinction noted, generally accords with present Jamaican law. However as regards personal injury and damage to luggage claims, the 6 year period of limitation is available to the claimant.

Article 17 of the convention which deals with "competent jurisdiction " permits a claimant to choose from a variety of courts to bring his action. If he chooses a Jamaican Court, one benefit he will clearly have vis-a-vis the controls of State Parities to the Convention is a longer time within which to bring his action in respect of personal injury and loss or damage to luggage.

On the other hand, if it is a fatal accident claim arising from the death of the passenger during the voyage he may well find himself with less time to commence proceedings in the Jamaican court as against that permitted by the courts of the State parties to the Convention.

It appears anyway that a "limitation period" Forum Shipping claimant might be very much constrained in exercising his Article 17 options by the relatively few number of State Parties to the Convention. At June 1, 1989, this amount stood at a mer 12 countries.

(iii) Claims for Oil Pollution Damage

Article 8 of the International Convention on Civil Liability For Oil Pollution Damage (1969) provides that:

"Rights of compensation under this convention shall be extinguished unless an action is brought thereunder within three years from the date when the damage occurred. However, in no case shall an action be brought after six years from the date of the incident which caused the damage. Where this incident consists of a series of occurrences, the six years' period shall run from the date of the first such occurrence."

Similarly, Article 6 of the International Convention on the Establishment of An International Fund For Compensation For Oil Pollution Damage provides as follows:

"1. Rights to compensation under Article 4 or indemnification under Article 5 shall be extinguished unless an action is brought thereunder or a notification has been made pursuant to Article 7, paragraph 6 within three years from the date when the damage occurred. However, in no case shall an action be brought after six years from the date of the incident which caused the damage.

2. Notwithstanding paragraph 1, the right of the owner or his guarantor to seek indemnification from the Fund pursuant to Article 5, paragraph 1 shall in no case be extinguished before the expiry of a period of six month as from the date on which the owner or
his guarantor acquired knowledge of the bringing of an action against him under the Liability Convention."

In considering these provisions, it is worth bearing in mind that the main aim of the "Liability Convention" is to facilitate the recovery of compensation for oil pollution damage against the responsible vessel.

The "Fund" Convention broadly aims to provide additional compensation in appropriate cases where damage claims are not covered by the Liability Convention. Article 4 of this convention provides for the obtaining of such compensation. Article 5 facilitates indemnification of the owner and his guarantor in certain circumstances. Article 7 (6) requires notice to be given to the Fund in respect of any proceedings for oil pollution damage brought in a contracting state's court under the Liability Convention.

For both Conventions, the basic limitation period is three year from the date when damage occurred. Claimant in respect of latent or deterred oil pollution damage stand to benefit from the longer but absolute 6 years ceiling for bringing claims. Although, this need not always be so as in this case time runs from the incident and not the damage. Often, the full effects of oil pollution damage take a long time to manifest themselves. The potential claimant may thus be


Ibid.

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prejudiced accordingly.

Jamaica is a party to neither the Liability nor the Fund Convention. The general six year limitation period thus applies to oil pollution damage claims. However, Jamaica may wish to benefit from certain Voluntary Compensation Schemes provided by the Oil Industry. For both TAVOLOP and CRISTAL, a claimant is required to give notification within two years of the incident.

(iv) Other Maritime Claims - applying six year limitation period.

These broadly include all other claims such as those for demurrage, freight under a charterparty, loss or damage under a marine insurance policy and contribution to general average. For these claims, there appears to be no International Convention provisions specifying particular limitation periods.

3. Maritime Liens - their extinction by lapse of time

i. General consideration

Maritime liens, with limited exceptions, are not subject to any specific time for enforcement

Tanker Owners Voluntary Agreement Concerning Liability For Oil Pollution.
Contract Regarding A Supplement To Tanker Liability For Oil Pollution.
under Jamaican Law. However, they may be lost through lack of reasonable diligence in enforcing them.

Thomas notes that "with regard to the operation of the doctrine of laches in the Admiralty Court, it would appear that a claim will rarely founder on the ground of mere delay. " Thus in the Chieftan (1863) B&L. 212, a lapse of 10 months before a master instituted a suit for wages was held to be no bar. In The Europa (1863) B& L 80, a delay of over three years in prosecuting a damage lien arising out of collision did not bar enforcement.

The case of The Wing Magnus, 1891 p. 223 affords a remarkable example. In that English case a delay of eleven days before instituting proceedings in rem was held insufficient to extinguish the claim, although during that period the offending ship had made frequent visits to port in the United Kingdom.

The applicable principle appears to be that where there is undue delay in presenting a claim the Court looks not only to the period of time which has elapsed, but to the total circumstances as they touch upon the interests of justice or of the parties involved, the ultimate consideration being "... the balance of justice or injustice in affording or refusing relief."

