Commercial maritime legislation in Mozambique - ways and means of reformation

Juliao Viriato Mauele

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COMMERCIAL MARITIME LEGISLATION IN MOZAMBIQUE
Ways and Means for its Reformulation

By

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GMA1-'88

Mozambique
WORLD MARITIME UNIVERSITY
Malmö - Sweden

COMMERCIAL MARITIME LEGISLATION IN MOZAMBIQUE
Ways and Means of Reformulation

By

JULIÃO VIRIATO MAUELE
Mozambique

A paper submitted to the Faculty of the World Maritime University in partial satisfaction of the requirements for the award of a

MASTER OF SCIENCE DEGREE
IN
GENERAL MARITIME ADMINISTRATION.

The contents of this paper reflect my personal views and are not necessarily endorsed by World Maritime University.

Signature: Julião Viriato Maule
Date: 17 October 1988

Supervised and assessed by: Mr C. MORENO MERICAECHEVARRIA, lecturer in Maritime Law - World Maritime University;

Co-assessed by Professor P. STANKOVIC - University of Rijeka, Yugoslavia.
DEDICATION

To my parents,

my wife and

my sons.
The work of gathering references to the maritime legislation applied to Mozambique was carried out in 1984, at the then Ministry of Ports, Railway and Merchant Marine. Such work has been done to comply with the order given by then Vice-Minister of Merchant Marine, Mr. I.A.D. Muhate, and performed by Mr. F.A.L. Couto, a Portuguese lawyer, working in the Ministry on a co-operation basis, assisted by the author, who was then a beginner in maritime law matters. The short general comment upon such legislation, elaborated together with references, pointed out its outdatedness. Such work and other experience that the author has acquired in the work as a (junior) legal advisor, as well as the valuable tuition in maritime law and other subjects given by professors and lecturers (both resident and visiting) at World Maritime University, have built up the author's interest and attention to maritime law matters.

The selection of the commercial sector of the maritime legislation is due to the limited time available both for research and elaboration work, as well as to the thesis size recommended for the award of a master degree.

The author nourishes the hope that something will be taken from this modest study, for the reformulation of the commercial maritime law in Mozambique, and that it will contribute to building up a new Mozambican maritime legislation as a whole.
ACKNOWLEDGEMENTS

My efforts towards the production of this paper would have resulted in something else of less importance rather than a thesis, if I had not received the necessary tuition and assistance of variable nature. In this regard I would like to address my special gratitude to Mr. C. Moreno Mericaechevarria, my lecturer in Maritime Law, who has provided me necessary guidance and advice in different stages of my thesis. I would also like express my sincere thanks to:

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- Mr. R. Poisson and all library staff, for their assistance in research materials;
- WMU and its resident and visiting, teaching staff for all tuition (including English language course) provided to me.

Yet I would like to address my thanks to Ministry of Transport and Communications of my country, for nominating me to attend the course and to the Norwegian Agency for Development (NORAD), for financially sponsoring my studies at WMU, as well as to every person who directly or indirectly assisted me in writing this thesis.
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The thesis is introduced in chapter one by a presentation of the objective, to examine the existing commercial maritime legislation in Mozambique and to suggest ways and means of its reformulation. The title and subtitle are discussed, followed by a presentation of the system of research as well as the methodology of analysis.

Chapter two is devoted to presentation of the country, covering geographical and economic aspects, mainly regarding the country’s location, population and economic potentialities, as well as the efforts undertaken to overcome her serious economic problems. Yet as part of the country’s presentation a picture of her role in the SADCC region is shown. Such role consists of transportation services that Mozambique, as a coastal country, can render to her neighbouring countries, specially to those ones which are landlocked. As to complete the presentation, an overview of Mozambique’s maritime administration and of her developing shipping industry is given. The author considers all these aspects as the scenery where the legislation in discussion acts.

Chapter three is directed to consider the Mozambican legislation, beginning with a short historical background on it. Reference is made in respect to the succession to the Portuguese colonial legislation, and hierarchy of laws in parallel with the competent state organs for enacting such laws, as well as a system of enactment of legislation is presented.
The fourth chapter is the first part of the core of the thesis. In it, the existing commercial maritime legislation (most of it embodied in the Commercial Code - Book III) is critically analysed, both in its structure and contents, through discussion of some articles. The diagnosis from such analysis is that such legislation is obsolete. The limited degree of membership to the related international conventions is referred to as part of outdatedness of the legislation discussed in the thesis. From this analysis it is concluded that the existing legal commercial maritime order in Mozambique needs to be reformulated.

In chapter five, the second core part of the thesis, ways and means of reformulation are suggested. Considerations are elaborated with regard to the involvement of state organs, as well as of other institutions or organisations in the reformulation of the law discussed. It is suggested that such work be done in phases and in separate acts, instead of opting for working out a new maritime code, because of the time required and other disadvantages. In this connection, the People’s Assembly, the highest organ of the state power, would delegate powers or give order to the Council of Ministers so as to pass reformulating decrees. The importance of updating Mozambique’s membership in international conventions is also suggested as part of reformulation.

As to conclude the thesis, in chapter six an overview of the discussion held in the thesis is given in terms of emphasising the urgent need to cure the obsolescence from which the Mozambican commercial maritime legislation suffers, as well as the ways and means of doing it.
LIST OF ABBREVIATIONS

ANFRENA, E.E. - Agencia Nacional de Frete e Navegacao, empresa estatal (National Agency of Freight and Shipping)

CEMANA - Centro de Manutencao Naval (Center of Naval Maintenance)

CMI - Comite Maritime International (International Maritime Committee)

DINASMAR - Direccao Nacional de Administracao e Seguranca Maritima (National Directorate of Maritime Safety and Administration)

DNM - Direccao Nacional da Marinha (National Directorate of Merchant Marine)

DNTMF - Direccao National dos Transportes Maritimos e Fluviais (National Directorate of Maritime and Fluvial Transports)

DW - Dead weight

EEZ - Exclusive Economic Zone
EMOSE, E.E. - Empresa Mocambicana de Seguros, empresa estatal (Mozambican Insurance Enterprise, State enterprise)

ESCAP - Economic Commission for Asia and Pacific

GRT - Gross registered tons

ICOD - International Center of Ocean Development

MT - Metical (Mozambique national currency)

MTC - Ministerio do Transportes e Comunicacoes (Ministry of Transport and Communications)

NAVINTER, E.E. - Empresa de Navegacao Internacional, empresa estatal (Enterprise of International shipping, State enterprise)

NAVIQUE, E.E. - Empresa Mocambicana de Navegacao, empresa estatal (Mozambican Shipping Enterprise, State enterprise)

TS - Territorial sea.

UNCTAD - United Nation Commission for Trade and Development

WMU - World Maritime University
1.1 OBJECTIVES

The Constitution of the People's Republic of Mozambique,1 which came into force on 25 June 1975 (independence day), has revoked by its article 79 the former legislation contrary to it. In addition, the same article provides that the remaining legislation (the one which is not contrary to the Constitution) "shall be maintained in force until such time as it is altered or revoked". In this way the colonial legislation related to the commercial maritime field, as well as most of the legislation settling other affairs, was inherited from the former colonial regime. Marked by obsolescence and insufficiencies, this legislation is in many aspects inadequate and thus it may be a retarding element to the country's shipping development. Since the time the country

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1 The first version of the Constitution was approved by the Executive Committee of the Mozambique Liberation Front (FRELIMO). Changes to Constitution have been introduced in 1977 and in 1983 by the People's Assembly, and a bill of its revision is now subject to people's discussion, so as to probably be enacted in the next session of the People's Assembly.
try has achieved its political independence, developments have been made in the sense of creating a new legislation or updating the existing one, in order to make it suitable to the peculiarities and developmental needs of the Mozabican Nation, but nothing (or almost nothing) has been done as far as the legislation in discussion is concerned.

Hence, the objective of this thesis, is to analyse the structure and content of the existing commercial maritime legislation in Mozambique and its defective aspects in general, as well as to suggest the ways and means of reformulating it. This is done in the ambit of partial fulfillment of requirements for the completion of the author's studies in mastership of Science of General Maritime Administration at World Maritime University, with the hope that the ideas contained in this thesis shall be taken into account by the authorities concerned back home.

In developing the proposed study the author will take into consideration the country's social and economical policy and her developmental perspectives, as well as the developments in the international seaborne trade and in the world shipping industry as a whole, in the sense that the future Mozambican maritime commercial legislation can correspond to the efforts internationally made in the harmonization of the maritime legislation.
1.2 DISCUSSION OF THE TITLE AND DEFINITION OF THE THESIS SCOPE

"COMMERCIAL MARITIME LEGISLATION IN MOZAMBIQUE" being the title of the present thesis, may lead to or suggest, in a way, an idea different from that one that the author has in mind. Thus, discussing it and at the same time endeavouring to clarify the scope of the thesis seems to be a necessary procedure in order to, at least, narrow the field of possible divergencies.

Maritime legislation, as a special sector of the legal order, comprises the whole set of legal instruments (laws, decrees or acts, treaties, regulations, etc.) applicable to the commercial maritime transport. Closely related activities are within this ambit of application, not including, of course, the legislation that purely aims at the sea zones, sovereignty and jurisdictional aspects upon those zones and marine resources, as these matters pertain to the branch of law classified as the Law of the Sea.

In restricting the study of Mozambican maritime legislation to the field of commerce, the author intends to discuss the legal order applicable to shipping transactions, i.e. transactions falling upon transportation services by sea or water-ways. The use of the word "transactions" is due to the fact that such activities consist of the selling of transportation services by ship owners to carriers or users, this being, thus, the core part of maritime commercial affairs.
It is pertinent to include in maritime commercial legislation rules of law governing aspects closely related to the aforementioned transportation services by sea or by water-ways, which provide on the means for safeguarding interests of those who are involved in maritime adventure. Such are for example the legal rules regarding the limitation of liability, maritime insurance, liens and mortgages. It is obvious yet to consider ship ownership as object of regulation in the ambit of commercial maritime law as well. In this context, a shipowner may for instance participate with the value of his vessel in sharing losses resulting from the sacrifice of a certain portion of cargo carried on board his vessel, when a general average has been declared, from undertakings made for the sake of the rest of the cargo and of the vessel as well. It is also possible for the shipowner to be compensated by the carriers whose cargo had been involved together with the vessel in a casualty covered by such legal institute. Beyond this, the change of ship ownership may have implications in solving maritime claims, which are settled with application of commercial maritime legislation.

As far as salvage and assistance at sea are concerned, it is controversial to classify this institution as part of commercial maritime law. It is clear that assistance must be looked at as a moral obligation recognized by the public law, aiming at assuring the rescue of people in distress at sea. But salvage, as it entitles the salvor to remuneration, tends to become a commercial matter. As a matter of fact a contract of salvage can include provisions on payment of a remuneration for salvage services. In addition, nowadays there are companies created with the aim of exercising commercial salvage.
It is not an easy task to define the boundaries between the commercial maritime legislation and the rest of the maritime legislation (this being a matter deserving a separate thesis). In fact the carriage, for example of goods by sea may not be effective if the vessel used in its performance does not carry a certificate of seaworthiness and if not manned by certificated seafarers. Furthermore a vessel can not legally enter a commercial voyage if it is not properly registered. Nevertheless seaworthiness and seafarer certifications and registry of ships are administrative affairs. They are mostly settled by legislation that can be particularly classified as maritime administrative legislation.

In considering this discussion, one may ask why not elaborating the matter under the title "Shipping Legislation". The answer is that in some cases where shipping law is referred to, it means more than the matter in discussion. This is for example the case of "Chorley & Giles' Shipping Law" - by N.J.J. Gaskell, C. Debbattista and R.J. Swatton, and of "Nigerian Shipping Laws" - by L. N. Mbanefo. Those works deal with aspects, such as ports jurisdiction, ship's flag, seafarers, terminal dues, ports and even territorial waters and exclusive economic zones.