Re Sharpe (1892) I Ch. 154, per Lindley J. at p. 168.
hands she may pass, and may be enforced after a considerable lapse of time; but to effect the rights of third persons, reasonable diligence in its enforcement must be used, otherwise the lien may be lost."

In the same case it is stated that "Reasonable diligence means not the doing of everything possible but that which, having regard to all the circumstances, including consideration of expense and difficulty, can be reasonably required."

The doctrine of laches prevail except in cases where there are specified limitation periods as in respect of salvage and collision damage liens. Thomas opines that where there exists a statutory time limitation, there can be no successful challenge for delay within the specified period, for the statutory period of time represents "... the period during which the law permits him to delay, without losing his right."

If this is so then it seems to the writer that this rules out the possibility of a situation occurring where a claim secured by a maritime lien survives the loss of that lien. However, such a possibility, although considered "unlikely" has been put forward in Pineus: Time-Barred Actions.

The example given is where a lien has been lost through lach of reasonable diligence "as

(1863) B & L 89.
Ibid.
Ibid.
Ibid.
may be the case if the vessel is allowed to change ownership to the plaintiff's knowledge without the plaintiff attempting to exercise the lien, the plaintiff would still have his claim until the expiry of the limitation period."

It is respectfully submitted that this latter view ought to be preferred to that of Thomas. The fact is that maritime claims can and do exist without accompanying maritime liens.

A maritime lien is a privilege against particular maritime property. Its retention is subject to certain rules. These rules are quite distinguishable from those relating to preservation of the right of action on the claim by instituting proceedings within a specified limitation period.

While application of one set of rules may bring into consideration the other set, each set is not inextricably bound up with the other. Thus, it seems to the writer, that if a court in applying the rules relating to the extinction of maritime liens resulting from lapse of time to a particular case, find that it is an appropriate case for extinction of the lien, then it may well determine that the "other rules" are only part of the matrix of factors relevant to arriving at such a finding.

Hence, it is the writers respectful submission that it seems possible for an underlying maritime lien to be extinguished within the limitation period leaving the claim it accompanied otherwise intact.

Vide: Tetley, William: Maritime Liens and Claims, International Shipping Publications, Montreal, 1985, at p. 40 where he defines a maritime lien as "a privilege against property (a ship) which attaches and gains priority without any court action or any deed or any registration ", cited in IMO and UNCTAD consultations: vide; LEG 55/4/1, IMO, consideration of work in respect of Maritime Liens and Mortgages and Related Subjects; Also vide supra.
Both existing conventions on Maritime Liens and Mortgages have failed to gain broad international acceptance. Preparatory work on a new convention on the subject under the auspices of IMO and UNCTAD is now at a very advanced stage.

Both of the existing Conventions contain provisions relating to the extinction of Maritime Liens. Article 9 of the 1926 Convention has very detailed stipulations but like its much briefer, 1967 Counterpart, per Article 8, it prescribes a period of one year for the extinction of specified liens subject to certain qualifications.

Article 8 of the new draft Convention on Maritime Liens and Mortgages also generally prescribes a one year period for the extinction of the lien.

Section 74 of the Jamaica Shipping Bill, 1989 is based on and worded similar to that of Article 8 of the draft Convention in its present form.

Section 74 provides (with the marginal note: "Limitation Period"), as follows:

"1 The maritime liens relating to a ship set out in section 68 shall be extinguished after a period of one year 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 provisions of the rules of court or any other law for the time being in force relating to the sale of property in admiralty proceedings.

2 The one 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 lien holder is legally prevented from arresting the vessel."

This provision was apparently put into the Jamaican Bill in anticipation of Jamaican eventually becoming a party to the finalized convention.

However at the present time there are a number of doubts and misgivings surrounding the present draft Article 8.

Chief among these is the concern about the period of one year was too short and that it should be extended to two years. Alternatively, a compromise proposal between the latter and the present draft proposal could be to allow maritime liens recorded at the end of one year to continue their validity for another year.

These various positions have been canvassed at the Sessional Group meetings of the Joint Inter Governmental Group of Experts on Maritime Liens on December 20, 1988. Jamaica was
not represented at this meeting.

The majority view is that "... the one-year period was sufficient since maritime liens were hidden charges and should not remain valid for a period longer than one year"

However special problems may arise in respect of crew wages. Here the International Confederation of Free Trade Unions have proposed that special consideration be given to extending the period of validity of maritime liens to two years, at least, in case of crew wages "... since the crew members often stayed on board ship for a period longer that one year during which time they were not paid."

Similarly, the International Labour Organization, supporting the proposal has noted that in the case of social insurance contributions, the problem was even more serious, as "...often the crew members discovered much later that social insurance contributions had not been paid."

It seems that the best solution could be to have a generally applicable period of one year but with exceptions for crew claims in which case the period would be two years. Such a compromise solution would be in Jamaica's best interest where more and more seafarers are being produced. While ignorance of the law is no excuse, seafarers are likely to be quite susceptible to the harsher consequences of this maxim as regards limitation periods.

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Ibid., p 24.
Ibid.
Ibid., p 25.
Thus, bearing in mind this fact as it relates to Jamaica and the observations of the International Labour Representatives, special consideration should be given to giving seafarers ample opportunity to pursue their legal claims. Except for this qualification, the present majority view should be supported. As regards the drafting of Section 74 itself, it seems the marginal note: "limitation of Action " is inappropriate. The note should be "extinction of maritime liens by lapse of time". Such a note would not only be identical to the present caption of the relevant Article 8 of the draft convention, but would more accurately indicate the intent and contents of that Article as contained in Section 74. Moreover, as discussed above, the issue of extinction of maritime liens by lapse of time although related is quite distinguishable from considerations relating to limitation factions, stricto senso.

**Maritime Arbitration Proceedings and Time-Bars**

Maritime Arbitrations are founded on agreement between the parties as to how disputes between them are to be resolved. Accordingly <jamaican law does not ipso facto prescribe any specific time period for commencing arbitration proceedings. Any such requirement is provided by the arbitration agreement.

Thomas notes that it is not open to the court to "...dismiss a claim in arbitration or grant an

Thomas, D. Rhidian: The legal remedies for dilatoriness in the pre-hearing arbitral procedure, 1983,
injunction to restrain an arbitral proceeding that had it been an action at law the court would have dismissed the claim for want of prosecution."

He notes further that "...a respondent in an arbitration enjoys no right as against the claimant expeditiously advanced or that prejudicial delay would be avoided..."

The arbitrator himself has at common law no inherent power to dismiss a claim for want of prosecution (Crawford v. A.E.A. Prowting Ltd., 1973, 1Q.B.1; Bremer Vulkan Schiffinban und Machine fabriko v. South India Shipping Corp, 1981 A.C. 909).

It thus appears that a very advisable stipulation in any Agreement to submit to Arbitration is one specifying the time within which Arbitration proceedings are to be brought and the attendant consequences for failure to do so.

hence, Arbitration Agreements often specify that a particular step must be started within a prescribed period of time with failure to do so operating as a bar to subsequent prosecution of the claim concerned.

The Centrocon arbitration clause provides a typical example. It states in part:

"Any claim must be made in writing and claimant's Arbitrator appointed within twelve months of final discharge and where this provision is not complied with, the claim shall be"
deemed to be waived and absolutely barred."

Such "time and bar" arbitration agreements operate independently of statutory time limits. Thomas notes that "In effect, by substituting an alternative period of time to that specified by statute, such agreements operate as a contractual displacement of the otherwise operative time limits."

These "time and bar" clauses are valid and not deemed to be contrary to public policy. (Atlantic v. Drefus, 1922, 2A.C. 250). However they can give rise to harshly inequitable consequences for a potential claimant particularly where the time period stipulated is rather short. A default extinguishes the claim (in respect of both right and remedy), leaving nothing capable of being pursued either in arbitration or a court of law.

Maritime Arbitrations in Jamaica are governed by The Arbitration Act, 1900. This Act does not contain any special provision empowering the court to take ameliorative action when faced with an unconscionable but valid "time and bar" clause. It is probable that the court may well consider itself unhappily fettered by the manacles of the position at common law. This permissive common law approach is itself clearly buttressed by the sanctity of contract principle.

Ibid.
Term used by Thomas, Ibid, to indicate that default bars the claim absolutely, as compared with a "time stipulation simpliciter" which "leaves open the possibility of legal proceedings subject to the court's discretion to stay": Ibid., p 530.
It therefore appears that appropriate amendment to the Jamaican Arbitration Act to remove these shackles. Here, it is worth noting the provision of Section 27 of the United Kingdom's Arbitration Act 1950, of which there is no equivalent in Jamaican Arbitration Legislation.

Section 27 provides that:

"Where the terms of an agreement to refer future disputes to arbitration provide that any claims to which the agreement applies shall be barred unless notice to appoint an arbitrator is given or an arbitrator is appointed or some other step to commence arbitration proceedings is taken within a time fixed by the agreement, and a dispute arises to which the agreement applies the High Court, if it is of opinion that in the circumstances of the case undue hardship would otherwise be caused, and notwithstanding that the time so fixed has expired, may, on such term if any, as the justice of the case may require, but without prejudice to the provisions of any enactment limiting the time for commencement of arbitration proceedings extend the time for such period as it thinks proper."  