In short, the scope of this thesis is roughly the area of intersection of the maritime law and commercial law.

In this attempt of defining the scope of the present thesis, it can be concluded that maritime commercial law is not an island isolated from the rest of maritime law. Furthermore sometimes other branches of law may be taken
as a resort to solve problems of interpretation by integration of commercial maritime law.

Having in mind the considerably international character of maritime law, as it is connected with international trade, the author will devote special attention to the maritime commercial legislation in force in Mozambique. In doing so, the author makes reference to the legislative power and responsibility of the Mozambican authorities in revising such legislation aiming in part at enabling the national developing shipping industry, as an integral part of the country's economic and social development. This is the justification of part of the main title with special reference to the country.

The phrase "Ways and Means for its Reformulation", as subtitle clearly indicates that the thesis does not include any draft of a new maritime commercial law, decree or code. As it has been already said in the presentation of the objective, the thesis aims at suggesting effective ways and means of reformulating the existing legislation applicable to the commercial maritime field. As to end this discussion of the project title the author considers that it is important to make clear the meaning of the words in the subtitle. The word "ways" is used in this thesis to express the idea of how to perform the proposed reformulation, which steps must be taken with view to, without delay, achieve the intended aim. As far as the word "means" is concerned, it is used to express the idea, not only of state organs to be involved and legal instruments to be used, but also the idea of who is to perform or to be involved in such intended task. The importance of the involvement of people is stressed.
1.3 SYSTEM OF RESEARCH AND CONSIDERATIONS
ON THE ANALYSIS METHODOLOGY ADOPTED

The research with a view to elaborate this thesis has fallen upon the existing relevant legal instruments and on important documents on both the national and regional (SADCC) perspectives for shipping and economic development. A number of those materials were written in Portuguese, the official language of Mozambique. Where necessary, parts of the content of such materials are provided either through mere reference of the idea or information there contained or through quotations freely translated by the author.

As a methodology of analysis the author examines the structure of the legislation and some legal provisions, taking into account the theoretical teaching on shipping and maritime law found in publications and lecture papers. Modern commercial maritime legislation patterns taken from updated international treaties, upon which again the author’s research activity has fallen, are also taken into consideration. Yet the author will elaborate on the matter in discussion resorting to the comparative study of other countries’ legislation.

As a complement/supplement to the documental research the author has contacted directors and civil servants working in notable position both at entrepreneurial and ministerial levels. Information disclosed by those people regarding both the administrative affairs and shipping business has been directly or indirectly used in elaborating this thesis.
The validity and effectiveness of the legislation cannot be properly discussed without taking into consideration the context of its application or, in other words, the scenery where such legislation acts. Hence, before going into the core part of the thesis, which comprises chapters four and five the author considers important to present the country, mainly with reference to those aspects which are related to the shipping industry, viz geographical and economical features and economic developmental program, a general overview of the country's maritime administration and information about the shipping industry in Mozambique. For the same reason the author presents in chapter three a perspective of the Mozambican legislation, as the universe where the set of commercial maritime legislation is inserted.
CHAPTER 2

PRESENTATION OF THE COUNTRY, HER MARITIME ADMINISTRATION AND SHIPPING

2.1 - MOZAMBIQUE'S GEOGRAPHICAL AND ECONOMIC FEATURES

Mozambique, a former Portuguese colony, became independent on 25 June 1975 and from that day officially named as República Popular de Moçambique (RPM) i.e. the Peoples Republic of Mozambique. Situated on the south-east of Africa, Mozambique is bathed by the Indian Ocean on the east, sharing the Mozambique Channel with Madagascar. She shares borders, from the north to the south, with Tanzania, Malawi, Zambia, Zimbabwe, South Africa and Swaziland. Her area is of 789,800 km² (303,709 square miles) and her population is of 13.4 millions inhabitants (statistics of 1984), 80% of whom live in rural areas. Mozambique’s coastal length is of about 1,400 miles (1,400x1.609km = 2252.6 km), extending from Quionga on the north to Ponta de Ouro on the south. The breadth of her territorial sea and exclusive economic zone is respectively of 12 and 200 nautical miles.*

*3 - See annex I - Moçambique in Africa, and annex II - Mozambique and some of her economic resources.

*4 - The 12 nm Mozambique’s TS and 200 nm EEZ have been declared through the Decree-Law no. 31/76 of 14 August 1976. Mozambique is a signatory State of UNCLOS 1982.
The economy of Mozambique is based on agriculture (predominantly, yet carried out at the family level), while the industry is its dynamizing factor. The existing industry is yet predominantly light, mainly processing foodstuff, manufacturing textile and cloths, producing cement. Yet petroleum refinery, metallurgy and timber manufacturing, are, inter alia, other branches of the Mozambican industry.

Mozambique possesses a number of economic potentialities: she has, for example, fish and crustacea in her territorial sea and exclusive economic zone, in her subsoil mineral resources such as natural gas in Pande, coal in Tete, semi-precious stones in zambezia. The country has favorable land for agriculture and forest industry in various places. Some rivers are found there, the Zambeze being the major one and where the important hydroelectric dam of Cahora Bassa is found. Furthermore the country has a privileged geographical location, i.e. it is a coastal country with immediate access to the sea.

The main export products are prawn, cashew nuts, tea, cotton, and sugar. These commodities together with the railway-port traffic have been providing important

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45 - Article 6 of the Constitution reads (as translated): "The People's Republic of Mozambique, taking the agriculture as basis and the industry as dynamizing and decisive factor, directs its economic policy towards the clearance of the underdevelopment and the creation of conditions for rising the standard of living of working people..."
amounts of foreign currency, but not yet enough to cover the country’s deficient balance of payment.

From the independence time up to 1981 some economic growth has been recorded, though the insufficiency of expertise, infrastructure and equipment. From 1982 up to 1987 the country’s economy has declined. The main reasons of such decline were the natural disasters characterized by prolonged droughts alternated with floods, sometimes with tropical depressions. Another and most prejudicing factor is the insecure situation caused by destabilizing action from abroad, mainly through armed bandits. To sum up, the South African regime has boycotted the use of the Port of Maputo which is economically a preferential passage for that country’s exports and imports which in turn has in the past contributed to reducing the deficit in the economic balance of payments.

2.2 EFFORTS AIMING AT ECONOMIC DEVELOPMENT IN MOZAMBIQUE

Mozambique strives to overcome her acute economic problems. In 1987, the main strategy was defined in the Programa de Rabilitacao Economica (PRE), i.e. The Program of Economic Rehabilitation, elaborated by the Government. Reporting on such program, Prime Minister Mario Machungo said in his intervention during the second session of the second legislature of the People’s Assembly, which is the highest organ of the the State power:

"...The Program of Economic Rehabilitation, which aims at promoting and restoring in four years, up to 1990, the economic activity with a
12% increase of internal products, establishes a global economic policy encompassing a set of sectorial policies and measures aiming at the increase of the agricultural and industrial production, respectively for assuring the internal consumption and to support the agricultural commercialization, stimulating the exports and replacing the imports. (...) The PRE aims at rehabilitating the economic infrastructures, giving priority to the commercial network, in order to re-activate those sectors which are directly productive, as well as at restoring the railway and port traffic and mobilizing new external resources and affecting them to priority sectors.

One of the measures being taken within the scope of the PRE is the institutional reform, by which companies (state-owned) can have autonomy of decision, and joint companies with foreign share holders who ensure the introduction of new techniques of production and management.

In 1984 the Law of Foreign Investments (Law 4/84 of 14 August) was passed. It guarantees, inter alia, security and legal protection of properties and rights of investors (Article 15); it assures the transfer of the exportable capital, amortisation of loans run into by

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7 - Op cit., page 4.
foreign investors, as well as respective interest (Article 17 -1(a, b, c)). Some of the incentives provided in such Law are: the exemption of customs dues relating to properties imported either temporarily or definitively, as well as of dues relating to the import of raw materials or subsidiary materials for production (Article 19 (a,b)). This Law may attract investors in shipping or related areas such as brokerage.

As far as the country's economy and its perspectives of development is concerned, one can easily conclude that the transport system in general and the maritime transport (governed by appropriate legislation) in particular has an important role to play, being preferable for its low costs.

2.3 - THE ROLE OF MOZAMBIQUE IN THE SADCC REGION

The People's Republic of Mozambique is one of the nine member States of the Southern Africa Development Co-ordination Conference (SADCC), other states being of Angola, Botswana Lesoto, Malawi, Swaziland, Tanzania, Zambia and Zimbabwe. The aims of this organization are (in short) to seek co-ordination of efforts with a view to accelerating the regional development as well as the development of every member country and towards reduction of economic dependence from South Africa.

Mozambique geographically has a privileged location. Her main ports and railway network can facilitate the exports and imports from and to her neighbouring countries, thus being a preferential passage. Such fact places the
country in a position of playing an important role in the ambit of the SADCC. As a matter of fact the port of Maputo is linked to South Africa, Swaziland and Zimbabwe (in the southern part) through the Ressano Garcia, Goba and Limpopo railway lines, forming the the southern port-railway system; the port of Beira is linked to Zimbabwe and Malawi through two railway lines, which together with a pipeline running from Beira (in Mozambique) to Mutare (in Zimbabwe) and also a railway line to Malawi, forming the center port-railway system nowadays known as "Beira Corridor"; and finally the port of Nacala linked to Malawi through the Nacala railway line, forming the northern port-railway system. The chairmanship of the Southern Africa Transport and Communications Committee (SATCC), within the the SADCC structure, is committed to Mozambique. The Mozambican State (through the Ministry of Transport and Communications) is in charge of co-ordinating the activities covered by the scope of the SATCC.

Among a number of developmental projects, which are being studied, implemented or under consideration in the ambit of the SADCC in general and of the STCC in particular there is "The Regional Cooperation in Shipping". In such project the establishment of a SADCC group of experts in shipping has been suggested. They would, as recommended, form a shipping commission and a shipping

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8 - See Annex II - SADCC Region map.

investigation unit at a regional level. Both the commission and the unit would have connections with national shipping committees and shipping investigation units.

When considering shipping development, the development of the respective legislation is to be considered as well, for the sake of the whole economic development both/either in the ambit of the region and/or in the context of individual member countries.

2.4 - MOZAMBIQUE’S MARITIME ADMINISTRATION

Maritime administration in Mozambique is centrally carried out at the Ministry of Transport and Communications (MTC), which is a central organ for the state policy implementation regarding the whole set of affairs that its name suggests. The MTC is headed (as it is obvious) by a Minister, who in maritime matters is specially assisted by one of the two Vice-Ministers of Transports and Communication.

Within the structure of the MTC there is a National Directorate of Merchant Marine (Direcção Nacional da Marinha/DNM). The head of this organ, the National Director of Merchant Marine, accounts to the Minister of Transports and Communications (10) for the

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10 - The National Director of Merchant Marine accounts also to the Vice-Minister who normally has delegated competences for matters regarding maritime activities.
activities carried out in the scope of his directorate area. The National Directorate of Merchant Marine is an organ of the state machinery, party of the Ministry of the MTC which directs, plans co-ordinates and controls the maritime, fluvial and lacustrian transport activities, as well as other merchant marine activities. It is directly through the DNM that the Mozambican State exercises the sovereignty and jurisdiction in the internal waters, maritime public domain (from the law water line or from the base line up to 100 meters ashore), territorial sea and exclusive economic zone. Attributions of the DNM, which is a result of a recent unification of the former National Directorates of Maritime Safety and Administration (NTMF), and of Maritime and Fluvial Transport (DNTMF) comprises, inter alia:

- Promotion of safety of navigation and safety of life at sea;
- Promotion of marine environment protection and control of application of norms for prevention, detection and combat of maritime pollution;
- Establishment of normative principles on commercial strategies of maritime transport, as well as freight rates;
- Assuring the representation of the People’s Republic of Mozambique in the international maritime organisations;
- Assuring the tutorship of subordinate institutions;
- Looking after the divulgence and fullfilment of the maritime legislation applicable to the country.

Among the various attributions of the National Director,
there are two related to the subject into discussion deserve regard in this thesis. Such are (a) to submit proposals of legislation regarding the maritime commerce, safety of navigation and the protection of the marine environment and maritime administration, and (b) to prepare the elaboration of the specific national legislation for the merchant marine sector.

The organisational structure of the National National Directorate of Merchant Marine comprises departments, sectors or services which deal with maritime safety, shipping, inspections, administration, finances, planning, marine personnel and others. National Institute of Hydrographic and the Nautical School (for training of merchant marine officers) are considered subordinate institutions to the MTC. DNM has (local) branches named maritime administrations, headed by maritime administrators, and covering different jurisdictional areas in the ambit of competence of that National Directorate of Merchant Marine.

An Ad-hoc Maritime Tribunal used to function at the ex-DINASMAR, as a special tribunal, with participation of a judge and a public prosecutor designated by the Judge President of the City or Provincial Court (a common court). This tribunal deals with cases of violation of the territorial waters, illegal fishery and unlawful acts prejudicing the marine environment and navigation. This is likely to continue because of the

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²¹ See diagram of DNM organisation structure in Annex III.
some of the DNM Competences, as aforementioned. Questions rising from commercial maritime business are settled by common courts and, if parties involved are state-owned enterprises, the settlement is done at ministerial level, according to a provision of the Law 2/81 on state enterprises, and such will remain until such time as an arbitration body for state enterprises will be created.

The Mininister’s Office (Gabinete do Ministro, which assists the Minister and the Vice-Ministers, integrates a legal advisory body. Among the legal advisors, two lawyers (the author being one of them) deal specially with maritime legal matters. The main functions of the legal advisors are:

- to assist the Minister, Vice-Ministers and National Director of the Merchant Marine in legal matters;

- to perform the wording of or give proper form to proposals and counter proposals of agreements;

- drafting ministerial diplomas and dispatches, proposals of decrees for submission to the Council of Ministers;

- to assist as well the shipping companies, which are tutored by the MTC, have no legal advisors on their own.

As part of the organisation of the MTC, there are consultative organs from which the Minister gets support in his decision making and co-ordinating actions which cover
inter alia regarding the maritime field. Such organs are
the MTC Co-ordinating Council (Conselho Coordenador do
MTC) the MTC Consultative Board (Conselho Consultivo
and the General Board of Merchant Marine (Conselho
Geral da Marinha Mercante).

2.5 - THE SHIPPING INDUSTRY IN MOZAMBIQUE

The shipping industry in Mozambique has its historical
background roughly backing to the XVIII century, when
mercantile navigation was carried out by foreign ships for
carrying slaves to Brazil, Cuba, and French islands in the
Indian Ocean. Mercantile navigation was then still
involved in transporting gold from Manica mines in
Changamira lands and ivory from Zambezia, Niassa and
Maputo, pears from Sofala and Inhambane, mainly to Portu­
gal and India. In exchange, clothes, guns and strings of
fine beads (missangas) were carried by sea into the
lands which today form Mozambique.12 By 1914,
(after the Berlin Conference, where Mozambique and other
African territories were allocated to Portugal) news on
the existence of gold in Manica was spread out, tens of
pounds were then invested for establishing steamship
lines.13 The demand for commodities was there,
which caused a demand for ships. Though the idea of
establishing a shipping industry in Mozambique was then
very remote, those shipping activities along the
country's coast can be taken as the preludium of the

12 - "Historia de Mocambique - Vol. 2: Agressao Impe-
13 - Op. cit - p. 54
shipping industry in Mozambique.

Three private shipping companies have later been established with foreign capital and fully operated in Mozambique. Their names ironically suggested to be of Mozambique while their main head offices were abroad. Such companies were Companhia Mocambicana de Navegação, Parceria Marítima do Xai-xai, Empresa do Limpopo A. Couto, Ltd. Within roughly a period of one year following the country's independence the owners of those companies abandoned running them in Mozambique. Such attitude constituted a threat to the paralization of Mozambican coastal trade. In face of this the Government reacted by intervening, under the Decree-Law 16/75, passed by the Transitional Government, and set the companies under the control of a liquidation commission designated by the Minister of Transport and Communications. A similar treatment has been given to some shipping agencies, namely Michel Cotts, Navetur and Navemar which were similarly abandoned.

Following the liquidation of the abandoned companies, new companies started to emerge. In the field of agency activities the Agencia Nacional de Frete e Navegação, Empresa Estatal (ANFRENA E.E.) appeared, and formally created in 1977 with part of its capital comprising some amount of money provided by the State and an other parts made of properties from the liquidation process of the three afore mentioned shipping agencies. ANFRENA is a state-owned shipping and forwarding agency enterprise. It represents a number of foreign shipping companies the ships of which call at Mozambican ports, as well the owners of cargo transiting through
Mozambique to and from foreign hinterland. There are other agency companies: one is the Empresa Mocambicana de Cargas, Empresa Estatal (MOCARGO, E.E.) i.e. Mozambican Enterprise of Cargo, a state enterprise - created in 1984 for procuring export and import cargo, under the tutorship of the Ministry of Commerce; others are Manica Freight Services and AMI Mocambique which are private.

As the result of the liquidation of the already mentioned shipping companies an Empresa Mocambicana de Navegacao, Empresa Estatal (NAVIQUE, E.E. em formacao), i.e. the Mozambican Shipping Enterprise, a state enterprise "under formation", has been established on an experimental or provisory basis. Such provisory situation is the reason for the words "under formation", and that was one of the ways of assuring the continuation of shipping activities while feasibility of the enterprise was being assessed and some practical knowledge being acquired by new managers designated by the MTC. The position of enterprise "em formacao" - i.e. under formation - was nevertheless a hampering situation for the development of a national shipping industry, specially with respect to the legal personality for full recognition of the company by third parties. Recognising the hampering situation in which such company under formation was, the Government formally created the NAVIQUE, E.E. on 18 May 1984, as a State shipping enterprise.

NAVIQUE, E.E. is a cabotage enterprise performing liner services for carrying cargo and passengers, mostly along the Mozabican coast. Irregularly NAVIQUE ships call at ports of Durban, Dar-es-Salam and Mombasa, respectively in South Africa, Tanzania and Kenya, in
feeder services. This company possesses its own fleet of nine ships and it operates with chartered vessels as well. In some time charter party contracts there are clauses of purchase option and permission by shipowners so as to give the new Mozambican merchant marine officers the possibility of practical training on board chartered vessels.

In 1987 NAVIQUE's fleet of eight vessels carried 58.1% of the total cargo carried by the company that year, whilst the remaining 41.9% was carried by chartered vessels the tonnage of which summed up to 8,000 tons DW and 11732 GRT, with an average age of 17.3 years.

There is another shipping company which de jure came into existence in the same date as NAVIQUE, E.E. This is the Empresa de Navegacao Internacional, Empresa estatal (NAVINTER, E.E.), i.e. Enterprise of International Shipping, state enterprise. This company was established as to operate in ocean going trade. It started operating two years after its creation with chartered vessels, as so far it has no vessels of its own. Its existence de facto was marked in that way. The company trades in regular services linking the port of Maputo to two ports of United State of America, and in tramp services to other countries. In some cases NAVINTER and MOCARGO co-operate with respect to the carriage of export and import cargo. Freights are negotiated according to the rates prevailing in the international market.

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*14 - See Anex IV: NAVIQUE's fleet tonnage - Table 1, and performance - Table 2.
Mozambique is not yet a member of the Code of Conduct and none of her shipping companies is not yet member of any conference lines. Some bilateral agreements on cargo sharing have been signed by the Government, through the Ministry of Transport and Communication, e.g. with Belgium - on the 40:40:20 basis and with the Democratic Republic of Germany - on the 50:50 basis.

Short distance services, in what is called small cabotage and local traffic, are performed by small vessels, ferries and barges, both for carrying passengers and cargo along the coast, in lakes and lagoons.

Commercial ports, which though in Mozambique are treated as part of the port-railway systems and centrally directed by the National Directorate of Ports and Railways, deserve a special remark in the ambit of the Mozabican shipping industry. As a matter of fact their importance is such that one cannot properly consider the commercial maritime activities without mentioning ports. Three main (or international) ports, Maputo, Beira and Nacala are found along the coast. These ports together with railway lines connected to them serve the foreign hinterland formed by the neighboring landlocked countries and South Africa, beyond the services they render to the domestic needs. The ports of Inhambane and Quelimane connected to secondary railway lines and other secondary ports, Pemba, Macuse, and Chinde serve, though to a limited extent, the national hinterland. They participate in the movement of commodities from places where they are produced to the places of consumption, industrial transformation, commercialization, or exportation and in passenger traffic. National cabotage benefits from low
Port dues which are fixed by the State. Freight rates for both types of cabotage are similarly fixed by the State.

Marine Insurance is nationally carried out by Empresa Mocambicana de Seguros (EMOSE) a state-owned enterprise under the Ministry of Finance. Within the organization of this company there is a department for maritime insurance. Though the marine insurance service that EMOSE provides, most vessels involved in shipping are not insured.

As far as shipyards are concerned, Mozambique counts presently with two ship repairing companies under the control of the Ministry of Industry and Energy, viz the Empresa de Reparacoes Navais de Maputo the Epresa de reparacoes Navais da Beira. Under the Ministry of Transport and Communications there is the maintenance dry-dock of Maputo, the Epresa de Manutencao Naval in Maputo. There is a floating dock which mainly serves vessels involved in fisheries, probably under the tutorship of the Secretary of State of Fishery. Yet under the MTC there is a maintenance unit for small marine craft involved in local traffic located in Zabezia, being the latter Centro de Manutencao Naval (CEMANA).

From this chapter it can be seen that efforts are being carried out towards development of shipping in Mozambique. This is one more piece of evidence of the need for an updated related legislation.
CHAPTER 3

LEGISLATION IN MOZAMBIQUE

3.1 - BACK GROUND AND GENERAL PRESENT STATE

Some literature about Mozambique history\textsuperscript{15}, leads to conclude that the existence of positive law in Mozambique can be taken as far back as to 1890s, when Portuguese colonial authorities were undertaking the "effective occupation". It seems that positive penal and labor laws have been the first to be introduced. A number of legal instruments (laws, decree-laws, decrees, etc.) related to various branches of law, which have been passed in Portugal, have since then been made applicable to Mozambique, similarly to what happened in other Portuguese colonies. Gradual replacement of part of the natural law practiced among natives has in such way taken place. Earlier in the 1970s, probably in 1972, Mozambique was changed from the status of "Oversea Portuguese Province" to "Oversea" Portuguese State". Consequently some increases in legislative competence have been given to the local, colonial authorities, the top of which was the Legislative Assembly. Thus Legislative Regulations (Diplomas Legislativos) with force of law, regulating some aspects of the economic and social

\textsuperscript{15} "Historia de Mozambique - Vol. 2: Agression Imperialista (1888/1930)".
life of Mozambique could be locally passed. Anyhow most of the legislation passed before the independence (with the exception of that one passed by the Transitional Government\textsuperscript{16}) was conceived to mainly serve the colonial interests. Though the recognition of that fact, such legislation could not be rejected totally when the country ascended to independence. A chaos would have result from the vacuum that could have been created if such rejection had occurred without immediate replacement, which was not possible. Thus, as it has been already mentioned in the introduction, a great deal of colonial legislation has been inherited and adapted as Mozambican law. The Article 79 of the Constitution through which such inheritance has occurred, is translated as follows: "Former legislation which is contrary to the Constitution is automatically revoked. Former legislation which is not contrary to the Constitution shall be maintained in force until such time it is altered or revoked."