By this provision the English Court is given a discretionary jurisdiction to extend the time for commencing an arbitration proceeding in circumstances where the applicant would otherwise suffer undue hardship and injustice. A similar provision in Jamaican Arbitration legislation would go a far way in correcting the pregnant potential for injustice and hardship provided by the existing position at common law.
Salmon L.J., in the case Liberian Shipping Corp. v. A. King & Sons, Ltd: the Pegasus (1967) 1 Lloyd's Rep. 302,309, commented on the state of English law as regard "time and bar" clauses, prior to the enactment of Section 27. These comments which point appositely to the present state of Jamaican law were as follows:

"Prior to this enactment...the commercial community...and...those who practiced and administered commercial law...were shackled by...this type of arbitration clause. It put it out of the power of the Court to grant any relief to a claimant who had allowed perhaps a day or two to run beyond the period...specified in the clause, even although the delay could have caused no conceivable harm to the other side....The other party, who had not been guilty of a deliberate breach of contract, was relieved from liability to pay compensation for the heavy loss which he had caused....It was no doubt to remedy this hardship and injustice that the legislature intervened to alter the law."

It seems all the more desirable to legislatively empower the courts to intervene when it is remembered as noted in the United Kingdom's 1927 Machinnon Report on the Law of ARbitration that ..." the vast majority of submissions to arbitration are contained in the printed arbitration clause in printed form of contract, which cannot be carefully examined in the transaction of business, and alteration of which it would be difficult for most people to

CMD. 2817, quoted in Thomas, op. cit., p 532.
In introducing an amendment to the Jamaican Act, it would be helpful to enact guidelines as to how the court's discretion to extend time or not should be exercised. Such guidelines are absent from the United Kingdom's 1950 Act. However, English Case Law provide some pointers.

In the Jocelyne, (1977) 2 Lloyds Rep. R1 at p. 129, Brandon, J. (as he then was) summarised some of the relevant criteria to be applied in relation to Section 27 of the United Kingdom Act. He stated as follows:

"In deciding whether to extend time or not the Court should look at all the relevant circumstances of the particular case. In particular the following matters should be considered:

(a) the length of the delay;"

(b) the amount at stake;

(c) whether the delay was due to the fault of the claimant or to circumstances outside his control;

(d) if it was due to the fault of the claimant, the degree of such fault;

(e) whether the claimant was misled by the other party;

(f) whether the other party has been prejudiced by the delay, and if so, the degree of

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Paragraph 33 of The Report, as quoted, Ibid.
such prejudice."

Other criteria have been identified in other English cases. These include the following considerations:

(g) the strength of the claim of the applicant. (Sanko Steamship Co., Ltd v. Tradax Export S.A. (1979) 2 Lloyds Rep. 273)

(h) whether apart from Section 27, there is a criteria structured into the arbitration process by which the time stipulation may be extended: (Ets Soules & Cie v. International Trade Development Co. Lt.(1979), 2 Lloyd's Rep. 122, Timmerman's Graan - En Maalhandel En Maalterij B.V. v. Sachs (1980) 1 Lloyd's Rep. 194.)

(i) would the applicant suffer personal liability if and so far as the claim is not allowed to proceed: (Timmerman's Graan - En Maalhandel En Maalterij B.V. v. Sachs (1980) 1 Lloyd's Rep. 194)

(j) was the time stipulation part of an international code for promoting uniformity: (Nea Agrex S.A. v. Baltic Shippin Co. Ltd. and Intershipping Charter Co. The Agios Lazaras (1976) 2 Lloyd's Rep. 47 (CA.) ; and

(k) considerations emanating from and prevailing within the particular trade in which the


It is submitted that Jamaica should make the necessary amendments paying cognizance to these guidelines.

While in general a Jamaican Court may feel powerless to deal effectively with a seemingly too short time period stipulation in a time and bar arbitration clause, this ought not to be the case where it is dealing with a case within the ambit of the Carriage of Goods Act, 1889 which enacted the Hague Rules.

The problem may arise if the time limit in the charter-party arbitration clause is shorter than the one year limit provided for in the Hague Rules where they govern the contract between the parties.

Application of a shorter time limit would violate Article 3 (8) of the Hague Rules because it would lessen the carrier’s liability. Hence such a time and bar clause ought properly to be treated as void and repugnant to the Hague Rules provisions contained in the Carriage of Goods Act.

The Limitation in Jamaican Conflict Laws
Under Jamaican Law, following the traditional English position, statutory rules on limitation of action are classified as procedural rather than substantive, on the ground that they only bar the remedy and do not extinguish the right.

Accordingly for purposes of Jamaican private international law, time limitation is governed by the lex fori. No foreign time bar will therefore be recognized even if that is labelled as substantive by the foreign law.

As a consequence, if an action is brought in a Jamaican Court to enforce an obligation arising from a contract governed by foreign law, a Jamaican Court following the English common law position, is obliged to apply the Jamaican Statute of Limitation and not that of the proper law of the contract.

Thus, if the Jamaican Limitation period has expired, it may be obliged to dismiss the action, even if the foreign period had not expired. Conversely the court would be obliged to permit the action if brought within the Jamaican period but after expiry of the foreign period.

This approach stands in sharp contrast to that taken by continental European, which characterize time bars as substantive. Further, the traditional English approach has now been abrogated with the enactment in England of The Foreign Limitation Periods Act, 1984 (U.K.),

The internal law of the country where the court is situated.
Stone, op. cit., p 497.
which came into force on October 1, 1985.

Thus in England, the basic rule now is that time limitation is treated as a substantive question and thus governed by the law which governs other aspects of the parties substantive rights.

The result is that a claim will be dismissed in England, if it is time barred by the lex causae, although not by English internal law, and will be upheld if it is timely under the lex causae, even if it id time barred under English internal law.

Stone notes that "the rule that procedure is governed by the lex fori has the legitimate purpose of simplifying the conduct of the proceedings and enabling them to be conducted in a manner with which the court is familiar and comfortable. It is not designed to enable the forum to give effect to its views, as to the appropriate outcome of the dispute.

He notes further that "... time limitation cannot justifiable be characterized as a matter of procedure: the relevant limitation rule will often be decisive as to the outcome of the case; there will seldom be any particular difficulty in applying a foreign limitation rule; and the question does not relate to the manner of conducting the proceedings."

Added to these very cogent reasons for departure from the traditional English position is the crucial question is the reasonable expectation of the parties.

Dicey and Morris observe that "The main justification for the conflict of laws is that it

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The law applicable to the case.
Ibid., p 500.
Ibid.
implements of reasonable and legitimate expectations to a transaction or an occurrence."

Thus where for instance, parties enter into a maritime contract for which the proper law is that of country X which provides for a limitation period of say three years, then it is reasonable to expect that if no action is commenced in accordance with the three year stipulation, that is the end of matter or at least no subsequeintation will be entertained.

However, if the matter ends up in a Jamaican Court where the applicable limitation period is, say six years, then the Jamaican Court, following the traditional English position, would be obliged to entertain the suit. It would then go on to apply the "substantive" law of country X to the case.

Such a scenario manifestly wreaks injustice. Consideration should therefore be given to reforming the law along the lines long taken in Continental European law and now belatedly followed by England.

Ibid., p 5.
CONCLUDING COMMENTS

Undoubtedly, a crucial preliminary consideration for any maritime claimant (and indeed for all concerned, whether in negotiations or otherwise about a claim) is how much time the claimant has left to initiate court or arbitration proceedings.

Exploration of the relevant Jamaican Law reveals an absence of Jamaican or West Indian cases or limitation of Maritime Actions. It is therefore likely that Jamaican Courts will resort to English case authorities.

However, these authorities are not without their problems. Indeed, some have been much criticized by UNCTAD, an organization in which Jamaica is represented. Such criticisms should not escape the attention of Jamaican Courts.

Here, it is worth bearing in mind that the perspectives of analysis adopted by UNCTAD are likely to more favourable to "cargo interests" countries like Jamaica, than those which gave rise to conventions such as the Hague Rules adopted when Jamaica was a British colony by a few mainly ship owning countries who naturally sought to legislate in accordance with their rested interests.

Overall, in the development of Jamaican jurisprudence and legislation in this area of the law,
due regard should thus be had to the deliberations of international organizations such as UNCTAD and IMO on subjects such as the Carriage of Goods by Sea and Maritime Liens.

This should be done not only to gain a different and wider perspective than that of the English but to be exposed to the direction of international thinking, an appreciation of which is vital in the international maritime law sphere. These deliberations offer readily accessible, inexpensive and comprehensive information in a relative non-voluminous form by an array of international experts.

Similarly, cases from other common law jurisdictions reveal different approaches which should aid judicial analysis.

Also, the approaches of civil law counties in this area can be very instructive. For instance, the treatment of Continental European law of limitation of actions as a "substantive" rather than "procedural" matter commends itself.

Here it has been shown that the United Kingdom itself has now albeit belatedly taken steps to rid itself of what, in the writer's humble view, was a blot on its jurisprudence.

Sadly, Jamaican law is left with this legacy. A new approach is therefore strongly urged.

A new Limitation of Actions Act is required to break new ground and consolidate certain existing laws. There should be clear enumeration of maritime and other claims, specifying their limitation periods as well as the overall applicable principles. Provision should be made in this
regards for Jamaican courts to deal with unconscionable time stipulations in Arbitration "time and bar" clauses.

The present incorporation of the draft Article on extinction of maritime lien by lapse of time points to an attempt to keep Jamaica's law abreast of the latest developments. While this is commendable, steps should be taken to ensure, as far as possible, Jamaica's participation in the decision making process as regards the draft Article itself and others. Otherwise, Jamaica might be "modernizing" but not in line with its best interests. For instance, as shown, our seafarers may be unduly prejudiced by a blanket one year period for the extinction of maritime liens.

As Jamaica is only a party to the Hague Rules which it has enacted, its limitation of action provisions in this area, suffer from a number of the deficiencies of these Rules. It is unable to benefit from the improvements afforded by the Hague-Visby amendments.