As to make the adaptation complete or, in other words, to bring the accession of the legislation into full effectiveness, the Minister of Justice has ordered, through a proper legal instrument within his competences, that words, such as "Portugal" and "Portuguese" should read as "Mozambique" and "Mozambican".

\textsuperscript{16} - The Transitional Government has been appointed under the Lusaka Agreement, signed on 7 September 1974 by FRELIMO and the Portuguese Government has ruled the Country from 20 September 1974 up to 24 June 1975.
The existing legislation in the People’s Republic of Mozambique comprises, thus, a great deal of of the former colonial legislation (including some international conventions to which Portugal was party, made applicable to Mozambique) as well as that one consequent to the independence. Some of the latter has gradually been replacing the former, but a lot has yet to be done. A small-sector of the legislation prior to the independence deserves a particular remark. Such is, as parenthetically aforementioned, the legislation passed by the Transitional Government (20 September 1974 to 24 June 1975) in which FRELIMO (Mozambique Liberation Front) held the majority. This legislation aimed mainly at securing the harmony of social and economic life of the country during the transitional period. An important part of such legislation is still valid. The already mentioned Decree-Law 16/75 is an example of such legislation.

As to end this section it can be said that the Mozambican legislation in its present state is under a process of transformation towards the development, along with the developmental efforts that are being carried out in various sectors of the country’s life.

3.2 HIERARCHY OF LAWS AND LEGISLATIVE COMPETENCE OF DIFFERENT STATE ORGANS

The hierarchy of laws (laws being taken as different types of legal instruments) may not have much particularities in terms of hierarchical structure per se. Some degree of particularity may exist with regard to the terminology used as to refer to the names or types of such
instruments and the degree of their legal force.

Correspondence with the terminology used in the English system may not be found in this study, due to differences both in legal systems and languages. Nonetheless, an idea of correspondence through as reference to the names or types of legal instruments presented in decreasing order of their hierarchy, in parallel with the State organs competent for passing them, as follows:

(i) Constitution$^{17}$ - People's Assembly (Assembleia Popular);

(ii) Law (Lei) - People's Assembly or Standing Commission of the People's Assembly (Comissão Permanente da Assembleia Popular);

(iii) Presidential Decree - President of Republic (Decreto Presidencial) (Presidente da República);

(iv) Decree (Decreto) and former Decree-Law - Council of Ministers (Decreto-Lei) (Conselho de Ministros);

(v) Ministerial Regulation (Diploma Ministerial) - Ministry or Ministries (Portaria) jointly.

$^{18}$ - See footnote 1 (page 1)
Legislative regulations passed in a period prior to the independence may (to the author's mind) at least be classed in the item (iv) of the hierarchy, in reason of the subject matters regulated through them. This may be a discussible issue, for the fact that any organ of the colonial local power was hierachycally inferior to the then Portuguese Council of the State (equivalent to the Council of Ministers) and even probably to the Ministry of Overseas. On the other hand the nature of matters regulated in such legislative regulations, in part because of their social impact, deserve being treated at the level of the People's Assembly. As an example, the Legislative Regulation 1595 of 23 April 1956, on labor relations, the updated content of which became part of the new Labor Law (Law 8/85 of 14 December), was passed by the People's Assembly. Dispatches of Ministers, which sometimes are normative instruments can, as such, be classed in what could be (vi) in the afore presented hierarchy.

The hierarchy of laws follows the hierarchy of state organs, in line with Chapter II of the Constitution which provides on State Central Organs (''Orgãos Centrais do Estado'') being governed by a principle according to which lower organs are subordinated to higher organs, within the spirit of unity of power. Differently from what happens in many countries, in the People's Republic of Mozambique there is no division of powers into legislative, executive and judicial. The already mentioned hierarchy of state organs gives an idea of such subordination. Activities of courts are so far looked after by the Minister of Justice, which nevertheless does not hinder the judge from obedience to the law and only to the law.
3.3- SYSTEM OF ENACTMENT OF LAWS

Enactment of laws in Mozambique is (as normally happens in other countries) a corollary of a process which comprises a number of stages. The duration of that process is mainly determined by the degree of the complexity of the subject matter regulated and the way how organisms and people involved relate among themselves.

One of the first steps of the legislative process is the drafting of a bill. This may be done by a person or group of people who have received an order and necessary instructions from a competent entity regarding the matter to be regulated, the objective, and addressees of the law.

As far as the initiation of a law (*strictus sensus*, as classed in the item (ii) of the hierarchy presented in the preceding sub-chapter, a translation of Article 45 of the Constitution is presented as follows:

"Initiative of laws belongs:

a) to the Central Committee of FRELIMO,*¹⁸ which determines the principles of legislation;

b) to the Standing Commission of the People's Assembly;

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*¹⁸ - "FRELIMO" was the name of the Mozambique liberation movement, but after the Country's independence it has been adopted as the name of the ruling party.
c) to the Council of Ministers;

d) to the Commissions of the People's Assembly.

A decree may be initiated as a consequence of a determination provided in a law. For example, the Law 8/85 (Labor Law) provides in its Article 1 (5) that "legal labour relations of State civil servants shall be settled by specific statute." As a consequence, a General Statute of State Civil Servants has been passed by the Council of Ministers in 1987. A decree may result as well from a suggestion or proposal made by one or more members of the Council of the Ministers. That may occur when there is a need, noticed by one or more Ministeries or even Secretaries of State with regard to a matter or a set of interrelated matters concerning their field of activities.

A decree may provide that a Ministerial Regulation shall be issued by a Ministry or Ministries, jointly, to regulate certain matters. For example, the Law 2/81 on state enterprises contain a provision which determines that internal regulations of such enterprise shall be after their creation, by the respective central state organ of tutorship.

The Presidencial Decree no. 69/83 of 29 December defines the objectives and competences of the Ministry of Justice. As provided in the Article 1 of such Decree, one of the competences of the Ministry of Justice is to promote "legislative initiatives for the elaboration of a new law. Furthermore, one of the objectives to be proceeded by that Ministry is to elaborate and ameliorate
the legislation to be constituted in the national law, taking root from the cultural and political life of our People..." - Article 2(b). For materialising such objective in the domain of legislation, the Ministry of Justice "a) directs methodologically the process of legislation elaboration, aiming at amelioration of its technical level and of the established legal order;

b) elaborates laws which are necessary to the main sectors of socio economic-life and performs the systematic gathering of experience acquired through participation of people's masses in the administration and application of justice" - Article 3(4).

The Ministry of Justice has got in its organisational structure a Department of Legislation Research Development, which has been promoting a number of the workshops devoted to various legal matters. One of workshops (where Professor John Wilson and Professor Charles Debattista have lectured) was devoted to the theme "International Commerce and Maritime Law", in May 1985.

The drafting of a legislation bill may be assigned to one or more persons and one or more lawyers are normally involved. But those people may not be acquainted enough with the subject matter so as to cope with all particularities related to the matter aimed at. Then other people within the organization or/and of other organisms or institutions are called up to collaborate. Sometimes special meetings are promoted as to enable the collection of information with a view to elaborating a first draft.
Discussion of drafts or bills are normally carried out at various levels, such as special commissions of the People's Assembly, Council of Ministers, Party committees or other political structures, social and professional organizations, ministerial boards, etc. Subsequent new drafts may result from such discussions before the final bill is produced.

Accession or ratification of international conventions is preceded roughly by a similar procedure to the one followed for the enactment of the domestic legislation. The 1978 International Convention on Standards of Training and Certification and Watchkeeping for Seafarers (STCW/78), as an example, has in its main lines followed the steps below:

An order has been given to the legal advisors working for the then Ministry of Ports, Railways and Merchant Marine (Ministerio dos Portos, Caminhos de Ferro e Marinha Mercante or MPCMVM) (now MTC) to study the STCW/78 Convention with view to accession to it. There has been a need for consulting some officials tied to some ministerial organs or subordinate institutions to MTC, such as the then DINASMAR and Nautical School. The purpose was to check the level and syllabi of education and training of merchant marine officers and the degree of suitability of the legislation which was then in force, compared to the STCW/78 Convention. From the discussions held it has been concluded that existing legislation should be revised as to bring it into harmony with the Convention. Another finding was the fact that due to the character of the Convention, beyond the need for securing the safety of navigation, acceding to the STCW Convention would put Mozambique in a position of
exercising the port state control. It was also born in mind that Mozambican ships calling at other state ports might be subject to the principle of "no more favorable treatment".

A seminar has been convened to discuss the matter with participation of representatives of various institutions somehow related with the matter. Some of the participants were from the Ministries of Education and of Foreign Affairs and Secretaries of State of Fisheries and of Labor. A consensus in the sense acceding to the convention has been achieved, but there was yet a way to go. A document which included a summary of the Convention content and brief considerations on its contents have been prepared by the MFCFMN maritime legal advisers, as to accompany, together with a favorable opinion of the Ministry of Foreign Affairs, a formal proposal made by the Minister of Ports, Railways and Merchant Marine. Those papers have been sent to the Office of Presidency of the Republic Presidencia da Republica. A session where the accession of STCW/78 Convention has been convened and such accession finally ratified by the Council of Ministers. After the necessary publication of the decision, instruments of accession have been duly deposited with the IMO Secretary General.

A law or a decree, after being approved by the competent organ is ordered to be published by the President of the Republic. Ministerial Regulations, after being signed by the Minister, are sent to the Presidency of Republic where some lawyers verify certain aspects, such as the wording and legality, and afterwards they are sent to the Imprensa Nacional (National Press), for publication through the Boletin da Republica (BR), the official
publication of the People’s Republic of Mozambique.

Some Conventions, mainly those which are self-sustaining, are published together with their translation into Portuguese, the country’s official language. It seems that nonself sustaining treaties are not published in their original text, since their content is generally reflected in the domestic legislation. There have been indications that the seven Portuguese speaking States (Mozambique, Angola, Brasil, Cape Vert, Guinea-Bissau, Portugal, and Sao Tome & Principe have been cooperating in adopting the same text of conventions in the Portuguese language. As a matter of fact, in 1974 there was a meeting in Maputo (Mozambique) where the translation of the 1982 UN Law of the Sea Convention was discussed and probably agreed upon.

By presenting the Mozambican legislation, its hierarchical aspects and enactment system, a rough picture of the legal building or legislation universe has been given, where the country’s commercial maritime legislation is inserted as a specific set. Thus a necessary ground has been built up for a better discussion of the core part of the thesis.
CHAPTER 4

THE STATUS QUO AND ANALYSIS OF THE MOZAMBICAN COMMERCIAL MARITIME LEGISLATION

4.1 - AN OVERVIEW OF THE EXISTING DOMESTIC COMMERCIAL MARITIME LEGISLATION AND GENERAL CRITICAL CONSIDERATIONS ON ITS STRUCTURE AND CONTENTS

Existing Mozambican commercial maritime legislation, as already mentioned in the thesis introduction, has been inherited from Portuguese colonial authorities, like most of the legislation in force in the country. It is Mozambican legislation by adaptation, this being a consequence of the already mentioned constitutional provision of the article 79. For a better implementation of such provision, an order has been passed by the Ministry of Justice on necessary changes to make the laws suitable to the nation’s name - Sub-chapter 3.1.

The commercial maritime legislation in force in Mozambique is basically found in Book III - Maritime Commerce, of the Mozambican (ex-Portuguese) Commercial Code, Hereinafter referred to as Commercial Code or simply as Code. The Code was promulgated on 28 June 1988 and made applicable to Mozambique on 20 February 1894. The contents of Book III is complemented or supplemented or in some cases updated; by some loose domestic legal
intruments. International conventions to which Portugal was party and as such made extensive to Mozambique for application can be taken as constituting also a complementary and updating instrument of the domestic legislation on maritime commerce.

Book III of the Commercial Code has its articles distributed into eight titles, and it can be outlined as follows:

(i) General provisions on ships - their legal nature, nationality, building, repair, ownership and seizure (title I, chapter I, articles 485 - 491);

(ii) Shipowner - his civil liability, his relationship with the captain (or master), partnership and respective legal regime (title I, chapter II, articles 492 - 495);

(iii) Captain (or master) - his functions, liabilities, responsibility, rights and, competences, and books to be carried on board under the master's responsibility (title I, chapter III, articles 496 - 515);

(iv) Crew (title I, chapter IV, articles 516 - 537 - completely revised by the Decrees-Laws 45969 and 45969);

(v) Bill of lading - its content and functions (title I, chapter V, articles 539 - 540);

(vi) Affreightment (or chartering) - charterparty,
modalities of affreightment, rights and obligations of contracting parties, delivery of goods and liens over goods;

(vii) Passengers - transportation regime, rights and obligations of contracting parties (title I, chapter VII, articles 563 - 573);

(viii) Liens - their ranking, subsistency, apportionment, endorsement and extinction over ships, cargo and freight (title I, chapter VIII, Section I, articles 574 - 583;

(ix) Maritime Hypopotec (or Mortgages - their constitution, regulation, extinction and registration, concourse of credits and ship's loss or unseaworthiness (title I, chapter VIII, section II, articles 584 - 594);

(x) Insurance against sea risks (or marine insurance) - application of the general rules on insurance provided in Book II of the Commercial Code, maritime insurance policy, duration and limitation, uninsurable values and things, insurer's liabilities and obligations (title II, articles 595 - 615);

(xi) Abandonment - abandonment of insured objects, notification, extension, effects and inefficiency of abandonment, right of regress (or right of falling back on another as primarily liable) in case of seizure of the ship (title III, articles 616 - 625);
(xii) Contract of (maritime) risk - its form, transmissibility and object, amount of loan, exoneration of the risk taker, contribution for averages, concourse of loans (title IV, articles 626 - 633);

(xiii) Averages - their concept and varieties, apportionment, contribution and adjustment (title V, articles 634 - 653);

(xiv) Forced harborages - their causes, formalities, charges, legitimacy, liability for damages, repair or sale of cargo and justified delay due to forced harborage (title VI, articles 654-663);

(xv) Collision - culpability and fortuity, ships loss and right of remedy, claims for losses and damages, applicable law and competence of court (Title VII, articles 554 - 675);

(xvi) Salvage and assistance - ships and wrecks appropriation, obligation of the salvor, surveillance of grounded ship, destiny of salvaged objects, remuneration and its governing law, and competent court for claims.

In construing Book III of the Commercial Code it is, in some cases, necessary to resort to other provisions of such Code (e.g. in partnership and insurance) and to the Civil Code (e.g. in settlement of hypothecs or mortgages).
The main domestic, loose legal instruments which are complementary, supplementary or updating to Book III of the Code into consideration are the following:

(a) The Navigation Act (Acto de Navegacao), of 8 July 1863, dealing with nationality of ships, probably made applicable to Mozambique at the same time as the Commercial Code;

(b) The Decrees-laws 42544 and 42545, both of 14 November 1959, dealing with commercial registration of ships and made applicable to Mozambique through Regulation 22139 of 29 July 1966;

(c) Decree-law 37052, of 9 September, dealing with nationality of shipping enterprises;

(d) Decree-law 37053, of 9 September, 1948, on inscription of shipping operators;

(e) Decree-law 39375, of 3 October, 1953, reserving to national fleet the traffic of passengers and goods between national ports.

(f) Decree 4/84, of 1 August, defining the legal regime of agency activities of ships and of cargo in international transit;

(g) Ministerial Regulation 40/84 settling matters regarding licencing of agency activities and complementary services referred to in the Decree 4/84.
(h) Dispatch of the Minister of Ports, Railways and Merchant Marine determining the requisites for exercising agency activities;

(i) Dispatch of the Minister of Ports, Railways and Merchant Marine and of Finances determining fiscal requisites for requesting concession of licencing of agency activities

The structural aspect of the legislation is part of its form. If the form carries defects it may negatively influence the understanding of its content. Thus, the author finds some relevancane in discussing the structure of the legislation in consideration.

The articles of Book III of the Commercial Code are chiefly distributed into eight titles. The first of these title (Title I - Of Ships) has the particularity of being divided into chapters, the last of which comprising two sections. The remaining seven titles comprises a reduced number of articles, without being organized neither into chapters nor into sections. The problem of the structure of this Book resides in the fact that a reader or the addressee of the law can not easily realise or imagine that the provisions, regulating, for example matters regarding ships (articles 485 -495) and those regarding bills of lading (articles 539 - 540) are provided upon under the same heading of the "Title I - Ships" ("Título I - Dos Navios"). A different case is that of "Title II - Insurance Against Sea Risks" ("Título II - Do Seguro Contra os Riscos do Mar"), where provisions on abandoned objects, instead of being ranged under this title, are found under "Title III - Abandonment" ("Título III - Do Abandono").
With regard to the general content covered by the Book III of the Commercial Code, the aspect subject to the authors' criticism is connected with the suitability of its heading - "Maritime Commerce" ("Do Comercio Maritimo. Provisions under this heading include matters of administrative nature, (e.g. nationality and registration of ships) and those pertaining the sphere of labour relations - crew). It appears that the inclusion in the Commercial Code of such provisions regarding matters of non commercial nature has been done to fill gaps left by the Navigation Act, the promulgation of which preceded the Commercial Code. Though the fact that this is not a particular case of the Mozambican legislation, it must be corrected in the framework of building up a new national maritime law.

The Commercial Code is outdatea, specially in its provisions aimed at the maritime commerce. Some of them prescribe old-fashioned practices, as it is the case of competences given to the ship master (to be considered later on). It leaves certain aspects of its field of application under-regulated or even unregulated, as it is the case of ownership, partnership, freight forwarding, ship chandling. It might be said that problems connected with this matters could be solved by resorting to other legal instruments such as the Civil Code, the Regulation of Partnerships or even the rest of the Commercial Code; but due to the *sui generis* character of the maritime commerce, such a recourse may not be satisfactory.

In respect to the carriage of goods by sea no reference of shipping documents, such as mates's receipt and seaway bill is made. With regard to carriage of passengers by sea nothing is provided on compensation or indemnity in
case of injuries, loss of life of a passenger and loss of, or damage to passenger’s luggage.

Marine insurance is not sufficiently covered. In this respect it must be borne in mind that the United Kingdom insurance market is so dominant that her policy has been adopted by many countries. With regard to this matter it seems opportune to quote what is said in the Polish Maritime Code:

"Provisions of the Maritime Code on the contracts of marine insurance indicate to a strong inspiration by the English law of marine insurance, particularly as regards the principle of the insurer's liability and the wide use of abandonment."[*17]

The chapter dealing with chartering (or affreightment) matters needs a thorough revision, for the fact that its few provisions are confusing. In considering this matter some doctrinal discussion may be held (not in this study), particularly with regard to the legal nature of the chartering contracts, whether they are contracts of carriage of goods by sea or contracts of hire of the ship or of her space. No express reference is made with regard to time, voyage and bare-boat charter parties or leasing.

The Code provides on a kind of contract which is seldom found in other maritime legislations. Such is the "Contract of Risk", as provided in title IV, also known as maritime exchange. Such kind of contract was common

[*17 - The Polish Maritime Code - Introduction: XVIII  
Marine Insurance, p. 63.
in the old days, when the concept of arrived ship was
dominant. This is similar to what is provided in the 1906
British Marine Insurance Act. The "Contract of Risk" is
some sort of loan contract run into by the master during
the voyage, as to proceed with the voyage when there is
no other means for continuation. According to article
627 of the Code, the contract of risk may only fall upon
all or part of the cargo or upon due freight, all togeth­
er or separately. The contract of risk as prescribed by
the Code appears unpracticable for the fact that the
"risk taker" (the person who runs into the loan) can be
totally or partially exonerated in case of loss due to a
fortuit case or force majeur (article 630). Though the
fact that the "donor" (the person who lends money) is
titled to a premium, by lending money, he runs into the
risk of not recovering his/her money. Thus it is unpro­
bable that one may accept providing such loans in such
risky conditions nowadays. The law, as it is, does not
offer attractive incentives to the donor.

Professor E. Gold referred in one of his papers*20
to changes that the traditional maritime law would under­
go in the 1980s. Such changes would, as he wrote, "not
only affect the operational responsibilities of ship­
masters, but shipping as a whole.". Professor Gold
based his foreseeing of changes in "the restucturing of
many aspects of the world's commercial interests as part
of the 'new international economic order', which is
moving at rapid pace through the United Nations and

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*20 - International Maritime Law in the 1980s in
"International Maritime Laws Basic
Principles" (ICODE Maritime Law Course at
WMU, June 8-12, 1987) - p. 10
many of its specialized agencies."

A century has gone and many changes have occurred since the time of enactment of the Commercial Code. Few changes particularly with regard to the maritime field have been introduced and the outdateness subsists. As a Portuguese Minister of Justice once mentioned in 1986 the Commercial Code, "should have been deposited in the archives of the History of Law".*

4.2 CRITICAL ANALYSIS OF SOME PROVISIONS OF BOOK III OF THE COMMERCIAL CODE

Discussion of some provisions of Book III of the Commercial Code is held in this section, from the point of view of practicability of its prescription. Modern patterns of the merchant shipping industries and of communication systems are as well taken into consideration so as to examine the timevalidity of the legislation into discussion, in connection with the countries' peculiarities and needs. Though not often expressly mentioned, related international conventions and other countries' legislation and legal doctrines are used as instruments of analysis.

Article 511 - Urgent necessities during the voyage
This article provides on means and procedures to which the master may resort, so as to solve "urgent neces-

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sities" during the voyage. Such are the needs of money for "repair works and purchase of victuals or other ship’s urgencies". The article prescribes that the master shall give notice to the ship operator (armador) or charterer and consignees as to entitle him to expenses for resolving such necessities. The article prescribes in addition that in the event that there is no time for waiting for the answer and providence of interested persons the master shall ask authorization from the president judge of the court of commerce or from the port judicial magistrate. Furthermore, in paragraph 1, which follows the main part of the article it is provided that in case such urgent necessities arise in a foreign country, the authorization will be asked from the Mozambican consular agent, and, if there is a lack of one, such authorization will be asked from that country’s judicial authority. Paragraph 2 provides on entering the log book with such occurrences as well as of obligation titles, and paragraph 3, on sending current account related to such expenses. Indication of justifying documents to the ship owners or ship operators is required as well. This provisions give strict means to interested persons so as to safely control the expenses and undertakings done by the master during the voyage. Thus, ship owners or ship operators are protected from possible excessive undertakings of the master.