The Limitation of Actions and related provisions of the Hamburg Rules, which although not yet in force, are very instructive as they arguably point in the direction in which the international maritime community is moving. They provide a useful part jurisprudential policy framework for judicial analysis and legislative activity. Further, to the extent that in some respects they purport to only clarify certain ambiguous provisions of the Hague Rules they are to some extent indicative of agreement on preferred interpretations existing Hague Rules provisions.
These Hamburg Rules Limitation of Actions and related provisions appear to offer a more just and equitable balancing of the risks between cargo and carrier interests as compared to the Hague or Hague-Visby Rules. Cargo Interests are provided with more reasonable time to negotiate with carriers before commencing proceedings to protect their claim. This itself accords with certain established commercial shipping practice.

As regards collision claims, it appears that Jamaica should consider establishing Rules of Court as required by the existing convention, along the lines of its established principles for writ renewal.

The Maritime Conventions Act (U.K.) 1911, does not appear in the Volumes of Laws of Jamaica. This means that resort has to be had to English literature to locate the Act. Jamaica is a party to the existing Collision and Salvage Conventions, in its own right. It should reenact these conventions into Jamaican law so that the relevant legislation appears in our statute books.

In the case of salvage claims, the new Salvage Convention has done away with the need for special Rules of Court as regards extension of time. This convention with its emphasis on encouraging operations to stem oil pollution, should prima facie, be favourably viewed by Jamaica.

Overall, there is a need to carefully look at International Conventions, en toto, to determine their desirability. However even if there is a decision not to become a party to a convention, it is
apparent that guidance for judicial and legislative purposes can be obtained from an examination of its limitation of action and related provisions. Moreover, uniformity as regards such provision are very desirable.

The modernization of Jamaican law relating to the limitation of maritime actions in accordance with widely accepted international provisions would enhance not only the contents of its law provisions but also Jamaica's appeal as a forum.

No analysis has been attempted of provisions of conventions other than those impinging on the subject of this chapter, hence no inferences are offered about these Conventions on a whole. Nevertheless, it is clear that in the case of the Carriage of Goods by Sea, the limitation of actions provisions of the Hague Rules especially as they have been interpreted by the English Courts to be revised.

Here, one caveat worth emphasising is that time limitation provisions of maritime conventions constitute a relatively small albeit very important component of these conventions. Hence, consideration of a Convention, especially if seen as a package of compromises require meticulous cost-benefit analysis.

It has been shown that analysis of these convention provisions additionally serve the useful purpose of seeing where Jamaican law stands as regards certain internationally agreed time
limitation stipulations.

Further, even where there are no International Conventions as is the case with TOVALOP and CRISTAL, it is important to know the time constraints within which a Jamaican maritime claimant operates. It therefore seems safe to conclude, that in any event from the perspective of practice, time will ultimately be of the essence.
Chapter 7

CONCLUSION

A Variety of subject matters falling under the broad umbrella of preliminary legal issues have been examined. In each of the preceding chapters dealing with the various preliminary legal issues an attempt has been made in each case to indicate the main inferences to be drawn from the analysis. It is not the writer's intention to simply regurgitate them here.

Certain conclusions may be advanced from the study as a whole. The primary conclusion is that preliminary legal issues pertaining to maritime claims enforcement in Jamaica definitely have an international dimension worth considering when such issues are being dealt with.

Examination of all of the major sub-areas spanned by the thesis support such an inference.

This is manifestly the case as regards issues pertaining to ship arrest and the scope of the Jamaican Admiralty Jurisdiction where essential local rules clearly have their roots in international Convention stipulations.

The study supports the basic inference that municipal maritime Jurisdiction and Choice of
Law issues ultimately operate within international legal parameters and it's useful to see them in this light. In the case of Time Limitation of Maritime Actions, where, prime facie, it seems less probable that international rules may have an influence, the study shows that as regards a number of particular Maritime claims the influence is direct and very significant.

The basic reason for this recurring international and local legal nexus, appears to be simply the international character of maritime matters. As a consequence, there is increasingly the striving for international uniformity, certainty and justice in maritime matters generally.

Thus, more and more, international maritime rules are extending their frontiers into the domain of what was traditionally perceived as the preserve of municipal law rules.

For instance, IMO has traditionally been preoccupied with safety and anti-marine pollution substantive safety regulations. However, in recent years, it has been increasingly concerned with civil liability and related jurisdictional issues as these pertain to, for example, oil pollution.

UNCTAD which has been traditionally preoccupied in the legal sphere with broad issues of economic regulation of shipping, is now with IMO jointly focusing on issues of maritime liens and ship arrest.

Also UNCTAD by way of its more recent conventions on the carriage of goods by sea
and multimodal transport has been paying special attention in these Conventions to preliminary
legal issues. This, the study shows reflects a growing trend in international maritime
stipulations. Indeed, this development has been prompted by the failure of many of the past
conventions to include provisions on these preliminary legal issues and to make them
mandatory for the municipal law of Contracting State parties. Such a failure it has been shown
has at times to frustrated the objectives of the substantive Rules of the relevant Conventions.

The net result of this new trend is more direct consequences for state parties' domestic
procedural and private international law rules.

In the case of Jamaica, this is exemplified by the incorporation of provisions of the Draft
Articles for a new Convention on Maritime Liens and Mortgages in its new Shipping Bill.
Whenever both sets of provisions move beyond the draft stage into being respectively,
international and Jamaican law, then the nexus will entail clearer consequences for law practice
in Jamaica. The international dimension, to such issues will then be more readily discernible.

However, on the whole, the trend is yet to have full impact on Jamaican law.

More directly responsible for the link between the preliminary issues and international
stipulations in the Jamaican Context is the mechanism of extended U.K. legislation.

This is what has been largely responsible for the appearance in Jamaica of international
stipulations seemingly clothed only in local procedural garb.
The process of extended legislation has brought with it international convention stipulations which have helped to keep Jamaican maritime procedural and private international law rules in keeping with existing international stipulations. However, they have also brought with them particular problems of statutory interpretation and various deficiencies. Where they have required or contemplated further enactment, these have not been promulgated.

Overall, it is safe to conclude that the area of the law examined by this study has been ignored by the legislators. The reasons for this include the apparent low priority accorded the development of rules embracing these preliminary issues and a lack of expertise for both identifying and effecting needed changes.

Many areas of Jamaican law have been identified as needing changes or particular approaches in seeking solutions to problems. At times, important national interests are hampered by the local maritime and private international law rules. Thus, a basic conclusion is that significant changes are needed to improve the efficacy and efficiency of the relevant local laws.

The manifest international dimension to these preliminary issues have highlighted the need for Jamaica to strive to participate fully in the shaping of the narrower circumscribed maritime conventions dealing with such issues.
The study supports the inference that International Maritime Convention provisions provide valuable aids to judicial and legislative activity.

Attempts to ascertain what the law is on particular issues is at times made more difficult by the very limited amount of Jamaican cases impinging on the subject area. Also compounding this difficulty is the process of extended legislation, and various colonial legacies.

On the whole however, the legal position in Jamaica on the various issues can generally be stated with a significant degree of certainty.

Also, it may well be that the study, mainly, by its express incorporation of the International dimension as well as its emphasis on the protection of national interests will provide at least an additional lens with which to view the preliminary issues discussed.

The importance of the preliminary legal issues can hardly be doubted. Part of the future challenge is to ensure that the relevant rules are updated and improved to make certain their relevance to national interests as well as their overall efficacy and efficiency. A further and vital challenge is to simultaneously pay due cognizance to the international dimension involved.
### TABLE OF INTERNATIONAL CONVENTIONS

**(A) Brussels International Maritime Law Conventions**

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(B) ILO Maritime Conventions

12. Convention fixing the Minimum Age for Admission of Children to Employment at Sea (Convention 7 of 1920)

13. Convention concerning Unemployment Indemnity in case of Loss or Foundering of the Ship (Convention 8 of 1920)


15. Convention fixing the Minimum Age for the Admission of Young Persons
1 to Employment as Trimmers or Stokers (Convention 15 of 1921)

16 Convention concerning the Compulsory Medical Examination of Children and Young Persons Employed at Sea (Convention 6 of 1921)

17 Convention concerning Seamen's Articles of Agreement (Convention 22 of 1926)

18 Convention fixing the Minimum Age for the Admission of Children to Employment at Sea (Convention 58 of 1936)

(C) IMO Conventions

1 International Convention on Civil Liability for Pollution Damage, 1969

2 Protocol on the International Convention on Civil Liability for Oil Pollution Damage, 1969

3 Protocol of 1984 to amend the International Convention on Civil Liability for Oil Pollution Damage, 1969


5 1976 Protocol to the International Convention of the Establishment of an International Fund for Compensation for Oil Pollution Damage 1971


7 Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea
1974

8 Protocol to the Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea 1974

9 Convention on Limitations of Liability for Maritime Claims 1976

(D) UNCTAD Conventions related to Maritime Matters

1 Convention on a Code of Conduct for Liner Conferences, 1974


(E) U.N. Conventions on the Law of the Sea.

Geneva Convention on Territorial Sea and Contiguous Zone, 1958

APPENDIX 1

JAMAICA - A skeletal profile

Part A: General

Name etymon: XAYMACA ("land of wood and water")

*Location: Caribbean Sea 18' N, 77 W
(See appendix)

Population: 2.4 million

*Area: 4,243.6 mls (10,990.98 sq km)

Language: English

Government: Civil-parliamentary democracy

Climate: Tropical

Capital: Kingston

Recorded History: Original Inhabitants - Arawaks (650-1492),
Columbus/Spanish arrival: 1492; English Colony: 1655-1962

Independance: August 6, 1962

*Economy: Tourism, Bauxite (main foreign exchange earners). Also,
Agriculture, Light Manufacturing, Unemployment Rate
(1986): 22.3%; Inflation Rate (1986): 14.7%; Growth Rate

Organization


Part B: Maritime Supplementary Data

1. Jamaica. Coastal, Shelf and EEZ Characteristics:

(a) Coastal length: 280 nautical miles

(b) Shelf area to 200 meters depth: 11,700 square nautical miles

(c) EEZ area to 200 nautical miles: 86,800 square nautical miles


(Attard indicates that this data is itself based on "information supplied by the U.S. Geographer; see eg., Limits no.36 (4th Rev.). The EEZ figures are generally based on the equidistant boundary and a normal baseline".