Among interested persons, reference to consignees is made in the title into discussion, with regard to their authorization for expenses. From this it can be implied that the master is made accountant to the consignees for the expenses needed to solve urgent necessities during the voyage. This does not make sense since the master is a ship owner’s or ship operator’s employee and as such he
is only responsible either to one or to the other of these two persons and not to the consignees. The discussion is not held to exclude the master’s obligation of delivering the goods to the consignee as described in the bill of lading or in the sea way bill; but it appears that the master does not need any authorization from the consignees, unless the case where goods to be delivered are to be resorted to, as to cover such urgent necessities. If so, the provision needs reformulation in the sense of clarifying this aspect. It should then be borne in mind that the consignee may not necessarily be the ultimate owner of the cargo and so he may not be entitled to deciding on the goods delivered to him/her. The Greek Code of Private Maritime Law has a similar provision (Article 45 - "Imperative needs", but it excludes the consultation with or authorization of the consignees.

Article 513 - Sale of the ship

This article reads that:

"the master cannot sell the ship without special authorization of the owner, save the case unique of unseaworthiness".

Paragraph 1 (out of three paragraphs which follow the main part of the article) provides on the decreeing of the unseaworthiness by judicial authorities or by a consular agent in a foreign country (similarly to the provision of article 511, already discussed), for the consequent sale of the ship by the master. In other words the article allows the master to sell the ship in case of unseaworthiness since such unseaworthiness has been decreed by the judicial authorities or consular agent. This leaves the ship owner unprotected from prejudices resulting from deliberate decision of the master. The
shipowner may in this way be excluded from negotiating the price of the vessel even if such vessel can be considered as scrap. The fact that nowadays the market of second hand and scrap vessels may avail the shipowner with an important amount of money is to be taken into account, as to judge the validity of this article. The competence of decreeing on the unseaworthiness of ships appears to pertain rather to the maritime administration than to the a commercial court, as provided in paragraph 1 of the article.

Paragraph 2 of the same Article 515 provides on the incumbency of the master to look for the chartering of another ship in order to carry cargo to the destination. Paragraph 3 ceases this application, if the freight is greater than that which was due to the vessel, unless the people interested in the cargo agree on raising the freight. This does not seem to be a practical procedure in modern commercial shipping.

Article 538 — Content (and number) of bills of lading
Paragraph 2 of no. 7 of this article provides on the obligation of the master to hand over a number of bills of lading (originals or copies) (exemplaires) not less than four, each of which indicating the respective addressee, viz: the shipper, the consignee, the master himself, and the ship operator. In paragraph 3 of again no. 7 it is provided that each of the bills of lading must indicate to whom of other interested people such document is destined; and paragraph 4 reads: "The master shall sign all the bills of lading except those destined to him, which will be signed by the shipper. Thus, the article prescribes oldfashioned practices, particularly with regard to the addressee of the bills of
In connection with this, the use of the world *exemplares* does not enable the necessary distinction between originals and copies of such a shipping document, which may give rise to confusion and even to fraud.

**Article 542 - Modalities of affreightment**

This article refers, in its main part, to five modalities of affreightment (or chartering) contracts as follows:

1st - Round, for the whole ship;
2nd - For part of the ship;
3rd - For one or more voyages;
4th - Per load, harvest or deal, when the master receives from all who present themselves with goods that better appear to him to be loaded and carried to the port of destiny;
5th - For objects which are determined or designated only by their number or weight and value.

The chartering modalities above referred to are out of use even in Mozambique. The last two modalities are evident example of outdatedness; their equivalence may not be found in the present commercial practice. Chartering per load, per harvest, per deal, mentioned as the fourth modality, appears on the one hand as a partial chartering of space in a ship, and on the other hand as time chartering, where the ship is to be engaged during the entire time needed to complete the carriage of a deal or harvest. Thus, this modality is a chartering contract with a term which can be taken as a resolutive condition. It seems that through this article the legislator has
tried to offer a wide field of choice, but at the same time has created a certain impreciseness, particularly with regard to the last two modalities. In the new legislation it is advisable to adopt modern and common practices, where contracts are classed as: (a) time charter, (b) voyage charter and (c) bare-boat charter or leasing. Aspects related to particular quantity and type of goods to be carried should be left to be freely agreed upon by the parties.

Article 545 - Lay time
This article provides on the method of calculating the lay time when for loading and unloading such time is not stipulated in a charter party. For steam ships the article establishes a rate of 120 tons of weight per day and the half of this weight when a sailing ship is used, here the outdatedness is so clear that it does not need much discussion. In face of the context of this article it is enough to say that it does not apply to motor vessels which are commonly used nowadays. When parties fail to determine the lay time in the charter party problems regarding this point may sometimes be difficult to solve.

Article 563 - Regime of passenger transportation
This article, the first part of Chapter III, provides that lacking a "special convention", transportation of passengers shall be regulated by provisions of this chapter. The phrase "special convention" appears in this context to mean a special agreement between the ship owner or the ship operator and a particular passenger or a group of passengers, rather than to mean a treaty. Thus, the article opens a field for a contractual liberty and it seems to make bilatéral contracts prevalent to
the means of positive law. People who look for a ship as a means of transport are not permanently in the business of contracting ship transportation. In such a situation they can not develop the skill to be able to detect possible unfairness of proposals forwarded by the carriers. Thus, the article make the passengers unprotected.

Article 578 - Ranking of liens upon ships
According to this article debts that have privilege upon ships are ranked as follows:

1 - Judicial (or legal) costs and expenses done in the common interest of the creditors;
2 - Wages owed for assistance and salvage;
3 - Pilotage and towage expenses at the port entrance;
4 - Tonnage, light houses, anchorage and public health dues or any other port dues;
5 - Expenses for ship keeping and storage of ship's spare parts.
6 - Master's and crew member's wages
7 - Cost expenses of repair of ship and her tools and apparatus;
8 - Reimbursement of goods loaded that the master has had to sell;
9 - Insurance premium;
10 - Prices in debt, relating to the last acquisition of the ship;
11 - Expenses for the repair of the ship and her tools and apparatus in the last three years prior to the voyage, counting from the day of completion of repair;
12 - Debts deriving from the ship's building contract;
13 - Premium of the insurance made upon the ship, if
totally insured, or upon part of her and spare parts included in the number 9; 14 - Indemnity owed to shippers for lack of delivery of goods or damages caused to the goods;

Paragraph unique - The debts mentioned in numbers 1 to 9 are those which have been run into during the last voyage, and for such voyage."

As it can be seen, the list of preferred credits is almost three times greater than that found in neither of the two international conventions signed in Brussels (one of 10 April 1926 and another one of 27 May 1967) for unification of certain rules of law relating to liens and mortgages. Plurality of preferred credits, as set forth in the article into discussion, may prejudice the fair satisfaction of those credits belonging to those persons (including corporations) who frequently render services to ships. It seems that the legislator sought to contemplate most of the possible ship creditors, but not bearing in mind the importance of services rendered and the degree of their vulnerability. These factors, inter alia, should be taken as a criterion of ranking credits to be benefitted by liens upon the ship. In reformulating the provision into discussion it would be recommendable to adopt the ranking set forth in one of the international conventions on this matter, specially that one of 27 May 1976.

Article 617 - Abandonment due to lack of news the assured may according to this article, abandon the ship to the insurer, without being obliged to prove the loss of the ship. In this provision there is some sort
of presumption of total loss, the condition of which is based on lack of news during a certain lapse of time. Such lapse of time is counted from the day of the ship’s departure or from the day referred to by the last notices sent from the ship. In case the ship has taken a voyage to “Europe”, such lapse of time is six months and for "longer voyages" one year. This provision is obsolete in two aspects. The first aspect is the fact that the lapse of time after which the abandonment can be declared is determined on the basis of the communication system which existed at the time of enactment of the Code (1888); nowadays there is no need for waiting six months or one year so as to presume a ship's loss, as there is a means to get information on casualties which may cause a ship’s disappearance. The second aspect of obsolescence is related to the area within which the voyage is performed - “in Europe”. Even admitting the adaptation as to correspond to Mozambique’s geographical location, the replacement of the world "Europe” by "Africa" would not help much in making the provision effective. A ship may have its departure from the port of Maputo in Mozambique and perform a voyage around the Cape, to call at a port located somewhere in the Magreb and there get lost.

The outmodedness of legal order governing the maritime commerce in Mozambique has just been partially shown in this chapter. Though the fact that the author has endeavoured to thoroughly discuss some aspects, the intention was not to make an exhaustive analysis, but to give evidence that the legislation into discussion needs to be reformulated without delay.
4.3 CONSIDERATIONS REGARDING MOZAMBIQUE’S MEMBERSHIP OF INTERNATIONAL CONVENTIONS

A limited number of international conventions related to maritime commerce, to which Portugal was party during the colonial period, have been made extensive to Mozambique for application, viz:

(a) The International Convention for the Unification of Certain Rules of Law Respecting the Assistance and Salvage at Sea - Brussels, 23 September 1910, which is applied to Mozambique from 20 August 1914;

(b) The International Convention for the Unification of Certain Rules of Law with Respect to Collision Between Vessels - Brussels, 23 September 1910, applied to Mozambique from 20 August 1914;

(c) The International Convention for the Unification of Certain Rules of Law relating to the Bills of Lading - Brussels, 25 August 1924, applied to Mozambique from 19 August 1950;

(d) The International Convention for the Unification of Certain Rules of Law relating to the Arrest of Seagoing Vessels - Brussels, 10 May 1952, applied to Mozambique from 7 February 1958;

October 1957, applied to Mozambique from 22 February 1969;


As it can be seen from the list above, Mozambique is left behind with regard to the degree of her membership to international conventions applicable to maritime commerce. However, some of conventions relating to the field covered by this study, to which the colonial power was party, have not been extended to Mozambique for application.

The conventions to which by succession Mozambique is party contributed to amending in a way some defects of the domestic law. That is because most of those conventions, once acceeded to, are applied in settling domestic issues, as it is the case of the Brussels' Convention of 1924 on the limitation of the shipowner's liability regarding the carriage of goods by sea.

Some of the conventions needed to be supplemented or regulated by domestic regulations so that they could become fully applicable. Such is the case of the above mentioned Brussels Convention of 1924 with regard to the amount, in national currency, to which shipowners (or ship operators) may limit their liability. The domestic currency could not resist against the "natural" erosion along the years. Such erosion has been speeded up in
Mozambique by the currency devaluation, within the ambit of the Program of Economic Rehabilitation. In this connection shipowner’s liability is limited to 12,000.00MT* (equivalent to about 27.00 USD in January 1988) per package, is far from the minimum amount to protect the shipers. In connection with this matter it is opportune to mention that acceding to the Visby Rules will be helpful in the sense of up dating the legislation.

NAVINTER, E.E., the state-owned shipping company for international trade, enters transportation contracts with shippers agreeing in terms that are in line with the Hage-Visby Rules. As the 1924 Brussels’ convention allows shipowners to increase their liability, there is no problem with the legality of such contracts. The acceptance of the Visby protocol terms (which may contribute to attracting shippers) can be interpreted as meaning that there is a need for acceding to such protocol.

Mozambique may enter a possible regional (SADCC) shipping market of transportation of passengers. Such will require that the country become party to the international conventions for limitation of liability signed in Brussels on 29 April 1961 and of 27 May 1966, or the 1974 Athens Convention.

As mentioned in chapter III of this thesis, Mozambique has entered an agreement with Brussels for cargo sharing,

*22 - "MT" stands for "Metical", the national currency name, which was introduced on July 16, 1980
on the 40:40:20 Rule of the UCTAD Code of Conduct of Liner Shipping. *NAVINTER, E.E.* operating in the international shipping market is likely to become a member of a conference line. This fact leads to the conclusion that there is a need for Mozambique to accede to the Geneve Convention of 6 April 1979, also known as the UNCTAD Code of Conduct. Benefits may be harvested from this convention by developing states, of which Mozambique is one. As Professor E. Gold wrote: "it helps to build up their fleets."*23*

This analysis leads to the conclusion that less applicability of international conventions regarding maritime commerce places Mozambique in a situation of disadvantage. This is actually one of the aspects of outdatedness of the legislation discussed in this thesis.

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*23 - International Maritime Law in the 1980s in "International Maritime Laws Basic Principles" (ICODE Maritime Law Course at WMU, June 8-12, 1987) - p. 10*
CHAPTER 5
HOW TO REFORMULATE THE MOZAMBIAN COMMERCIAL MARITIME LEGISLATION

5.1 GENERAL CONSIDERATIONS

The outmodedness and defectiveness (both in structure and content) of the Mozambican commercial maritime legislation, as the author tried to evidence in the preceding chapter of this thesis, is a problem which cannot successfully be remedied through amendments; a new legislation is a better solution instead. A similar action has been taken in Mozambique for example with legislation regarding labour relations, which resulted in a new labour law (Law 8/85) and the General Statute of Civil Servants passed through a decree of the Council of Ministers.

The country's socio-economic development perspectives stimulated by the Program of Economic Rehabilitation (PRE), as referred to in chapter 2, section 2.1 is to be taken into account as one of the rationales for the development of a new commercial legislation. Furthermore, the fact that shipping, needs to be developed as well, so that it can be capable of playing the role assigned to it in the frame of the implementation of the
PRE, is to be also taken into account as the main and immediate exigence of enacting a suitable legislation.

The development of a new commercial maritime legislation is likely to cause to considering consequent or simultaneous changes in other sectors of the Mozambican maritime law. In this connection special regard is to be payed to what can be cataloged as administrative and safety maritime legislations. It follows that the reformulation of a new commercial maritime legal order must be looked at as part of a process of building up a new Mozambican maritime law as a whole. Bearing this in mind, it suggested to be firstly passed what can be considered as an umbrella-law, which can be named as a General Merchant Marine Law (Lei Geral da Marinha). Such a general law would be helpful in the sense of harmonizing and indicating the course and patterns to be followed by the Mozambican marine legislation in its most ample sense. The content of this General Merchant Marine Law would comprise provisions on basic principles, comprising inter alia:

a) The general statement policy, in the sense, e.g. of stimulating the national social and economic development and international co-operation;

b) Reference to UNCLOS 1982 (of which Mozambique is a signatory State) and IMO conventions as the foundation for development of the national maritime law in its diverse branches;

c) Considerations on the efforts undertaken at the international level towards the unification of certain rules of law relating to the maritime
underwriters. These associations could become members of the Comite Maritime International, which for years has internationally been playing an important role in developing the unification of certain rules of law relating to the maritime commerce. The existence of such associations would contribute a lot for the development of knowledge among Mozambicans about maritime commerce and of rules of law governing it. Furthermore it would enable to safely speed up the development of a pertinent legislation in Mozambique.

Ways and means must be looked at as two faces of the same coin. Thus, though the fact that they are separately studied in the following sections, consideration falling upon them may be found overlapped.

5.2 THE WAYS

In chapter one, section 1.2 the idea has been given with intention to clarify part of the thesis subtitle by using the world "ways": it means how to carry out the reformulation of the legislation here discussed, including the steps to be taken towards such purpose.

24 - Comite Maritime International is a private organisation where various national law associations are affiliate. Its membership covers shipowners, average adjusters, brokers, insurers, freight forwarders and maritime lawyers.
commerce and other pertinent international treaties;

d) A certain autonomy or independence of the maritime contract regime from the civil law due to the peculiarity character of the maritime adventure, including its international character;

e) The need of safeguarding interests of all parties involved (both occasionally and permanently) in the national and international trade relying on the transportation by sea, in connection with what has been referred to in item (a);

f) A general definition of a ship, for commercial purposes and conditions required for such a ship to be entitled to the Mozambican flag, including general principles of ship ownership, and foreign partnership,

g) The relevance of a ship’s seaworthiness and proper manning in maritime commerce.

h) Delegation of powers to the Government to enact detailed commercial maritime legislation, as well as legislation related to other branches of maritime law.

The Commercial Code was enacted through the Charter of Law (Carta de Lei) of 28 June 1888. The already mentioned General Merchant Marine Law would be in line with the doctrine according to which a law can only be changed or derogated by a legal instrument of at least the same hierarchical level. In fact the People’s Assembly, in its
highest capacity, has for example passed in 1978 the Law of Private Commerce (Lei do Comercio Privado).

The suggested umbrella law must neither go beyond the basic principles nor assume the form of code, because working up such a code would be a long and time consuming work which might delay the process of reformulation of the commercial maritime legislation, which is of urgent need.

As a term of comparison, for the reformulation of the commercial maritime law in Portugal in 1986, there has been a dispatch issued by the Ministry of Justice, through which he layed down brief guiding statements, but only concerning the branch of maritime commercial law, with specific reference to Book III of the Commercial Law.

The Portuguese example can be followed, but the importance of revising two other branches of maritime law closely related to the commercial maritime field must be born in mind: the administrative maritime law (for matters, such as ship registration and mortgage registration) and maritime safety (for matters such as ship’s seaworthiness, including proper manning).

The reformulation of the legislation discussed in this thesis will require serious discussion so as to be fairly accurate. In this connection it is suggested to create associations like a Mozambican Maritime Law Association aggregating lawyers and students of law interested in legal maritime matters, and a Mozambican Shipping Association aggregating shipowners, ship agents or shipbrokers, cargo brokers, ship chandlers and marine insurance
In general considerations made in the previous section 5.1, the recourse to amending instruments has been pushed away. It is neither viable to rebuild Book III of the Commercial Code in the way of maintaining it as part of such code, for this would be like mending a rag by using a new piece of cloth. Furthermore it must be born in mind that a number of countries have developed commercial maritime legislation separately from their commercial codes. One of the reasons is probably the awareness of the particular character of maritime transport.

The United Nations Economic and Social Commission for Asia and Pacific (ESCAP) has produced "Guide-lines for Maritime Legislation" (hereinafter referred to as "Guide-lines"). In such work all aspects concerning the marine field are contemplated in terms of legislation. The "Guide-lines" consider the advantages and disadvantages of two alternative ways - a code or separate acts.

In some countries, e.g. Liberia, Poland and Sweden, the commercial maritime legal provisions have been embodied in respective maritime or shipping codes. The advantages from a comprehensive maritime or shipping code is that it gathers in a single document the provisions regarding all or most of aspects related to the maritime or marine field, making them available for an easy consultation. According to the "Guide-lines" (page 4) such alternative "might, however, delay the passing of legislation, because the drafting of a code requires considerable time". To this opposing statement of the "Guide-lines" to a code, which points out disadvantage of resorting to such kind of instrument, another one can be added. This relates to the fact that nowadays shipping is recording
dynamic changes. Therefore it has been clamming for, and causing corresponding moves in the international maritime legal regime. In turn, the international maritime law has a considerable impact upon the domestic maritime legislation. Frequent amendments of the domestic maritime legislation embodied in a code turn the law into an actual patchwork quilt, with the inconvenience of a difficult reading arising thereto. Taking these disadvantageous factors into account and bearing in minde the urgency of action required to respond to the needs of the Mozambican nation, a better solution will definitely be to resort to separate acts.

Separate acts deserve a remark in terms of provisions included. If a separate act embraces all matters of a particular branch of the maritime law, such as commercial, administrative, safety, etc. - in such case it remains as a code. If the content of Book III of the Commercial Code is rebuilt as one separate legal instrument it still remains as a code.

The United Kingdom has for many years been following a procedure of enactment which corresponds to the separate acts similar to that one suggested by the "Guide-lines", with some exceptions. The British shipping law comprises a number of separate acts autonomizing in a way different sectors of maritime law. There are for example separate acts for Bills of Lading (1855), Carriage of Goods by Sea (1971), United Kingdom Standards Conditions for Towage and Other Services (revised in 1983).

Following a similar procedure Portugal has recently (1986) passed separate decrees-laws relating to the carriage of goods by sea, carriage of passengers by sea,
contracts of towage, contracts of affreightment or chartering contracts. This complies with what has been recommended by the Portuguese Minister of Justice through his Dispatch (Despacho) n°. 7/86.

Reformulation through separate acts, as exemplified, above, enables to firstly consider certain subjects which require urgent attention, in order to rapidly develop the new legislation and easily introduce necessary changes in the future. This idea can be emphasized by a translated, partial quotation of the preamble of the Portuguese Decree-Law n°. 352/86 of 21 October, as follows:

"... The monumentalization of the legislative work would imply two figurable difficulties: (...) the system of maritime law is today inclined to decodification, yet because its areas renew with diversified rhythms..."*25

Another aspect regarding the ways is the degree of detail. In this regard one may consider that a detailed and dense legislation enables a more uniform interpretation and perhaps more fair decisions by the courts. But if option is taken in the sense of trying to produce a detailed and dense legislation such option might retard the legislative process because of the time required. Furthermore, legislation resulting from such an option may make the rules very strict, against the flexibility and rapidity of action required in the shipping business. In this connection it is opportune to mention that in the

*25 - "Direito Comercial Maritimo: Legislacao e Doutrina", p. 17
real shipping business life some contracts, as those of affreightment or chartering (including leasing), the principle of contractual freedom appears to be predominant. Thus a certain degree of flexibility in the legal commercial maritime order is required, but not leaving hiatuses, which might generate some anarchy. The author suggests a reasonably flexible commercial shipping legislation as to encourage both the users and the service renderers to become more and more involved in shipping, for the sake of development.

The international character of shipping (as earlier mentioned in this thesis) is to be considered in working up the new commercial maritime legislation in a manner to make it based upon and include pertinent international conventions. It follows that accession to such international conventions must be considered seriously in the sense of taking them as part of the legislation reformulation process.

After the enactment of a General Merchant Marine, Law by the Standing Commission of the People's Assembly, laying down general principles to govern the maritime legislation, and giving power to the Government to enact detailed legislation, the steps suggested for reformulating maritime legislation can be summarised as follows:

1st. Dispatch of the Ministry of Justice or a joint dispatch of The Ministries of Justice, of Transport and Communications, of Commerce and of Finance, laying down necessary guidelines and appointing a drafting commission;
2nd. Elaboration of draft(s) in consultation with SATCC experts in shipping, enterprises of shipping, ship agencies, freight forwarders, insurance, importers and exporters or other representatives of carriers, users of passenger services and other interested organisation and people;

3rd. Submission of the first draft to the ministers concerned for appreciation and even discussion in their ministerial boards, and yet give a feedback of comments to the commission;

4th. Revision of the first draft on the basis of comments referred to in the preceding item, as to produce a second draft;

5th. Discussion of the second draft in meetings or seminars with representatives of sectors concerned, including the associations the creation of which has been suggested in section 5.1;

6th. Submission of the draft, with adjustments suggested in meetings referred to in the previous item, to the ministers concerned, for final recommendations.

7th. Submission of the final draft to the competent State organ for enactment in an appropriate legal instrument.

8th. Preparation of subsidiary legislation and submission to the competent authority for enactment.
5.3 THE MEANS

The means for reformulating the Mozambican commercial maritime legislation means involvement of Mozambican State organs and other institutions (including non-state organizations) and, of course, people tied to them. In this connection competences, responsibilities and interests and/or concerns come into play. Means also include the right type of legal instrument in terms of its legal force, related to its hierarchical level as presented in chapter 3, section 3.2.

As it has been mentioned in chapter 3, section 3.3, the Ministry of Justice is the competent organ for promoting legislative initiatives and elaboration of a new law. Amelioration of the legislation has been also mentioned as one of the objectives proceeded by the Ministry of Justice. The materialization of this objective passes not only through a due orientation of the legislative process (by such Ministry), but also through the elaboration of laws necessary for the main sectors of socio-economic life. As the maritime commercial legislation belongs to this category of laws, the Ministry of Justice has a crucial role to play in the discussed reformulation.