He also notes in reference to the data that limitations may prevent states from claiming a full 200 mile EEZ. Overall, it appears that the figure given in respect of the EEZ indicated the area the zone would have if Jamaica was able to claim all areas.
adjacent to it to a distance of 200 miles from the relevant baselines. However, as Jamaica is a Carib-locked country, the figure stated for the EEZ is larger than it will be eventually when Jamaica actually declares an EEZ.

2. Registered

Tonnage: 7,473 GRT (as at July 1, 1985 per Annex 3, U.N. Convention on Conditions for Registration of Ships)

3. Maritime Training:

Jamaica Maritime Training Institute (Facility for training Caribbean Master Mariners, Chief Engineers and other sea going personnel, established, 1980)

4. Maritime Administration:

centered in work of Marine Division of Ministry of Public Utilities but involving a number of other Government Ministries and Departments. (see Appendix 2)

5. Maritime Sector
APPENDIX 3

JAMAICAN MARITIME LEGISLATION (By subject matter)*

Carriage of Goods By Sea

Carriage of Goods Act, 1889

Bills of Lading Act, 1872

Economic Regulations

Cargo Preferences Act, 1979

Shipping (Incentives) Act 1979

West Indies Shipping Corporation Act
HARBOUR / PORTS

Harbour Fees Act 1927

Harbour Lights and Lighthouse Act

Harbours Act, 1874

Leyland Wharf Pier Law

Montigo Bay Pier (Enabling) Law

Pilotage Act, 1975

Port Authority Act, 1972

Port -authority Declaration of Ports (Validation) Act

Port Authority (Superannuation Scheme)(Validation) Act

Port Workers (Superannuation Fund) Act

Shipping Master's Fee's Law

Wharfage Act, 1895

MARINE RESOURCES

Beach Control Act, 1956

Fishing Industry Act, 1976

Rio Cobre Canal Law

River Rafting Act, 1970
MARITIME ADMINISTRATION

Marine Board Act, 1903

MARITIME COMMUNICATIONS

Merchant Shipping (Wireless Telegraphy) Act, 1926

International Ocean Telegraph Company's Law

MARINE INSURANCE

Marine Insurance Act, 1973

PRIZE GOODS

Prize Goods Law

SEAFARERS

Seafarers (Certification) Act, 1986

Seamen (Repatriation) Act

Seamen's Wages (Recovery of) Law

TERRITORIAL JURISDICTION
Morant and Pedro Cays Act, 1907

Territorial Sea Act, 1971

WRECK AND SALVAGE

Wrack and Salvage Law, 1875

*Only Jamaican enactments dealing essentially or at least substantially with maritime related matters are included.
APPENDIX 4

List of International Maritime Conventions to which Jamaica is a Party.

A: IMO CONVENTIONS


2. International Convention for the Safety of Life at Sea, 1974

3. Convention on the International Regulations for Preventing Collisions at Sea, 1972


5. International Convention for Safe Containers, 1972


B: ILO CONVENTIONS

8. Convention fixing the minimum age for admission of Children to employment at sea, 1920 (ILO Convention #7)

9. Convention fixing the minimum age for the admission of young persons to employment as trimmers or stokers, 1920 (ILO CONVENTION #15)

10. Convention fixing the minimum age for the admission of children to employment at sea (revised 1936) (ILO Convention #58)

11. Convention concerning unemployment indemnity in case of loss or foundering of the ship, 1920 (ILO Convention #8)

12. Convention concerning the compulsory medical examination of children and young persons at sea, 1921 (ILO Convention #16)

UN CONVENTIONS


18. Convention on a Code of Conduct for Liner Conferences,

C: CMI-BRUSSELS CONVENTIONS


APPENDIX 5

Regional Maritime Convention to which Jamaica is a party.

APPENDIX 6

Bilateral Maritime Agreements to which Jamaica is party:

1. Jamaica / Colombia Fishing Agreement 1982
2. Jamaica / Colombia Fishing Agreement 1984
3. Jamaica / Colombia Fishing Agreement to initiate negotiations for delimitation of all marine and submarine areas, corresponding to regions mentioned in the Jamaica / Colombia Fishing Agreement, 1984.
4. Jamaica / Guyana Fishing Agreement, 1984
5. Jamaica / Mexico Maritime Transportation Agreement, 1975
7. Jamaica / USSR Agreement on merchant navigation, 1978