Two other central state organs mostly concerned with the commercial maritime legislation are the Ministry of Transport and Communications which directs the maritime field, and the Ministry of Commerce which leads trade affairs. Though the legal competence of the Ministry of Justice of initiating the reformulation, the initiative is likely to come from the two above-mentioned minis-
tries, and more probably from the Ministry of Transport and Communications, because of its deep involvement in maritime transport. Interaction with other more state organs, among them the Ministry of Foreign Affairs - for accession of related international conventions, the Ministry of Finance - for marine insurance matters, as it exercises the tutorship of enterpresarial insurance matters, The Bank of Mozambique - for matters related with documentary credits.

Working up legislation drafts requires involvement of people acquainted with legal matters and and technical aspects of the the sector aimed at. One person may not be able to cope with all aspects covered by the intended legislation. In this regard it is opportune to refer to the experience of other countries, such as Poland and Portugal. In Poland a commission has been appointed for revising the 1961 Polish Maritime Code. The reformulation of the commercial maritime legislation in Portugal is being carried out by a Commission involving lawyers appointed by the Minister of Justice. Among those lawyers one is from a faculty of law and others are members of the Portugese Commission of International Maritime Law (Comissao do Direito Maritimo Internacional), and even from the Comite Maritime International.

Mozambique can rely on her limited number of lawyers tied to the maritime field. Such lawyers can form a team with others who work in other sectors concerned. Taking into account what has been said with regard to the competence of the Ministry of Justice, The Minister of Justice would issue a dispatch commanding the reformulation of the legislation subject to discussion in this thesis, and
appoint a commission for such purpose. The commission members would come from the Ministry of Justice (with the task of co-ordinating), from the Ministries of Transport and Communications, of Commerce, of Finance and from the Bank of Mozambique. The suggestion of such a composition is based on the involvement of those state central organs in maritime commerce. Other ministries may be made represented in the commission. Nonetheless it must be born in mind that large commissions (in terms of number of members) may not work efficiently.

Drafting a new commercial maritime legislation must involve the enterprises concerned. This can be done through individual contacts for consultations and discussions in special meetings or seminars for the interchange of ideas. In connection with this, the author emphasizes the need for creating of a Mozambican Maritime Law Association and a Mozambican Shipping Association, as suggested in section 5.1.

The final stage of the legislating process is the enactment of rules of law by an appropriate State organ and through an appropriate legal instrument. As mentioned in section 5.1, the Commercial Code was enacted through a Charter of Law in 1988. Therefore it can be only altered or abrogated partially or totally through a Law, a legal instrument the enactment of which is of the People’s Assembly competence. As to expedite the enactment of the new Mozambican commercial maritime legal order, the People’s Assembly would better enact the general principles which must govern the building up of a new maritime law, giving power to the Government to enact such legislation in separate acts. In this connection priority
must be given to contracts of transport, specially of passengers as this kind of transportation tends to increase in Mozambique. New legislation on such contracts would not only be confined to the transportation by sea, but also, mutatis mutandis, be made applicable to fluvial and lacustrian transportation.

Following the option of enactment of separate instruments, each decree would relate to a particular aspect of maritime commerce. There must be separate acts for the carriage of goods by sea, carriage of passengers by sea, contracts of affrayment, contracts of ship repair and maintenance, etc.

Aspects vulnerable to frequent changes, (e.g. the amount of limitation of liability, fines, as well as clarification of certain aspects of legislation of filling of gaps) would, among other matters, be better regulated through ministerial regulations. Where necessary, depending on the nature of the matter in terms of competence, joint ministerial regulations may be issued, as it has been practiced in Mozambique.

The suggestion of allowing matters related to the amount to which liability can be limited and the amount of fines to be regulated through a ministerial regulation may need explanation. This has to do with the quick erosion of the money value in Mozambique, specially now that the Economic Rehabilitation Program is taking its course. In fact, since 1987 almost every six month or so, the value of the Metical, the national currency has been devaluated, in order to adjust it, inter alia, to the level of the country’s production, in parity with hard currencies.
Thus it would be embarrassing in terms of time, to the Council of Ministers to always have to adjust such amounts, in detriment of other important matters. Joint ministerial regulation on this matter can assure suitable decisions on such kind of matters.
CHAPTER 6

CONCLUSIONS

This thesis is devoted to the commercial maritime legislation in Mozambique, so as to suggest the ways and means for its reformulation. The author did not attempt to undertake an exhaustive analysis of the subject matter into discussion, but to evidence the degree of outmodedness which affects the effectivness of the Mozambican commercial maritime legislation. Such legislation (most of it embodied in the Commercial Code enacted in 1888) suffers from obsolence both in structure and content. The obsolence was not caused by the mere passing of time, but is due to changes of various factors and the appearance of new ones. As a matter of fact there has been changes in:

(a) the political and socio-economic field — Mozambique is now an independent country with specific problems and perspectives; adjusting continuously her policy so as to overcome such problems and materialize such perspectives;

(b) the shipping and port technology field — new design of ships and machinery, as well as of handling equipment, which enable quicker performance of voyage and cargo handling;
(c) the communication field - usage of new technology which enables quicker communication through various means;

(d) international relationship - development of international co-operation and harmonization of interests in the seaborne trade development of related treaties;

(d) other aspects, such as the development of ship and cargo brokers, the diminishing of the shipmaster's tasks as an agent of the shipowner, new shipping documents, etc.

From this diagnosis it can be concluded that the cure can not be safely obtained through amending instruments, but through reformulating ones, elaborated from the root. In this connection quick actions towards such reformulation of the existing commercial maritime legislation is needed. For a more successful and quick reformulation a strategy to be adopted is discussed and suggested in this thesis, in terms of ways and means.

As far as the ways are concerned, it is suggested that the reformulation be undertaken in phases and in separate acts. Each act is to contemplate a particular individualizable section of the commercial maritime legislation. In other words, each decree is to cover a particular separable subject matter aimed at by the law, e.g. a particular kind of contract. This will make the future work of updating the legislation easy, as it can not be expected to last for ever. It is suggested that in the first phases contracts of carriage of goods by sea, carriage of
passengers by sea, contracts of affreightment (or charter party contracts) be given priority.

Accession of related international conventions to which Mozambique is not yet party is to be taken as an important part of the ways, and the conventions themselves as part of the means for the reformulation.

Means comprise institutions, people and legal instruments. Legal competence and attributions of state organs, and interests in maritime commercial maritime legislation are important aspects to be taken into consideration so as to decide who is to do what. In this regard necessary power must first be given by the People's Assembly or its Standing Commission to the Government, through an umbrella law which must set forth the principles which must govern the new maritime law. Afterwards, initiatives are to be taken by the Ministries of Justice and of Transport and Communications, which are mostly concerned. Other ministries concerned are those of Commerce and of Finances, as well as the Bank of Mozambique because of their involvement in maritime commerce. It follows that a reformulating commission will comprise lawyers and/or other skilled civil servants from such institutions, being appointed by the Minister of Justice, or jointly with the heads of other state organs. Enterprises of shipping, brokage and freight forwarding, as well as maritime law and shipping associations (if existing) and other interested organizations must be involved through consultations, meetings or seminars. This will be a way to ensure that all interests are contemplated. Nevertheless such participation must not be in conflict with basic principles laid down in the General
Law of Merchant Marine enacted by the People's Assembly. A reformulating commission is to be designated by a dispatch of the Minister of Justice, and through such dispatch specific directives with regard, inter alia, to methodology of work is to be given. Such will contribute for producing a suitable legislation.

Following the People's Assembly and its Standing Commission, the most important state organ to be involved is the Council of Ministers, to which competence must be delegated as to enact the main commercial maritime legislation. A decree of the Council of Ministers will be the appropriate legal instrument so as to speed up the enactment of legislation in discussion, as well as to update it, when necessary. Aspects susceptible to frequent changes and (as has been the practice in Mozambique) the clarification of doubts risen from the application and interpretation of legislation would be left to be passed through a ministerial or joint ministerial regulation, as a subsidiary legislation.

The new legislation must encourage or initiate interested persons to get more and more involved in maritime commerce. In other words, the new law must protect and harmonize interests of shipowners, ship operators, marine underwriters and financing entities, ship and cargo agents and port operators, etc. This will help to develop the Mozambican shipping and to foster the country's economy as a whole, in line with the Program of Economic Rehabilitation.
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ANNEX I

MOZAMBIQUE IN AFRICA
ANNEX II

MOZAMBIQUE AND SOME OF HER ECONOMIC RESOURCES
ANNEX III

SADC REGION

- Major railways
- South African railways
- Pipeline
ANNEX IV

ORGANISATION STRUCTURE OF
DIRECCAO NACIONAL DA MARINHA
(NATIONAL DIRECTORATE OF MERCHANT MARINE)

1 - DIRECTORATE

DEPARTMENTS
2 - Maritime Safety Administration
   2.1 - Maritime Registry
   2.2 - Maritime Safety
   2.3 - Sea-marking
   2.4 - Coast Vigilance and Maritime Safety
3 - Maritime and Fluvial Transport
4 - Navigation Material

SUPPORT SERVICES
5 - Administration and Finances
6 - Planning
7 - Marine Personnel
8 - Directorate Secretary's Office

SUBORDINATE INSTITUTIONS
9 - National Institute of Hydrography
10 - Nautical School

LOCAL BRANCHES
11 - Maritime Administrations
ANNEX V

NAVIQUE’S FLEET AND ITS OPERATION

TABLE 1
NAVIQUE’S FLEET IN JANUARY 1988

<table>
<thead>
<tr>
<th>Ship’s name</th>
<th>type of cargo</th>
<th>built</th>
<th>DW</th>
<th>GRT</th>
</tr>
</thead>
<tbody>
<tr>
<td>Inharrime</td>
<td>containers</td>
<td>1974</td>
<td>2,150</td>
<td>2,950</td>
</tr>
<tr>
<td>Linde</td>
<td>G. cargo</td>
<td>1973</td>
<td>2,600</td>
<td>2,794</td>
</tr>
<tr>
<td>Lugela</td>
<td>containers</td>
<td>1974</td>
<td>2,150</td>
<td>2,950</td>
</tr>
<tr>
<td>Luabo</td>
<td>petroleum</td>
<td>1973</td>
<td>1,000</td>
<td>2,286</td>
</tr>
<tr>
<td>Macuse</td>
<td>petroleum</td>
<td>1946(?)</td>
<td>320</td>
<td>400</td>
</tr>
<tr>
<td>Muanza</td>
<td>G. cargo</td>
<td>1967</td>
<td>1,000</td>
<td>2,270</td>
</tr>
<tr>
<td>Nguri</td>
<td>G. cargo</td>
<td>1977</td>
<td>1,150</td>
<td>2,286</td>
</tr>
<tr>
<td>Polana</td>
<td>G. Cargo</td>
<td>1967</td>
<td>2,300</td>
<td>2,890</td>
</tr>
<tr>
<td>Save</td>
<td>G. Cargo</td>
<td>1970</td>
<td>1,250</td>
<td>2,800</td>
</tr>
</tbody>
</table>

TOTAL: 13,920 21,626

TABLE 2
NAVIQUE’S FLEET OPERATION IN 1987

| Tons transported: | 210,909 |
| Nautical miles:   | 95,052 |
| Total time of navigation | 545 days (13.57%) |
| Total time at ports |
| loading & unloading | 2,256 days (56.18%) |
| Total time of repair | 666 days (16.58%) |
| Total time of immobilization | 548 days (13.65%) |
| Total time         | 4,015 days (100.00%) |